An Institution to «Give a Child a Family»? The Outdated Framework of Italian Adoption Law

¿Una institución destinada a «dar una familia a un menor»? El marco normativo obsoleto de la adopción en el ordenamiento jurídico italiano

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Abstract: The paper examines the Italian legal framework on adoption, highlighting both its structural and subjective limitations, which undermine its full adherence to the principle of the best interests of the child. Despite the solidaristic rationale underlying Law No. 184 of 1983, the rigid dichotomy between foster care and adoption fails to reflect the complexity of contemporary family dynamics, particularly in situations of semi-abandonment, where emotional ties with the biological family persist despite parental inadequacy. Moreover, full adoption remains conditional upon marriage, excluding unmarried couples, same-sex unions and single persons, in tension with constitutional and conventional principles of equality and family pluralism. In the absence of comprehensive legislative reform, courts have sought to address these gaps through flexible interpretations, especially via special adoption, yet such judicial solutions lack the legal certainty that only systematic legislative intervention—also in light of comparative European experiences—can provide.

Keywords: adoption, best interests of the child, family law, civil unions, social parenthood.

Resumen: El presente artículo analiza el marco jurídico italiano en materia de adopción, poniendo de relieve las limitaciones tanto estructurales como subjetivas que obstaculizan su plena conformidad con el principio del mejor interés del menor. A pesar de la *ratio* solidarista que subyace en la Ley n.º 184 de 1983, la rígida dicotomía entre acogimiento familiar y adopción no refleja la complejidad de las dinámicas familiares contemporáneas, especialmente en los supuestos de semiabandono, en los que subsisten vínculos afectivos con la familia biológica a pesar de la inidoneidad parental. Asimismo, la adopción plena sigue estando supeditada al matrimonio, excluyendo así a las parejas de hecho, a las uniones del mismo sexo y a las personas solteras, lo cual entra en conflicto con los principios constitucionales y convencionales de igualdad y pluralismo familiar. Ante la ausencia de una reforma legislativa orgánica, la jurisprudencia ha tratado de colmar estas lagunas mediante interpretaciones flexibles, especialmente a través de la adopción en casos especiales; sin embargo, tales soluciones carecen del nivel de certeza jurídica que solo una intervención legislativa sistemática – considerando también las experiencias comparadas en el ámbito europeo – puede proporcionar.

Keywords: adopción, mejor interés del menor, derecho de familia,uniones civiles, parentalidad social.

I. The Legal Framework of Adoption in the Italian Legal System: General Overview

1. Alongside parenthood based on natural conception, contemporary legal systems increasingly recognize forms of parent–child relationships established independently of biological procreation and genetic ties. Within this category fall, on the one hand, techniques of medically assisted reproduction (MAR)[1], made possible by scientific progress and allowing natural limitations on reproduction to be overcome, and, on the other, adoption, which constitutes the focus of the present study. Unlike MAP, adoption is not aimed at fulfilling a personal desire for parenthood, but pursues an intrinsically solidaristic purpose: to ensure that a child deprived of an adequate family environment may grow up within a stable, emotionally supportive context conducive to his or her personal development. This purpose is clearly reflected in the very title of Law No. 184 of 4 May 1983, significantly entitled *"The Child's Right to a Family"*[2], which places at the heart of the institution not the interest of adults in having a child, but rather the child's fundamental right to have a family.

2. In Italy, the legal framework governing the adoption of minors—originally introduced as an amendment within the Civil Code—has been consolidated into a special statute outside the Code: Law No. 184 of 4 May 1983, *"Regulation of Adoption and Foster Care of Minors"*, subsequently amended by Law No. 149 of 28 March 2001, which also changed the title of the statute to *"The Child's Right to a Family."*[3]

Initially conceived as a means to allow childless couples to perpetuate the family name and transmit their inheritance, the institution is now centered on the placement of a child in a state of aban-

[1] Medically assisted procreation is regulated in the Italian legal system by Law No. 40 of 19 February 2004 (*Provisions on Medically Assisted Procreation*), which has been repeatedly reinterpreted by the courts. Within the scope of medically assisted reproduction techniques are also included surrogate motherhood arrangements, expressly prohibited under Article 12(6) of Law No. 40/2004. Moreover, Law No. 172 of 27 November 2024 (*Amendments to Article 12 of Law No. 40 of 19 February 2004 concerning the criminal liability for surrogacy conducted abroad*, published in the Official Gazette No. 279 of 29 November 2024 and in force since 14 December 2024) introduced paragraph 6-bis into Article 12 of Law No. 40/2004, providing that the penalties set out in paragraph 6 shall also apply where the offence is committed abroad by an Italian citizen or by a foreign national residing in Italy.

[2] The institution of adoption is governed by Law No. 184 of 4 May 1983 (*Regulation of the Adoption and Foster Care of Minors*), subsequently amended by Law No. 149 of 28 March 2001, which changed its title to *"The Child's Right to a Family."* Further legislative amendments were introduced by Law No. 173 of 19 October 2015 (*Amendments to Law No. 184 of 4 May 1983 on the Right to Emotional Continuity for Children in Foster Care*) and by Law No. 107 of 29 July 2020. Most recently, the field has undergone additional systematic adjustments under the so-called Cartabia Reform (*Legislative Decree No. 149 of 10 October 2022*).

[3] For a general discussion, see C.M. Bianca, *Una nuova pagina della Cassazione sul diritto fondamentale del minore di crescere nella sua famiglia*, *Foro Italiano*, 2017, p. 3171 et seq.

donment within a new family capable of meeting his or her life needs[4]. This child-centered orientation has been expressly reaffirmed by the Italian Constitutional Court in judgment No. 221 of 2019[5], which underscored the conceptual and axiological distance between adoption and medically assisted reproduction. The Court clarified that *"adoption is not intended to give a couple a child, but primarily to give a family to a child who lacks one,"* emphasizing that, in adoption, *"the child is already born and thus especially deserving of protection,"* whereas MAR is instead directed *"toward giving a child yet to be born to a couple, thereby fulfilling their parental aspirations."*

This decision is particularly significant in that it critically revisited the parallel previously drawn between heterologous MAP and adoption—a connection earlier suggested by Constitutional Court judgment No. 162 of 2014[6].

3. Despite the solidaristic rationale underlying Law No. 184 of 1983, the Italian legal framework governing adoption and foster care no longer appears fully capable of giving effective implementation to the principle of the *best interests of the child*[7]. The critical issues arise, first and foremost, at a struc-

[4] On *full adoption*, see, inter alia, L. Fadiga, *L'Adozione legittimante*, in G. Collura, L. Lenti, M. Mantovani (eds.), *Filiazione*, in *Trattato di diritto di famiglia*, directed by P. Zatti, vol. II, Milan, 2002, p. 625 et seq.; P. Morozzo della Rocca, *L'adozione dei minori e l'affidamento familiare. Presupposti ed effetti*, in *Filiazione e adozione*, *Trattato del nuovo diritto di famiglia*, directed by G. Ferrando, vol. III, Bologna, 2010, p. 587 et seq.; T. Auletta, *Diritto di famiglia*, Turin, 2016, p. 379 et seq.

[5] See also Italian Constitutional Court, judgment of 23 October 2019, No. 221, in *Corriere Giuridico*, 2019, p. 1460, with commentary by G. Recinto, *La legittimità del divieto per le coppie same sex di accedere alla PMA: la Consulta tra qualche "chiarimento" ed alcuni "revirement"*, at p. 1469 et seq.; and by the same author, *La Corte costituzionale e la legittimità del divieto per coppie dello stesso sesso di ricorrere alla PMA: non può configurarsi nel nostro ordinamento un "diritto assoluto alla genitorialità"*, *Giustizia Civile Online*, 6 November 2019, p. 1 et seq. See also *Foro Italiano*, 2019, I, p. 3782 et seq., with note by G. Casaburi, *"Qui sto. Non posso fare altrimenti": la Consulta tiene fermo il divieto di accesso alla PMA delle coppie omosessuali (femminili)*; *Nuova Giurisprudenza Civile Commentata*, 2020, I, p. 548 et seq., with note by V.I. Barone, *Fecondazione eterologa e coppie di donne: per la Consulta il divieto è legittimo*; *Responsabilità Civile e Previdenza*, 2020, p. 430 et seq., with note by R. Fadda, *Il conflitto assiologico nella legge n. 40/2004 tra morale kantiana e diritto alla procreazione.*

[6] See also Italian Constitutional Court, judgment of 10 June 2014, No. 162, in *Famiglia e Diritto*, 2014, p. 753 et seq., with commentary by V. Carbone, *Sterilità della coppia. Fecondazione eterologa anche in Italia*; *Europa e Diritto Privato*, 2014, p. 1105 et seq., with commentary by C. Castronovo, *Fecondazione eterologa: il passo (falso) della Corte costituzionale*, at p. 1117; *Nuova Giurisprudenza Civile Commentata*, 2014, p. 393 et seq., with note by G. Ferrando, *Autonomia delle persone e intervento pubblico nella riproduzione assistita. Illegittimo il divieto di fecondazione eterologa*; *Quaderni Costituzionali*, 2014, with commentary by A. Ruggeri, *La sentenza sulla fecondazione "eterologa": la Consulta chiude al "dialogo" con la Corte EDU*, at p. 569; and G. D'Amico, *La sentenza sulla fecondazione "eterologa": il peccato di Ulisse*, at p. 563; *Giustizia Civile Online*, with note by M. De Maria, *La figura del genitore nel pensiero della Corte costituzionale*; editorial by L. Lenti, *Abbattuto un altro pilastro della legge 40: la Corte costituzionale cancella il divieto di procreazione assistita eterologa*; note by F. Mite, *La Consulta apre un'ulteriore breccia nella legge n. 40 del 2004: illegittimo il divieto di fecondazione eterologa*; *Rivista di Diritto Internazionale*, 2014, p. 1123 et seq., with note by S. Tonolo, *Il diritto alla genitorialità nella sentenza della Corte costituzionale che cancella il divieto di fecondazione eterologa: profili irrisolti e possibili soluzioni*; *Diritto delle Successioni e della Famiglia*, 2015, p. 511 et seq., with note by A.G. Annunziata, *La libertà procreativa quale intima scelta individuale: la Corte dichiara l'illegittimità costituzionale del divieto di fecondazione eterologa.*

[7] On the concept of the *best interests of the child*, the scholarly literature is vast. Without any claim to completeness, see, among many others: P. Stanzione, *Minori (condizione giuridica dei)*, in *Enciclopedia del diritto, Annali*, IV, Milan, 2011, p. 725 ff., esp. p. 726 ff.; Id., *Personalità, capacità e situazioni giuridiche del minore*, in *Diritto di famiglia e delle persone*, 1999, p. 260 ff.; Id., *Capacità e minore età nella problematica della persona umana*, Naples, 1975, pp. 260 ff., 346 ff.; G. Ferrando, *Diritti e interesse del minore tra principi e clausole generali*, in *Politica del diritto*, 1998, p. 169 ff.; F. Ruscello, *La potestà dei genitori. Rapporti personali (artt. 315–319)*, in *Codice civile commentato*, directed by Schlesinger, Milan, 1996, p. 78 ff.; E. Quadri, *L'interesse del minore nel sistema della legge civile*, in *Famiglia e diritto*, 1999, p. 80 ff.; M. Dogliotti, *La potestà dei genitori e l'autonomia del minore*, in *Trattato di diritto civile e commerciale* (directed by Cicu and Messineo), vol. VI, pt. 2, Milan, 2007, p. 93 ff.; Id., *Sul concetto di diritto minorile: autonomia, favor minoris, principi costituzionali*, ibid., 1977, p. 954 ff.; C. Focarelli, *La Convenzione di New York sui diritti del fanciullo e il concetto di "best interests of the child"*, in *Rivista di diritto internazionale*, 2010, p. 981 ff.; G. Ballarani, *La capacità autodeterminativa del minore nelle situazioni esistenziali*, Milan, 2008, p. 38 ff.; Id., *Diritti dei figli e della famiglia: antinomia o integrazione?*, in *Studi Giacobbe*, II, Milan, 2010, p. 473 ff.; Id., *La capacità autodeterminativa del minore*, in L. Falchi, A. Iaccarino (eds.), *Legittimazione e limiti degli ordinamenti giuridici*, 2012, p. 465 ff., esp. p. 468 ff.; L. Fadiga (ed.), *Una nuova cultura dell'infanzia e dell'adolescenza. Scritti di Alfredo Carlo Moro*, Milan, 2006, p. 129 ff.; V. Buonomo, *A vent'anni dalla Convenzione sui diritti del fanciullo*, in *Asprenas*, 2010, p. 49 ff.

See also P. Perlingieri, *Norme costituzionali e rapporti di diritto civile*, in Id., *Tendenze e metodi della civilistica italiana*, Naples, 1979, p. 95 ff.; G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Naples, 2019, esp. p. 100 ff.; V. Scalisi, *Il superiore interesse del minore ovvero il fatto come diritto*, in *Rivista di diritto*

tural level: the system, built upon a rigid dichotomy between foster care and adoption, fails to provide adequate protection for the so-called "grey area" cases—situations in which the child's family of origin, though incapable of ensuring stable and adequate care, nevertheless maintains an emotional bond that should be positively valued.

To this structural rigidity must be added a subjective limitation concerning access to full adoption: the law continues to make marriage—and not civil union[8]—a necessary prerequisite, thereby excluding *de facto* couples, same-sex couples, and single persons, even where their parental suitability has been clearly demonstrated. The Italian legal system thus continues to privilege the so-called traditional forms of family relationships, consistent with a literal interpretation of Article 29 of the Italian Constitution[9], which has historically crystallized the notion of the family as a heterosexual, marital institution, thereby restricting the system's openness to alternative family models[10].

4. Empirical data further confirm the existence of a structural imbalance between the number of couples available to adopt and the number of children actually declared adoptable. In 2022, n. 8,362 applications for national adoption were filed, compared to only 755 judgments granting so-called full adoption[11]. Couples available for adoption therefore far outnumber the children actually adopted through domestic procedures. Nevertheless, as of 31 December 2023, approximately 15,992 minors were placed in foster care[12]—mostly under judicial orders—and 18,304 minors were living in residential facilities (communities or family homes), excluding unaccompanied foreign minors[13]. It is particularly significant that two-thirds of children in foster care and over one-fifth of those in residential facilities remain there for periods exceeding twenty-four months, in clear violation of the time limit established by Article 4(4) of Law No. 184/1983.

5. These figures portray a system incapable of ensuring the effective protection of minors experiencing family vulnerability. The fact that thousands of children remain for years in a state of legal and

civile, 2018, p. 412 ff.; L. Lenti, *Note critiche in tema di interesse del minore*, in *Rivista di diritto civile*, 2016, p. 86 ff.; Id., *"Best Interest of the Child" o "Best Interest of Children"*, in *Nuova giurisprudenza civile commentata*, 2010; E. Lamarque, *Prima i bambini. Il principio dei best interests of the child nella prospettiva costituzionale*, Milan, 2016, passim; J. Long, *Il principio dei best interests e la tutela dei minori*, in F. Buffa, M.G. Civinini (eds.), *La Corte di Strasburgo*, Vicalvi, 2019, pp. 413–418. For a broader international approach, see H. Stalford, K. Hollingsworth, S. Gilmore (eds.), *Rewriting Children's Rights Judgments. From Academic Vision to New Practice*, Oxford and Portland (OR), 2017, pp. 34–35; C. Fenton-Glynn, *Surrogacy and the "Best Interests Principle"*, in K. Trimmings, S. Shakargy, C. Achmad (eds.), *Research Handbook on Surrogacy and the Law*, 1st ed., Edward Elgar Publishing, 2024, pp. 40–53. For a more detailed discussion of the principle, see § II.1; for a critical perspective, see § IV.1.A.

[8] The introduction of Law No. 76/2016 on *civil unions*—while marking the legal recognition of relationships between same-sex persons—did not extend such recognition to *parent-child* relationships. Article 1(20) of Law No. 76/2016 provides that: "For the sole purpose of ensuring the effective protection of rights and the full performance of obligations deriving from the civil union between persons of the same sex, the provisions referring to marriage and the provisions containing the words 'spouse', 'spouses', or equivalent terms, wherever they appear in legislation, shall also apply to each party to the civil union between persons of the same sex. The provision in the preceding sentence shall not apply to those rules of the Civil Code not expressly referred to in this Act, nor to the provisions of Law No. 184 of 4 May 1983." Among the rules not expressly incorporated are those governing filiation. On this point, see § III.2.

[9] Article 29 of the Italian Constitution states: "The Republic recognizes the rights of the family as a natural society founded on marriage." For a substantive reconstruction of this provision, also in light of the travaux préparatoires of the Constituent Assembly, see § III.

[10] See also C. Nardocci, *Intended or New Parenthood? The Child's Best Interest: Italy and the European Court of Human Rights*, *ERA Forum* 25 (2024), pp. 109–126, esp. p. 112.

[11] Data elaborated from the Directorate-General for Statistics and Organizational Analysis of the Department for the Digital Transition of Justice, Statistical Analysis and Cohesion Policies, Ministry of Justice, referring to the year 2022 (published 29 April 2024), available at https://www.giustizia.it/cmsresources/cms/documents/Adozioni_2022_parziale_G.pdf. According to this report, declarations of adoptability of minors totalled 873 for the year in question.

[12] Ministry of Labour and Social Policies, *I minorenni in affidamento familiare e nei servizi residenziali attraverso i dati SIOSS*, *Quaderni della Ricerca Sociale*, No. 61 (2023), p. 18, available at https://www.lavoro.gov.it/notizie/pagine/dati-sui-bambini-e-gli-adolescenti-fuori-dalla-famiglia-di-origine-anno-2023.

