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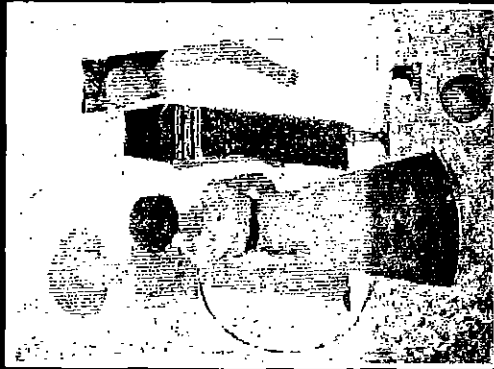
*P*rospettive di diritto comparato

# PARENTS AND CHILDREN IN A NARROWING WORLD

Issues on adoption

a cura di

Isabella Ferrari e Maria Donata Panforti



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Mucchi Editore

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## Italy dealing with orphanages' closing: make a virtue of necessity

ISABELLA FERRARI

SUMMARY: 1. *Adoptio naturam imitatur* - 2. The birth of orphanages: the wheel of Naples - 3. Adoption after the birth of the Italian Republic - 4. The Italian reforms - 5. Foster care - 6. The orphanages' closing - 7. Accommodation and support for minors at risk in the XXI century - 7.1. Residential communities - 7.2. Day-care communities - 8. Communities for adults - 9. After the orphanages' closing: reflections on the outcomes

### 1. *Adoptio naturam imitatur*

Throughout history, many adoption cases have taken place: the Roman Emperor Tiberius was adopted by Augustus, Nero by Claudius, not to mention the so-called "*affiliatio*", set up by Augustine of Hippo to permit property transfer within the holy order.

With the exclusion of Moses adopted by the Pharaoh's daughter, within the Old Testament, the Law of the Twelve Tables, the Codex Justinianus and the Middle Ages' various legal systems, adoption was mainly a tool for the transfer of assets, titles and surnames among and for the benefit of adults.

Minors' adoption, instead, was practiced in accordance with moral provisions and common sense, complying with the Latin brocard "*adoptio naturam imitatur*"; meaning that the basic rules set in nature should govern adoption. Thus the age gap between parents and the adopted child should resemble the one possible according to nature, besides love affairs between the adopted and the adopting parents were to be banned, and the primogeniture of the already existing child had to be respected. These few principles, established by customs, were strictly followed through out centuries, when the only form of adoption contemplated by the law was that of adults.

## 2. The birth of orphanages: the wheel of Naples

In the total absence of checks, controls and rules with regard to minors' adoption, the overall procedure was entrusted to the supervision of relatives and the community: after the biological parents' decease, children were taken care by the close environment around them, without special formalities.

The gradual move of people witnessed in Europe during the Middle Ages, from the countryside to urban cities, gave rise to a sudden increase in the number of abandoned children, together with the consistent growth in anonymity and suspicion among people.

In fact, whereas agricultural workers could take their newborns and infants in the fields, and by doing so could keep working after giving birth, industrial workers were compelled by the child-unfriendly factory environment to stay home nursing their babies. It goes without saying that women solely – in both environments – were undertaking the child rearing.

Another major issue for urban families was represented by the higher renting costs as opposed to the affordable ones in the countryside. This imbalance soon led families to shrink, in order to find easier and cheaper accommodation. Hence, large families, usually depended on the support and the assistance of its many members (especially in the event of births), were rapidly replaced by nuclear families: less members meant in fact less bonds, less constraints and minor expenses.

Even to entrust children to relatives or acquaintances before migrating into the city became more and more unlikely: the consignees in the countryside were no longer available to rear others children either because they also desired to relocate, or because they could not economically afford such a commitment. On the other hand, social relationships were feeble in urban centres as opposed to the countryside, thus it was arduous to place children at somebody else's place while working. Eventually, urban mothers had to take care of their own offspring in complete autonomy.

Because of the many issues above, parents started the practice of abandoning children after birth, usually placing them in front of churches for nuns to take care.

The wide spread of abandonments led in A.D. 787 to the establishment of the first *brephotropium* in Milan: an institute especially created for accommodating abandoned children. It was the starting point for a fundamental change in focus and politics: attention was devoted to minors, rather than to adults, as bearer of special and specific needs to be preserved and protected *erga omnes*.

Minors were obviously unable to protect themselves and to provide autonomously food, shelter and education. Hence, it was up to the political and religious powers to intervene, arranging the necessary supporting measures. Among the backing policies, new buildings were erected during the Middle Ages, in order to meet the specific and various requirements for abandoned minors: baby hatches, dorms, playgrounds, classes for providing education eventually made their appearance within the new constructions, creating a welcoming environment for the foundlings. The recurring element for all these new buildings was the big wheel at the entrance, allowing the anonymous and yet protected leaving of children.

The first documented cases of foundling wheels date back to the XII century: French hospitals initially placed baby hatches at their entrance, in order to facilitate the relinquishment and to protect minors from the street. In 1188 the wheel was introduced in Marseille, then in Aix en Provence, in Tolone and in several other French cities. Nevertheless, it was in Italy that the wheel was first recognised by the law, being officially ordered by the Pope Innocent III as a compulsory element in the Hospital of the Holy Spirit (near the Vatican City), in order to prevent infants from being killed by mothers unable to nourish them.

