European Review of Private Law 1-2023 [15–34] © 2023 Kluwer Law International BV, The Netherlands.

Children's Adoption in ECtHR Case Law: Opportunities or Threats for Italy?

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Abstract: The European Court of Human Rights' (ECtHR) case law on children's adoption has been calling for a rethink of well-established domestic principles and practices in Italy. For instance, Strasbourg decisions were instrumental in getting Italian courts to acknowledge that the adoptee's right to private and family life may require access to his or her birth record and adoption file and, sometimes, even contact with the family of origin after adoption. Other challenges launched by the Court, thus far not fully addressed by Italian social services, concern the need for specific support for migrant parents and the necessity to consider their sociocultural background when assessing parental skills. Still, the Court's tightening of the grounds for adoptability and its favour for simple adoption over full adoption result in an emphasis on blood ties and parental rights. There is a danger of disqualifying adoption where serious neglect put children's development at risk. In addition, this trend could create ambiguous situations where the family of origin is unsuitable to raise the child but could interfere in the adoptive family's life. A disenchanted approach to the ECtHR case law therefore seems to be necessary.

Résumé: La jurisprudence de la Cour européenne des droits de l'homme sur l'adoption d'enfants appelle à repenser principes et pratiques nationaux bien établis en Italie. Par exemple, les décisions de Strasbourg ont contribué à que les tribunaux reconnaissent que le droit de l'adopté à la vie privée et familiale peut exiger l'accès à son acte de naissance et à son dossier d'adoption et parfois même des contacts avec la famille d'origine après l'adoption. Un autre défi lancé par la Cour européenne, mais jusqu'ici pas entièrement relevé, concerne la nécessité d'assurer une assistance sociale ciblée aux parents migrants et de prendre en considération leur milieu socioculturel lors de l'évaluation des compétences parentales. Pourtant, le durcissement par la Cour européenne des conditions d'adoptabilité et sa préférence pour l'adoption simple par rapport à l'adoption plénière se traduisent par une emphase excessive sur les liens de sang et les droits parentaux. Le risque est d' exclure l'adoption lorsque la négligence grave des parents met en danger le développement des enfants. De plus, cette tendance pourrait créer des situations ambiguës difficiles à gérer pour les enfants et les parents adoptifs, où la famille d'origine est inapte à élever l'enfant mais pourrait s'immiscer dans la vie de la famille adoptive. Un regard désenchanté à la jurisprudence de la Cour européenne des droits de l'homme semble donc nécessaire.

Zusammenfassung: Die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte zur Adoption von Kindern hat in Italien zu einem Überdenken etablierter nationaler Grundsätze und Praktiken geführt. So haben die Straßburger

* The final version of this contribution was submitted on 4 December 2022.
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Entscheidungen dazu beigetragen, dass die italienischen Gerichte anerkennen, dass das Recht des Adoptierten auf ein Privat- und Familienleben den Zugang zu seiner Geburts- und Adoptionsakte und manchmal sogar den Kontakt zur Herkunftsfamilie nach der Adoption erfordern kann. Weitere Herausforderungen, die der Gerichtshof aufgeworfen hat und die von den italienischen Sozialdiensten bisher nicht in vollem Umfang berücksichtigt wurden, betreffen die Notwendigkeit einer spezifischen Unterstützung für Eltern mit Migrationshintergrund und die Notwendigkeit, bei der Beurteilung der elterlichen Fähigkeiten den soziokulturellen Hintergrund zu berücksichtigen. Die Verschärfung der Adoptionsvoraussetzungen und die Bevorzugung der einfachen Adoption gegenüber der Volladoption durch den Gerichtshof führen zu einer Betonung der Blutsbande und der elterlichen Rechte. Es besteht die Gefahr, dass die Adoption ausgeschlossen wird, wenn schwere Vernachlässigung die Entwicklung des Kindes gefährdet. Darüber hinaus könnte dieser Trend zu unklaren Situationen führen, in denen die Herkunftsfamilie nicht in der Lage ist, das Kind aufzuziehen, sich aber in das Leben der Adoptivfamilie einmischen könnte. Eine entzauberte Herangehensweise an die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte scheint daher notwendig zu sein.

1. Introduction

1. The Convention for the Protection of Human Rights and Fundamental Freedoms European Convention of Human Rights (ECHR) contains few explicit references to the rights of children. However, the European Court of Human Rights' (ECtHR) decisions on the topic has been growing exponentially due to a multiplicity of factors.[1] First, the Court interprets the Convention as a living instrument evolving over time to ensure the effectivity of the rights recognized in it.[2] Furthermore, it is nowadays generally acknowledged that the ECHR is applicable both to public authorities (vertical effect) and to relations between private

1 For an overview see C. Fenton-Glynn, *Children and the European Court of Human Rights* (Oxford: Oxford University Press 2021); A.F. Jacobsen, 'Children's Rights in the European Court of Human Rights – An Emerging Power Structure', 24. *IJCR* (*The International Journal of Children's Rights*) 2016(3), pp 548–574; U. Kilkelly, 'The Best of Both Worlds for Children's Rights – Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child', 23. *Human Rights Quarterly* 2001, pp 308–326; M. Verheyde, 'The Protection of Children's Rights by the European Court of Human Rights', in A. Alen et al. (eds), *The UN Children's Rights Convention: Theory Meets Practice* (Intersentia 2007), pp 107–119.

