

## **Reform in national and international adoption**

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In order to understand the rationales behind the reform in national and international adoption, distinction should be made between the two laws 149/2001 and 476/1998 as each one stems from a different doctrine. Unlike Law 476/1998, which represented a real revolution in the world of international adoption, Law 149/2001 simply made a partial modification to the previous Law 184/83, merely adapting the legislation to the social changes that have taken place over the last two decades and to the changing perception of the positive rights of minors. The legislator essentially focussed on two social changes.

The first of these was the significant increase, even in Italy, of common-law couples. This phenomenon was taken into consideration with modification by the legislator of the requisite in Article 6 for a minimum of three years of marriage for couples wishing to adopt. The innovation was the possibility of including any time spent living *more uxorio* when calculating the three years required for adoption, the continuity and stability of which was to be ascertained by the Juvenile Court. Nevertheless, this failed to meet the expectations of those hoping for adoption rights to be extended to cohabiting couples as well, as part of a wider process ensuring equal rights for common-law and legal families. The second significant social change to come about in recent decades is the considerable increase in life expectancy, flanked by an increasingly more common decision to postpone having children. The legislator therefore felt it opportune to increase the maximum difference in age between adopter and adoptee from 40 to 45 years. This provision should not however be considered as absolute as it is subject to assessment of the minor's best interests. The new provisions, causing much controversy, appear to have given rise to a principle in contrast with what is repeatedly declared in preparatory works and in the law itself; in other words that the minor's best interests must be at the base of adoption reform. Recent reform, in fact, is less severe regarding suitability requirements, and in this way focuses on the would-be adoptive parents and their "right" to have a child. Between the two extremes of opinion, for and against this reform, there is a middle voice, which is of the view that the

recurring error made when assessing possible parents is that of automatically considering a young couple as more suitable for adopting a child, a view that only takes into consideration life expectancy, neglecting research carried out into effective parenting ability, which is in no way linked to age.

With a view to safeguarding the rights of minors, the recent reform has turned its attention to the child's right to speak and be heard by institutions, thus incorporating the indications that emerged during the Conventions of New York (1989) and Strasbourg (1996). Current legislation governing the procedure for declaration of adoptability has replaced a rule in Article 7 of Law 184/83 with the following indication: "If the adoptee is over twelve years of age s/he must be interviewed; if s/he is not yet twelve, s/he may be interviewed, if opportune, depending on her/his capacity for discernment". Under the previous law the under-twelve-year-old could be interviewed "if opportune" and "provided that the interview" did not "prejudice the minor". Replacement of the expression "if opportune" with "depending on her/his capacity for discernment" implies a change in perspective with regard to the judge interviewing a minor. Focus has in fact shifted from the figure of the judge, who had to assess if it was opportune or not to interview the minor, to the figure of the minor, who will need to have reached an acceptable standard of maturity and judgement.

Furthermore, it should also be noted that cross-questioning has been introduced right from the initial stages of the procedure for declaration of adoptability for a minor. Whereas previous legislation called for a non-contentious courtroom type judgement, whereby the right to defence of the minor's parents or fourth degree relatives was not contemplated until the subsequent phase of opposition to the minor's declared state of adoptability.

With a view to protecting the rights of minors, the law governing access to information regarding the origins of the adoptee has also been changed.

Article 24 of Law 149 of 28 March 2001 introduced new rules to replace Article 28 of the previous legislation. The changes brought about by the new law are very significant: paragraph 5 allows adoptees over the age of 25 access to information regarding their personal background and the identity of their biological parents; in the case of confirmed, serious motives of mental and physical health, access is authorised at 18 years of age (Article 24, paragraph 4). It is also interesting to note that the

interruption of juridical relations between the adoptee and the biological family, as laid down by our legislation, in no way implies an interruption of effective contact, which may precede the adoption or which may develop subsequently. It has been argued that cases should be assessed individually, to avoid severing bonds, however unsatisfactory, which may have been important in the child's past. This solution has already been put into practice in countries like Great Britain and the United States, in the form of so-called "open adoptions".