[13] Id., p. 40: according to the report, when considering only minors placed in residential communities and those in foster families for at least five nights per week, the total number of minors living outside their families of origin (excluding unaccompanied foreign minors) amounts to 30,936—an increase of roughly 1 per cent over 2022, also accounting for SIOSS data integrations.

relational suspension—oscillating between prolonged foster care and institutionalization—represents the clearest symptom of the rigidity of the current legal framework, particularly in those borderline cases[14] where, despite the manifest inadequacy of the parents, it is difficult to establish the statutory conditions for *abandonment*[15] and the corresponding declaration of adoptability[16]. The result is a substantial restriction of the child's fundamental right to live and grow within a stable family environment—a right which cannot be subordinated to a formalistic conception of biological ties nor to exclusions grounded in traditional family models.

6. It is therefore difficult to maintain that the mere preservation of a formal bond with the family of origin[17] can, in itself, guarantee the child's best interests, particularly where prolonged residence in foster care or in a residential facility results, in practice, in a condition of emotional and relational suspension, detrimental to the child's emotional stability and to the harmonious development of his or her personality[18]. Moreover, in a context where over 30,000 children live permanently outside their family of origin, reserving full adoption exclusively for married heterosexual couples appears not only anachronistic but also in clear tension with constitutional and supranational principles, as well as with the evolving conception of the family as a social formation capable of ensuring the child's full personal development, regardless of its composition.

From this perspective, the two reform trajectories—on the one hand, the need to simplify and render more flexible adoption procedures by overcoming the rigidity of the adoption/foster care dichotomy, and on the other, the necessity of broadening the category of persons eligible for full adoption—cannot be treated as distinct objectives. They must instead be understood as complementary components of a single reform strategy, coherent both with the solidaristic rationale underlying the institution and with the

[14] Reference is made to the notion of *permanent semi-abandonment* (see § IV.1). Specifically, C. Sartoris, *La moltiplicazione dei modelli adozionali e i loro rapporti sostanziali e procedimentali*, in *Famiglia e diritto*, No. 1/2024, p. 50, defines as "borderline" those situations "susceptible of evolving in opposite and hardly predictable directions (either recovery or worsening of hardship), in which full adoption, with its radical effects, would constitute an excessive measure, whereas hetero-family foster care, given its institutional temporariness, would be unable to ensure a stable protective framework."

[15] Pursuant to Article 8 of Law No. 184 of 4 May 1983, "1. Minors shall be declared adoptable by the Juvenile Court of the district where they are located if it is established that they are in a situation of abandonment because they lack moral and material care from their parents or from relatives bound to provide for them, provided that such lack of care is not due to force majeure of a temporary nature. 2. The situation of abandonment shall also exist, subject to the conditions of paragraph 1, when the minors are in public or private care institutions, family-type communities, or foster care. 3. Force majeure shall not be deemed to exist when the persons referred to in paragraph 1 refuse the support measures offered by the local social services, even following the notification under Article 79-bis, and such refusal is deemed unjustified by the court. 4. The adoptability proceedings must be conducted from the outset with the legal assistance of the minor and of the parents or relatives referred to in Article 10(2)." For a broader discussion of the notion of abandonment, see § II.2.

[16] For an analysis of the conditions that constitute abandonment and justify the consequent declaration of adoptability—which, as will be shown, do not adequately protect all situations of child vulnerability—see § II. In doctrine, a "misalignment" has been noted between the procedure for declaring adoptability in domestic adoptions and that applicable to intercountry adoptions, given that in the latter case the declaration is made in the child's country of origin, often without effective verification of whether family-support measures were undertaken to prevent removal. See L. Bozzi, *Criticità dell'adozione e protezione del minore. Il problema del semi-abbandono permanente e le sue possibili soluzioni*, in *Jus Civile*, 3/2023, p. 664, who observes that "it is reasonable to presume that such measures were not attempted" and further adds that "in cultural contexts where the notion of extended family predominates—and thus total abandonment is rather rare—it is almost inevitable to wonder whether such declaration is, at best, influenced by a comparison with the economic well-being and unquestionably greater opportunities that the child could enjoy if adopted by a family from the 'wealthy Western world.'"

[17] The child's right to grow up within his or her family is primarily guaranteed by Article 1(1) of Law No. 184 of 4 May 1983, which opens by recognizing "the right of the child to grow up and be educated within his or her own family," identified as the environment naturally best suited to ensuring the child's harmonious development, overall well-being, and fulfilment of emotional, material, and moral needs. Adoption is therefore conceived as an *extrema ratio*, a residual remedy to be applied only when parenting-support measures have failed and no other solution is feasible (see § II.2).

[18] Children in foster care exhibit higher rates of mental health disorders than those in the general population. The most common diagnoses include oppositional defiant disorder/conduct disorder, major depressive disorder, post-traumatic stress disorder, and reactive attachment disorder. Variables such as the type of maltreatment and placement predict mental health outcomes (see A.D. Engler, K.O. Sarpong, B.S. Van Horne, C.S. Greeley, R.J. Keefe, *A Systematic Review of Mental Health Disorders of Children in Foster Care*, *Trauma, Violence, & Abuse*, 23(1) (2020), 255–264, https://doi.org/10.1177/1524838020941197, originally published 2022).

evolving models of family life. Only an integrated approach, capable of combining procedural simplification with openness toward all forms of effective parenthood, can be deemed genuinely consistent with the *best interests of the child* and with the solidaristic function that adoption is designed to serve within the contemporary child law system.

7. Against this background, the present contribution aims to provide a critical analysis of the Italian law on adoption, highlighting its structural and systemic shortcomings in relation to the solidaristic function the institution is intended to fulfil. The discussion follows a logical and systematic framework: beginning with the normative structure and *ratio legis* of Law No. 184 of 1983, it first examines the objective prerequisites of adoption and the rigidity of the binary foster care–adoption model, before turning to the subjective dimension concerning access to full adoption, which remains restricted to married couples. Particular attention is given to the evolution of the concept of filiation and to the issue of same-sex parenthood in light of the Civil Unions Act.

The analysis then addresses the principal weaknesses of the current system—objectively, with regard to the criteria for establishing the child's adoptability status and for ensuring the right of every child to grow up within a stable family environment, given that the existing framework often fails to protect "hybrid" situations, particularly those of permanent semi-abandonment; and subjectively, with respect to the persistent restrictions preventing full adoption by *de facto* couples, single persons, and same-sex unions.

The paper underscores the subsidiary role of the judiciary, which has developed flexible reinterpretations of various statutory provisions to protect the emotional relationships established by the child and to recognize family situations not contemplated by the legislature[19], while nonetheless leaving a number of critical issues unresolved[20]. The study concludes with comparative reflections and reform proposals aimed at overcoming the binary dichotomy between foster care and adoption, expanding the category of eligible adoptive parents, and constructing a unified framework consistent with constitutional principles, international and European standards, and, above all, the *best interests of the child*.

II. The Regulatory Context and *Ratio Legis*: Objective Preconditions for Adoption

1. Adoption in the Perspective of the *Best Interests of the Child*

8. Law No. 184 of 1983 provides for four distinct forms of adoption — *legitimating adoption*[21] (now referred to as *full adoption*[22]), *intercountry adoption*[23], *special-case adoption*[24], and *adoption of an*

[19] From this perspective, case law has reinterpreted the rules governing adoption both with regard to the recognition of the rights of the child and of prospective parents (Judgment No. 79 of 2022, which recognized the existence of a legal relationship of kinship between the adopter's relatives and the adopted child in so-called special-case adoptions), and with regard to the gradual modification of the rigid exclusion of the family of origin in full adoption (Judgment No. 183 of 2023, which held that ties with the family of origin need not be severed, even in cases of full adoption, where the maintenance of such relationships may serve the child's best interests).

It should be noted that in a civil-law system such as the Italian one, legislative power rests with Parliament, while the courts are entrusted solely with the application and interpretation of existing statutes. The absence of a comprehensive legislative reform thus produces an uncertain and fragmented framework, in which the recognition of family ties depends upon judicial practice and fluctuating interpretative approaches, with serious implications for legal certainty and equality of treatment among children and families.

[20] See § 46.

[21] Provided for by Articles 6 et seq. of Law No. 184 of 1983.

[22] The adjective "*legittimante*" is a linguistic legacy of the now-abrogated category of "legitimate children" (see supra, ch. 1). Despite the far-reaching reform of the law of filiation, the Italian legislature has not updated this terminology, which still appears in more recent provisions. See G. Binato, *Filiazione e attribuzione della genitorialità. Un prospettiva europea*, Naples, 2025, p. 217, noting scholarly proposals to replace "*legittimante*" with "parental" and to rename "adoption in special cases" as "parental adoption," in line with the new perspective of substantive equality among all forms of filiation; cf. S. Stefanelli, *L'adozione genitoriale*, in F. Albano, G. Cassano, P. Corder, G. Oberto (eds.), *Le tutele nella famiglia*, Milan, 2018, p. 866.

[23] Intercountry adoption: Articles 29 et seq., Law No. 184/1983; applicable where the child is foreign and lacks family care, with procedures compliant with the 1993 Hague Convention.

[24] Adoption in special cases: Article 44, Law No. 184/1983; this form does not sever legal ties with the family of origin and is permitted only in specific, enumerated hypotheses (e.g., a pre-existing bond with the adopter; impossibility of a pre-adoptive placement).

adult[25] — all of which, pursuant to Article 74 of the Civil Code, as amended by Law No. 219 of 2012, constitute a valid legal basis for establishing a relationship of kinship between the adoptee and the adopter, with the sole exception of the adoption of a person of full age.

9. The guiding principle of the 1983 reform[26] is that of the *best interests of the child* (BIC), which permeates the entirety of contemporary child law and finds its foundation both in international conventions[27] and, indirectly, in domestic constitutional principles[28]. Although the notion has often been misinterpreted[29] — particularly in Italy, owing to a misleading translation of the formula[30], which has

[25] Adoption of adults: Articles 291 et seq. of the Civil Code; this is not aimed at child protection but at establishing a legal bond between an adult adoptee and the adopter.

[26] Adoption was not originally designed for the protection of children. The 1865 Civil Code reflected Roman-law roots: adoption was directed at adults and, on essentially consensual grounds, served to ensure transmission of the surname and estate to those without children or who had lost them. Even the 1942 Civil Code, though providing for adoption of minors, was not protection-oriented and continued to pursue patrimonial and succession logics. For an overview, see U. Gualazzini, *Adozione, diritto civile* (entry), in *Novissimo Digesto*, 290–302; G. Cattaneo, *Adozione* (entry), in *Digesto delle discipline privatistiche. Sezione civile*, I, Turin, 1996, 94–131; M.G. Di Renzo Villata, *Persone e famiglia nel diritto medievale e moderno* (entry), in *Digesto delle discipline privatistiche. Sezione civile*, XIII, Turin, 1996, 457–527; M. Trimarchi (ed.), *Adozione*, *Quaderni di diritto civile*, Milan, 2004; L. Rossi Carleo, *La filiazione adottiva*, in *Diritto civile*, II, *La famiglia*, eds. N. Lipari & P. Rescigno, coord. A. Zoppini, Milan, 2009, 441–449.

[27] Article 3(1) of the 1989 United Nations Convention on the Rights of the Child (CRC) provides: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*" (official English text at www.ohchr.org). Compared with the 1959 Declaration of the Rights of the Child, which first referenced the best interests, the Convention marks two advances: it broadens the duty-bearers to include not only courts but also legislatures, administrations and private entities; and it changes the wording from "*the paramount consideration*" to "*a primary consideration*," underscoring that the child's interest is to be given priority, though not absolute priority, and must be balanced, case by case, with other constitutionally or conventionally protected interests. The travaux préparatoires confirm this reading: S. Detrick (ed.), *The United Nations Convention on the Rights of the Child. A Guide to the "Travaux Préparatoires"*, Martinus Nijhoff, 1992, pp. 137–138. As E. Lamarque observes (pp. 147–148), the drafters intended that decision-makers assign the best interests "a," not "the," primary consideration, allowing an open balancing of all competing rights and needs. Only as regards adoption did Article 21 deliberately provide that the best interests of prospective and adopted minors be *the* paramount consideration, further highlighting the ratio underpinning the regime.

The principle has also been received at EU level by Article 24(2) of the Charter of Fundamental Rights of the European Union, requiring Member States to treat the child's best interests as a primary consideration in all actions concerning children. Its placement in Title III (Equality) reflects an aim to promote substantive equality grounded in childhood status, linked to the non-discrimination principle.

[28] Although not expressly named in the Italian Constitution, the best-interests principle is systematically derived from Articles 2, 3, 30 and 31 Const., and, through binding supranational sources—particularly Article 3 CRC and Article 24 of the EU Charter—operates as a general principle. See Constitutional Court, Judgment No. 11 of 1981 (Justice Leopoldo Elia), a landmark adoption case predating the CRC's entry into force, later acknowledged as seminal by the Court itself: Const. Ct., Judgments No. 102 of 2020, § 4.1; No. 33 of 2021, § 5.3; No. 79 of 2022, § 5.2.3. In scholarship, see E. Lamarque, *Prima i bambini*, Milan, 2016, passim; Id., "*Diritti fondamentali della persona di minore età e best interests of the child*," *Giustizia Insieme*, 6 Feb. 2023.

[29] The European Court of Human Rights has developed a body of case law on the best-interests principle (not expressly contained in the ECHR) that has not always been linear. Both the terminology—oscillating among "paramount," "primary," "particular," or "crucial"—and some outcomes reveal tensions. For example, in *Paradiso and Campanelli v. Italy* (GC, 2017) the Grand Chamber, while recognizing the child's interest, prioritised public policy and the notion of *de facto* family life without a concrete assessment of the individual interest. A similar approach emerges in *kafala* cases (*Harroudj v. France*, 2012; *Chbihi Loudoudi v. Belgium*, 2014), where references to the child's interest appear generic and subordinated to national policies. The *Neulinger and Shuruk* (2010) / *X v. Latvia* (2013) trajectory shows a shift from a substantive to a predominantly procedural approach, later reaffirmed in *Strand Lobben and Others v. Norway* (GC, 2019). Surrogacy cases (e.g., *K.K. v. Denmark*, 2022) even display terminological oscillations (paramount vs. primary), fuelling uncertainty in application. See further E. Lamarque, *Diritti fondamentali della persona di minore età e best interests of the child*, *Giustizia Insieme*, 6 Feb. 2023.

[30] In Italy the expression *best interests of the child* has often been rendered—following the official Italian text of Article 3(1) CRC—as the unusual singular *best interest of the child* or as the formula *superiore interesse del minore* (E. Lamarque, "*I best interests of the child*," in *La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza. Conquiste e prospettive a 30 anni dall'adozione*, AGIA, Rome, 2019, 140 ff., esp. 141). Scholarship suggests a more faithful rendering would emphasize both the plural *interests* and the superlative *best*—e.g., "the child's *best* (i.e., most advantageous) interests" or "the optimal solution for the child"—so as not to elide the comparative balancing with other rights and needs. See E. Lamarque, *Prima i bambini. Il principio dei best interests of the child nella prospettiva costituzionale*, FrancoAngeli, Milan, 2016; Id., *I best interests of the child*, cit., esp. p. 146; G. Mingardo & E. Lamarque, "*Gestazione per altri e best interests of the child*," in F. Pesce (ed.), *La surrogazione di maternità nel prisma del diritto*, Editoriale Scientifica, Naples, 2022, 123 ff.; and online at

sometimes deprived it of its substantive meaning by reducing it to a predominantly adult-centric perspective[31] — its interpretative core remains clear.

In balancing competing interests, the child's interests must be given *primary*, though not absolute, weight. This means that where the child's interests conflict with those of the biological parents, Article 8 of the European Convention on Human Rights (ECHR) requires national authorities to strike a fair balance among all the interests at stake — a balance in which the child's interest may, though need not necessarily, prevail.

A leading authority in this regard is the judgment of the Grand Chamber in *Strand Lobben and Others v. Norway* (2019)[32], followed by more recent cases, including condemnations of Italy such as *A.I. v. Italy* (2021)[33]. Regardless of the nature of the family tie — whether biological, adoptive, or de facto — the assessment of the BIC requires respect for the child's capacity for discernment and his or her right to be heard. Accordingly, the principle must be anchored in the child's "right to the development of his or her personality,"[34] understood as the right to grow within stable and meaningful emotional relationships.

10. Within the framework of adoption law, this principle is pursued through a dual pathway: on the one hand, by recognizing the child's right to grow up and be educated within his or her family of origin; on the other, where this is not possible, by ensuring placement in a stable and harmonious family environment (*un foyer stable et harmonieux*), consistent with Article 8(2) of the 1967 Strasbourg Convention on the Adoption of Children.

In this light, the replacement of the family of origin with the adoptive family — resulting from the severance of pre-existing family ties in cases of full adoption — is designed to guarantee the child's right to grow up in an emotionally balanced environment conducive to his or her psychological and physical development. The 1983 reform thus marks the transition from a traditionally *adult-centric* conception, focused on the adult's interest in becoming a parent (including for patrimonial or succession purposes), to a *child-centred* perspective, in which the *best interests of the child* emerge as the guiding criterion for all decisions concerning parenthood and adoption[35].

2. The Dual-Track Protection System and the Role of Adoption as an *Extrema Ratio*

11. The system of child protection established by Law No. 184 of 1983 pursues the objective, programmatically set out in Article 1, of guaranteeing every child the right to grow up within a family capable of ensuring his or her harmonious and comprehensive development. To this end, the law provides two main instruments: foster care (*affidamento familiare*)[36] and adoption (*adozione*)[37].

Giustizia Insieme (https://www.giustiziainsieme.it/it/minori-e-famiglia/2642-diritti-fondamentali-della-persona-di-minore-eta-e-best-interests-of-the-child?hitcount=0).

[31] The Italian experience also shows that the principle has sometimes been invoked even where the child is not yet born, e.g., in debates on surrogacy or medically assisted reproduction. See G. Recinto, "*L'interesse 'non per forza' superiore del minore*," *Democrazia e diritti sociali*, 2/2024, 19–27; Id., "*Il superiore interesse del minore*…," *Foro italiano*, 2017, 3669 ff. For a broader international perspective, see A. Daly, *Children, Autonomy and the Courts. Beyond the Right to be Heard*, Brill Nijhoff, 2018.