2 One of the first cases where the Court recognized the necessity of an evolutionary interpretation was *Tyrer* v. *UK* (25 Apr. 1978, application n. 5856/72, see para. 31). The question (positively answered) was if a judicial corporal punishment of a boy aged 15 on the Isle of Man could amount to degrading treatment under Art. 3. More recently, in the case of *Schalk and Kopf* v. *Austria* (24 Jun. 2010, application n. 30141/04) the Court, for the first time, recognized that the emotional and sexual relationship of a same-sex couple 'falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would' (para. 99).

individuals (horizontal effect).[3] Additionally, according to the doctrine of positive obligations developed by the Court, the Convention not only protects individuals against arbitrary interferences in the enjoyment of the rights enshrined, but also places on Member States positive obligations functional to effective respect for fundamental rights.[4] Lastly, the entrance into force in 1998 of a restructured machinery for the enforcement of rights and liberties guaranteed by the Convention[5] increased applications from individuals. Thus, a growing number of parents have been turning to the Court to complain about the violation of their rights. In most cases, they invoke their and their children's mutual right to respect for family life (Art. 8 ECHR).[6] Sometimes they refer to the violation of the right to a fair trial (*ivi*, Art. 6) in the removal procedure of the offspring. In a minority of cases, it is the former child-now-adult who appeals to the European Court to complain about the violation of his or her right to respect for private life, in terms of personal identity, violated by public authorities due to or as a consequence of the placement in care.[7,8]

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3 For instance, the protection of family life under Art. 8 ECHR entails the obligation on the national authorities to provide a regulatory framework of adjudicatory and enforcement machinery, and the implementation of specific measures to facilitate contact with the non-custodial or co-custodial parent in the case the co-parent refuses to comply with the judicial decision and obstruct contacts (*ex multis A. T.* v. *Italy*, 24 Jun. 2021, application 40910/19). According to the Court, '*un manque de coopération entre les parents séparés ne peut dispenser les autorités compétentes de mettre en œuvre tous les moyens susceptibles de permettre le maintien du lien familial*' (*Santilli* v. *Italy*, 17 Dec. 2013, application n. 51930/10).

4 For instance, 'art. 8 includes a right for the natural parents to have measures taken with a view to their being reunited with their children (...) and an obligation for the national authorities to take such measures' (*Olsson* v. *Sweden II*, 27 Nov. 1992, para. 90).

5 The reference is to Protocol n. 11.

6 In the Court's word, 'The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life' (*ex multis* see *Olsson* v. *Sweden I*, 24 Mar. 1988, application n. 10465/83) and parent and child should therefore have been recognized the right to establish, maintain and develop a factual relationship through 'contacts'. One of the most frequent interferences by public authorities with this right is the removal and placement in care of the offspring by public authorities (*Olsson* v. *Sweden I*, cit. and, among the most recent decisions, the Grand Chamber in *Strand Lobben and others* v. *Norway*, 10 Sep. 2019, application n. 37283/13). Besides, its violation can derive, as already mentioned above, from the failure to execute the judicial decision of custody due to obstructive conduct of the custodial or co-custodial parent (see *A. T.* v. *Italy*, cit.).

7 See e.g., *Gaskin* v. *United Kingdom* (7 Jul. 1989, application n. 10454/83) where a young adult formerly into care of the Liverpool City Council wished to access his personal case record to obtain details of where he was kept and by whom and in what conditions in order to be able to help him to overcome his present problems and learn about his past.

8 For instance, in the case *McMichael* v. *United Kingdom* (24 Feb. 1995, application n. 16424/90) the Court held that there has been a violation of Art. 6 para. 1 of the Convention since Mrs McMichael did not receive a 'fair hearing' at either of the two stages in the care proceedings

2. To date nineteen judgments from the European Court held Italy in violation of the Convention with regard to placement of children in care. The first case was *E.P.* v. *Italy.*[9] The most recent is *D. M. and N.* v. *Italy.*[10] In both judgments the Court deemed unjustified the declaration of adoptability of the applicant's daughter. The salient element of the latter case is that the Court, in the motivation and in the operative part of the decision, states that:

> *il est souhaitable, eu égard aux circonstances particulières de la présente affaire et au besoin urgent de mettre fin à la violation du droit des requérantes au respect de leur vie familiale, que les autorités internes réexaminent, dans un bref délai, la situation des requérantes à la lumière du présent arrêt et qu'elles prennent les mesures appropriées dans l'intérêt supérieur de l'enfant.*

It is the first time that Italian juvenile courts have been expressly urged by the European Court to reopen and reconsider a case in light of its rulings. This asks the Italian legal system to reconsider the impossibility of revocation of civil judgments (and especially of children's adoptions) even if found by the ECtHR to be in contrast with the Convention. A possible tsunami.

3. In the following paragraphs, I will focus on the contribution of the decisions of the ECtHR to a rethink of well-established domestic principles and practices in the Italian approach to the adoption of children who cannot remain in the care of their family of origin.[11] Not only cases against Italy will be considered. Indeed, important principles are drawn from decisions that concern other states. For instance, the judgment *Odièvre* v. *France* [12] easily predicted the conviction of Italy in *Godelli* v. *Italy* [13] since, unlike France, the Italian legal system does not include tools to promote the right of adopted biological children of anonymous birth mothers to know their family and genetic origins.

As we will see, some indicators show positive developments. For instance, the ECtHR led to a better recognition in Italy of the adult adoptee's 'right' to know his or her history before adoption (see *infra* para. 2.1). Other challenges, such as the implementation of the right of migrant parents to specific support, and the need to consider the parent's sociocultural background when assessing their parental skills, have not been fully implemented so far (*infra* para. 2.2). Still, as *D. M.*

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concerning her son by reason of her inability to see certain documents considered by the child's hearing.

9 16 Nov. 1999, application n. 31127/96.

10 20 Jan. 2022, application n. 60083/19.

11 In this work I will not therefore deal here with stepparent adoption, either in heterosexual or in homosexual families.

12 13 Feb. 2003, application n. 42326/98.

13 25 Sep. 2012, application n. 33783/09.

and N. v. *Italy* and other similar cases show, the European Court's emphasis on blood ties and parental rights results in tightening excessively the conditions for adoptability and in favouring simple adoption over full adoption since it safeguards the legal bond (and therefore family life) with parents, even if unfit to take care of their offspring (*infra* para. 3). In the conclusion to this work, I will therefore argue for a disenchanted approach to the ECtHR case law.

2. Opportunities and Challenges

4. ECtHR case law is positively contributing to the legal system of adoption in Italy in different ways. Sometimes it called for legislative reforms. For instance, Law 173/2015 *sul diritto alla continuità affettiva dei bambini e delle bambine in affido familiare* (on the right of foster children to maintain their emotional ties after the end of foster care) implements the principles laid down in the *Moretti and Benedetti* v. *Italy* case.[14] The judgment condemned Italy because, in evaluating the best adoptive solution for a newborn child in foster care for several months, courts did not consider the application for adoption presented by foster parents. With this aim, the new law introduced a new provision under which the judge deciding on the adoptability of a child already placed in foster care shall 'take into account the significant emotional ties and stable and enduring relationship consolidated between the child and the foster family', pronouncing the adoption in favour of the foster parents if they are eligible for adoption and want to adopt the child.