In this context, mention must be made of the proposal by Franco Occhiogrosso, presiding judge in the Bari juvenile courts, for the diffusion of so-called "gentle adoptions". Based on the legal discipline of special adoption cases, this model would offer guaranteed protection even after age of 18 for the countless minors whose temporary foster care has become permanent. "Gentle adoption" would allow the minor to continue her/his relations with her/his family of origin and to keep the same surname, which would be suffixed by that of the adoptive family. This solution would mean that the minor would not be traumatised by natural family bonds being severed and would quite often encourage the natural family to consent to an adoption plan.

While Law 149/01 only partially modified national adoption laws, Law 476/98 represented a real revolution in the world of international adoption.

The desperate lack of protection for minors in the Third World and the alarming spread of trafficking in children for adoption led to realisation by international bodies that a streamlined legislation system governing adoption was called for, to safeguard minors and ensure their fundamental rights. 37 countries were to sign the Convention of The Hague in 1993 with these very objectives, ratified in Italy by Law 476/98.

The fundamental cornerstones of the Convention of The Hague are to protect the child's best interests and to allow international adoption only when there is no hope of finding a family environment able to meet the material and psychological needs of the minor in the country of origin. To achieve these objectives, common provisions were agreed upon by the so-called "sending countries" and the hosting countries. These provisions do not constitute international law, but are a shared definition of several essential issues that do not however impede the introduction of stricter legislation.

The Convention of The Hague undertook to regulate intermediation by making it compulsory for all contracting countries to create a central authority, known in Italy as

the Commission for International Adoptions, which would coordinate cooperation activities between the minors' home nations and those where they would be adopted. It would also be possible to delegate some of the tasks involved to qualified bodies, nevertheless subject to the control of a central authority, under our legislation called "authorised agencies". These authorised agencies must inform couples of both the procedures to be followed and the psychological problems linked to adoption, and must also process the bureaucratic papers with the relevant foreign authorities, forwarding the adoption application, the declaration of suitability and the report indicating requirements for matching a minor to the family. After informing the adoptive family of the overseas authorities' proposal for a meeting and having received approval from the family, the agency supervises transfer of the minor to Italy. Authorised agencies are also responsible for providing support for adoptive families after the adoption, if the family so desires.

What was the overall opinion regarding the new adoption laws?

Opinions were not positive as far as the national adoption reform was concerned. From a formal viewpoint, the need to obtain approval of Law 149/2001 before the imminent dissolution of Parliament generated a rather careless text: the new law was the result of integration, modification and replacement of the provisions in Law 184/83, which in any case represents the basic law for the institute of adoption, thereby making interpretation of the law even more difficult.

If on the other hand, the results achieved in safeguarding the rights of minors are taken as the assessment criteria for the new legislation, it has been observed that the principle of adoption as a last resort has been pursued more on a level of intent than of implementation of efficient interventions, as shown by inclusion in the new legislation of the fact the State and local authorities shall support families at risk "as far as financial resources will allow". In particular, it has been remarked that this legislation does not cover the issue of disabled minors. Not only does the precedence in proceedings provided for in this case not represent a special advantage, as the time involved is in any case quite short (one hundred and twenty days), but it should actually be seen as a serious limit for an investigation that should be even more meticulous as it aims to assess the suitability for adoption of a child who will require special skills of solidarity and adaptation.

Problematic difficulties also came to light in the assessment of the legislation on international adoptions.

The most important was due to the ambiguity of the juridical nature of the relationship between the adoptive family and the authorised agency. With the new adoption system, once declared officially suitable the adoptive family has the subjective right to appoint an authorised agency and the latter is obliged to accept, as is clearly defined in the Guidelines for authorised agencies by the Commission for International Adoptions. It has been noted that despite ascertainment of suitability being the exclusive competence of the Juvenile Court, there is nevertheless a need to create a relationship of trust between aspiring parents and the agency, an affinity in the way the adoption is considered which is actually incompatible with the agency's obligation to accept the appointment. Other contradictions lie in the fact that these authorised agencies must be no-profit structures. In fact, no precise rules have been established in accordance with this provision regarding financing that would allow more and better services to be offered.

Strong criticism has also been made regarding the agencies' obligation to cooperate with development activity. Several legal experts have remarked that promotion of children's rights should be the sole responsibility of the State, which should implement policies for the economic support of non-government organizations operating in developing countries. Agencies should show their solidarity by abstaining from projects for the adoption of minors who could find a suitable family nucleus in their country of origin.