[32] *Strand Lobben and Others v. Norway*, Grand Chamber, 1 Sept. 2019, No. 37283/13, §§ 204, 220.

[33] *A.I. v. Italy*, First Section, 1 Apr. 2021, No. 70896/17, §§ 87, 94.

[34] G. Recinto, "*Stato di abbandono morale e materiale del minore: dichiarazione e revoca della adottabilità*," *Rass. dir. civ.*, 2011, p. 1169.

[35] C. Sartoris, *Semi-abbandono e interesse del minore*, Padua, 2024, p. 14.

[36] For an initial study on the institution of *foster care*, see G. Manera, *L'adozione e l'affidamento familiare*; Id., *L'affidamento familiare: disciplina attuale e prospettive di riforma*, *Dir. fam.*, 1996, 235 et seq.; A. and M. Finocchiaro, *Disciplina dell'adozione e dell'affidamento dei minori*, Milan, 1983; L. Sacchetti, *L'affidamento dei minori*, Rimini, 1984; G. Cattaneo, *Affidamento* (entry), in *Digesto delle discipline privatistiche*, vol. I, Turin, 1987, 155 et seq.; M. Dogliotti, *Affidamento e adozione*, Milan, 1990; Id., *L'affidamento familiare e il giudice tutelare*, *Dir. fam.*, 1992, 82 et seq.; Id., *Modifiche alla disciplina dell'affidamento familiare, positive e condivisibili, nell'interesse del minore*, *Famiglia e diritto*, 2015, 12, 1107 et seq.; J. Long, *I confini dell'affidamento familiare e dell'adozione*, *Dir. fam. pers.*, 2007, 1432 et seq.; G. Ferrando, *I diritti dei minori nelle famiglie in difficoltà*, *Famiglia e diritto*, 2010, 1174 et seq.; A. Cordiano, *Affidamenti e adozioni alla luce della legge sul diritto alla continuità affettiva*, *Nuova giur. civ. comm.*, 2017, II, 255 et seq.

[37] For a general overview, see G. Cattaneo, *Adozione* (entry), in *Digesto delle discipline privatistiche. Sezione civile*, vol. I,

Foster care allows for the temporary placement of a minor with a family unit other than that of origin—preferably one that already has children—or, alternatively, with a single individual, who is entrusted with the child's care and education for as long as necessary to enable the biological parents to restore an environment suitable for the child's well-being. It is, therefore, a temporary and supportive measure, designed to protect the child during periods of crisis or fragility within the family of origin, without severing the affective ties that connect them.

By contrast, where the biological parents are deceased, unknown or anonymous, or where they engage in conduct—whether by action or omission—that deprives the child of the moral and material care owed to them, a situation of abandonment arises, authorising the Juvenile Court to declare the child's adoptability pursuant to Article 8 of the same law.

12. From the foregoing, it clearly emerges that the protection of minors in situations of family vulnerability rests upon a dual-track system, in which adoption operates as an *extrema ratio*: a residual measure to be activated only when foster care, parental support interventions, or judicial measures limiting parental responsibility prove ineffective or impracticable in the specific case.

The subsidiary nature of adoption as an institution becomes particularly evident in light of its profound legal consequences for the child's personal status. Article 27 of Law No. 184 of 1983 establishes a complex framework of constitutive and extinguishing effects that radically transform the child's legal status[38].

On the constitutive side, full adoption (*adozione piena*) entails the child's integration into a new family, which entirely replaces the family of origin, thereby creating a new filial bond: in other words, "the child acquires the status of a child born in wedlock to the adopters" (Art. 27(1)). By virtue of this new status, the child enters into kinship relations with the adopter's relatives and acquires the correlative inheritance rights arising from the new *status filiationis*.

Conversely, and symmetrically, adoption produces extinguishing effects, since the creation of the new filial bond presupposes the termination of the previous *status filiationis* and the cessation of all legal relationships with the biological family—not only with the parents, but also with all relatives by blood (Art. 27(3)).

However, the Constitutional Court, in Judgment No. 183 of 2023, clarified that such severance cannot be regarded as absolute: in concrete cases, it is necessary to recognise the possibility of maintaining significant relationships with the family of origin, whenever this corresponds to the best interests of the child[39].

Turin, 1987, 94 et seq.; A. Trabucchi, *Adozione* (entry), in *Enciclopedia giuridica Treccani*, vol. I, Rome, 1988, 1 et seq.; M.R. Marella, *Adozione* (entry), in *Digesto civile – Aggiornamento*, vol. I, Turin, 2000, 1 et seq.; L. Fadiga, *L'adozione*, Bologna, 2003; M. Dogliotti, *Adozione* (entry), in *Enciclopedia giuridica Treccani*, Rome, 2004, 1 et seq.; L. Lenti, *L'adozione*, in P. Zatti (ed.), *Trattato di diritto di famiglia. Le riforme – Il nuovo diritto della filiazione*, vol. II, edited by L. Lenti & M. Mantovani, Milan, 2019, 415 et seq.; G. Bonilini & M. Boselli, *L'adozione dei minori di età*, in G. Bonilini (ed.), *Trattato di diritto di famiglia*, 2nd ed., vol. III, *La filiazione e l'adozione*, Turin, 2022, 507 et seq.

[38] The effects of *full adoption* (*adozione piena*) have been examined in particular by: F. Giardina, *Art. 27 of Law 4 May 1983, No. 184*, in C.M. Bianca, F.D. Busnelli, G. Franchi, S. Schipani (eds.), *Commentary on Law No. 184/1983*, *Nuove leggi civili commentate*, 1984, 112 et seq.; G. Cattaneo, *Adozione*, cit., 97 et seq.; Conti, *Art. 27 – Della dichiarazione di adozione*, in G. Cian, G. Oppo, A. Trabucchi (eds.), *Commentario al Codice Civile*, vol. VI, pt. 2, Padua, 1993, 271 et seq.; M. Dogliotti, *Adozione*, cit., 5 et seq.; B. Checchini, *Art. 27*, in E. Gabrielli (ed.), *Commentario del Codice civile – Della famiglia*, edited by G. Di Rosa, 2nd ed., Turin, 2018, 723 et seq.; E. Al Mureden, *Il cognome tra autonomia dei genitori e identità personale del figlio*, *Nuova giur. civ. comm.*, 2022, 5, 1092 et seq.

[39] Specifically, the Constitutional Court, in Judgment No. 183 of 2023, clarified that Article 27(3) of Law No. 184/1983 does not preclude, in particular circumstances, the preservation of the child's emotional relationships with certain members of the family of origin, where such preservation corresponds to the child's best interests. This consideration must already be addressed at the stage of the declaration of adoptability, since Article 19 of the same law empowers the judge to adopt "further measures in the child's interest," which must be crafted solely for the protection of the child, without any balancing against interests of a different nature. These cases concern the so-called *open adoption* (*adozione aperta*), to which reference is made in § IV.2(A) for further discussion and bibliography.

3. The Condition of Abandonment, the Child's Right to Emotional Continuity, and Situations of Permanent *Semi-Abandonment*

13. Precisely because of the gravity of the consequences flowing from an adoption decree, it is essential to define with clarity the legal precondition for a finding that a child is in a state of abandonment. Pursuant to Article 8 of Law No. 184 of 1983, such a condition arises where there is a lack of moral and material care by the parents or by relatives who are legally bound to provide it. In effect, since Article 147 of the Civil Code—in line with Article 30 of the Constitution—imposes upon parents the duty to maintain, instruct, and educate their children, a state of abandonment exists whenever they are gravely and permanently in default of both their duty to provide moral and emotional support and their obligation to contribute, including financially, to the child's maintenance and upbringing.

Consistent with the established case law of both national[40] and supranational courts[41], a declaration that a child is adoptable (*dichiarazione dello stato di adottabilità*) may be issued only where the child's family of origin[42]—even in its extended form[43]—is entirely absent, as in the case of children abandoned at birth, or is affected by such grave and irreversible inadequacy as to endanger the child's physical or psychological health and to impair his or her balanced development. For the purposes of such an assessment, mere economic deprivation is not sufficient, and should rather prompt the competent welfare services to adopt appropriate support measures[44].

In all cases, the order by which the Juvenile Court declares adoptability or orders placement in foster care is grounded in a prognostic evaluation of the possibility of recovery of parental capacity. This necessarily entails a delicate balancing between, on the one hand, the need not to sever family ties prematurely, and, on the other, the equally compelling duty not to jeopardise the child's right to grow up in a stable and emotionally secure environment[45].

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[40] Among many others, see: *Corte di Cassazione*, 7 October 2014, No. 21110; *Corte di Cassazione*, 18 December 2015, No. 25526; *Corte di Cassazione*, 13 January 2017, No. 782; *Corte di Cassazione*, 27 March 2018, No. 7559; *Corte di Cassazione*, 22 August 2018, No. 20954; *Corte di Cassazione*, 3 October 2019, No. 24791; *Corte di Cassazione*, 13 February 2020, Nos. 3643 and 3654; *Corte di Cassazione*, 25 January 2021, No. 1476; *Corte di Cassazione*, 17 February 2021, No. 4220; *Corte di Cassazione*, Order of 14 September 2021, No. 24727; *Corte di Cassazione*, 15 December 2021, No. 40308; *Corte di Cassazione*, 4 May 2022, No. 14077.

[41] *European Court of Human Rights*, 21 January 2014, *Zhou v. Italy*, Application No. 3373/11; 16 July 2015, *Akinnibosun v. Italy*, Application No. 9056/14; 13 October 2015, *S.H. v. Italy*, Application No. 52557/14; 20 January 2022, *D.M. and N. v. Italy*, Application No. 60083/19.

[42] On this point, see G. Ballarani and P. Sirena, *Il diritto dei figli di crescere in famiglia e di mantenere rapporti con i parenti nel quadro del superiore interesse del minore (art. 315-bis c.c., inserito dall'art. 1, comma 8, l. n. 219/2012)*, *Nuove leggi civili commentate*, 2013, p. 534 et seq.; A. Finessi, *Adozione legittimante e adozione c.d. "mite" tra proporzionalità dell'intervento statale e best interest of the child*, *Nuove leggi civili commentate*, 2020, p. 1343 et seq.; M.C. Bianca, *L'interesse del minore alla propria famiglia: un interesse ancora in attesa di piena tutela*, in M. Bianca (ed.), *The Best Interest of the Child*, Sapienza University Press, 2021, p. 255 et seq., noting that "the child's right to grow up in a family is a personality right, as it protects an essential human interest during the formative years, and that the bond with the parents must be preserved until the protection of a prevailing interest of the child—such as the right not to be subjected to violence—becomes imperative" (p. 256); E. Quadri, *Una riflessione su "l'interesse del minore e il suo diritto a crescere in famiglia"*, in the same volume, p. 261 et seq.

[43] The term "family of origin" is understood, at least, to include relatives up to the fourth degree of kinship, as implicitly provided by the adoption law, which under Article 9 requires that only those who do not have such kinship and host the minor for more than six months must notify the Juvenile Court. See M. Dogliotti and F. Piccaluga, *L'art. 8 della legge sull'adozione prima e dopo la riforma del 2001*, *Rivista trimestrale di diritto e procedura civile*, 2003, p. 593 et seq., para. 10.

[44] See Articles 30 and 31 of the Italian Constitution and Article 1 of Law 4 May 1983, No. 184, which provides that "the parents' or parent's condition of indigence shall not constitute an obstacle to the exercise of the child's right to his or her own family. For this purpose, support and assistance measures shall be made available to the family." Cf. L. Bozzi, *Criticità dell'adozione e protezione del minore. Il problema del semi-abbandono permanente e le sue possibili soluzioni*, cit., p. 662.

[45] P. Morozzo della Rocca, *Abbandono e semi-abbandono del minore nel dialogo tra CEDU e Corti nazionali*, *Nuova giurisprudenza civile commentata*, 2020, I, p. 835, notes that "if the residual nature of adoption were to be understood as meaning that it may not be resorted to except in cases of serious and current harm, this would risk entrenching family situations where both the serious danger to the development of a very young child and the unfitness of the biological parents are already clear, effectively turning delay and hesitation—signs of lack of responsibility and empathy (often limited to adults)—into a supposed virtue. In short, the risk is that of losing the *carpe diem* and, with it, the child's concrete care, merely to remain faithful to a protocol increasingly incompatible with the tyranny of the child's own time and fragility."

14. This approach also responds to the principle of the right to continuity of affective bonds (*diritto alla continuità dei legami affettivi*). Within the conceptual framework of adoptive filiation[46], the child's interest in preserving established social and emotional relationships finds explicit recognition in several provisions, notably in Article 4(5-quinquies) of Law No. 184/1983, which requires the court, in cases where the child lacks a suitable family environment, to give priority to maintaining relationships with relatives up to the third degree and, where siblings exist, to ensure, as far as possible, their joint placement.

This provision, which represents a clear statutory acknowledgement of the significance of emotional ties with the biological family, does not, however, exclude the possibility that members of that family may prove unable to exercise a genuinely protective function. Consequently, family continuity may at times shift from being a safeguard to becoming a source of harm to the child[47].

The right to continuity of affective bonds also forms the cornerstone of the important reform of the foster care institution introduced by Law No. 173 of 19 October 2015[48], entitled *"Right to the affective continuity of boys and girls in foster care"*, which amended Law No. 184 of 4 May 1983 in the part relating to out-of-home placement (*affidamento eterofamiliare*)[49].

15. Against this background, it appears plausible that courts—even in the presence of situations marked by significant parental inadequacy, and notwithstanding the very young age of the child—tend to adopt an attitude of caution[50], refraining from departing from the principles now consolidated in both national and European case law[51].

Yet, excessive postponement of judicial intervention aimed at determining the state of abandonment—in the hope of an eventual improvement in the family's circumstances—renders the severance of the bond with the family of origin increasingly complex, thereby reducing the likelihood of securing for the child a new and stable emotional environment. The risk is that of adopting an approach amounting to a form of "defensive justice"[52], which privileges the formal preservation of the family bond over a more decisive and timely intervention truly responsive to the best interests of the child.

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[46] On this issue, see G. Recinto, *Le genitorialità. Dai genitori ai figli e ritorno*, cit., p. 36 et seq.; A. Montaldi, *Contraddizioni e criticità del principio della continuità affettiva nei procedimenti di adozione: continuità affettiva e affido familiare*, in M. Bianca (ed.), *The Best Interest of the Child*, cit., p. 1105 et seq.

[47] *Corte di Cassazione*, Civil Section I, 13 May 2025 (hearing 20 March 2025, decision filed 13 May 2025), No. 12822, with a note by S.A.R. Galluzzo, *In assenza di rapporti significativi la disponibilità dei parenti non esclude lo stato di abbandono*, *IUS Famiglie*, 24 June 2025.

[48] On this topic, see M. Dogliotti, *Modifiche alla disciplina dell'affidamento, positive e condivisibili, nell'interesse del minore*, *Famiglia e diritto*, 2015, p. 1107 et seq.; P. Morozzo della Rocca, *Sull'adozione da parte degli affidatari dopo la L. n. 173/2015*, ibid., 2017, p. 602 et seq.; A. Cordiano, *Affidamenti e adozioni alla luce della nuova legge sul diritto alla continuità affettiva*, *Nuova giur. civ. comm.*, 2017, II, p. 255 et seq.; A. Morace Pinelli, *Il diritto alla continuità affettiva dei minori in affidamento familiare. Luci ed ombre della legge 19 ottobre 2015, n. 173*, *Diritto di famiglia e delle persone*, 2016, p. 303 et seq.

[49] In order to avoid harm to a child who has developed a significant relationship with the foster family that has cared for him or her for an extended period, the reform inserted Article 4(5-bis) into Law No. 184/1983, allowing the foster family—where the requirements of Article 6 of the same law are met—to apply for adoption of the fostered child.

[50] Cf. L. Bozzi, *Criticità dell'adozione e protezione del minore. Il problema del semi-abbandono permanente e le sue possibili soluzioni*, cit., p. 663.

[51] The case decided by the *European Court of Human Rights*, 12 February 2019, *Minervino and Trausi v. Italy*, Application No. 63289/17, although ultimately concluded with an adoption, is emblematic. Chronology: in 2008 the family came under the supervision of social services; in 2009 the Juvenile Court ordered the placement of the children in a suitable facility due to the family's difficulties; in 2012 the children were entrusted to social services; in July 2014 the Juvenile Court suspended the applicants' parental responsibility, confirmed the children's placement, and instructed the social services to identify foster families; in February 2015 the Public Prosecutor sought the forfeiture of parental responsibility and the initiation of adoption proceedings; in April 2015 the Juvenile Court confirmed the suspension of parental responsibility; in July 2015 the Court declared the children adoptable.

[52] L. Bozzi, *Criticità dell'adozione e protezione del minore. Il problema del semi-abbandono permanente e le sue possibili soluzioni*, cit., p. 663, observes that "it seems unrealistic to assume that judges—even in the case of a very young child where the parental and family deficiencies are significant and unlikely to be reversible—would set themselves against well-established domestic and European case law and choose to declare adoptability, unless the situation were *ictu oculi* so grave as to require such a measure. A more likely outcome is an approach inspired by *defensive justice*, whereby the decision is taken not to sever the child's bond with the family."

16. In particular, while the structure of the institution—consistent with its underlying function of ensuring that the child grows up within a stable and permanent family environment—appears coherent in principle, it also reveals the rigidity of the normative model. As traditionally interpreted, it fails to capture the multiplicity of situations of vulnerability which, although not amounting to *abandonment* in the strict legal sense, may nonetheless significantly impair the child's best interests.