Still, the greatest influence on Italian adoptions occurs through the impact of Strasbourg case law on domestic courts. Indeed, lower courts and Supreme Courts make use of the ECHR to interpret domestic law and reinforce the rule of decisions based on domestic law. Hardly, they raise questions of constitutional legitimacy for violation of the Convention, as interpreted by the European Court.[15]

2.1. The Adoptee's Right to Know Her or His Origins

5. The first area where this instrumental use of Strasbourg case law took place for the judicial interpretation of domestic law is the adoptee's right to know her or his origins.

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14 27 Apr. 2010, application 16318/07.

15 According to the Italian Constitution, 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and *with the constraints deriving from EU legislation and international obligations*' (Art. 117 para. 1, emphasis added). Thus, the court that considers a domestic law contrary to an international treaty can raise before the Constitutional Court a question of constitutional legitimacy for the violation of Art. 117.

6. Already in the case *Gaskin* v. *United Kingdom* [16] the European Court recognizes that a person placed in public care when he was a baby has a 'vital interest' in accessing his social service record because it enables him to understand his childhood and early development. In the judgment *Odièvre* v. *France* (cited above), the Court ruled that the French legislation on adoption and anonymous birthing is not in breach of the European Convention since it provides balancing mechanisms that ensure that both the biological mother's right to anonymous birth and the adult adoptee's right to access information on his or her origins are taken into consideration. The absence of these mechanisms in Italian law produced, as could easily be foreseen, the condemnation of Italy in the *Godelli* case (cited above).

7. This very case law led Italian courts to recognize that the adult adoptee's need to know about his or her origins amounts to a fundamental 'right'. Indeed, in 2001, pursuant to an amendment to the 1983 Adoption Act, Italian law had already allowed the adult adoptee to access his or her adoption file, albeit setting several restrictions. The most relevant of these limitations was anonymous birth: the mother's decision not to be named excluded every possibility for the offspring to access information.[17] However, in 2013, recalling the cases *Odièvre* and *Godelli*, the Constitutional Court introduced the need for a concrete balance between the child's right to access and the mother's right to anonymity. Indeed, the Court declared unconstitutional (it being against the child's right to personal identity) the strict and immutable prohibition for the adult adoptee to know his or her origin if the biological mother chose to give birth anonymously.[18] The decision is especially important because it stated that juvenile courts referred to by adult adoptees should trace the biological mothers and ask them if they confirm their decision to give birth anonymously. If they confirm, the court will reject the application.[19] The Constitutional Court did not formally use the ECHR to declare the unconstitutionality of the Adoption Act, while making extensive references to the *Godelli* case. The fact that an identical case was rejected in 2005 and that the only novelty that had occurred meanwhile was the judgment in *Godelli* advocating that the Constitutional Court attributed in its decision a crucial role to European case law.

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16 7 Jul. 1989, application n. 10454/83.

17 Article 28 para. 7 Adoption Act.

18 *Corte costituzionale*, 22 Nov. 2013, n. 278.

19 A recent implementation of the principles stated by the Constitutional Court is the recent judgment by the *Corte di Cassazione* n. 22497 of the 9 of Aug. 2021 which invokes European case law on the need for a balance between the vital interest of the child and the anonymity of the mother, confirming the decree of the Court of Appeal of Trieste which denied the right of the daughter to know the identity of the mother who was very old and in precarious health conditions, but specifying that the daughter can access health information on the health of the mother to know the existence of any hereditary transmissible diseases provided that the anonymity of the woman is guaranteed.

Under the same light, the Italian *Corte di Cassazione* broadly refers to Strasbourg case law to endorse the access by the adult adoptee to the information concerning the identity of the anonymous birth mother if it emerges that she was deceased at the time of the offspring's application).[20] Also, it admitted the communication of the identity of the biological siblings, provided they consent to the disclosure of their identity.[21]

2.2 Open Adoptions and Soft Adoptions

8. In Italy, the idea of adoption as a permanent and irrevocable legal transplant of the child from one family to another, when the child cannot be raised by his or her parents, was first endorsed by the law in 1967 (Law n.431) and then revived in 1983 (Law n.184, which constitutes the Adoption Act already in force). The adoptee becomes the adoptive parents' son or daughter, and their surname is transmitted; the legal relationship with his or her birth parents is completely terminated (Art. 27 Adoption Act). In addition to this full adoption, the Adoption Act introduced a simple adoption, limited to specific cases (hence the name *adozione in casi particolari*, literally 'adoptions in particular cases'), such as blended families or children with special needs that cannot find adoptive parents under full adoption[22] (Art. 44 Adoption Act). The name 'simple' adoption comes from its limited effects: the adoptee legally becomes a child to the adoptive parent but continues to have (in addition) a lawful bond to the family of origin. Indeed, Article 55 of Adoption Act refers, for the description of the effects of simple adoption, to Article 300 of the Civil Code on the adoption of the adult adoptee, according to which 'the adoptee retains all rights and duties towards his family of origin'.[23] Besides, simple adoption is revocable in special circumstances, i.e., when the adoptee (who is older than fourteen years) makes an attempt on the

20 *Cassazione*, 21 Jul. 2016, n. 15024. Out of twenty pages of motivation, ten are dedicated to analytically reconstructing the *Odièvre* and *Godelli* judgments.

21 *Cassazione*, 20 Mar. 2018, n. 6963. The Court speaks of the need for a 'constitutional and conventional' interpretation, meaning that courts should interpret the Adoption Act in a manner consistent with the Italian Constitution and in accordance with the ECHR.

22 Only married couples are eligible for full adoption (Art. 6 Adoption Act). If full adoption is not possible (because no suitable married adoptive parents were found), a simple adoption can be granted to ensure children with special needs the right to a family. Exemplary is the story of Luca Trapanese, a gay father to a newborn girl with Down Syndrome that had been rejected by twenty other families before being welcome in his family: the story is told by Trapanese himself in L. Trapanese & L. Mercadante, *Nata per te* (Torino: Einaudi 2018).