Alongside the religious nunneries and cloisters, lay institutions were soon to be founded for the same purpose: in 1318 the so-called Holy House of the Annunziata<sup>1</sup> was established by laymen in Naples, under the auspices of the King Robert of Anjou.

<sup>1</sup> M.T. LANNITTO, *La ruota della vergogna: la Casa Santa dell'Annunziata di Napoli e i figli della Madonna*, Napoli, Colonnese, 1999; G. DA MOLLIN, *I figli della Madonna: gli esposti all'Annunziata di Napoli (sec. XVII-XIX)*, Bari, Cacucci, 2001; M.G. GORNI, "Il problema degli «esposti» in Italia dal 1861 al 1900" in *Un problema di storia sociale: l'infanzia abbandonata in Italia nel secolo XIX* (Gorni-Pellegroni ed.), La Nuova Italia

Thanks to the widespread introduction of baby hatches and wheelchairs, but rather from anonymous institutions operating in the best interest of minors.

In the wake of the said French hospitals and the Italian religious and lay houses, many other institutions were soon founded across Europe, gradually leading to the creation of orphanages (for orphans) and *brephotrophium* (for abandoned children)<sup>2</sup>, and to the corresponding decrease in minors' deaths<sup>3</sup>.

*Brephotrophium* and orphanages were thus provided (either by the Church or by lay institutions) on a voluntary basis, with no public support or control over the entrusting, raising and education of minors. The custom was for abandoned minors to grow up in these institutions, and to leave them only as adults. No procedure for adopting minors from orphanages or *brephotrophiums* did exist, due to the general feeling of mistrust towards children of unknown origins. Only after World War II, with the crowding of institutions due to the increase in number of war orphans, the worldwide discovery – by means of media coverage – of the awful living conditions of minors in orphanages, and the increase in producing difficulties due to – amongst other factors – the delay of pregnancy by working women, led to a dramatic change in the field of adoption.

Eventually, the practice of adopting children in order to provide them with better chances gradually took place, leading to the concurrent emptying of orphanages, especially in the countries defeated after World War II.

Edirice, Firenze, 1974, pages 95-107. The House also hosted the wheel, inside which parents could place their children to be welcomed and raised.

<sup>2</sup> The *Pio Ospedale della Pietà* was founded in Venice in 1346, the *Ospedale degli Innocenti* in Florence in 1419 (set up by the Silk Guild with the task of forming abandoned children in a specific art); many more orphanages were established in France (la *Maison de La couche in Paris*), Spain and Germany, leading to a dramatic increase in the number of abandoned children across overall Europe.

<sup>3</sup> Notwithstanding the lexical division among orphans and abandoned minors, in reality all minors without parental support were hosted in the same structures.

### 3. Adoption after the birth of the Italian Republic

In the decades following World War II, the practice of adoption went through an essential change, turning from a procedure for the property transfer among adults to an instrument to amend the abandonment of minors. This was the final step in a centuries-long adjustment: the perspective moved from adults to minors involved in the adoptive procedure, and the law changed accordingly.

In fact, it soon became necessary to adapt existing laws in order to mirror the society; new rules for the adopting of minors were introduced alongside those already included in the civil code.

The Italian civil code 1942 contemplated the so-called "ordinary" or "consensual" adoption, applicable indifferently to minors and adults, under the sole condition of an agreement between the biological parents and the adopting ones. Consensual adoption did not interrupt the original lineage, and the adopted was allowed to maintain relationships with the original and the adopting family.

On the sideline, the Italian Parliament passed in 1967 the Law No. 431<sup>4</sup>, with the specific intent to provide adopted minors secure treatment and protection. The target of the new law was minors aged 0 to 8 (which were also adoptable by means of the still-existing consensual adoption), to be adopted by parents with an age gap with the minor less than 45 years. Once adopted in accordance with this law, minors became the legitimate offspring of the adopting parents, that is to say that they acquired the surname of the new family, losing definitively track of their origins as well as of their birth parents.

Adoption in accordance with the Law No. 431/1967 was so-called "special", to be distinguished from the surviving "ordinary" or "consensual" one. The coexistence of these two forms of adoption led to inevitable issues, becoming a two way path, each following different rules and preclusions and satisfying diverging needs: ordinary adoption soon became the remedy for transferring property for the benefit of adults, while special adoption was in the sole interest of minors.

<sup>4</sup> On the 1967 reform, see L. FADIGA, *L'adozione*, Il Mulino, Bologna, 1999, pages 11-12.

Yet, couples willing to adopt young children notwithstanding their mature age or other possible preclusions (they may have been nor married or not psychologically suitable for adopting) had the possibility of circumventing the law, applying for consensual adoption after agreeing with the birth parents, usually in exchange for monetary compensation. The result was soon child trafficking and widespread corruption in the whole system, affecting deeply the effectiveness of minors' protection.