In this respect, the notion of so-called "semi-abandonment" (*semi-abbandono*)—in its permanent or cyclical form—developed by juvenile case law, taken up in academic doctrine[53], and more recently endorsed by the Constitutional Court in Judgment No. 183 of 2023[54], is emblematic. This expression refers to a variety of circumstances in which the shortcomings of biological parents, although demonstrating an inability to provide adequate care and to foster the child's balanced emotional development, do not meet the threshold either of abandonment as defined in Article 8 of Law No. 184 of 1983, or of a merely temporary lack of a suitable family environment within the meaning of Article 2 of the same law.

Examples include cases of parents affected by drug addiction, who alternate between phases of recovery and relapse; or individuals suffering from chronic or latent psychiatric disorders, characterised by periodic exacerbations that compromise their ability to establish stable and coherent relationships with their children. In other instances, parental deficiencies do not follow a cyclical pattern but evolve linearly and progressively, tending toward chronicity—as occurs in situations of economic hardship, social marginalisation, or disabling illnesses, particularly of a psychiatric nature[55].

All such circumstances, despite their differing origins, share a common feature: the recognition of parental inadequacy does not necessarily imply the absence of an emotional bond between parent and child. Even where the parents' educational and caregiving capacities are gravely compromised, an emotional relationship may persist which—if consistent with the child's best interests—ought to be acknowledged and, insofar as possible, preserved[56].

The residual positivity of the familial bond requires national authorities to adopt appropriate measures to safeguard the child, in accordance both with Article 8 of the European Convention on Human Rights, which protects the right to respect for family life, and with the spirit and framework of Law No. 184 of 1983[57].

17. Nevertheless, the rigidity of the current legislation produces the paradoxical effect of creating a "grey area" of non-protection: the child, being ineligible for adoption, remains trapped in a regime of prolonged foster care or is placed in an institutional facility, thereby experiencing an indefinite suspension of his or her developmental trajectory and being deprived of the possibility of forming stable and lasting family relationships[58].

As a result, the principle of continuity of family ties, although formally emphasised by the legal system, may at times become an obstacle to the full realisation of the child's best interests, insofar as the preservation of the biological bond prevails over the imperative of ensuring an adequate emotional and relational environment.

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[53] For early studies on the notion of *semi-abandonment*, see A. Batà and A. Spirito, *Semiabbandono permanente e adozione mite*, *Famiglia e diritto*, 2003, p. 301 et seq.; F. Longo, *Stato di abbandono del minore: una nozione da rimeditare?*, *Famiglia e diritto*, 2010, p. 695 et seq.; F. Astiggiano, *Riflessioni in tema di stato di abbandono del minore*, *Famiglia e diritto*, 2013, p. 168 et seq.; M. Renna, *Forme dell'abbandono, adozione e tutela del minore*, *Nuova giur. civ. comm.*, 2019, I, p. 1366 et seq.; A. Thiene, *Semiabbandono, adozione mite, identità del minore. I legami familiari narrati con il lessico europeo*, *Famiglia e diritto*, 2020, 11, p. 1067 et seq.; P. Morozzo della Rocca, *Abbandono e semi-abbandono del minore nel dialogo tra CEDU e Corti nazionali*, *Nuova giur. civ. comm.*, 2020, p. 830 et seq.; C. Sartoris, *La tutela del minore nelle ipotesi di c.d. semi-abbandono permanente*, in C. Angiolini and D. Santarpia (eds.), *La fattispecie "liquida": quattro casi sintomatici*, Naples, 2023, p. 105 et seq.

[54] Cf. *Corte costituzionale*, 28 September 2023, No. 183, *Foro italiano*, 2023, 12, I, p. 3302.

[55] C. Sartoris, *Semi-abbandono e interesse del minore*, cit., p. 2.

[56] C. Sartoris, *Semi-abbandono e interesse del minore*, cit., p. 19.

[57] Cf. in particular *European Court of Human Rights*, 21 January 2014 (*Zhou v. Italy*, Application No. 33773/11), *Minorigiustizia*, 2014, p. 268 et seq., with a note by F. Occhiogrosso, *Con la sentenza CEDU Zhou contro l'Italia l'adozione "mite" sbarca in Europa*; *Nuova giur. civ. comm.*, 2015, 2, p. 155 et seq., with a note by A. Pasqualetto, *L'adozione "mite" al vaglio della Corte europea dei diritti dell'uomo tra precedenti giurisprudenziali e prospettive "de jure condendo"*.

[58] With the consequences highlighted above; see note No. 18.

As will be shown below, judicial practice has progressively developed flexible interpretations of the legislative framework in an effort to provide effective protection for these intermediate situations, which elude the traditional dichotomy between foster care and adoption[59].

III. Filiation and Same-Sex Parenthood: The Subjective Preconditions for Adoption

1. From the Paradigm of *Imitatio Naturae* to the Centrality of Filiation

18. From the standpoint of subjective requirements, the legal framework governing adoption continues to display a marked rigidity. Full adoption (*adozione piena*) may be applied for only by spouses who have been married for at least three years (or who have cohabited for an equivalent period), are not legally separated, are both of full age, and whose age difference with the child is between 18 and 45 years. Consequently, the law *ex lege* excludes unmarried couples, civil partners, and single persons, regardless of their affective and educational suitability.

This legislative approach—still rooted in the presupposition of marriage conceived within a heteronormative[60] framework—reveals a structural inadequacy in light of the plurality of family models now recognised within the Italian legal order. It also stands, as will be shown below, in clear tension with the constitutional principles of equality and solidarity, as well as with international and European standards on child protection.

19. The legislature's choice has traditionally been justified by reference to the paradigm of *imitatio naturae*, understood as the need to reproduce, through adoption, the scheme of biological filiation. This approach, deeply rooted in the Roman-law tradition, had even led to excluding women from the possibility of adopting, on the assumption that, since they did not exercise natural paternal authority, they could not acquire parental authority over another's child[61].

Although society has profoundly changed, a strand of legal scholarship continues to invoke this paradigm, arguing that both the principle of *imitatio naturae* and that of the best interests of the child presuppose a preference for a biparental, heterosexual model of family[62].

20. Even within such a framework, legal mechanisms have not been lacking that allow single persons to access adoption[63], and Law No. 184 of 1983 itself contains certain openings.

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[59] See § IV.2.A).

[60] The term "heteronormativity", originally coined by M. Warner (*Introduction: Fear of a Queer Planet*, *Social Text*, 1991, 29, p. 3), refers to the set of "*institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent ... but also privileged*": see L. Berlant and M. Warner, *Sex in Public*, *Critical Inquiry*, vol. 24, 1998, no. 2, p. 547. See also P. Johnson, *Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority*, *Social and Legal Studies*, vol. 20, 2011, p. 349; A. Schuster, *L'abbandono del dualismo eteronormativo della famiglia*, in idem (ed.), *Omogenitorialità. Filiazione, orientamento sessuale e diritto*, Milan–Udine, Mimesis, 2011, esp. p. 35. See more broadly A.M. Lecis Cocco Ortu, *L'omogenitorialità davanti alla Corte di Strasburgo: il lento ma progressivo riconoscimento delle famiglie con due padri o due madri*, cit., p. 98, where the author observes that "*the entire body of family law norms in Europe, firmly anchored in traditional notions, has been built upon a 'legitimation and institutionalisation of inequalities': between husband and wife, between father and children, between married and cohabiting couples, between legitimate and 'natural' children and, of course, between same-sex and different-sex couples.*"

[61] See Gaius, Institutiones, 1.104: "*Feminae vero nullo modo adoptare possunt*." As is well known, early Roman adoption consisted of solemn agreements by which a *pater familias* submitted himself to the *potestas* of another (*adrogatio*), or a *filius familias* was transferred from one father's *potestas* to another's (*adoptio*): both structures were "naturally" incompatible with a woman's participation. Nonetheless, exceptions did exist. In the late Roman period, adoption was exceptionally granted to women *ex indulgentia principis ad solacium liberorum amissorum*, according to the formula preserved in Justinian's compilation (*Inst.* 1.11.10). See further S. Sciortino, *Sull'adozione da parte delle donne*, *Annali del Seminario Giuridico dell'Università di Palermo*, 2006, pp. 1–40.

[62] Some scholars maintain that the constitutional concept of family remains modelled upon marriage, such that the Constitution would not protect realities that depart from the principle of *imitatio naturae*—that is, those diverging from the possibility of natural procreation. See R. Senigaglia, *Genitorialità*, p. 952; C. Castronovo, *Eclissi del diritto civile*, Milan, 2015, p. 78.

[63] Within the current legal framework, forms of adoption by single persons—though producing effects not equivalent to full

Paragraphs 4 and 5 of Article 25 allow full adoption by one spouse alone when, during the pre-adoptive placement, the other spouse dies, becomes legally incapacitated, or the couple separates—situations that, in effect, place the child within a single-parent household.

More explicitly, Article 44, governing adoption in special cases, provides in paragraph 1(c) (as introduced by Article 25 of Law No. 149/2001) that a non-married person may adopt a child who, being orphaned of both parents, is affected by a disability (*Article 3(1) of Law No. 104/1992*). Paragraph 3 further extends this possibility to cases in which pre-adoptive placement is not feasible.

21. In any event, the issue that most profoundly animates doctrinal and judicial debate concerns the recognition of adoptions by same-sex couples. The core of the discussion lies in the value to be ascribed to the paradigm of *imitatio naturae* and in assessing whether it still constitutes an obstacle to recognising same-sex (homoparental) adoptions.

At the European level, the case law of the European Court of Human Rights (ECtHR) has made it clear that an individual's sexual orientation cannot, in itself, serve as a ground for denying protection of parent–child relationships, nor be regarded as detrimental to the child's interests. The Court has also reaffirmed that homosexuality cannot constitute a discriminatory criterion for restricting access to adoption or similar family institutions[64].

In Italy, however, this parameter continues to underpin a legal distinction in access to marriage[65], with corresponding implications for eligibility to adopt with full legal effect. It is therefore legitimate to question whether, in light of social evolution and the transformation of the constitutional and supranational value framework, it still makes sense to invoke *imitatio naturae* as the organising principle of the adoption system—especially considering that, as Santi Romano once observed, *"law must once again be conceived as inventio."*[66]

Indeed, the family, as a fundamental social formation, has undergone profound transformations over time, evolving from a unitary conception based exclusively on marriage to a plurality of affective models, characterised by both legal and social bonds[67]—diversity that the legal system can no longer afford to ignore.

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adoption—have some legal recognition. In the Italian system, adoption by a single individual is permitted, on the one hand, in the civil-code institution of adult adoption (Articles 291 et seq. Civil Code), which preserves elements of the Roman model, and, on the other, in adoption in special cases under Article 44 of Law 4 May 1983, No. 184. An example is *Corte di Cassazione*, 26 June 2019, No. 17100, available at www.altalex.com, which recognised the full suitability of an elderly single woman to care for a minor. In the same vein, see *Corte costituzionale*, judgment No. 33 of 21 March 2025, declaring Article 29-bis(1) of Law 4 May 1983, No. 184 unconstitutional "insofar as it does not include single persons resident in Italy among those entitled to submit a declaration of availability to adopt a foreign minor residing abroad"—a landmark ruling. On this point, see further § IV.

[64] European case law has never recognised a right to adoption per se, but has relied on the principle of non-discrimination. Thus, where a State permits single-person adoption, it may not exclude a particular applicant solely on the ground of homosexual orientation (*ECtHR*, Grand Chamber, *E.B. v. France*, 22 January 2008, No. 43546/02). Likewise, where a State allows the adoption of a partner's biological child within heterosexual de facto unions, it may not deny that possibility to same-sex couples (*ECtHR*, Grand Chamber, *X and Others v. Austria*, 19 February 2013, No. 19010/07).

[65] The European Court of Human Rights has, however, held that there is no obligation to open marriage to same-sex couples (*ECtHR*, *Schalk and Kopf v. Austria*, 24 June 2010, No. 30141/04), since the Convention merely requires that some form of legal recognition be afforded (*ECtHR*, 21 July 2016, *Oliari and Others v. Italy*, Nos. 18766/11 and 36030/11). Consequently, if the right to adopt a partner's child is denied with respect to all de facto unions and limited to married couples, no discrimination arises even where same-sex couples are excluded from marriage (*ECtHR*, *Gas and Dubois v. France*, 15 March 2012, No. 25951/07).

[66] S. Romano, *Frammenti di un dizionario giuridico*, Milan, 1947, reconceptualised the very perspective from which law should be viewed, describing it once again as *inventio* "*a reality immanent in the deeper strata of society, where the legislator must first seek, find, and record it*" (as quoted in P. Grossi, *Il mondo delle terre collettive*, cit., p. 28, esp. n. 22).

[67] On the most recent cultural and doctrinal trends in Italian family law, see, among others: M. Dogliotti, *Famiglia, Famiglie, Unione civile e convivenza di fatto di fronte al matrimonio*, Turin, 2025, *passim*; G. Bevivino, *Introduzione "critica" al diritto di famiglia. Regole e tendenze del moderno diritto delle relazioni familiari*, Turin, 2024, *passim*; U. Salanitro, *Quale diritto di famiglia per la società del XXI secolo?*, Pisa, 2020, *passim*; and earlier, G. Amadio and F. Macario (eds.), *Diritto di famiglia*, Bologna, 2016, *passim*; A. Margaria, *Nuove forme di filiazione e genitorialità. Leggi e giudici di fronte alle nuove realtà,* Bologna, 2018, *passim*.

22. In Italy, this process has been accompanied by legislative reforms[68] and the introduction of new regulatory frameworks[69] which, in line with constitutional and supranational principles[70], have shifted the focus of protection from the preservation of the family as an institution to the safeguarding of the individuals who compose it, with particular attention to the rights of children.

The current legal framework therefore appears to structure the family around the concept of filiation rather than marriage[71], marking a departure from the traditional model historically centred on the matrimonial bond[72].

2. The Law on Civil Unions and *Stepchild Adoption* in the Italian System

23. Yet, despite the emergence within social reality of family units composed of same-sex partners—whether through assisted reproductive techniques abroad or through reconstituted families making use of stepchild adoption—the Italian legal system continues to display a marked gap between normative data and social experience.

The enactment of Law No. 76 of 2016 on civil unions certainly represented a step forward in the protection of same-sex couples; however, such recognition did not extend to relationships of filiation. As a result, a persistent discrepancy remains: the desire for parenthood continues to generate family projects that the legal system is unable to fully accommodate through full adoption, which remains tied to the requirement of marriage. This has the practical consequence of reducing the number of families eligible and available to welcome a child.

24. It is within this space of normative tension that judicial interpretation has developed, progressively enhancing the role of adoption in special cases (*adozione in casi particolari*) as an instrument capable of ensuring continuity and stability in the affective bonds already established by the child[73].

Judicial practice has, in fact, paved the way for both the recognition of stepchild adoptions and the domestic consolidation of family relationships formed abroad through procedures not permitted under Italian law, subsequently requiring their recognition within the national legal order.

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[68] Beginning with the 1975 reform of family law (*Law 19 May 1975, No. 151*), which marked a fundamental turning point in Italian family law: among other things, it replaced *patria potestas* with parental authority—now termed parental responsibility—abolished the husband's marital authority, and established the equality of spouses. On this point, see P. Schlesinger, *Quarant'anni di riforme del diritto di famiglia*, *Famiglia e diritto*, 2015, p. 969.

[69] In particular, reference is made to the reform of filiation: Law 10 December 2012, No. 219, *Provisions on the recognition of children born out of wedlock*, and Legislative Decree 28 December 2013, No. 154, *Revision of the existing provisions on filiation*. The literature is extensive; among early commentaries see *Aa.Vv.*, *La riforma del diritto della filiazione* (ed. C.M. Bianca), *Nuove leggi civili commentate*, 2013, p. 437 et seq.; idem, *La legge italiana conosce solo figli*, *Rivista di diritto civile*, 2013, I, p. 1 et seq. See also on the single status of child (Articles 315 et seq. Civil Code) and Law No. 40/2004.

[70] The 2012 reform of filiation draws upon the constitutional principles expressing the value of the human person (Articles 2, 3, 30 of the Constitution), as well as upon the prohibition of discrimination based on birth (Article 21 of the Charter of Fundamental Rights of the European Union) and the European Convention on Human Rights (ECHR).

[71] According to the most recent ISTAT Report, *Natalità e fecondità della popolazione residente – Year 2023*, births outside marriage accounted for 42.4 per cent of all births (2023), an increase of 0.8 percentage points over 2022 (41.5 per cent). The figure shows a slight rise, though less than the average annual growth recorded during 2008–2022 (+1.5 points per year). The share of births to never-married parents rose from 35 to 35.9 per cent, while births to couples including at least one previously married parent remained stable (6.6 to 6.5 per cent). For a fuller analysis, see *ISTAT, Natalità e fecondità della popolazione residente, Year 2023*, p. 1, available at https://www.istat.it/wp-content/uploads/2024/10/Natalita-in-Italia-Anno-2023.pdf.

[72] Traditionally, filiation served as a means to ensure the continuity of the *pater familias* and the intergenerational transmission of property, not only in economic terms—a function pursued, in the absence of biological offspring, through the institution of adoption. For a long period, however, the overall structure of family law rested exclusively on the institution of marriage. The conceptual overlap between marriage and family meant that only the marital relationship was legally relevant for parenthood and, consequently, for filiation, which lacked autonomous legal status if not supported by a marital bond. This conception of the family made it possible to create distinctions among individuals by means of the concept of legitimacy of filiation, the legal title through which rights and duties were conferred, granting the child—by virtue of the recognised legal bond of descent—a specific status. For an overview of the historical evolution from Roman law onwards, see G. Binato, *Filiazione e attribuzione della genitorialità. Una prospettiva europea*, Naples, 2025.

[73] See § IV.II.A).

25. The question of adoption by civil partners, moreover, represented one of the most controversial issues in the political and doctrinal debate that accompanied the adoption of Law No. 76 of 2016.

The so-called "Cirinnà Law" – entitled *"Regulation of civil unions between persons of the same sex and discipline of cohabitation"* – was passed also in response to strong supranational pressures.

On one side, the European Parliament, through its Resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013–2014), had urged Member States to adapt their legislation to the evolving composition of families, by making domestic laws more inclusive toward single-parent households and LGBT parenthood.