23 The discipline of adult adoption traces back to Roman *adoptio.* Since its purpose is to enable the adopter to transmit his name and his assets to the adoptee (and not to protect the adoptee's right to find a family), there is no reason why this tool should break the legal parenthood link between the adoptee and the family of origin.

life of the adoptive parent or of his or her spouse, of offspring or ascendants, or is 'guilty towards them of a crime punishable with detention for no less than three years in the minimum' or when the same facts are carried out by the adoptive parent against the adoptee, or his or her spouse or offspring or ascendants (Art. 51 and Art. 52).

9. Since the start of the new millennium, the idea of adoption as a transplant of the abandoned child into the new family has been criticized. In the case *Aune* v. *Norway* [24] the ECtHR holds that the decision to deprive a mother of parental responsibilities and to authorize the adoption of her child by foster parents had been supported by relevant and sufficient reasons and had been proportionate to the legitimate aim of protecting the child's best interests since it did not prevent the applicant from continuing to have a personal relationship with her child after adoption and had not 'cut him off from his roots'. In the case *Bogonosovy* v. *Russia*,[25] the European Court deemed that national authorities should have evaluated the possibility of maintaining post-adoption contacts between a grandfather and a baby girl, who had lived with him for five years during her mother's serious illness and death, until she moved out to live with her future adoptive parents.[26]

10. In Italy as well, a different reading of the best interests of the adopted child led courts and social workers to recognize that, sometimes, the interest of the child may require the preservation of some degree of openness in adoption, i.e., the maintenance of contacts with members of the family of origin after the adoption. Indeed, courts now acknowledge that Article 27 of the Adoption Act does not impose the break of any contacts between the children and the family of origin after full adoption, and that it only provides for the end of the legal parental bond with the family of origin.

Adozioni miti (literally soft adoptions) represent another type and are different from open adoptions. They are simple adoptions that maintain not only contacts but also the legal relationships between the child and the family of origin. They are realized through an extensive interpretation of the abovementioned instrument of simple adoption, well beyond the intentions of the legislature. Indeed, the law includes, among the 'special cases' in which this type of adoption

24 28 Oct. 2010, application n. 52502/07.

25 5 Mar. 2019, application n. 38201/16.

26 A similar principle guides the Court in the judgments rendered in *T.S. and J.J.* v. *Norway* (11 Oct. 2016, application no. 15633/15) and in *Beccarini et Ridolfi* v. *Italy* (7 Dec. 2017, application no. 63190/16). In the first case a Polish boy was taken into public care by Norwegian authorities after the death of his mother, with recognition to the Polish maternal grandmother of limited visitation rights. In the second case three children moved in with their maternal grandparents because their mother was incapable of caring for them. The authorities then started a process concerning the adoptability of the children, and the grandparents did not see them for five years.

can be used, any situation in which adoption is in the best interest of the child, but where conditions for full adoption do not exist (literally, 'Where the impossibility of pre-adoption fostering has been ascertained': see Art. 44 letter d of the Adoption Act). As already mentioned, the intention of the legislature was to facilitate adoption of children with special needs who could not find young and married couples available for adoption, but could find, for instance, single adoptive parents. This interpretation was first adopted in 2003 by the Juvenile Court of Bari and then spread to other courts. The aim is to guarantee certainty and stability of family status to children who cannot grow up in their family of origin but cannot be adopted with full adoption either, because they cannot be considered fully abandoned. In this way, moreover, a rigid break with respect to the child's previous life is avoided, and the collaboration of the family of origin in the new life project for the child is encouraged. For instance, in 2019, the Juvenile Court of Bari ruled in the case of two brothers who had been in foster care for many years while maintaining a close relationship with their father (the mother had long disappeared).[27] The foster parents applied for the 'soft' adoption of the siblings, wishing – as expressly requested by the children – to safeguard their biological and family identity. The Court granted the adoption, underlining how 'the choice thus justified precisely complies with the legal principles set by the ECHR'.

2.3 Migrant Families and Parental Skills Assessment

11. A challenge launched by the European Court, but not yet fully addressed by Italy, concerns the need to ensure specific support to parents in vulnerable conditions, and especially to migrant parents, and to consider the parent's sociocultural background and cultural specificities when assessing their parental skills. Indeed, the European Court believes that the authorities of States Parties have positive obligations to provide increased protection to persons in a vulnerable situation, especially migrants. Under this light, it often reproaches Italian courts and social services the lack of what we could call an 'anthropological approach' to the assessment of parental skills.

It is a fact that the ECtHR has frequently ruled against Italy for disproportionate and unjust breaking of family ties between children and parents in migrant families.

Often, but not always, the applicant is a single migrant mother and has therefore an marginalized identity in several respects. In the cases *E. P. c. Italy* [28] and *Scozzari and Giunta* v. *Italy* [29] the applicants were Italian mothers who had lived abroad for years and then came back to Italy only to face the economic and

27 *Tribunale per i minorenni di Bari* (Juvenile Court of Bari) 6 Nov. 2019, in DeJure.it.

28 1 Apr. 2021, application n. 70896/17.

29 13 Jul. 2000, applications nn. 39221/98 and 41963/98.

social difficulties that migrants usually encounter. In *Todorova* v. *Italy* [30] and *Zhou* v. *Italy* [31] the applicants were respectively a Bulgarian mother and (as previously described) a Chinese mother who had been abandoned by their partner during pregnancy and were alone in Italy, with the problem of finding and keeping a job. In the case of *Akinnibosun* v. *Italy* [32] a Nigerian father, who had arrived in Italy on a boat from Libya with his two-year-old daughter and had been unjustly detained for two years, found it impossible after his release to rebuild the relationship with his daughter who had been placed in foster care and then for adoption. In the case of *Barnea and Caldararu* v. *Italy*[33] the European Court blamed the long separation between a Romanian Roma girl and her parents.