As a matter of fact the creation of a specific law for the protection of minors, No. 431/1967, had led to the opposite result as that originally sought, due to the binary system described above. Once again the perspective in adopting policies was therefore overruled, since the centre of interest had turned back to adults and their wish to build a family, abandoning minors' need for safety, protection and transparency.

#### 4. The Italian reforms

In 1978 the so-called "*Legge Basaglia*"<sup>5</sup> declared the gradual closure of mental institutions, to be completed before the year 2000. Hence, people with mental disorders were to be treated at their private homes, with the sole exception of the most severe cases, placed within psychiatrist hospitals. In other words, persons unable to autonomously take care of themselves, were to become an integral part of their own family, even attending to their parental duties.

The inadequacy of the result in relation to minors led to many cases of loss of parental responsibility: parents exiting mental institutions were soon discovered to lack the necessary parental skills, thus were deprived of child custody by means of judicial orders. In proportion to the gradual emptying of mental institutions, orphanages consequently became crowded, with new children being welcomed after many juvenile court decisions terminating parental responsibility.

To improve living conditions and chances for a better future for the abandoned minors, in line with the Geneva Declaration of the rights of the Child (adopted by the League of Nations in 1924), the Univer-

<sup>5</sup> The Italian law No. 180/1978. See G. RUSSO, F. CABRELLI, "*Dismantling asylums: The Italian Job*" in *London Journal of Primary Care*, April 2009, Radcliffe, London; B. NORGIO, "*Care for mentally ill in Italy*" in *BMJ*, vol. 306, 12 June 1993, pages 1615-1616, *BMJ* 1993;306:1615.

sal Declaration of Human Rights (Paris 1948), the UN Declaration of the Rights of the Child (1959) and the declaration of the year 1979 as the International Year of the Child by the UN<sup>6</sup>, a new perspective took place even within the Italian Parliament, with the result that a modern law on adoption was eventually enacted: the law No. 184/1983. The said law was especially devoted to childcare and minors' protection within the delicate adoption procedure<sup>7</sup>.

After subsequent integrations and modifications, the 1983 law is still in force, providing all children (adopted in Italy or by Italian couples abroad) with the same rules<sup>8</sup>.

Primarily, the binomial between the two types of adoption previously contemplated by the 1967 law ("*ordinary*" or "*consensual*", and "*special*") has been definitely banned, leaving minors' adoption with a unique procedure and thus ending malpractices related to corruption and child trafficking, often affecting consensual adoptions.

Furthermore, minors always become the legitimate offspring of the adopting parents, that is to say that any relationship with the birth family is interrupted for good<sup>9</sup>, with an irrevocable provision<sup>10</sup>.

<sup>6</sup> It appears noteworthy the fact that whereas international conventions and treaties specifically deal with minors' protection, the European Convention on Human Rights covers the same topic only indirectly: in fact, Article 8 of the ECHR lays down the duty to respect private and family life, without any explicit reference to the life of the minor. Yet, the uniform interpretation of the ECHR, released by the sentences of the Court of Strasbourg, has steadily applied this article to minors as well, establishing the principle of their protection. See RUSSO R., STURIALE M., *L'affidamento dei minori nella prospettiva europea*, Giuffrè, Milano, 2013, page 30.

<sup>7</sup> On the introduction of the interest and the rights of the minor within the new Italian law on adoption and foster care, see P. STANZIONE, "*Adozione e capacità di discernimento*" in *Diritto alla famiglia e minori senza famiglia (Legge 28.3.2001 n. 149 riforma dell'adozione e dell'affidamento di minori)*, Cedam, Padova, 2005, page 118. The Author, while focusing on the new attention paid by the legislator to minors involved in the procedure, underlines that the law still contains an essential discrepancy between the protection of the rights of minors and of the rights of adults.

<sup>8</sup> Rules on inter country adoption were instead enacted later on, by means of law No. 149/2001.

<sup>9</sup> Even in the negative event of the adoption annulment, the child is not reassigned to his previous birth family, nor does he re-establishes any contact with the original family; the rupture within the kinship is in fact definitive.

<sup>10</sup> M. DOGIORRI, "*Adozione dei minori: presupposti oggettivi e soggettivi*" in *Diritto alla famiglia e minori senza famiglia (Legge 28.3.2001 n. 149 riforma dell'adozione*



New conditions were also introduced in 1983 on the side of the adopting parents and of the adopted minor; conditions further modified in 2001 by means of the Law No. 149. In particular, adopting parents have since then to pass several inquiries done by the social welfare and the juvenile court, in order to make sure they are reliable and suitable for their parental role; they have to respect new age-limits prescribed by the law (45 years of maximum difference with the child, that can be extended to 10 more years in case one only member of the couple is older or in case of adoption of siblings), and must provide health and education certificates to prove their ability to raise a minor both on the physical and the personal level, on top of the criminal certificates attesting they are not convicted, and disclosing their income accounts (even though no minimum income is prescribed for adopting).