On the other side, the European Court of Human Rights, in Oliari and Others v. Italy, 21 July 2015 (Applications Nos. 18766/11 and 36030/11)[74], after referring to recent rulings of the Italian Constitutional Court and Court of Cassation recognising same-sex couples as social formations protected under Article 2 of the Constitution[75], found that Italy had exceeded its margin of appreciation, thereby violating Article 8 ECHR by failing to provide any legal framework for unions between persons of the same sex[76].

26. Following a heated political debate—which nearly jeopardised the approval of the reform—the discipline of civil unions was ultimately adopted only after the removal of the provisions originally concerning filiation.

Specifically, the Bill No. 2081, approved by the Senate on 25 February 2016, contained in Article 5 an amendment to Law No. 184 of 4 May 1983, intended to allow a partner in a civil union to adopt the child of the other partner (the so-called *stepchild adoption*). The provision proposed to amend Article 44(1)(b) by inserting, after the word "spouse", the words *"or by the partner in a civil union between persons of the same sex"*, and, after "of the other spouse", the phrase *"or of the other partner in a civil union between persons of the same sex"*.

The deletion of this provision became the political compromise that made it possible to secure the law's passage, relegating the issue to paragraph 20 of the sole article. This paragraph, on the one

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[74] European Court of Human Rights, judgment of 21 July 2015, Applications Nos. 18766/11 and 36030/11, *Oliari and Others v. Italy*; for commentary on this decision, see L. Lenti, *Prime note in margine al caso Oliari c. Italia*, *Nuova giurisprudenza civile commentata*, 2015, p. 575 ff.; P. Bruno, *Oliari contro Italia: la dottrina degli "obblighi positivi impliciti" al banco di prova delle unioni tra persone dello stesso sesso*, *Famiglia e diritto*, 2015, pp. 1073 and 555. On the significance attributed by the ECtHR to same-sex relationships also for the purpose of family reunification of a foreign partner, see *ECtHR*, judgment of 23 February 2016, Application No. 68453/13, *Pajić v. Croatia*; and, for a condemnation of Italy on this point, *ECtHR*, judgment of 30 June 2016, Application No. 51362/09, *Taddeucci and McCall v. Italy*. However, see *ECtHR*, judgment of 9 June 2016, Application No. 40183/07, *Chapin and Charpentier v. France*, where the Court underlined that there is no right to same-sex marriage, and that Article 12 ECHR, entitled *"Right to marry"* ("Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right"), cannot be interpreted as imposing upon Member States the obligation to extend the institution of marriage to same-sex couples. See more broadly G. Recinto, *Le genitorialità*, cit., p. 110 ff.

[75] Constitutional Court, 14 April 2010, No. 138, *Foro italiano*, 2010, I, c. 1361 ff., with comment by R. Romboli, *Il diritto "consentito" al matrimonio ed il diritto "garantito" alla vita familiare per le coppie omosessuali in una pronuncia in cui la Corte dice "troppo" e "troppo poco"*, and F. Dal Canto, *La Corte costituzionale e il matrimonio omosessuale*; also, ibid., I, c. 1701 ff., with comment by M. Costantino, *Individui, gruppi e coppie (libertà, illusioni, passatempi)*; *Famiglia e diritto*, 2010, p. 653 ff., with note by M. Gattuso, *La Corte costituzionale sul matrimonio tra persone dello stesso sesso*; *Iustitia*, 2010, p. 311 ff., with note by M. Costanza, *La Corte costituzionale e le unioni omosessuali*; *Responsabilità civile*, 2010, p. 1491 ff., with note by L. Morlotti, *Il no della Consulta al matrimonio gay*; *Guida al diritto*, 2010, no. 19, p. 16 ff., with note by M. Fiorini, *Un ulteriore ritardo nel varo di regole ad hoc rallenta il processo di integrazione europea*; *Famiglia, persone e successioni*, 2011, p. 179 ff., with note by F.R. Fantetti, *Il principio di non discriminazione ed il riconoscimento giuridico del matrimonio tra persone dello stesso sesso*. Also Constitutional Court, 7 July 2010, No. 276, *Giurisprudenza costituzionale*, 2010, p. 3386 ff.; Constitutional Court, 5 January 2011, No. 4, *Giustizia civile*, 2011, I, p. 841 ff., with note by G. Cosco, *Le unioni omosessuali e l'orientamento della Corte costituzionale*; *Iustitia*, 2011, p. 181 ff., with note by G. Cerrelli, *Ancora un no della Consulta alle nozze tra persone omosessuali*; *Diritto di famiglia*, 2011, p. 57 ff., with note by S. Bordonali, *Il matrimonio tra conservazione, evoluzione e fughe in avanti*. Court of Cassation, 9 February 2015, No. 2400, *Nuova giurisprudenza civile commentata*, 2015, I, p. 649 ff., with note by T. Auletta, *Ammissibilità nell'ordinamento vigente del matrimonio fra persone del medesimo sesso*; *Corriere giuridico*, 2015, p. 90 ff., with note by G. Ferrando, *Matrimonio same-sex: Corte di cassazione e principi europei a confronto*. For further references, see G. Recinto, *Le genitorialità*, cit., pp. 110–113.

[76] P. Rescigno, *Il matrimonio same sex al sindizio delle Corti*, *Corriere giuridico*, 2012, p. 861 ff.; G. Recinto, *Le genitorialità*, cit., pp. 110.

hand, extends to civil partners the general application of the provisions referring to marriage and spouses, but, on the other hand, expressly excludes the Civil Code and Law No. 184/1983[77], stipulating that, as regards adoption, *"the provisions currently in force shall remain applicable."*[78]

In so doing, the legislature chose not to innovate the existing adoption regime, leaving unaffected the possibility of applying the forms of adoption already provided for in the legal system—in particular, adoption in special cases under Article 44(d) of Law No. 184/1983—and entrusting the task of filling the gaps in protection for same-sex families to judicial interpretation.

27. From a different perspective, the Cirinnà Law itself, by expressly referring to Articles 2 and 3 of the Constitution, reaffirms that civil unions fall within the category of social formations in which the individual develops and fulfils his or her personality. It is therefore difficult to understand why this function of promoting personal dignity should not also extend to relationships involving minor children.

In this regard, the case law had long since excluded that sexual orientation, per se, constitutes an obstacle to parental suitability, condemning approaches based solely on the "mere prejudice" that a child's upbringing within a same-sex family would be detrimental to his or her balanced development[79].

28. Indeed, the new law—and in particular the provision contained in paragraph 20—has given rise to a lively scholarly debate: on the one hand, those who maintain that marriage and civil unions are substantially identical, including from an axiological standpoint; and on the other, those who regard the exclusion of filiation as evidence of the structural difference between the two institutions[80].

The prevailing interpretation has been anchored in a literal reading of the provision, applying to civil partners all rules concerning spouses, with the exception of those explicitly excluded[81]. The general clause of equivalence set out in paragraph 20 effectively entrusts the courts with the task of determining—within the framework of adoption in special cases—whether and to what extent a parent–child relationship, already de facto established within the family unit between one partner and the child of the other, may be recognised and protected[82], and under what limits and conditions.

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[77] For a detailed examination of paragraph 20 of the law, see V. Barba, *Le norme applicabili alle persone unite civilmente*, in *Trattato di diritto di famiglia*, directed by G. Bonilini, vol. V, Turin, 2017.

[78] This formulation appeared in the final revision of the legislative text, concurrently with the deletion of Article 5 of Bill No. 2081 (Senate).

[79] Court of Cassation, 11 January 2013, No. 601, *Nuova giurisprudenza civile commentata*, 2013, p. 432, with note by C. Murgo, *Affidamento del figlio naturale e convivenza omosessuale dell'affidatario: l'interesse del minore come criterio esclusivo*; *Corriere giuridico*, 2013, p. 893, with note by L. Balestra, *Affidamento dei figli e convivenza omosessuale tra "pregiudizio" e interesse del minore*; *Guida al diritto*, 2013, no. 5, p. 16 ff., with note by M. Finocchiaro, *La prova sul rischio di ripercussioni negative non doveva essere posta a carico del padre*; *Famiglia e diritto*, 2013, p. 570, with note by F. Ruscello, *Quando il pregiudizio... è nella valutazione del pre-giudizio! A proposito dell'affidamento della prole alla madre omosessuale*; *Foro italiano*, 2013, I, c. 1193 ff., with annotation by G. Casaburi; *Giurisprudenza italiana*, 2013, p. 1036, with note by M.M. Winkler, *La Cassazione e le famiglie ricomposte: il caso del genitore convivente con persona dello stesso sesso*, concerning the exclusive custody of a minor by his mother, a former drug addict living with a worker from her rehabilitation community. For an application of this approach in lower-court jurisprudence concerning foster care under Article 4 of Law No. 184/1983 to same-sex couples, see Juvenile Court of Palermo, 4 December 2013, *Famiglia e diritto*, 2014, p. 351 ff., with note by G. Mastrangelo, *L'affidamento, anche eterofamiliare, di minori ad omosessuali. Spunti per una riflessione a più voci*; Juvenile Court of Bologna, 31 October 2013, ibid., 2014, p. 273 ff., with note by F. Tommaseo, *Sull'affidamento familiare di un minore a coppia omosessuale*; *Foro italiano*, 2014, I, c. 59 ff., with note by G. Casaburi, *Dai diversi modelli di adozione di minore nella giurisprudenza della Cassazione alla novellazione legislativa della nozione di stato di abbandono*.

[80] V. Barba, *Unione civile e adozione*, cit., pp. 381–382.

[81] Among those who have proposed a different interpretation, see A. Schillaci, *Le unioni civili tra persone dello stesso sesso: profili di diritto comparato e tenuta del principio di eguaglianza*, *Diritto pubblico comparato ed europeo*, 2016, no. 3, p. 14; Id., *Un buco nel cuore. L'adozione coparentale dopo il voto del Senato*, available at www.articolo29.it, No. 2, endorsed by G. Casaburi, *La disciplina delle unioni civili tra persone dello stesso sesso*, in G. Casaburi, I. Grimaldi (eds.), *Unioni civili e convivenze. Legge 20 maggio 2016, n. 76. Lettura operativa e possibili soluzioni*, Pisa, 2016, p. 76.

[82] G. Ferrando, *Ordine pubblico e interesse del minore nella circolazione degli status filiationis*, cit., p. 19, notes that, in matters concerning the regulation of parent–child relationships within civil unions, the absence of legislative guidance leaves to the judge the entire responsibility for establishing the rules and guaranteeing the child's right to certainty and stability in his or her relationship with those who effectively perform the parental role.

IV. Profiles of Inadequacy in Law No. 184/1983: Objective and Subjective Limitations

29. The current legal framework governing adoption, although inspired by a solidaristic rationale and formally anchored in the principle of the best interests of the child, reveals significant systemic shortcomings that undermine its actual capacity for protection.

From an objective standpoint, the persistence of a rigidly binary structure, based on the foster care–adoption dichotomy, results in unequal protection for minors in situations of family vulnerability—particularly in cases of permanent semi-abandonment—which cannot be adequately accommodated within either measure.

From a subjective standpoint, the law continues to make full adoption conditional upon marriage, thereby excluding de facto couples, civil partners, and single individuals, in contrast with the evolving concept of family and the constitutional and supranational principles of equality and non-discrimination.

These deficiencies—evident in both the structural and personal dimensions of the institution—necessitate a broader inquiry into the overall coherence of the legislation with constitutional and international standards, as well as into the practical resilience of the system in light of judicial practice and emerging models of social parenthood.

1. Vertical Critique: In the Light of Constitutional and Supranational Principles

A) The Principle of the *Best Interests of the Child*

30. From an objective perspective, it is necessary to question whether the continuing rigidity of the binary model—based on the alternative between foster care and adoption—truly serves the best interests of the child, which instead require flexible and individualized solutions capable of combining emotional continuity with the protection of family stability.

The reference to the best interests of the child in fact constitutes a general and open-ended clause[83], binding the legal system, public authorities, and all institutions to safeguard minors as a class and to protect the individual child, both in relation to himself and within his family and social relationships[84]. Consequently, the principle is neither a mere rhetorical formula nor an automatically prevailing criterion in every case. Its application requires a concrete balancing of the different rights and interests involved in the adult–child relationship[85].

Adoption, designed as a remedy of last resort, to be activated only where all parental support measures have definitively failed, is often applied overcautiously. In practice, the difficulty of establishing the existence of a state of abandonment sometimes leads to an almost automatic preference for preserving the biological bond, even when that bond proves unable to ensure the child an adequate emotional and educational environment. This creates the risk of a misalignment between the rationale of

[83] On the correct interpretation of the general clause of the best interests of the child—and on the complex relationship between the principle of legality and the scope of judicial discretion—see L. Mormile, *L'interesse del minore fra paradigmi (e stereotipi) sostanziali e profili processuali*, in *Diritto di famiglia e delle persone*, 2024, no. 4, p. 1683 ff., esp. note 3, which refers to E. Lamarque, *Pesare le parole. Il principio dei best interests of the child come principio del miglior interesse del minore*, in *Famiglia e diritto*, 2023, p. 365 ff., and in particular p. 370, for reflections on interpretative perspectives in light of the principle of legality.

[84] G. Ballarani, *Contenuto e limiti del diritto all'ascolto nel nuovo art. 336-bis c.c.: il legislatore riconosce il diritto del minore a non essere ascoltato*, cit., p. 841 ff. On the relationship between the development of the child's personality and the parental function, see A. Nicolussi, *La filiazione nella cultura giuridica europea*, in ID. (ed.), *Diritto civile della famiglia*, Milan, 2012, p. 341 ff.

[85] G. Recinto, *L'interesse "non per forza" superiore del minore*, in *Democrazia e Diritti Sociali*, 2/2024, p. 20. The author refers to Corte d'Appello di Venezia, 6 March 2013, in *Repertorio Foro Italiano*, entry *Previdenza sociale*, no. 356, in which, in the context of a separation proceeding, the court deemed the interest of the blind non-custodial parent in retaining the family home to prevail over the minor daughter's interest in changing residence, since no particular benefit to the child had been proven —other than organizational difficulties— whereas the disabled parent's need not to disrupt his personal and working life was concrete.

the institution and its practical implementation, whereby the protection of the biological tie may prevail over the child's actual best interests.

31. A part of legal scholarship[86], emphasizing the continuity between the original and current wording of Article 8(1) of Law No. 184/1983, has argued that the declaration of adoptability should be based primarily on a quantitative assessment of the state of abandonment, measured against standards of family sufficiency, and that it may only be issued in the presence of serious and irreversible harm to the child. From this perspective, the revocation of the declaration of adoptability would always be in the child's best interests, as it serves to preserve ties with the biological family[87].

32. However, while paragraph 1 of Article 1 recognizes the child's right to grow up "within his or her family of origin," paragraph 5 of the same article—introduced by the 2001 reform—extends this horizon by affirming the "child's right to live, grow and be educated within a family."[88] This broader formulation enables a more balanced interpretation of the statute, requiring the interpreter to assess, on a case-by-case basis, whether remaining within the biological family truly serves the child's interests, or whether, conversely, it is detrimental to his or her development, making placement in another family context preferable—one capable of ensuring emotional stability, adequate care, and balanced growth.

It should therefore be recalled that "within the framework of adoption law, the legislator's focus is not primarily the protection and preservation of the biological family bond as a superior value, but rather the concrete needs of the child as a person in his or her emotional, existential, psychological, and physical dimensions."[89]

The biological family is certainly worthy of protection by virtue of the right to personal identity—enshrined in Articles 7 and 8 of the UN Convention on the Rights of the Child and in Article 28 of Law No. 184/1983—which guarantees the adoptee the possibility of knowing his or her origins. However, such protection cannot be understood in abstract or automatic terms: family continuity has value only when it reflects a genuine and enduring emotional relationship; it becomes mere formalism when it serves only to preserve a biological tie devoid of real relational substance.

The principle of continuity of emotional relationships safeguards the child's right not to suffer trauma from separation, but it cannot be treated as an absolute or overriding criterion in decisions regarding placement. Maintaining contact with the biological family is justified only where it genuinely benefits the child, contributing positively to his or her stability and harmonious development. Where such ties are harmful or detrimental, full adoption may represent the only suitable means of ensuring proper psycho-physical growth.

This vision is confirmed by Article 24 of the Charter of Fundamental Rights of the European Union, which recognizes the child's right to maintain relationships with his or her parents "unless this is contrary to his or her interests,"[90] thereby outlining a model of family not necessarily based on biological descent, but oriented toward the realization of the child's personality and well-being.

In accordance with this approach, the Italian Constitutional Court has held that, where required by the best interests of the child, the judge may order the maintenance of meaningful relationships with biological relatives, even where a state of abandonment exists that justifies a declaration of adoptability, recognizing that the child's identity is also nourished by emotional memory and the network of relationships that shape his or her personal history[91].

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[86] G. Recinto, *Le genitorialità*, cit., p. 37

[87] *Ibidem*.

[88] *Ibidem*, p. 39.

[89] *Ibidem,* pp. 36–42; see also Id., *Stato di abbandono morale e materiale del minore: dichiarazione e revoca della adottabilità*, cit., p. 1165 ff.; Id., *La situazione italiana del diritto civile sulle persone minori di età e le indicazioni europee*, cit., p. 1304 ff.

[90] G. Recinto, *Le genitorialità*, cit., p. 36

[91] See also Corte costituzionale, 28 September 2023, no. 183; Cassazione civile, 16 April 2024, no. 10278, and the note by S.A.R. Galluzzo, *Adozione piena e legami con i genitori d'origine*, in *IUS Famiglie*, 7 June 2024.

33. From a subjective standpoint, the rigidity of the eligibility criteria for full adoption raises further concerns as to their coherence with the constitutional and supranational principles of equality and non-discrimination. The statutory exclusion of de facto couples, civil unions, and single persons—based on purely formal criteria linked to marital status or sexual orientation—appears increasingly incompatible with the solidaristic function of the institution.