An exemplary case is that of *A. I.* v. *Italy*[34] where the Court finds a violation of Article 8 ECHR in the inability of the applicant, a Nigerian mother victim of human trafficking, to have contacts with her two children while the judicial proceedings concerning their eligibility for adoption was pending. Indeed, the ECtHR complains that 'judicial authorities did not take into consideration the condition of vulnerability of the applicant in assessing her parenting skills and her request to maintain contact. In the case of vulnerable groups, the public authorities must show particular attention and must ensure better protection'. Besides, it drew attention to the fact that national authorities had not taken into consideration cultural specificities in play such as 'the applicant's Nigerian origin or the different models of attachment between parents and children in African culture' (para. 104). Finally, the European Court noted that adoption would 'detach the child from its roots' (para. 98).

12. The high number of convictions of Italy for insufficient consideration of the parent's migratory background in the assessment of parental skills and in the preparation by social services of a specific project to support parenthood indicates the existence of reprehensible and illegitimate practices, at least in some areas of Italy, and urges self-criticism for Italian judges and social workers. This critical view is endorsed by cultural anthropologists, lawyers and even some judges. Indeed, a former juvenile judge, Ennio Tomaselli, devotes a chapter of his memoirs to some judicial cases of placement in care of children of migrant families explicitly stating that, even if it was not possible to say that this was general procedure, there have been 'inconsistencies, superficialities, procedural irregularities and substantial illegality'.[35] According to cultural anthropologist Simona Taliani, 'We are dealing

30 13 Nov. 2009, application n. 33932/06.
31 21 Jan. 2014, application n. 33773/11.
32 16 Jul. 2015, application n. 9056 /14.
33 22 Jul. 2017, application No. 37931/15.
34 1 Apr. 2021, application n. 70896/17.
35 E. Tomaselli, *Giustizia e ingiustizia minorile. Tra profonde certezze e ragionevoli dubbi* (Milan: FrancoAngeli 2015), p 184.

with a massive bureaucratic apparatus (...): a kind of symbolic engineering machine, aimed at making these children vulnerable, exposed to risks and prejudice, so that they can easily be declared adoptable ... their forms of care do not respond immediately to the Italian expectations of motherhood'.[36]

The very recent nature of the convictions indicates that the issue persists: the principles set by the European Court are not yet fully integrated into the domestic system. Just a few months ago, the European Court examined the case of a Cuban mother victim of domestic gender-based violence who had applied to the welfare services for assistance and was placed, with her child in a reception centre (*D.M. and N.* v. *Italy*, cited above). Following a negative evaluation of her parental skills on account of her behaviour, and that she had an unstable lifestyle, the child was declared adoptable. The analysis of the case shows that the mother's conduct was, at least partly, due to her cultural and migratory background (e.g., pregnancy without a family project, delegation of the care of the child to friends when she was at work, just as had happened in the case *Zhou* v. *Italy*).

3. Threats

3.1 Radical Rethinking of Grounds for Adoptability of Children

13. As I mentioned in the introduction to this work, I believe that the ECtHR case law is now having a negative impact on the Italian domestic system of adoption, namely the cultural and legal defeat of the idea that 'full' adoption is the best instrument for the protection of children deprived of family care. This is the result of the European Court's interventions in different but intertwined areas: (1) grounds for adoptability of children; (2) effects of adoption on contacts between the child and his or her family of origin after adoption; (3) effects of adoption on the legal bond between the child and the family of origin after adoption. N. 2 and n. 3 have already been touched upon in paragraph 2.2. However, as I will try to demonstrate, this evolution of the case law of the European Court was initially a factor of improvement of the Italian legal system because it mitigated its rigidity, but it is currently conveying an ideological stance in favour of blood parents.

14. According to the ECtHR, the removal of parental responsibilities and the declaration of adoptability are legitimate in cases of parental violence or maltreatment[37] and effective harm towards the child.[38] Conversely, serious neglect

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36 S. Taliani, 'Sometimes I feel like a motherless child: Nigerian migration, race memories and the decolonization of motherhood', in C. Gualtieri (ed.), *Migration and the Contemporary Mediterranean. Shifting cultures in 21st-century Europe, Race and Resistance Across Borders in the Long 20th Century* (Oxford: Peter Lang 2018), p 120.

37 As, e.g., in the *case Covezzi and Morselli vs. Italy*, 9 May 2003, application n. 52763/99.

38 As in *Bertrand* v. *France*, 19 Feb. 2002, application n. 57376/00.

and a risk for the psychic development of a child do not justify the severing of family ties.[39] For instance, in *Zhou* v. *Italy* (cited above) the first applicant was a Chinese mother who, because of her medical condition and due to the lack of an informal and formal network to support her, was unable to offer her child a suitable family environment: hence she went with her baby to a mother-child community, then the child was placed in a residential facility and, finally, he was declared adoptable since his mother could not take care of him. The European Court condemns Italy by observing rashness in the declaration of adoptability: the mother was not ill-treating the child and her vulnerability should have required targeted social interventions; moreover, national authorities should have considered arranging a 'simple' adoption, with the maintenance of factual and legal relationships with the mother.[40]

15. In the last ten years, the ECtHR case law has been playing a crucial role in the decision by the Italian Court of cassation to restrictively interpret the ground for adoptability of children.[41] This was possible, albeit without legislative reforms, as the Italian Adoption act makes extensive use of general clauses and courts are called on to give them concrete meaning: for instance, according to Article 8 Adoption Act, juvenile courts shall declare the adoptability of 'children whose *abandonment* is assessed because they *lack moral and material assistance* from parents or relatives (...), provided that the lack of assistance is not due to *temporary force majeure*' (emphasis added).

In 2015, the Italian Court of Cassation widely referred to Strasbourg case law to overrule its previous case law and affirmed that the willingness of the extended family to take care of the child excludes adoptability, even in the absence of a previous significant emotional relationship between child and relatives.[42] In 2018, the ECtHR case law was at the centre (two of the eight pages of the decision are entirely dedicated to European Court case law!) of the annulment of the adoptability of a neglected child in a situation that the Cassation explicitly described as much less serious than others where the Strasbourg Court found a violation of Article 8 ECHR: the Supreme Court highlights the 'particular binding nature of its rulings (...) beyond the judgement in which they are made'.[43] In 2020, the *Cassazione* extensively referred to the Strasbourg Court ('meaningful' and 'relevant indications come from the case law of the European Court of Human

39 *Zhou* v. *Italy*, cit., paras 57-59.

40 *Zhou* v. *Italy*, para. 60. See below para. 3.2.