Furthermore, under the 2001 Italian law – still in force –, the couple has to be either married for a minimum of three years or recently married with three years of previous cohabitation (duly proved)<sup>11</sup>. No single individuals are therefore permitted to adopt in Italy, except under special circumstances (adoption of a relative, of the spouse's child, of a disabled child or in case there is a strong relationship between the adult and the child, whose interruption could seriously damage the minor<sup>12</sup>). The adoption ban includes homosexual couples as well, given that – at the present date – they are not permitted marriage in Italy<sup>13</sup>.

*e dell'affidamento di minori*), Cedam, Padova, 2005, page 77: the status of the legitimate child – at the time of the reform – was getting closer to that of the natural born child, as a result of a profound change in the society (more open than ever before to the possibility of conceiving, giving birth and raising children out of wedlock). It must be added that the process of actualization has gone forward within the years 2001-2013, and is at the moment under adjournment at the legislative level.

<sup>11</sup> On the possibility of cohabitants to adopt, even if married for less than three years, see M. TRIMARCHI, "Adozione e famiglia di fatto" in *Quaderni di diritto civile*, Adozione, Giuffrè, Milano, 2004, pages 211-229. Applicants may prove the regularity of their relationship prior to marriage, by means of producing residential certificates (attesting the cohabitation), paid receipts for furniture, telephone, television, hearing bills, et cetera.

<sup>12</sup> On the so-called adoption under specific circumstances, see A. FINOCCHIARO, M. FINOCCHIARO, *Adozione e Affidamento dei minori. Commento alla nuova disciplina* (L. 28 marzo 2001, n. 149 e d.l. 24 aprile 2001, n. 150), Giuffrè, Milano, 2001, pages 135-145.

<sup>13</sup> The marriage of homosexual partners celebrated abroad is not recognized in Italy, due to the constitutional limit of the so-called "public order", used by the Parliament – and

On the other hand, the law No. 149/2001 has set new rules for the minors, whose abandonment has to be officially verified and recognised prior to adoption: a certificate of death or a renounce to parental duties on behalf of the birth parents has to be collected; the only alternative being the juvenile court's declaration of permanent abandonment in case of material and moral neglect by natural parents. These requirements are in line with those imposed by the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter Country Adoption, with its many bureaucratic requisites especially provided for the benefit of minors.

### 5. Foster care

The recent Italian reforms of the adoption law have introduced one more fundamental change in the system: the closure of orphanages, effective since December 31st, 2006.

The legislator's goal emerges from the initial prologue of the Law No. 149/2001, requiring that any adoptable minor has to be "spiritually

the courts of justice – to deny the registration of the marriage act within Italian registers. Nevertheless a new perspective is opening up, due to the autonomous decision of single courts. The Supreme Court of Cassation, First Section, has declared in the decision No. 4184 dated March 15th, 2012 that homosexual partners in a stable *de facto* relationship, even though not provided with the right to marry nor to register their foreigner marriage, can still refer to the court in order to gain protection in regard to their fundamental rights and to avoid discrimination as opposed to heterosexual couples. The Supreme Court even recommends couples, in the event of specific discrimination, to address courts in light of the reasonable principle and the due respect of the Constitution. See Decision No. 4184/2012. "I componenti della coppia omosessuale, conviventi in stabile relazione di fatto, se – secondo la legislazione italiana – non possono far valere né il diritto a contrarre matrimonio né il diritto alla trascrizione del matrimonio contratto all'estero, tuttavia [...] quali titolari del diritto alla "vita familiare" e nell'esercizio del diritto inviolabile di vivere liberamente una condizione di coppia e del diritto alla tutela giurisdizionale di specifiche situazioni, seguitamente alla tutela di altri diritti fondamentali, possono adire i giudici comuni per far valere, in presenza appunto di "specifiche situazioni", il diritto ad un trattamento omogeneo a quello assicurato dalla legge alla coppia coniugata e, in tale sede, eventualmente sollevare le conferenti eccezioni di illegittimità costituzionale delle disposizioni delle leggi vigenti [...], per assunta violazione delle pertinenti norme costituzionali e/o del principio di ragionevolezza". Thus, in the absence of parliamentary decisions on the topic, the judiciary power is taking over tasks and competences of the Parliament, clearing calling for a prompt legislative intervention.

and materially" abandoned, in lieu of "materially and spiritually" as previously stated: a tiny inversion, yet bearing profound changes.

To broach the spiritual abandonment from birth parents stresses that the capability of sustaining and maintaining a child is not essential for the preservation of parental responsibility, given that, in the event of parental impossibility, it can be externally entrusted without affecting the minor's formation and growth. What instead can not be assigned elsewhere is the spiritual nourishment, that constitutes a fundamental parental prerogative<sup>14</sup>.

Article 1 of the said Italian law recognises the right of the child to grow up and to be educated within the birth family, clearly stating that economic difficulties possibly faced by the birth parents can not frustrate these paramount rights of the child. In order to ensure any child the free enjoyment of the above fundamental rights, the State has the duty to arrange specific supporting measures<sup>15</sup>.

It follows that if the birth family is unable to provide for the spiritual growth of the minor, and by doing so is deeply affecting the minor's growth and personal stability, the right to grow up within the birth family becomes secondary to the right to grow up in a suitable environment; hence, only under such exceptional circumstances, the child is temporarily removed from his original setting.