Adoption is not a means of fulfilling adults' desire for parenthood, but rather a mechanism designed to guarantee the child a stable, suitable, and emotionally secure family environment. In this sense, it is in the best interests of the child to broaden the pool of eligible adopters, thereby allowing the judge to carry out a case-by-case assessment of which family arrangement best meets the child's specific needs.

B) Constitutional Evolution and New Family Models

34. An analysis of the objective and subjective limitations of the current adoption framework cannot overlook a reconsideration of the constitutional context of reference, and, in particular, the evolution of the concept of family within Italian constitutional jurisprudence. The constitutional debate on the notion of family centers on the interpretation of Article 29 of the Italian Constitution, which has traditionally been read literally, as expressing a "natural" and closed conception of the family unit, confined to heterosexual marriage.

This reading—still upheld by part of legal scholarship—treats "naturalness" as a constraint on the recognition of diverse family models. Yet, a systematic and constitutionally oriented interpretation now supports a broader and more inclusive vision of family, consistent with the pluralism of social formations recognized in the Italian constitutional order.

35. While acknowledging that the family enjoys a sphere of autonomy[92] not susceptible to external interference[93], it cannot be conceived as an entity governed by supposed laws of nature[94]. Indeed, Article 29 of the Constitution defines it as a "natural society founded on marriage," but the term "natural" must not be read in a biological sense; rather, it should be understood in its historical[95] and contextual meaning, reflecting the intent of the framers of the Constitution[96].

The Constituent Assembly sought to affirm the family's existence as a social formation pre-existing the State, endowed with functional and institutional autonomy[97]. This interpretation is confir-

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[92] On the idea that the family represents the locus where the dialectic of relationships among its members unfolds, thereby generating "the rules governing family relations," see V. Scalisi, *Le stagioni della famiglia nel diritto dall'unità d'Italia ad oggi. Parte prima: dalla "famiglia-istituzione" alla "famiglia-comunità". Centralità del rapporto e primato della persona*, in *Rivista di diritto civile*, 2013, p. 1043 ff.; see also G. Bevivino, *Introduzione "critica" al diritto di famiglia. Regole e tendenze del moderno diritto delle relazioni familiari*, Turin, 2023, p. 6.

[93] P. Rescigno, *Le famiglie ricomposte: nuove prospettive giuridiche*, in *Familia*, 2002, p. 1 ff.; Id., *Immunità e privilegio*, in *Rivista di diritto civile*, 1961, p. 415 ff., where the Author notes that "among social formations, the family is undoubtedly the one most marked by immunity, that is, by impermeability to the intrusiveness of legal regulation."

[94] P. Perlingieri, *Manuale di diritto privato*, Naples, 2024, p. 996

[95] Article 29 of the Constitution, which states: "The Republic recognizes the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses, within the limits established by law to guarantee family unity," represents—if examined diachronically—"a compromise between the positions of the Catholic and Communist factions, both represented in the Constituent Assembly": G. Bevivino, *Introduzione "critica" al diritto di famiglia. Regole e tendenze del moderno diritto delle relazioni familiari*, cit., p. 1.

[96] During the preparatory works for Article 29 of the Constitution, Aldo Moro emphasized the importance of defining the family as a social fact, advocating the formula "the family is a natural society" to free it from State interference. In Moro's view, the emphasis on "natural" was meant to erect a barrier against State totalitarianism, preserving the family as a fluid, pre-social entity. The following excerpt from the minutes of the First Subcommission of the Constitutional Drafting Committee (6 November 1946) is telling: "Moro declares that he will vote in favor of the formula, as it corresponds to a clear political concern [...] relating to the fight against State totalitarianism, which first attacks the family in order to undermine, through it, personal freedom. By declaring that the family is a natural society, the intent is to establish that the family has its own autonomous order vis-à-vis the State, which, when intervening, confronts a reality that it cannot diminish or alter." The preparatory works are available online at www.nascitacostituzione.it.

[97] See P. Rescigno, *Matrimonio e famiglia. Cinquant'anni del diritto italiano*, Giappichelli, Turin, 2000, p. XXIII. For a recon-

med by Article 30(1) of the Constitution, which safeguards the parents' right and duty to educate their children. Its purpose was to prevent public interference in educational choices—an intent made clear when compared with Article 147 of the Civil Code (1942), which required education in accordance with the "national Fascist sentiment."

In any case, other constitutional provisions modulate the family's composition and role depending on the legislative purpose and the specific interests at stake[98].

36. Within legal scholarship, while some maintain that the constitutional framework restricts the possibility of adopting national rules on parenthood departing from the bi-parental and heterosexual model[99], the prevailing view emphasizes that family law cannot be abstracted from the historical evolution of social relations[100], nor can Article 29(1) be interpreted in isolation from the broader constitutional context to which it belongs[101].

The growing recognition of forms of parenthood not based on biological ties confirms that the "naturalness" evoked by the Constitution does not correspond to genetic derivation, but rather to the pre-existence and autonomy of the family as an institution.

Read in conjunction with Articles 2, 3, 30, and 31 of the Constitution, Article 29 has thus served as the foundation for a constitutional reconstruction centered on the individual[102], within his or her social formations, guaranteeing the full development of personal identity[103].

Conversely, if constitutional protection were confined solely to families founded on biological criteria, the very institution of adoption—implicitly contemplated in Articles 30 and 31 of the Constitution—would paradoxically prove incompatible with Article 29[104].

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sideration of the meaning of the phrase "natural society founded on marriage" in Article 29 of the Constitution, see A.M. Benedetti, *Tutto ciò che è reale è … naturale? Riflessioni sull'art. 29, 1° comma, Cost.*, in *Rivista critica del diritto privato*, 2009, p. 589 ff.

[98] Similarly, Article 1023 of the Civil Code, which includes domestic servants of the right-holder within the family for purposes of use or habitation, does not define "family" but merely delimits the quantitative scope of such rights. Comparable considerations apply to the working family (Arts. 230-bis and 230-ter c.c.) and to the cohabiting or registered family (Law on Civil Unions, Art. 1(44)), as well as to the family unit for registry purposes, which includes persons linked by marriage, kinship, adoption, affinity, guardianship, or other emotional bonds, cohabiting and habitually residing in the same municipality, who normally satisfy their needs through pooling of income (*Art. 4, Presidential Decree 30 May 1989, No. 223*).

[99] In this sense, see R. Senigaglia, *Genitorialità*, cit., p. 952; C. Castronovo, *Eclissi del diritto civile*, Milan, 2015, p. 78.

[100] Constitutional Court, 15 April 2010, No. 138, in *Gazzetta Ufficiale*, 21 April 2010, No. 16, First Special Series, para. 9 of the reasoning: "The concepts of family and marriage cannot be considered crystallized with reference to the period when the Constitution entered into force, because they possess the flexibility typical of constitutional principles and must therefore be interpreted in light not only of legal transformations but also of the evolution of society and customs."

[101] In connection with Article 2 of the Constitution, see G. Autorino, *Profili evolutivi del diritto di famiglia (Per un'introduzione storico-sistematica),* in *Comparazione e diritto civile,* n. 2, 2018, p. 20, who clarifies that "no interpretation seems possible other than that linking Article 29 to Article 2 of the Constitution, which states that 'the Republic recognizes and guarantees the inviolable rights of man, both as an individual and within the social groups wherein his personality is expressed.' In this way, the expression 'natural society' becomes synonymous with 'social formation,' which receives legal protection only insofar as it performs the essential functions tied to the existence and development of individual personality." In this regard, Carlo Arturo Jemolo's definition of "family" (as "a metajuridical reality belonging to instinct, morality, and religion rather than to the world of law," *La famiglia e il diritto*, in *Annali del Seminario giuridico dell'Università di Catania*, III (1948–1949), Naples, 1949, p. 57 ff.) has often been recalled, albeit not always endorsed, in different periods by scholars of family law.

[102] G. Autorino, *Profili evolutivi del diritto di famiglia (Per un'introduzione storico-sistematica),* cit., p. 20, further notes: "If it is true—as it is—that the human person stands first in the hierarchy of constitutional values (Art. 2), and if the value of 'human person' constitutes the core element guaranteeing the unity of the legal system, it becomes evident that isolating paragraph 1 of Article 29 from the rest of the Constitution—particularly from its following paragraph, which refers to equality and equal dignity of the spouses, and from Article 2 as a general clause protecting the human person—is a methodological error."

[103] Families thus acquire significance as social formations essential to the full development of the individual (Art. 2 Const.). The sphere of autonomy recognized to them is complemented by assigning parents the right–duty to maintain, instruct, and educate their children (Art. 30(1) Const.). The State's role is to ensure respect for family life and to safeguard family functions from external interference (Art. 31 Const.), with direct intervention justified only to guarantee the child's upbringing and care (Art. 30(2) Const.). As an instrument for the realization of the person, the family resolves the ambiguity of the constitutional formula, which appears to subordinate the moral and legal equality of the spouses to the need for family unity. See G. Autorino, *Profili evolutivi del diritto di famiglia (Per un'introduzione storico-sistematica),* cit., p. 20.

[104] M.C. Venuti, *Procreazione medicalmente assistita: il consenso alle tecniche di PMA e la responsabilità genitoriale di single, conviventi e parti unite civilmente*, in *GenIUS*, 2018, p. 86.

37. The true directive that the Constitution sets with regard to the parent–child relationship emerges from Articles 30 and 31: the protection and care of children.

Article 30 assigns equal duties and responsibilities to both parents, irrespective of the circumstances of the child's birth. It establishes the principle of substantial equality between children born within and outside of marriage and, in its second paragraph, provides that, in cases of parental incapacity or absence, such duties may be performed by third parties, in accordance with the paramount interest of the child.

Article 31, in turn, entrusts the State with an active role in supporting the formation of families and protecting maternity, childhood, and youth.

Within this constitutional framework, it clearly emerges that the primary function of family law is the care and protection of offspring, while the form of the family and the legal status of the parents are not determinative conditions.

The phrase "whether born within or outside of marriage," contained in Article 30, is emblematic of the inherently neutral orientation of constitutional provisions toward the family context in which a child is born[105]—a principle that found full expression in the 2012 reform[106]. Following that reform, the legal notion of parenthood no longer depends on marriage or on the nature of the parental relationship.

In pursuit of an effective protection of the child's interests, the distinction—also terminological—between legitimate and natural children was abolished. Correspondingly, marriage no longer constitutes the sole foundation of the child's relationships with the parent's family: kinship arises equally in cases of filiation occurring within or outside of marriage (Article 74 of the Civil Code)[107].

Similarly, the rules governing parental responsibility apply uniformly, regardless of the parents' relationship status[108]—whether they are married, cohabiting, or separated (Article 316 of the Civil Code)[109].

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[105] Although based on a contrasting formula, the provision already reflects the plurality of family and couple models existing at the time of the Constitution's drafting. Contemporary scholarship, in an updated reading, includes within its scope filiation in same-sex couples joined by civil union or de facto cohabitation. On parenthood and filiation within same-sex couples under the framework of the Civil Unions Law, see L. Lenti, *Unione civile, convivenza omosessuale e filiazione*, in *Nuova giurisprudenza civile commentata*, 2016, p. 1707 ff.; P. Morozzo Della Rocca, *Progetti di procreazione e provvedimenti di adozione*, in M. Gorgoni (ed.), *Unioni civili e convivenze di fatto. L. 20 maggio 2016, n. 76*, Maggioli, Santarcangelo di Romagna, 2016, p. 143 ff.; M. Gattuso, *L'unione civile: tecnica legislativa, natura giuridica e assetto costituzionale*, in G. Buffone, M. Gattuso, M.M. Winkler (eds.), *Unione civile e convivenza*, Giuffrè, Milan, 2017, p. 38 ff., esp. 60 ff.; A. Belleli, *La filiazione nella coppia omosessuale*, in *Giurisprudenza italiana*, 2016, p. 1819 ff.; E. Quadri, *La tutela del minore nelle unioni civili e nelle convivenze*, in *Nuova giurisprudenza civile commentata*, 2017, no. 4, p. 566 ff.; on adoption by civilly united couples, see V. Barba, *Unione civile e adozione*, in *Famiglia e diritto*, 2017, no. 4, p. 381 ff.; M. Farina, *L'adozione omogenitoriale dopo la legge 20 maggio 2016, n. 76: ubi lex voluit… tacuit?*, in *Politica del diritto*, 2017, no. 1, p. 71 ff.

[106] The Law No. 219 of 2012 and Legislative Decree No. 154 of 2013. For commentary—without any claim of exhaustiveness—see C.M. Bianca, *La legge italiana conosce solo figli*, in *Rivista di diritto civile*, 2013, I, p. 1 ff.; Id., *La riforma della filiazione*, in *Nuove leggi civili commentate*, 2013, p. 437 ff.; Id. (ed.), *La riforma della filiazione. Uguaglianza dei figli. Riconoscimento del figlio nato fuori del matrimonio. Nuova disciplina delle azioni di stato. Responsabilità genitoriale*, Padua, 2015; G. Recinto, *La legge n. 219 del 2012: responsabilità genitoriale o astratti modelli di minori di età?*, in *Diritto di famiglia e delle persone*, 2013, p. 1475 ff.; ID., *La genitorialità. Dai genitori ai figli e ritorno*, Naples, 2016, p. 11 ff.; M. Sesta, *L'unicità dello stato di filiazione e i nuovi assetti delle relazioni familiari*, in *Famiglia e diritto*, 2013, p. 231 ff.; G. Ferrando, *La nuova legge sulla filiazione. Profili sostanziali*, in *Corriere giuridico*, 2013, p. 525 ff.; A. Palazzo, *La riforma dello status di filiazione*, in *Rivista di diritto civile*, 2013, p. 245 ff.; L. Lenti, *La sedicente riforma della filiazione*, in *Nuova giurisprudenza civile commentata*, II, 2013, p. 202 ff.; R. Pane (ed.), *Nuove frontiere della famiglia. La riforma della filiazione*, Naples, 2014; G. Chiappetta, *Lo stato unico di figlio*, Naples, 2014; O. Clarizia, *Innovazioni e problemi aperti all'indomani del decreto legislativo attuativo della riforma della filiazione*, in *Rassegna di diritto civile*, 2014, p. 597 ff.; M. Porcelli, *La responsabilità genitoriale alla luce delle recenti modifiche introdotte dalla legge di riforma della filiazione*, in *Diritto di famiglia*, 2014, p. 1628 ff.

[107] Article 1 of Law No. 219 of 10 December 2012 replaced Article 74 of the Civil Code; the previous text read: "Kinship is the bond between persons descending from a common ancestor."

[108] L. Lenti, *Responsabilità genitoriale. Il nuovo diritto della filiazione*, in L. Lenti and L. Mantovani (eds.), *Trattato di diritto di famiglia*, directed by Zatti, *Le riforme*, vol. 2, Milan, 2019, p. 375 ff.; G. De Cristofaro, *Dalla potestà alla responsabilità genitoriale: profili problematici di una innovazione discutibile*, in *Nuova giurisprudenza civile commentata*, 2014, p. 4 ff.; A. Gorassini, *La responsabilità genitoriale come contenuto della potestà*, in M. Bianca (ed.), *Filiazione. Commento al decreto attuativo. Le novità introdotte dal d.lgs. 28 dicembre 2013, n. 154*, Milan, 2014, p. 93 ff.; O. Clarizia, *La disciplina delle responsabilità genitoriali*, in AA.VV., *La nuova disciplina della filiazione*, Rimini, 2015, p. 153 ff.

[109] B. Salvatore, *Status filiationis e procreazione medicalmente assistita*, in *Liber amicorum per Paolo Pollice*, edited by C. Fabricatore, A. Gemma, G. Guizzi, N. Rascio, A. Scotti, 2020, p. 961.

38. It follows that the Constitution does not predetermine a model of parenthood, nor does it establish hierarchies among the various ways of becoming a parent. Rather, it outlines a mandate of care, assistance, and legal-social protection for children already born.

From this perspective, the constitutional principles of substantive equality and the protection of human dignity require that Article 29 be interpreted in light of the evolving axiological and social framework, which recognizes the plurality of family models as an expression of the free development of individual personality.

C) International and European Standards (ECHR and EU Law)

39. This approach finds continuity and further development in EU legislation and in the case law of the European Court of Human Rights, which have progressively shaped a pluralistic system of family-law protection grounded in the best interests of the child and not confined to the traditional model of heterosexual marriage. The ECHR does not define "the family" as an autonomous institution; rather, it protects certain affective relationships that may qualify as family life. In particular, Article 8 ECHR ("Right to respect for private and family life") secures to everyone the right to respect for his or her family life, permitting state interference only where necessary and proportionate. Read together with Article 12 ECHR, which protects the right of men and women to marry[110], and Article 5 of Protocol No. 7[111], which guarantees equality between spouses, a normative framework emerges that couples the recognition of fundamental rights with the non-discrimination guarantee in Article 14[112]. The latter applies across the Convention and its Protocols, reinforcing their scope and ensuring that the rights recognized are enjoyed on an equal footing[113]. It is evident these provisions were drafted in an era in which same-sex couples and same-sex parented families were not contemplated; the texts neither aimed to include nor to exclude them, reflecting a historically heteronormative approach that still strongly marks some legal systems. Nevertheless, the progressive recognition of diverse family forms and of the equal dignity of all family members has produced—also under the influence of European legal orders—a process of "civilizing" the law of persons and civil status, oriented to reconciling family protection with the safeguarding of individual rights[114].