41 L. Lenti, 'L'adozione e la Corte europea dei diritti dell'uomo. A proposito di Cass. 20954/2018', I. *NGCC* (*Nuova giurisprudenza civile commentata*) 2019, p 64. An analysis of the *Cassazione* case law of the last 3 years shows that, in most cases, the parents' lawyers invoke Art. 8 ECHR and the European to challenge the adoptability of the offspring.

42 Cassazione 18 Dec. 2015, n. 25526.

43 Cassazione 22 Aug. 2018, n. 20954.

Rights regarding the *domestic* legal regime aimed at regulating adoption models', emphasis added) to affirm that, in the assessment of adoptability, courts should also evaluate if the termination of any bond between the child and his or her parent is in his/her best interests.[44]

16. Recently, order n. 1476 of 25 January 2021 introduces as a new requirement for full adoption, in addition to abandonment: the explicit proof that the maintenance of legal relationships between a child and his or her family of origin after adoption is contrary to the best interest of the child. The case concerned the adoptability of a seven-year-old girl who had been in foster care since she was five months old and whose parents were both deprived of their parental responsibility.[45] According to the lower courts, the father and mother were unsuitable to raise her, although the mother showed affection towards her daughter and participated in a parenting support program organized by social services. In the Supreme Court's wording, the ECtHR case law (especially *Zhou* v. *Italy*) put an obligation on Italian courts to safeguard a minimum family life between children and parents, even if they are completely and definitively unsuitable to take care of them.

This interpretation means that in most situations full adoption is no longer an option. Indeed, usually the removal of the child comes after many interventions of social services and experiments of cohabitation with the parent, therefore an emotional bond exists.

17. The consequences are easy to imagine. Where the family of origin proves to be completely and definitively inadequate for the education of the offspring but there is an affective relationship, juvenile courts will refuse to declare adoptability and grant full adoption. Indeed, they will fear that if they free the children for adoption the decisions will then be overruled by the Court of Appeal and the Court of Cassation. Besides, the use of instruments of protection that do not cause the termination of a parental bond is easier and involves taking on less responsibilities: undeniably, procedures for adoptability require more demanding and difficult assessments and are therefore objectively more complex to manage; a less drastic solution, such as simple adoption, but also long-term foster care, appears easier and less demanding for judges and social workers.[46] Moreover, according to statistics, only around 20% of adoptable children have parents who abandoned them at birth.[47] On the contrary, most of the situations where juvenile courts intervene now involve serious neglect and so repeated efforts to help parents to acquire a

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44 Cassazione 13 Feb. 2020, n. 3643. It is the very case that will be decided by the European Court of Human Rights in *A. I.* v. *Italy*, 1 Apr. 2021, cit.

45 Cassazione 25 Jan. 2021, n. 1476.

46 A.C. Moro, *Manuale di diritto minorile* (Bologna: Zanichelli 2019), p 331.

47 Ministero della Giustizia, *Domande di adozione nazionale e internazionale pervenute nei Tribunali per i minorenni. Dati* (2018), www.giustizia.it/resources/cms/documents/civile_report_201816aprile2019.pdf.

sufficient level of suitability are necessary to ensure the right of the child to grow up and be educated within his own family (Arts 8 and 9 Convention on the Rights of the Child; Art. 1 Adoption Act). These very attempts to support parental skills inevitably build a de facto relationship between the parent and child that, in most cases, would be contrary to the child's best interests to break. Under this line of reasoning, full adoption could only be used in very few situations, namely physical and sexual abuses, in which it is self-evident that the continuation of the relationship would be contrary to the best interests of the child. All cases of negligence and psychoeducational risk would certainly remain excluded, disregarding clinical studies that demonstrate the effects of full adoption for the resilience of children who experienced trauma.

3.2 Inversion of Priority Between Full Adoption and Simple Adoption

18. In the last two years, the ECtHR case law has been playing a crucial role in the decision by the *Cassazione* to subvert the relationship of priority between full adoption and simple 'soft' adoption.[48] Indeed, according to this new interpretation, the latter should always be favoured over full adoption. Indeed, soft adoption allows to maintain, at least in part, the ties between the child and the family of origin and therefore sustains a minimum family life between them under Article 8 ECHR.

A decisive impulse came from the judgment rendered by the ECtHR in the above-mentioned case *Zhou* v. *Italy*.[49] As previously illustrated, the first applicant was a Chinese mother who had given birth to the second applicant while in Italy. The little boy was then declared adoptable on the grounds that the mother was unsuitable to rise her son, although very fond of him. The European Court deemed that national courts should have evaluated alternative scenarios to full adoption, for example, long-term foster care or simple 'soft' adoption, in the best interests of both the child and the parent (para. 58). Similarly, in *D.M. and N.* v. *Italy*, Strasbourg judges held that 'no attempt was made to explore the effectiveness of alternative measures with less serious consequences before the courts sought to sever the ties between the applicant and her daughter by declaring her adoptable' (para. 89).

19. In domestic case law, a first signal of change was given by order n. 3643 of 25 January 2021. It was the same case that would later give rise to the ruling of the ECtHR *A. I.* v. *Italy*: the adoptability of the two children of a Nigerian mother

48 P. Morozzo della Rocca, 'Abbandono e semiabbandono del minore nel dialogo tra CEDU e corti nazionali', II. *NGCC (Nuova giurisprudenza civile commentata)* 2020, p 835. The very courts recognize the crucial importance of the European Court in this trend: the spread of 'soft adoption' is the 'result of the emphasis given to the ECtHR rulings in matter of adoption' (*Corte d'Appello di Venezia*, 23 Sep. 2021, Dejure.it).

49 21 Jan. 2014, application n. 33773/11.

victim of trafficking. The Court of *Cassazione* quashes the decision of adoptability on the grounds that the Court of Appeal should have assessed the importance of the maintenance of the relationship with the mother for the development of the children's identity. According to *Cassazione*, 'relevant indications' coming from Strasbourg urge the domestic system of adoption to adapt the two existing models of adoption, simple and full.