Nevertheless, once parental problems are detected in a family, several attempts must be made to rebuild the family and recover its stability

<sup>14</sup> On the feeling of affection as a "leit motiv" within the 2001 Italian reform, see M. Docuorri, "Adozione dei minori: presupposti oggettivi e soggettivi" in *Diritto alla famiglia e minori senza famiglia (Legge 28.3.2001 n. 149 riforma dell'adozione e dell'affidamento di minori)*, Cedam, Padova, 2005, page 72 and following. The Author also underlines that poverty should never be the direct cause for the declaration of abandonment of the minor. Compare to A.C. Moro, "Non mitizziamo l'affido" in *Una nuova cultura dell'infanzia e dell'adolescenza*, P.F. Angeli, Milano, 2006, page 100; P. Avallone, L. Bellanova, B. De Filippis, P. Giannino, R. Gigantesco, A. Mascia, K. Mascia, R. Mea, C. Olivieri, G. Savarese, V. Starita, A. Zotti, *Adozione nazionale ed internazionale*, Cedam, Padova, 2011, pages 76-78.

<sup>15</sup> A. Finocchiaro, M. Finocchiaro, *Adozione e Affidamento dei minori. Commento alla nuova disciplina (l. 28 marzo 2001, n. 149 e d.l. 24 aprile 2001, n. 150)*, cited, pages 13-19; F. Milanese, "L'affidamento familiare" in *Manuale di diritto minorile*, Cedam, Padova, 2007, page 342.

before any judicial order on the removal of parental responsibility may be issued. In particular, in the event of economic struggles of the birth parents, local authorities can arrange various remedies: monetary supports (e.g. in the form of waivers for the school canteen or tax exemptions), psychological support by means of group therapy conducted by teams of social workers, psychologists and pedagogues. The common aim of the above professionals is to establish correct relationships within the birth family, providing them all with the competences related to their natural tasks and banning those role exchanges, frequently spotted by sensible minors with irresponsible parents.

In light of the various possible scenarios and the different levels of danger possible for minors involved in each case, the professionals' intervention has to be attuned on a case by case basis.

The less alarming situations can be supervised by means of weekly meetings with the family members and the professionals, in order to follow educational paths specifically designed for the case.

Instead, in the event the family requires more incisive support to retrieve its functionality, its offspring may be placed in part or full-time foster care: in part-time foster care, minors spend each afternoon together with a host family, doing homework, receiving daily meals as well as any other contribution the host family may provide for (books, clothes, sports, medical checks, et cetera), with the necessary approval of the birth family. Part-time foster care always presumes the agreement of the birth family, intending to accept external help to go back on track.

Full-time foster care, instead, is mainly ordered by the juvenile court (even though it can be the result of an agreement for the benefit of the child, with the consensus of the birth parents). The judiciary sets the remedy's limits in time and scopes, and defines the responsibilities of each subject involved in the proceeding. In the most serious cases, the court may even decide to temporarily suspend parental responsibilities until further decision, in order to safeguard the offspring, which in the meantime is subject to the responsibility of the court itself or of a third person appointed by the court.

Even if foster care was introduced in Italy relatively early (in 1983), it came into actual practice only after the 2001 reform, due to the fact that the Law No. 149/2001 recognised adoption as *extrema ratio*: thus ev-

ery possible alternative solution had to be attempted prior to adoption in order to preserve and ensure minors their birth origins. Such provision is in line with the 1989 New York Convention on the Rights of the Child, expressly stating in Article 9 that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence".

Even though foster care already existed within the Italian frame, the 2001 legislator introduced a peculiar novelty, that is the reference to the economical background of the foster family, which can not be much wealthier than the original family, in order to avoid traumas to the minor upon re-entry in his own birth family.<sup>16</sup>

#### 6. *The orphanages' closing*

Among the various significant improvements in the field of minors' protection in adoption, the 2001 Italian legislator included the closure of all existing orphanages. The decision was motivated on the grounds that minors should be able to live and grow up in contexts as similar as possible to those of real families. Thus, huge institutions did not represent any longer the optimal solution for orphans nor abandoned children, being preferable to find new domestic allocations for the growth of such minors.

<sup>16</sup> A. SIMONATI, "Riflessioni sui profili di costituzionalità della legge n. 149/2001" in *Diritto alla famiglia e minori senza famiglia (Legge 28.3.2001 n. 149 riforma dell'adozione e dell'affidamento di minori)*, Cedam, Padova, 2005, pages 54-57. The Author questions upon the constitutional legitimacy of such a provision, given that it requires minors coming from families in hardship to be placed in foster care in families experiencing similar economic difficulties. At the end, a minor coming from a struggling family dealing with struggles (which have caused the foster care placement), can only be assigned to a similar context that may resemble the same difficult situation. But if this is the case, then the equality principle under the Italian Constitution is violated, given that children are provided with different options in regard to their origins.

Even though these premises were supported by abundant medical literature<sup>17</sup>, arresting the detrimental impact that institutionalisation may have on minors, the sudden decision to close Italian orphanages imposed stringent schedules on all bureaucratic levels. In the short time of five years, orphanages were to be closed for good and children moved elsewhere; that is to say that soon new rules had to be implemented.