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[110] The European Court of Human Rights has held that Contracting States have a positive obligation not to discriminate with regard to sex assigned at birth. Consequently, the right to marry under Article 12 ECHR includes a transgender person's right to marry a person of their choice, provided that person is of the opposite sex; ECtHR (Grand Chamber), 11 July 2002, no. 28957/95, Christine Goodwin v. the United Kingdom. By contrast, the notion of marriage in Article 12 does not include a right for two persons of the same sex to marry. On this point, see first Schalk and Kopf v. Austria (2010); S. Cooper, *Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights*, German Law Journal, 2011, p. 1758; L. Hodson, *A Marriage by Any Other Name? Schalk and Kopf v. Austria*, Human Rights Law Review, 2011, p. 171. Most recently, concerning the lack of an obligation to register a marriage contracted abroad, see Orlandi and Others v. Italy; F. Deana, *Diritto alla vita familiare e riconoscimento del matrimonio same-sex in Italia: note critiche alla sentenza Orlandi e altri c. Italia*, Rivista di diritti comparati, 2019, p. 153 ff. For the broader evolution of ECtHR case-law on protection of same-sex relationships, see, among others: M. C. Venuti, *La Corte europea dei diritti dell'uomo e la non discriminazione tra coppie etero e omoaffettive*, Nuova giur. civ. comm., 2018, p. 351 ff.; D. Rudan, *Unioni civili registrate e discriminazione fondata sull'orientamento sessuale: il caso Vallianatos*, Diritti umani e diritto internazionale, 2014, p. 236 ff.; C. Paladini, *ECtHR, 21 July 2015, Oliari and Others v. Italy. The inertia of the Italian Parliament on civil unions before the Strasbourg Court*, DPCE Online, 2015; E. Savarese, *In margine al caso Oliari…*, Diritti umani e diritto internazionale, 2015, p. 655 ff.

[111] The text of Article 5 of the Additional Protocol (equality between spouses) reads: "Spouses shall enjoy equality of rights and responsibilities of a civil character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children."

[112] Article 14 does not expressly mention sexual orientation, but prohibits any discrimination "such as on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." On sexual orientation as a "protected" ground, see R. Wintemute, *Sexual Orientation and Human Rights…*, OUP, 1997; more generally A. M. Lecis Cocco Ortu, *L'omogenitorialità davanti alla Corte di Strasburgo…*, Genius, 2/2014, p. 98.

[113] The prohibition in Article 14 is accessory: it can be invoked only in conjunction with another Article of the Convention or its Protocols. It thus operates as if integrated into every other provision of the Convention; B. Rainey, E. Wicks & C. Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights*, Oxford, 2014, p. 546 ff.

[114] L. Burgorgue-Larsen, *La jurisprudence des cours constitutionnelles européennes en droit des personnes et de la*

40. In application, the ECtHR has developed a broad interpretation of Article 8, encompassing within "family life"[115] both de jure and de facto families, provided there is a stable and genuine emotional bond rather than merely a formal tie[116]. Thus, all relationships evidencing permanent, authentic and effective family links fall within Article 8's protection; after all, the Convention is a living instrument to be interpreted in light of present-day conditions[117]. Accordingly, although drafted in a historically heteronormative context, these parameters have been read dynamically. As early as Marckx v. Belgium[118], the Court clarified that Article 8 does not endorse exclusively the "marital family," nor does it draw a distinction between that and family formed outside marriage; instead, it affirms each person's subjective right to respect for family life and recognizes both negative and positive state obligations to protect de facto family ties. Likewise, in Johnston and Others v. Ireland (1986)[119], the Court held that the applicants constituted a "family" under Article 8 "notwithstanding the fact that their relationship exists outside marriage." The principle that "the notion of family life is not confined to marriage-based relationships"[120] has since been reiterated and applied in varied contexts: to relations between non-resident parents and children after divorce (Luca v. the Republic of Moldova, 2023, § 85); between parents and adult children with disabilities where additional factors of dependency exist (Bierski v. Poland, 2022, §§ 39–41, 46–47); and between biological fathers and children born out of wedlock—even potentially—where the father has shown commitment before and after birth (A and Others v. Italy, 2023, § 73; Katsikeros v. Greece, 2022, §§ 47–48; Schneider v. Germany, 2011, § 81).

41. The case law has thus consolidated protection of the parent–child bond, recognizing that protection from birth[121] and valuing mutual companionship as an essential element of family life. It has also struck down discriminatory rules based on status or sexual orientation, by applying Article 14 in

famille, in *Les Nouveaux Cahiers du Conseil constitutionnel,* 2013/2 N° 39, pp. 227-250, spec. p. 229, referring to a "civilizational metamorphosis" (*métamorphose civilisationnelle*) of European family law—from a communitarian perspective, where family members were subject to a pater familias in the name of protecting the family unit, to an individual-rights perspective in which each family member is a rights-holder and thus personally deserving of protection.

[115] On the content of "family life" under Article 8 ECHR, see the Guide on Article 8 – Right to respect for private and family life (ECtHR), pp. 71–72, available at the Court's knowledge site. The Court has held that an essential element of family life is the right to live together and enjoy each other's company (Marckx v. Belgium, 13 June 1979, § 31; Olsson v. Sweden (no. 1), 24 March 1988, § 59; Strand Lobben and Others v. Norway [GC], 10 September 2019, § 205), and that the concept is autonomous and depends on close de facto personal ties (Paradiso and Campanelli v. Italy [GC], 24 January 2017, § 140; Johnston and Others v. Ireland, 18 December 1986, § 56; X, Y and Z v. the United Kingdom, 22 April 1997, § 36; Oliari and Others v. Italy, 21 July 2015, § 130). Family life has been found even absent biological or legal links where stable emotional ties exist (Moretti and Benedetti v. Italy, 27 April 2010, § 48; Kopf and Liberda v. Austria, 17 January 2012, § 37; Wagner and J.M.W.L. v. Luxembourg, 28 June 2007, § 133), while it has been denied where ties were fleeting or harmful (Ahrens v. Germany, 22 March 2012, § 59; Evers v. Germany, 28 November 2002, § 52; Paradiso and Campanelli [GC], §§ 156–157). The Court has further stated that Article 8 does not guarantee a right to found a family or to adopt, requiring the existence—or at least the potential—of an actual family tie (Berrehab v. the Netherlands, 21 June 1988, § 21; L. v. the Netherlands, 1 June 2004, § 36; Lazoriva v. Ukraine, 17 April 2018, § 65).

[116] A. C. Tedeschi, "*'Family' and 'Marriage' in the ECHR*," in P. Gianniti (ed.), *La CEDU e il ruolo delle Corti*, Bologna, 2015, p. 1232.

[117] The need for a dynamic interpretation of the Convention was first made explicit by the ECtHR in a criminal case, Tyrer v. the United Kingdom (25 April 1978, no. 5856/72), where the Court stated that the Convention is a "living instrument" that "must be interpreted in the light of present-day conditions."

[118] Marckx v. Belgium, 13 June 1979, no. 6833/74.

[119] ECtHR, Johnston and Others v. Ireland, 18 December 1986, Series A no. 112, § 55.

[120] Contact Rights, ECHR Key Theme – Rights of the Child: Contact Rights (Registry, ECtHR, 28 February 2025), available at the Court's knowledge site.

[121] The ECtHR has clarified that, from birth, a family tie arises *ipso iure* between a child born in wedlock and his or her parents, irrespective of cohabitation (Berrehab v. the Netherlands, 21 June 1988, no. 10730/84, § 21). For children born out of wedlock, the de facto cohabitation of parent and child is accepted as "family life" (Keegan v. Ireland, 26 May 1994, no. 16969/90), whereas biological kinship alone is insufficient absent cohabitation or other factual elements showing a stable personal bond (Kroon and Others v. the Netherlands, 27 October 1994, no. 18535/91; Lebbink v. the Netherlands, 1 June 2004, no. 45582/99, § 37). More favorable to the biological father is Anayo v. Germany, 21 December 2010, no. 20578/07, § 60, holding that the absence of a de facto relationship does not bar Article 8 protection where the parent has demonstrated from birth the intention to establish a relationship (so-called "intended family ties").

conjunction with Article 8[122]. In the adoption field[123], the Court has held that distinctions in access to adoption by single persons based on sexual orientation are discriminatory (E.B. v. France, Grand Chamber, 2008)[124], and that excluding stepchild adoption for same-sex couples, where it is available on the same terms to different-sex couples, is likewise discriminatory (X and Others v. Austria, Grand Chamber, 2013)[125]. The emerging orientation defines parental status by the effective relationship of care and responsibility toward the child, rather than by mere biological or marital criteria—a line that resonates in the domestic laws of Member States which, despite their particularities, converge toward family models centered on educational and affective functions.

42. Against this backdrop, the European model no longer conceives marriage as the sole foundation of the adoptive family, but gives concrete weight to the relational, emotional and educational suitability of prospective adopters. At present, twenty-three European countries allow joint adoption by same-sex couples (including Austria, Belgium, France, Germany, the Netherlands, Portugal, Spain, Sweden, the United Kingdom, Switzerland, and, more recently, Estonia and Greece). As for adoption by single persons, it is permitted in numerous jurisdictions (including France, Germany, the United Kingdom and Spain) and has recently been recognized in Italy—at least for intercountry adoption—by Constitutional Court judgment No. 33 of 2025. According to data from the Commission for Intercountry Adoption, approximately thirteen European countries are open to intercountry adoption by single applicants without particular restrictions.**Inizio moduloFine modulo**

2. Horizontal Critique: In the Light of Judicial Practice and Comparative Models of Social Parenthood

A) The Supplementary Role of the Judiciary: Towards Flexible Models of Protection;

43. The inadequacy of the current legal framework is particularly evident in the surrogate role assumed by case law, which has progressively reinterpreted existing institutions to adapt them to new needs for the protection of the child and to the transformation of the concept of family. On the one hand, courts have sought to make the system more flexible in order to address situations of vulnerability not fully encompassed by the existing models of foster care or adoption; on the other, they have aimed to afford legal protection to family configurations excluded from statutory recognition, such as same-sex parented or "blended" families. In this way, an interpretative trend has emerged seeking to render the application of adoption and foster-care rules more adaptable through a creative adjustment of existing institutions.

44. The solutions developed follow different directions: on the one hand, the attempt to broaden the notion of "impossibility of pre-adoptive foster care" so as to extend the application of adoption in special cases (the so-called *adozione mite* or "mild adoption"[126]); on the other, the perspective of a more flexible inter-

[122] ECtHR, Guide on Article 8 of the Convention – Right to respect for private and family life, Council of Europe, 2021, p. 18, noting that Article 8 has often been examined together with Article 14; with respect to same-sex couples, the Court has underscored the constant international movement toward legal recognition of same-sex unions (Oliari and Others v. Italy, §§ 178 and 180–185), while acknowledging that States may reserve access to marriage to different-sex couples (Schalk and Kopf v. Austria, § 108).

[123] In 2002 the Court delivered its first decision on adoption by a homosexual person, taking a restrictive approach and treating the difference in treatment based on sexual orientation as justified by protection of the child's health and rights (Fretté v. France, 26 February 2002, no. 36515/97). Yet in 1999 the Court had already found that denial of child custody based on a parent's sexual orientation violates the right to respect for family life (Salgueiro da Silva Mouta v. Portugal, 21 December 1999, no. 33290/96). The Court later moved to a more open approach: E.B. v. France, 22 January 2008, no. 43546/02.

[124] Notably, in E.B. v. France the Court did not invoke the States' margin of appreciation; M. C. Virucci, *Orientamento sessuale e adozione nella giurisprudenza della Corte europea dei diritti umani*, Diritti umani e diritto internazionale, 2013, p. 486.

[125] ECtHR (Grand Chamber), X and Others v. Austria, 19 February 2013, no. 19010/07.

[126] For a general introduction to the subject of *"mild adoption" (adozione mite)*, see F. Occhiogrosso, *Manifesto per una gi-*

pretation of the effects of full adoption (*adozione aperta* or "open adoption"[127]), allowing—where compatible—the preservation of certain ties with the child's family of origin. A further interpretative line, although less common but still significant, focuses on non-kinship foster care, suggesting a modulation of the requirement of temporariness and outlining the figure of *affidamento di lunga durata* ("long-term" or "strong" foster care[128]) as a possible intermediate tool capable of combining emotional continuity with legal stability. All three approaches, though founded on different statutory premises, share a common feature: a more flexible reading of the substance or effects of existing child-protection mechanisms[129].

45. Particularly significant in this context is the reinterpretation of adoption in special cases, governed by Article 44 of Law No. 184 of 1983. Originally conceived as a residual and limited measure —since it does not sever the child's ties with the family of origin nor create kinship relations with the adopter's relatives— it has evolved through judicial interpretation into a genuine instrument of comprehensive child protection. This evolution has produced innovative applications, such as the model of *adozione mite* ("mild adoption"), capable of recognizing family bonds in situations of semi-permanent neglect, while avoiding unnecessary ruptures with the biological family.

Precisely this flexibility has made adoption in special cases the main legal tool for protecting family bonds formed within same-sex parented contexts. Through an extensive interpretation of Article 44, letter (d), the courts have recognized *stepchild adoption*, giving legal weight to the relationship between the child and the biological parent's partner who shared the reproductive project and took part in the child's care. A pivotal turning point in this development is represented by the judgment of the Court of Cassation No. 12962 of 22 June 2016[130], in which the Supreme Court, for the first time, allowed recourse to adoption in special cases pursuant to Article 44(1)(d) of Law No. 184 of 1983 in favor of the same-sex partner of the child's biological mother. On that occasion, the Court clarified that the "impossibility of pre-adoptive placement" required by the statute may be not only factual but also legal, arising whenever such placement is not legally feasible, as in cases where the child is not in a state of abandonment because he or she is stably cared for by a parent. This ruling marked an initial judicial recognition of the legal relevance of the emotional and relational bond established between the child and the intended mother, albeit without extending to the creation of an original *status filiationis*.

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ustizia minorile mite, Milan, 2009. On the Bari experience, see S. Caffarena, *L'adozione "mite" e il "semiabbandono": problemi e prospettive*, *Famiglia e Diritto*, 2009, p. 393 ff.; M. Fiorini, *Corsia preferenziale all'esigenza di garantire la continuità negli affetti*, ibid., 2008, p. 19 ff.; F. Occhiogrosso, *I percorsi comuni alle due adozioni: adozione aperte e conoscenza delle origini*, *Minori e Giustizia*, 2003, p. 244 ff.; Id., *Circolare del Presidente del Tribunale per i minorenni di Bari ai servizi territoriali*, ibid., 2003, p. 278 ff.; Id., *L'adozione mite due anni dopo*, ibid., 2005, p. 149 ff. On the concept of "semi-permanent abandonment" and, more specifically, on *adozione mite*, see L. Gigante, *Le funzioni positive dell'adozione mite*, ibid., 2007, p. 143 ff.; L. Lacera, *Chi ha paura dell'adozione mite?*, ibid., 2007, p. 151 ff.; Aa.Vv., *L'Adozione mite: giudici professionali e giudici onorari a confronto*, *Minori e Giustizia*, 2009, p. 112 ff. With reference also to the reform of filiation, see T. Montecchiari, *Adozione "mite": una forma diversa di adozione dei minori o un affido senza termine?*, *Diritto di Famiglia e delle Persone*, 2013, p. 1381 ff. Among those expressing doubts about the legitimacy of *adozione mite*: M. Dogliotti, *Adozione "forte" e "mite", affidamento familiare e novità processuali della riforma del 2001, finalmente operative*, *Famiglia e Diritto*, 2009, p. 427 ff.; A. Proto Pisani, *Sulla c.d. giustizia minorile "mite"*, *Foro Italiano*, 2010, V, p. 303 ff.; F. Santanera, *L'adozione mite: una iniziativa allarmante e illegittima, mai autorizzata dal Consiglio Superiore della Magistratura*, *Prospettive Assistenziali*, 2006, p. 154 ff.; L. Fadiga, *Adozione aperta? Sì o no?*, *Prospettive Assistenziali*, 2008, p. 161 ff.; E. Ceccarelli, *L'affidamento familiare nella legge e nelle sue applicazioni*, in P. Giasanti and E. Rossi (eds.), *Affido forte e adozione debole. Culture in trasformazione*, Milan, 2007.

[127] The Italian Court of Cassation, 28 September 2023, No. 183, provided an extensive interpretation of Article 27(3) of Law No. 184/1983, envisaging adoption as a protective institution of dual nature: on the one hand, it remains a "full" adoption in that the adoptive family entirely replaces the biological one in legal terms; on the other, it assumes "open" characteristics, allowing the adopted child to maintain—where compatible with their best interests—affectional ties with members of the family of origin.

[128] In practice, juvenile courts, rather than resorting to flexible adoption models, often tend—so as to preserve the emotional bonds established by the child with both families—to extend periods of foster care, as permitted by Article 4(4) of Law No. 184/1983, sometimes setting a new duration, sometimes omitting to specify one, with the result that foster care is effectively prolonged until the child reaches adulthood.

[129] C. Sartoris, *Semiabbandono del minore*, cit., p. 54.

[130] Court of Cassation, 22 June 2016, No. 12962, in Corriere giuridico, 2016, p. 1203 ff., with a commentary by P. Morozzo della Rocca, "Le adozioni in caso particolare ed il caso della stepchild adoption." For a contrary view, see: Juvenile Court of Milan, decree of 17 October 2016; Court of Cassation, 30 September 2016, No. 19599.

In this sense, the Court of Cassation has emphasized that adoption in special cases under Article 44(1)(d) of Law No. 184/1983, "in light of the current evolution of the legal system, represents the instrument that makes it possible, on the one hand, to obtain the status of child and, on the other, to recognize legally the de facto bond with the genetic parent's partner who shared the procreative plan and participated in the child's care from birth."[131]

In this connection, the Court[132] further observed that recourse to adoption in special cases under Article 44(1)(d) of Law No. 184 of 1983—already deemed admissible by the Court of Cassation—"constitutes a form of protection of the child's interests that is certainly significant, yet still not fully adequate in light of constitutional and supranational principles." In that context, the Court noted that this form of adoption does not result in the attribution of full parental status to the adopter and leaves unresolved the issue of the establishment of kinship ties between the adopted child and those whom the child perceives as grandparents, uncles, aunts, or siblings. Moreover, adoption in special cases remains structurally dependent on the consent of the biological parent, consent that may be withdrawn in situations of conflict within the couple or in the event of a breakdown of the relationship[133].