But the decisive step was taken by the abovementioned order n. 1476 of 25 January 2021. The case concerned the adoptability of a seven-year-old girl who had been in foster care since she was five months old and whose parents were both deprived of their parental responsibility. According to the lower courts, the father and mother were unsuitable to raise her, although the mother showed affection for her daughter and participated in a parenting support program organized by social services. In the Supreme Court's wording, the ECtHR case law (and especially the case *Zhou vs. Italy*) put an obligation on Italian courts to prefer simple adoption over full adoption to safeguard family life between the mother and the daughter, avoiding a clean break in the relationship between them. Accordingly, the Court of Cassation quashed the decision of adoptability stating that the Court of Appeal should have assessed the interest of the girl to maintain the relationship with her family of origin after the adoption. Briefly: the child can be declared adoptable and free for full adoption only if the parents are completely unsuitable to raise him and the child has no interest in maintaining any bond with them.

20. Subsequent rulings consolidated this trend.[50] In July 2021, the *Cassazione* referred to the ECtHR to uphold the appeal of two Nigerian parents who complained that the possibility of a soft adoption of their daughter had not been evaluated by lower courts.[51] In November 2021, the adoptability of three children of psychiatric parents was overturned as the Court of Appeal did not assess whether the interest of children in maintaining the emotional relationship with the parents and their interest to be welcomed in a new family unit could be ensured by soft adoption.[52] In December 2021 the *Cassazione* dismissed an appeal against the soft adoption of three siblings whose mother had psychological problems that made her unsuitable for the care of the offspring, with whom, however, she had a strong emotional bond.[53] The case is interesting because the appeal was lodged by the Attorney General of the Court of Appeal that stated the adoption. Besides, the soft adoption was decided by the Court of Appeal within the appeal against the adoptability as a prerequisite for full adoption, i.e., in a proceeding with a different object.

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50 In addition to the decisions cited in the text see also *Cassazione* 14 Sep. 2021, n. 24722 and *Cassazione* 2 Sep. 2021, n. 23797.

51 Cassazione, ordinanza n. 20240 of 15 Jul. 2021.

52 Cassazione n. 35840, 22 Nov. 2021.

53 Cassazione n. 40308, 15 Dec. 2021.

21. The consequences are easy to imagine

22. The number of simple adoptions will put many more adoptees in difficult and potentially harmful situations. As explained above, persons adopted with simple adoption become children of the adoptive family, but they continue to have a legal bond to their family of birth. It is certainly true that belonging to two families can be a resource since it can provide multiple emotional and educational references (as often happens in blended families). However, it appears very unlikely that this situation could be managed easily in cases of adoptions, where the family of origin has been assessed to be completely and definitively unsuitable to raise the child and psychological mechanisms of denial and defence are often present. Consider, for instance, the risk of intrusion by the family of origin in the educational choices of the adoptive family. Or the physiological mechanism, common at least during adolescence, by virtue of which the child in conflict with his parents seeks an alternative family reference, which could easily be found in birth parents. Professionals already know these difficulties in foster care very well, especially if it is long term.[54] Welcoming a child into foster care requires not rejecting his or her parents, accepting their diversity and difficulty in bringing them up, despite the perplexity and occasional reactions of refusal that they can arouse. On the side of the birth parents, foster care can create frustration since they can see the foster parents as dangerous competitors. Furthermore, the child may encounter difficulties since being in the middle of two families can be psychologically demanding, especially when the birth family is problematic and his relationship with the carers is tense,[55] especially if long term (so called *sine die*). In the case of simple adoption, however, these difficulties can be exacerbated by the fact that – unlike in foster care – social services do not have a responsibility for monitoring and supporting the birth family and therefore do not mediate and manage the relationship between the two families.[56]

Further difficulties will likely arise from maintaining legal ties with the family of origin. Adoptees could at any time be sued for alimony by indigent birth parents (hypothesis far from remote given the multifaceted problems of many families of origin that present together social and economic issues).[57] On another

54 M. Chistolini, *Affido sine die e tutela dei minori. Cause, effetti e gestione* (Milano: FrancoAngeli 2015). The Author speaks of 'chronic precariousness', highlighting how it is the result of adult-centrism and high value for blood relations.

55 E. Ceccarelli, 'L'affidamento familiare nella legge e nella sua applicazione', in A. Gasanti & E. Rossi (eds), *Affido forte e adozione mite: culture in trasformazione* (FrancoAngeli 2007).

56 C. Maggia, 'Come è cambiata l'adozione in cinquant'anni: normative, dati applicativi a confronto e prospettive di riforma', 4. *Minorigiustizia* 2017, p 130.

57 Pursuant to Art. 448 bis Italian Civil Code, offspring are excluded from the obligation to financially support parents only when parental responsibility has been expressly terminated by a court decision.

note, birth parents and not the adopting parents claim succession rights over the adoptee.[58]

Finally, the revocability of simple adoptions should be recalled. Although the occurrences are rare, the very possibility of revocability makes this type of adoption at least symbolically precarious compared to full adoption.

23. The consequences of the increase in simple adoptions on families of origin and on prospective adoptive parents should also be considered.

Birth families will increasingly suggest simple adoption as being a preferable solution to avoid the complete termination of the legal relationship that derives from full adoption. Similarly, they will complain, on appeal or in cassation, if the court did not explicitly address, in addition to the lack of sufficient parental skills, the harm that the child would suffer from maintaining contacts with his or her birth parents. On another note, families of origin could be affected by the limited rights conferred to them in simple adoption proceedings: indeed, in the procedure for simple adoption, parents are not party to the trial and their lack to consent to the adoption of the offspring prevents adoption only in the rare cases in which they still hold parental responsibility. On the contrary, in the proceeding for the assessment of adoptability, parents hold full procedural rights to ensure the right of the child to grow with them, i.e., the right to have a lawyer, to participate in all the investigations ordered by the court and to comment on their results, to read all documents included in the judicial files.

Also, it is easy to envisage that the number of prospective adoptive parents will decrease: in fact, if being a parent is complex and, albeit with different modalities and intensity, it is even more so to be adoptive parents as it involves the care and education of a child who experienced the trauma of abandonment, it will be extremely complicated to parent a child who maintains legal relations and contacts with birth parents who proved themselves to be unfit to bring up their offspring.