On one hand, local authorities had to complete the closing process, by means of enacting regulations for the gradual movement of minors, the subsequent termination of all employees' contracts, the placement of existing instruments and furniture, as well as the new destination of orphanages buildings.

On the other hand, suitable alternatives to allocate minors had to be established at government level, then introduced locally and eventually approved after a double check on the national and the local level. It is obvious that this phase has been particularly complicated, due to the need of assuring minors security and safety in each and every level of control, avoiding speculation and corruption.

Two legal dispositions have therefore been enacted: the Law No. 328/2000, fixing the boundaries for an integrate system of social intervention and services, and the Ministry Decree No. 308/2001, establishing the minimum requisites for authorising the exercise of the said interventions and services. These legal provisions set the frame for the new allocating structures, meant to replace the closing orphanages: residential or day-care communities, to be distinguished in regard either to the urgency and the kind of services offered, or the age of the guests.

The common element for all communities and centres described *infra*, is the care and support activity provided for the benefit of minors, both on practical terms as well as on the psychological and relational level; such care is offered by professionals and volunteers, under the supervision of social workers and the Juvenile Courts.

<sup>17</sup> See E. BARTHOLER, "Permanency Is Not Enough: Children Need the Nurturing Parents Found in International Adoption", in 55 *New York Law School Rev.*, New York 2010-2011, pages 781-788; E. BARTHOLER, "The International Adoption Cliff: Do Child Human Rights Matter?" in *The intercountry adoption debate: dialogues across disciplines* (Ballard et al., eds.), Newcastle upon Tyne, UK, Cambridge Scholars Publishing expected 2014, page 3: "institutions that are so destructive to children's life prospects".

The inner organisation within these newly established structures attempts to facilitate personal relationships among the guests, as well as with the professional workers, and is specifically destined to reestablish the relationship among children and their birth families, if not prohibited for security reasons.

The assumption is that teaching minors how to inter-relate within a non-familiar environment, can encourage them to recover a healthy family relationship. This is especially true in the event of aggressive minors, that often turn violent and hostile as a reaction to the difficulties previously suffered at home. Exercises and measures addressed to the special and specific needs of each guest, may encourage these minors to open up to social workers and thus work productively with them in order to promptly gain full recovery and to facilitate the founding of a new kinship with their own birth family, based on a healthier and more trustworthy relationship than before. Only if these goals are fully reached within the time envisaged in the judicial order, can the family be reunited; if however the minor and the parents do not solve their issues, not even within the possible time extension granted, they must go their separate ways to ensure the least damage for the minor.

Even though the said Italian reforms, introducing the residential structures that will be analysed more in detail *infra*, have already come into force, the path towards an authentic change in the system of minors' protection is still long and arduous.

In fact, not only the changes within the law are still relatively new, but also the current economic crisis has reduced charity funding and has thus slowed down the opening of subsidiary communities.

### 7. Accommodation and support for minors at risk in the XXI century

The above mentioned Italian reforms, taken in light of the international paramount criteria for minors' protection, instituted a new set of communities for the care of orphans, minors both abandoned and at risk.

The said communities are analysed in detail in the following paragraphs.

### 7.1 Residential communities

Among residential communities, an important role is played by the so-called "case-famiglia" and "group-families".

These family-like communities were established already in the '70s (of the XX century) to support disabled persons or those affected by HIV, and lacking domestic help. They were characterised by a small and familiar environment, facilitating interchange between the guests and the employees, and opening up productive working sessions.

The 2001 Italian legislator made use of this kind of structure, considering it the appropriate solution for the best treatment of minors encountering difficulties.

A married couple is always present in *case-famiglia*, whereas in the *group-family* the two adult supervisors (preferably heterosexual) are not married to each other, but still mirroring parental roles. In both cases, adults working in the community must have experience in the field of support to minors in difficulty and are obliged to live in the residential structure.

The *case-famiglia* can host up to three minors, while the *group-family* can welcome six children, from the age of six to that of eighteen (or older in case of need, e.g. to complete the school education). Each and every minor in the community is provided upon entrance with a specific project, jointly elaborated by the social welfare together with psychologists, pedagogues and the directors of the structure, in order to ensure the best treatment in accordance with his/her specific needs and rights. These communities resemble foster care families, with the peculiarity that they are more closely followed by specialists in minors' treatment, and thus are warmly recommended in the event of problematic minors, that could endanger themselves as well as other children.

For minors close to the age of majority (eighteen in Italy), another type of allocation in residential communities is possible under the current law: the placement in "apartment groups". This solution is preferable in the event of minors at risk, lacking parental support and affected by multiple problems (e.g. drug or alcohol addicted, victims of abuses, violent persons), whose placement in foster care families, *case-famiglia* or *group-families* could endanger other people.

*Apartment groups* are constantly open, day and night, 365 days a year; they can run a gender division, hosting only male or female adolescents to facilitate that the educational work is free from sexual interferences or disputes. Guests are free to leave the apartment to attend school or work, as well as to practice sport and enjoy their leisure time; they attend to their own needs in autonomy, even though under the constant check of educators and pedagogues.