46. It is true that some of these critical aspects have been progressively mitigated through judicial developments: on the one hand, by the recognition of kinship ties between the adopted child and the adopter's family (Constitutional Court, Judgment No. 79 of 2022[134]); on the other, by limiting the possibility for the biological parent to withhold consent to cases in which such refusal corresponds to the child's best interests (Court of Cassation, Order No. 25436 of 2023). Nevertheless, the Constitutional Court, in Judgment No. 68 of 2025[135], held that these corrective developments are insufficient to overcome the structural inadequacy of the institution, which remains incapable of ensuring an original *status filiationis* where this status derives from consent given to a medically assisted procreation project.

Further intrinsic limitations of adoption in special cases therefore persist—particularly where it is employed as an ex post "compensatory" mechanism for the lack of recognition of the intended mother—and may be summarized as follows. First, protection is neither immediate nor automatic: the child's status is consolidated only upon the conclusion of judicial proceedings and produces effects solely from the moment the adoption is finalized, without guaranteeing a legally secure position from birth (Constitutional Court, Judgments Nos. 32 of 2021 and 230 of 2020). Second, the initiation of the proceedings depends exclusively on the initiative of the intended parent, which must be maintai-

[131] See also Cassation, Order 2 August 2023, No. 2352, available at www.altalex.it (cf. G. Recinto, *L'interesse non per forza superiore del minore*, *Democrazia e Diritti Sociali*, 2/2024, p. 25).

[132] Constitutional Court, 28 January 2021, No. 33.

[133] A. Carrato, *La procreazione medicalmente assistita e le tematiche connesse nella giurisprudenza costituzionale*, cit., p. 51.

[134] *Constitutional Court, 28 March 2022, No. 79*, in Famiglia e diritto, 2022, 897 ff., with a note by M. Sesta, *Stato giuridico di filiazione dell'adottato nei casi particolari e moltiplicazione dei vincoli parentali*, and in Nuova giurisprudenza civile commentata, 2022, I, 1013, with a note by M. Cinque, *Nuova parentela da adozione in casi particolari: impatto sul sistema e nati da surrogazione di maternità*, as well as in Familia, 2022, 364, with a note by C. M. Bianca, *La Corte costituzionale e il figlio di coppia omoaffettiva. Riflessioni sull'evoluzione dei modelli di adozione*. The Constitutional Court intervened in a case concerning the registrability in Italy of a birth certificate of a child born through surrogacy, in which the intended parent had expressly requested that the ordinary court declare the existence of kinship ties between the child and the intended parent's relatives. On the same judgment, see also M. C. Venuti, *Adozione in casi particolari e rapporti di parentela tra adottato e famiglia dell'adottante secondo la Corte costituzionale*, in Rivista critica del diritto privato, 2022, 567. See further F. Azzarri, *L'adottato in casi particolari e l'unicità dello stato di figlio: riflessi sistematici del tramonto di un dogma*, in GenIUS, 24 February 2023, 1 ff.

[135] By that judgment, the Constitutional Court declared the constitutional illegitimacy of Article 8 of Law No. 40 of 2004 insofar as it fails to provide that a child born in Italy through heterologous medically assisted reproduction carried out abroad acquires the status of a recognized child of the woman who, together with the biological mother, consented to the parental project and assumed the corresponding responsibility. See *Constitutional Court, 22 May 2025, No. 68*, in Famiglia e diritto, No. 10, 2025, 887 ff., with a note by E. Bilotti, *La Corte costituzionale e la tutela dei nati a seguito della violazione dei divieti previsti dalla legge n. 40 del 2004*. See also, in the same issue, M. Dogliotti, *Differenti modi di valutare l'interesse del minore: cinque sentenze della Corte costituzionale di cui quattro pronunciate e una immaginaria*, 933 ff. On this point, see further M. Dogliotti, *Famiglia, famiglie… Unione civile e convivenza di fatto di fronte al matrimonio*, Turin, 2025, 649, 920 ff.; F. Di Masi, *Le sentenze nn. 68 e 69/2025 e lo "strabismo" della Corte*, in Questionegiustizia.it, 2025.

ned throughout the entire duration of the proceedings, thereby exposing the child to the risk that the commitment undertaken within the parental project may lapse. Additional critical issues stem from the costs, duration, and procedural uncertainty of the proceedings, given the need for legal representation, the conduct of a complex evidentiary phase, and the involvement of social services and public security authorities pursuant to Article 57 of Law No. 184 of 1983.

Added to this is the gap in protection that arises during the period between birth and the possible completion of the adoption, during which the child remains in a condition of legal precariousness capable of affecting personal identity and the stability of family relationships—a precariousness further exacerbated by potential developments within the parental couple. Finally, it should be noted that the legal system lacks mechanisms enabling the child—or those representing the child—to autonomously initiate proceedings aimed at the recognition of parental status: in the absence of initiative by the adopter, the system fails to provide equivalent protection. Similar risks arise in cases of relationship breakdown or the death of the intended mother prior to the finalization of the adoption, circumstances that may result in the definitive loss of rights and guarantees for the child.[136]

In any event, in the face of legislative inaction, it is once again the courts that have borne the responsibility of responding to the needs of same-sex families, often formed through assisted reproduction abroad or, in some cases, surrogacy practices prohibited under domestic law. Judicial intervention thus tends toward solutions which, while remaining within existing statutory limits, seek concretely to give effect to the child's best interest not to be deprived of the relationship with both parents who jointly conceived and cared for him or her from birth.

47. Within this context lies Judgment No. 33 of 2025 of the Constitutional Court, which marked a decisive turning point in the evolution of the adoption system. With this ruling, the Court declared unconstitutional the absolute ban preventing single persons from accessing intercountry adoption, contained in Article 29-bis(1) of Law No. 184/1983, insofar as—by referring to "the conditions set forth in Article 6"—it excluded unmarried and single persons from submitting an application of availability for international adoption. The Court thereby overruled the traditional approach that had recognized the legislature's broad discretion to reserve intercountry adoption to married couples alone, instead embracing an evolutionary and value-oriented interpretation of the system.In particular, the Court affirmed that nothing, in principle, prevents a single person from offering a child a stable and emotionally adequate family environment, provided such suitability is concretely ascertained by the judge, also in light of the applicant's relational and social support networks. The ruling, breaking away from the system's rigidly marital framework, recognizes the plurality of family models and the capacity of single-parent or same-sex parented households to ensure a child's balanced and harmonious development.

The Court also underscored the inconsistency of a legal order which, while prohibiting such forms of adoption domestically, allows Italian minors to be placed abroad with single or same-sex families—thus producing a systemic contradiction.

More broadly, Judgment No. 33/2025 fits within a path of progressive openness rooted in the historical development of adoption: from the Civil Code of 1865, which already permitted single persons to adopt, to Law No. 431/1967 introducing *special adoption* restricted to married couples, to Law No. 184/1983, which unified the discipline but confined single applicants to adoption in special cases. The Court also recalled its Judgment No. 79 of 2022, which had removed the limitation on the parental effects of adoption in special cases—further confirming the growing centrality of the child's best interest in the entire system.

Consistent with the constitutional ruling, the Juvenile Court of Naples subsequently issued the first order admitting a single person to initiate an international adoption procedure, marking the concrete implementation of the principles set forth by the Constitutional Court.

Judgment No. 33/2025 thus comes at a moment of particular strain for the Italian adoption system and marks a turning point: it affirms, on the one hand, the need to overcome a conception rigidly centered on marriage, and on the other, calls upon the legislature to undertake a comprehensive reform capable

[136] Italian Constitutional Court, Judgment of 22 May 2025, No. 68, § 9.3 (*Considerato in diritto*).

of ensuring the effective realization of the child's right to a family, in harmony with constitutional and international principles.

B) The Role of Consent in the Regulation of Medically Assisted Procreation

48. A further aspect for reflection arises from the comparison between the legal framework on adoption and that on medically assisted reproduction (MAR), as regulated by Law No. 40 of 19 February 2004. Unlike full adoption, which is rigidly reserved for married couples, the legislation on MAR allows access also to unmarried heterosexual couples, provided they are of age, cohabiting, and of potentially fertile age (Article 5, Law No. 40/2004). This openness is explained by the different rationale of the institution: MAR is based not on the formal bond of marriage but on informed consent and the shared parental project, as an expression of a free and conscious decision to assume joint responsibility for conceiving and raising a child. Article 6 of the same statute assigns constitutive value to consent, in that only through the joint expression of intent does entitlement to access medically assisted reproduction arise, thereby grounding a responsibility stemming from the "will [that] brings into being a person who otherwise would not have been born (Judgment No. 127 of 2020), and entailing the right of the child so born to be recognized as the child of those who intended that birth"[137]. In this sense, consent constitutes the foundation of the entire legal and moral construct: parenthood does not derive from a biological or formal act, but from the shared intention to welcome and raise a child.

49. This intentional element allows a significant parallel to be drawn with adoption, in which the basis of the family bond lies not in biology but in the conscious undertaking of a project of care and responsibility toward a child. However, the fundamental difference lies in the fact that, in adoption, the child already exists and is in need of a suitable family to welcome them, whereas in MAR the parental project precedes the very birth of the child. This results in a clear systemic inconsistency: the legislature allows access to MAR for unmarried couples, yet continues to exclude such couples from full adoption—although adoption pursues precisely the same aim, namely to ensure the child a stable, emotionally balanced, and nurturing family environment conducive to their development.

50. Such an approach appears difficult to reconcile with the principle of systemic coherence and with the *best interests of the child*, of which Article 1 of Law No. 184/1983 is a direct expression. If the legal system recognizes that parental capacity may be grounded in a shared emotional and caregiving project, independent of marital status, there is no reason to exclude *a priori* that similar projects could also take shape within an adoptive pathway. It follows that, both in the sphere of MAR and in that of adoption, the decisive criterion should not be the legal form of the couple's relationship or the partners' sexual orientation, but rather the concrete suitability of the individual or couple to provide the child with a calm, emotionally stable, and morally adequate environment. From this perspective, the consistency of the system must be assessed against the solidaristic function of adoption, which cannot be reduced to a merely formal institution but must continue to serve as a dynamic instrument for the protection of the child's fundamental rights.

V. Reform Proposals for the Italian Legislator in a Comparative Perspective

51. The analysis developed so far highlights how the Italian legal system remains anchored to a traditional adoption model, centred on marriage and on a rigid dichotomy between foster care and adop-

[137] Italian Constitutional Court, 22 May 2025, No. 68, § 5 (*Considerato in diritto*). In the operative part of the judgment, the Court states that "consent is of such value as to constitute an adequate basis for the emergence of parental responsibility even in cases of dissociation between biological identity and legal identity, grounded—pursuant to Article 6 of Law No. 40 of 2004—on the joint consent to the parental project, which is deemed an appropriate legal basis for the establishment of a *status filiationis* (Judgment No. 162 of 2014)," and that "from the common commitment voluntarily undertaken derive the duties inherent in parental responsibility."

tion—an approach increasingly misaligned with constitutional principles and with obligations arising from international and European law. Although originally conceived to protect the child by preserving the link with the family of origin, this framework has become inadequate in light of the complexity of contemporary family relationships and the many forms of parenthood that have emerged in society.

Its inadequacy is evident both from an objective standpoint—since the system remains tied to a bipolar structure unable to provide flexible responses to situations of semi-abandonment or emotional vulnerability—and from a subjective one, due to the exclusion from full adoption of entire categories of individuals, such as unmarried couples, civil unions, and single persons, who in practice may be perfectly capable of offering a child a stable and emotionally nurturing environment.

52. In this context, case law has taken on a creatively compensatory role, attempting to fill legislative gaps and adapt the institution to social reality and to the principle of the *best interests of the child*. Through an evolutionary interpretation of Article 44 of Law No. 184/1983, the courts have progressively expanded the scope of adoption in special cases, enhancing its function as a comprehensive child-protection measure and granting legal recognition to family bonds formed within same-sex parented or so-called "intentional" families. Two landmark rulings by the Constitutional Court—No. 79 of 2022 and No. 33 of 2025—represent decisive steps in this evolution: the former extended the effects of simple adoption, equating them, in terms of parental rights, with those of full adoption; the latter declared unconstitutional the absolute ban on single persons accessing intercountry adoption.

53. Nevertheless, despite this evolution of *living law*, the solutions developed remain dependent on judicial interpretation—lacking the certainty and stability that only comprehensive legislative reform can provide.

The need for a systemic revision of Law No. 184 of 1983 has therefore become increasingly urgent. It is essential to overcome the rigid dichotomy between foster care and adoption, introducing flexible protection models capable of reconciling legal stability with emotional continuity. Otherwise, in the absence of structural reform, the alarming statistics concerning children in foster care will remain largely unchanged: thousands of minors risk spending their entire childhood and adolescence in a legal limbo—without a stable family or enduring emotional bonds—with serious repercussions for their emotional and relational development. A system unable to provide definitive solutions to such suspended situations not only contradicts the solidaristic purpose of the institution but also stands in open tension with the principle of effective protection of children's fundamental rights.

At the same time, it is necessary to broaden the pool of potential adopters, eliminating exclusions based on personal status or sexual orientation, and allowing all individuals who demonstrably possess the required aptitude to undertake the adoption process. Such an approach does not imply that adoption is always consistent with the *best interests of the child*[138], nor that there exists an absolute right to parenthood[139]. Rather, it realises a principle of substantive fairness: ensuring that every child can find a family capable of welcoming them, based on a case-by-case assessment focused on the child's superior interest.

[138] Scholars have emphasized that it cannot be assumed uncritically that adoption always and necessarily fulfils the *best interests of the child*: empirical studies have shown that, particularly in adoptions from care contexts, tensions may arise concerning the continuity of family relationships, issues of identity and the right to know one's origins, as well as the management of post-adoption contact with biological parents and siblings. In this regard, see J. Doughty, S. Meakings, K. Shelton, *Rights and Relationships of Children who are Adopted from Care*, *International Journal of Law, Policy and the Family*, Vol. 33, No. 1, 2019, pp. 1–23, which highlights that, although adoption can offer protection and stability, it is not necessarily free from critical issues concerning the full realization of children's rights.

[139] See also G. Recinto, *Fecondazione eterologa, scambio di embrioni, maternità surrogata, omogenitorialità: nel rapporto genitori/figli c'è ancora un po' di spazio per i figli?*, in *Famiglia, Persone e Successioni*, 2015, pp. 665 ff.; Id., *Il superiore interesse del minore tra prospettive interne "adultocentriche" e scelte apparentemente "minorecentriche" della Corte europea dei diritti dell'uomo*, in *Foro Italiano*, 2017, IV, p. 3669 ff.; Id., *Con la decisione sulla c.d. maternità surrogata le Sezioni Unite impongono un primo "stop" al "diritto ad essere genitori"*, in *Diritto e Religioni*, 2019, pp. 560 ff.; Id., *La Corte costituzionale e la legittimità del divieto per le coppie dello stesso sesso di ricorrere alla PMA: non può configurarsi nel nostro ordinamento un "diritto assoluto alla genitorialità*, in *Il Corriere Giuridico*, 2019, p. 1460 ff.; Id., *La decisione delle Sezioni Unite in materia di c.d. maternità surrogata: non tutto può e deve essere "filiazione"*, in *Diritto delle Successioni e della Famiglia*, 2019, pp. 347 ff.; Id., *Un diritto che ad oggi "non può trovare spazio": il diritto alla genitorialità*, in *Diritto e Religioni*, 2/2023, pp. 26 ff.

54. Particularly urgent, in this respect, is the need for explicit statutory regulation of *stepchild adoption*, which currently exists solely through judicial interpretation, with all the limitations that have been identified in relation to adoption in special cases[140]. Express legislation would provide certainty to the emotional bonds formed by a child with the biological parent's partner and ensure protection for couples who have resorted abroad to medically assisted reproduction techniques not permitted under Italian law. Legislative intervention should thus aim to systematize and consolidate the case-law developments, translating them into clear rules consistent with the principles of equality, non-discrimination, and effective child protection.

55. A comparative perspective further confirms the urgency of reform. As shown by the most recent data from ILGA-Europe's *Rainbow Map 2025*[141], Europe presents a "three-speed legal geography." In Western and Northern European countries—such as the Netherlands, Belgium, France, Germany, Spain, Portugal, Ireland, and the Scandinavian states—adoption is open to same-sex couples on the same terms as to heterosexual ones, with parental capacity and emotional stability as guiding criteria rather than the gender composition of the couple. In an intermediate position lie countries such as Italy, Greece, Slovenia, and Croatia, where judicial practice has compensated for legislative inertia by recognising, through interpretation, the possibility of protecting same-sex parental relationships via adoption in special cases or *stepchild adoption*. By contrast, many Eastern European and Balkan jurisdictions—such as Poland, Hungary, and Romania—maintain a markedly restrictive approach, excluding same-sex couples from adoption altogether and denying legal recognition to same-sex parented families, in violation of Article 14 ECHR read in conjunction with Article 8, as interpreted by the Strasbourg Court in *E.B. v. France* (2008) and *X and Others v. Austria* (2013).

Comparative experience thus demonstrates that opening adoption to same-sex couples and single persons does not distort the institution but rather strengthens its solidaristic function, shifting the focus from an abstract family model to the child's concrete well-being. From this perspective, the child's interest must be understood in a substantive and dynamic sense—as the right to live in a stable and affectionate environment, regardless of the legal form of the family that welcomes them.

56. In conclusion, aligning Italian adoption law with European and international standards requires comprehensive legislative reform capable of restoring coherence to a system now fragmented and misaligned with social reality. Only a reform that overcomes the current structural rigidity and enhances the relational function of adoption can ensure the effective realization of the child's right to grow up within a family—whatever its form—in full implementation of the constitutional and conventional principles that place the individual and their affective bonds at the centre of legal protection.

[140] See § 46.

[141] Available at: https://rainbowmap.ilga-europe.org/categories/family/