4. A Disenchanted Approach

24. The analysis conducted in this study shows how a human rights-based approach has been contributing to the improvement of children's adoption in Italy, challenging rigidities, and stereotyped approaches. In fact, this progressive effect was achieved following different paths.[59] First, Strasbourg case law promotes

58 Article 55 Adoption Act in governing the effects of simple adoption, refers to Art. 304 Civil Code, according to which 'The adoption does not give the adoptive parent any right of succession'.

59 Among the scholars who dealt specifically with the relationship between human rights and family law, see J. Herring & S. Choudhr, *European Human Rights and Family Law* (Oxford: Hart Publishing 2010); D. Coester-Waltjen, 'The impact of the European Convention on Human Rights and the European Court of Human Rights on European family law', in J. Scherpe (ed.), *European Family Law Volume I. The Impact of Institutions and Organisations on European Family Law* (Elgar 2021), pp 49-94.

an evolutionary interpretation of the law to respond to changing social demands.[60] Besides, its decisions raise the level of protection of human rights by promoting the circulation of fundamental rights and models of protection from one Member State to another.[61] Lastly, it ensures special protection for individuals belonging to vulnerable groups at risk of discrimination.[62]

25. Still, the risks of an enthusiastic and uncritical approach to Strasbourg case law cannot be disregarded. As argued in this article, the Court's tightening of the grounds for adoptability and its favour for simple adoption over full adoption questions the use of full adoption as best instrument to protect children who experienced serious neglect and risks creating ambiguous situations where the family of origin is unsuitable to raise the child but could interfere in the adoptive family's life.

26. But what are the reasons for this trend by the ECtHR? Actually, many factors appear to play a role

First, there are technical and structural reasons. Indeed, the ECtHR appears to be more inclined to protect the rights of adults than those of children. There are very few applications lodged by children complaining about the delay or lack of intervention by public authorities in cases of serious harm to them by their parents' actions or neglect[63] and few possibilities for the child whose parents apply to the Court to make their voice and interest heard.[64] On the contrary, to submit an application to European judges, and therefore to have a voice in the proceedings before them, are almost exclusively parents acting both on their behalf and their children's interest to complain about an illegitimate interference in their family

60 A good example is provided by the different reading of the best interests of the adopted child that led Italian courts and social workers to recognize that, sometimes, the interest of the child may require the preservation of some degree of openness in adoption, i.e., the maintenance of contacts with members of the family of origin after the adoption. See above para. 2.2.

61 For instance, the judgment *Odièvre* v. *France* (13 Feb. 2003, application n. 42326/98) easily predicted the conviction of Italy in *Godelli* v. *Italy* (25 Sep. 2012, application n. 33783/09) since, unlike France, the Italian legal system does not include tools to promote the right of adopted biological children of anonymous birth mothers to know their family and genetic origins. With judgment 278 of 2013 the Constitutional Court created a new model to promote the adult adoptee access to his or her origin, compliant with the ECHR. See above para. 2.1.

62 The ECtHR ruled on the rights of women in the family, on the equalization between children born outside and inside the marriage, on the rights to family life of homosexual couples. In this work, I argue that an open issue in Italian case law is the assessment of parental skills of migrant parents without any consideration for cultural specificities: see above para. 2.3.

63 A rare example of condemnation of a Member State for the delay with which social services provided for the removal of a group of siblings in a highly problematic family situation is *Z. and others* v. *United Kingdom* (10 May 2001, application n. 29392/95).

64 For a recent case recognizing the necessity to appoint a separate representative to protect the interests of the child in proceedings before the European Court in which parents and child are in potential conflict of interests see *A and B* v. *Croatia* (20 Jun. 2019, application n. 7144/15).

life.[65] This explains why the areas of ECtHR case law concern the rights of adult family members: parents who, despite being assessed as being completely and definitively unsuitable for taking care of their children, argue for the need to maintain a relationship with their child who is growing up in another family (see para. 3.1 above); the adult adoptee who asks to access the information about the identity of his or her biological mother (*supra* para. 2.1). Indeed, according to the Court, the implementation of the mutual right of the parent and child to respect for family life under Article 8 ECHR requires 'a real balance between the interests of the child and those of his or her birth family'.[66]

More generally, it should be considered that ruling in the light of fundamental principles enhances the justice of the concrete case but could legitimize the systematic violation of the substantive and procedural guarantees established by the law for the protection of children as a group. A good example is provided by the European Court's decisions on tightening the grounds for adoptability and favouring simple adoption over full adoption. In most of the concrete cases examined,[67] full adoption did not probably appear in the best interests of the child. However, the Court's decision acquired the value of a principle in Italian case law undermining well-established domestic principles and practices set to safeguard children at risks. Besides, there is an evident danger of widening the judicial discretion and diminishing legal certainty. In fact, the risks are those, well known, posed by the theories of legal interpretation based on the reference to principles as guiding criteria in the application of statues and other sub-constitutional texts.[68] Therefore, a 'poisoned gift',[69] whose antidote lies within critical awareness and disenchanted approach to the ECtHR case law.

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65 It appears worth mentioning that parents are allowed to act before the European Court in their children's name even when a conflict of interest with their children arise, as is the case where national courts identify and respond to allegations of domestic abuse: see *Covezzi and Morselli* v. *Italy*, cit.

66 In this sense, see most recently *Strand Lobben and others vs. Norway*, cit., para. 220: the ruling considers that the multiple and differentiated actions by the Norwegian authorities in support of the parenting of a mother whose child was later declared in a state of adoptability were insufficient.

67 See *A. I.* v. *Italy* and *D. M.* v. *Italy*, cited above.

68 The references are in Italy G. Zagrebelsky, *Diritto mite* (Torino: Einaudi 1990), e L. Ferrajoli & E. Vitale, *I diritti fondamentali. Un dibattito teorico* (Roma-Bari: Zanichelli 2015).

69 B. Randazzo, 'Interpretazione delle sentenze della corte europea dei diritti ai fini dell'esecuzione (giudiziaria) e interpretazione della sua giurisprudenza ai fini dell'applicazione della Conv. Edu', *Rivista online dell'AIC*, 2015(2), p 17, https://air.unimi.it/retrieve/handle/2434/375480/593923/Randazzo_InterpretazCorteEuropea_2_2015.pdf.