The overarching goal for *apartment groups* is to provide minors with the necessary tools they will soon need, having to leave the community after becoming of age (or slightly older, if necessary to complete an already started educational path).

In case of urgency, when the juvenile judge, the social worker or a police officer believes that the minor is in danger in his own original family, the Italian law provides for the possible urgent allocation within a so-called centre for immediate welcome. In such a structure, six to eight minors between the age of 13 and 17, can be hosted for no longer than six months, which is the time presumed necessary and sufficient for the social workers to find a more stable allocation for the child within the other existing types of communities.

### 7.2 Day-care communities

Support and sustain to families in difficulty may also be offered by means of day-care communities, where minors are welcomed after school in order to eat lunch, do their homework, practice sport and socialise. The Italian legal order provides for several types of these structures, as described *infra*.

*Day-centres for minors* are destined to a maximum of fifteen minors from the age of six until majority, and are usually open five days a week for a minimum of five hours per day, all year around.

The so-called *open-centres* are especially devoted to minors at risk (due to their integration issues), can be accessed either on voluntary basis or on recommendation by the social workers, and work only during the school year term.

In the end, the *aggregational youth centres* provide support to people already of age coming from problematic families or contexts, until they

tum 25. Such centres ensure listening points free from any charge, with access on a voluntary basis, in order to help their guests correct character problems and overcome relational issues.

The above described communities constitute a mediation between the need for protecting minors and the right of these to live in their original birth families, offering an alleviate type of foster care, that may even be referred to as part-time foster care. This argues for the safeguard of the superior interest of the child, internationally recognised by the VI Principle of the 1959 United Nations' Declaration of the Rights of the Child ("The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable"), as well as by the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption ("Article 4: An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin: a) have established that the child is adoptable; b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests...").

Due to the rather recent introduction of these communities, their effective impact on the recovery of minors at risk has still not been fully evaluated. Yet, the growth in number of spontaneous placements in day-care communities (especially increased after the 2008 economic crisis) shows that the final beneficiaries – minors – appreciate the services offered them within these centres.

It must be highlighted the actual need for reforms in collateral sectors, such as that of education and gender equality, which are essential to the complete achievement of minors' protection.

First of all gender equality has to be improved by means of new rules on parental leave (on the wake of the German "Elternzeit", accord-

ed to the father or the mother indifferently)<sup>18</sup>, enabling fathers to give mothers concrete and effective help in domestic care, and by doing so to increase the quality of child rearing.

Subsequently it is reasonable (also in economic terms) to prolong the schooling schedule, on both a day and year basis.

In fact, in light of the weather trends and the frequent heat waves during summer afternoons, schools in Italy are usually open only until lunch time and classes are suspended from the beginning of June till mid September. Over these months the actual conditions for families at risk deteriorate substantially, for the complete abandonment of minors to themselves. It appears therefore obvious the need for a prompt reform within the schooling system, that may prolong the school-term and by doing so relieve the pressure on parents.

In closing, another type of day-care community is the so-called *centres for job socialisation*, destined for people from 15 to 25 years old, with serious difficulties in acquiring job competences and relating to others. These centres are open on working days, seven hours per day, with the specific task of developing personal capacities to enter the working world. They can host no more than 12 persons, from a minimum of six months to a maximum of three years. Guests are trained to discover and build their own personal career, to practice a job and communicate with employers and clients.

All in all, day-care communities represent a useful and convenient tool for increasing support and help to minors and families in difficulties (on economic terms as well as in regard to domestic intercourses) without intervening in actual relationships.

The offspring is not separated from the original birth family, but rather assisted along the path of building healthier family dynamics.

### 8. *Communities for adults*

The communities described above differ substantially from those especially envisaged to host adults, alone or together with minors: possible

<sup>18</sup> In accordance to the actual law on parental leave (Law Decree No. 151/2001), Italian fathers can take time off from work only in the event that the mother is subject to specific conditions, which do not let her benefit of the maternity leave.

guests are either persons coming from a previous status of abandonment during childhood or unmarried mothers.

The so-called "*autonomous domiciles*" are for persons aged 18 to 22, previously hosted in other residential communities due to their difficult family background. When these persons become of age (or slightly older in the event of a postponement granted for educational reasons), they must leave minors' communities even though they lack other possible accommodations. The *autonomous domiciles* work as a buffer for the initial span of years of autonomy, to avoid both the trauma from abandonment and the possible danger deriving from the total absence of an alternative residence.

These structures are strictly separated on a gender-base (to avoid the creation of families among the guests and the possible outbreak of conflicts, rejections or similar situations), can host a maximum of six persons and are supervised by external professionals on a non-regular basis. They offer the maximum level of autonomy among all residential communities, given that their guests are strictly on a voluntary basis<sup>19</sup> and, being already of age, are accountable and responsible for themselves.

In closing, one more type of structure for adults exists in the Italian frame, the community for mothers and children: these communities are especially established for abandoned mothers together with their new borns or toddlers, in the event they are incapable of providing shelter, food and education to their own children. The allocation within these structures may be voluntary (in case of need) or prescribed by social workers (in case of ascertained danger for the mother or the child).

Upon entrance, professional workers develop individual projects for each and every mother, in order to fix the boundaries for their intervention within the mother-child relationship, and to establish aims and objectives to be reached in a given time. The purpose of these communities is in fact not only to support, help and protect mothers and children, but also to assist young mothers in their path towards independence, in order to become fully autonomous.

These communities are open all year round, day and night, and offer the assistance of educators, especially trained in minors' support.

<sup>19</sup> In fact, at the age of majority all persons can freely decide to leave the community, to go back to the birth-family (provided that there are no restrictive measures) or to start a new life alone outside the community.

### 9. After the orphanages' closing: reflections on the outcomes

The Italian solution described above, distinguishing assistance, support and intervention with regard to the various needs of the minors involved, appears to be the best viable one for children requiring temporary removal from their birth family.

In fact, within the said communities, not only are children provided with special treatments designed on a case by case basis, therefore very accurate and attentive to their special requirements or to the needs of their birth families, but they are also together with minors facing similar difficulties. This last aspect can be particularly important, given that statistics show that very often children coming from backgrounds differing from the average ones are isolated and confined by their schoolmates<sup>20</sup>. To place together minors undergoing similar problematic situations and coming from alike backgrounds, may help preventing bullying or segregation, as well as embarrassment for those involved. Thus the recover of these problematic minors may be more effective and rapid.

Moreover, understanding that other minors are facing comparable struggles (e.g. the birth family is subject to restriction within its parental responsibility due to drug, alcohol, prostitution, etc. issues) may work for the better comprehension of the family's difficulties, and for the establishment of the so-called "empathy reflex" among all family members<sup>21</sup>.

Yet it appears fundamental to underline that the Italian reforms have considered communities apt only for minors over the age of six years. Younger children can only be fostered by real families, producing

<sup>20</sup> On the need for integration at school, see U. GALINBERTI, "E' in classe il primo motore dell'integrazione" in *La Repubblica*, 8 settembre 2007. See also on bullying and isolation at school, A. FONZI, *Il gioco crudele. Studi e ricerche sui correlati psicologici del bullismo*, Giunti Editore, Firenze, 1999; D. OLWAUS, *Bullismo a scuola. Ragazzi oppressi, ragazzi che opprimono*, Giunti Editore, Firenze, 2001.

<sup>21</sup> The empathy reflex was first analysed by the behaviorist John M. Gottman, executive director of the Relationship Research Institute in Seattle (see D. COURT, "Making Relationships Work" in *Harvard Business Review*, December 2007; J.M. GOTTMAN, N. SILVER, *The Seven Principles For Making Marriage Work*, Three Rivers Press, New York, 1999); it is also discussed in J. MEDINA, *Brain rules for baby*, Pear Press, Seattle, 2010, pages 82-85, who affirms that the active practice of empathy (as a practice for all parties involved in a dispute) helps preventing or solving family's conflicts.

less negative impact on the child development<sup>22</sup>, as attested by medical literature<sup>23</sup>.

In light of the human protection approach (held up on both the international and domestic stage) and the specific need for superior care towards minors, the law provides for solutions considered optimal in the vast majority of cases, yet adaptable to actual specific requirements by means of a judiciary order. Thus, the closure of orphanages, due to their frequent negative impact on children's development (both physical and psychological) and formation, and the gradual introduction of various remedies, differentiated in regard to minors' age, character and possible existence of relatives.

The initial evaluations of the above Italian reforms are definitely positive, in light of the decrease in number of parental responsibility termination orders since their entry into force<sup>24</sup>. Yet, it is essential that the legislator keeps improving on the minors' sector and its side areas, that is to say the educational, gender equality and labor sectors.

Only structural reforms, coordinated for the common goal of modernising the law and the society, may generate effective protection for minors.

<sup>22</sup> On the ratio of the actual provision, forbidding minors under six inside communities, and its constitutional lineage, see A. SMOSNATI, "Riflessioni sui profili di costituzionalità della legge n. 149/2001" in *Diritto alla famiglia e minori senza famiglia (Legge 28.3.2001 n. 149 riforma dell'adozione e dell'affidamento di minori)*, cited, page 50. The Author states that the principle of equality stated by Article 2 of the Italian Constitution shall apply in relation to minors, meaning that abandoned minors should get the same treatment as those in families. It must be noted that under extraordinary circumstances, even children under the age of six can reside in *case-famiglia*, given that their placement there is only temporary for the time necessary to find a suitable foster family.

<sup>23</sup> According to the Research project Daphne Programme in collaboration with WHO regional Office for Europe and the University of Birmingham UK, which has mapped the number and characteristics of children under three in institutions across Europe at risk of harm, "Children raised in orphanages have an IQ 20 points lower than their peers in foster care, according to a meta-analysis of 75 studies (more than 3,800 children in 19 countries)" (available at <http://www.childcare.info/12602/>) and within the material of the Congressional Coalition on Adoption Institute). See also J. Williamson, A. Greenberg, Families, not Orphanages, Better Care Network Working Paper, September 2010.

<sup>24</sup> Available at <http://www.istat.it/it/>.