Pursuing the Best Interest of Children in Non-Traditional Families

A Comparative Overview

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Abstract

The need to build a legal paradigm corresponding to the current evolution of society is one of the most important challenges that family lawyers are facing in the last years. In this regard, this paper illustrates the new Italian, French, and Irish reforms aimed at pursuing the best interest of the child within non-traditional families.

Keywords: best interest of the child, equality, non-traditional families, new bills, comparative analysis.

A Introduction: Can General Principles Build a Legal Status for Children Belonging to Non-Traditional Families?

In the last years, many European systems are dealing with the legal consequences relating to the fact that family is not a crystallized concept, but it follows social and habits evolutions. In countries where several non-traditional families do not find legal recognition, like Italy and Ireland, this may cause a lack of protection of parent–children relationships, which are central to a child's life. In fact, rights of parents and children are inevitably linked and the lack of protection for non-traditional families often does not ensure child's personal and material welfare.

This is in contrast with the UN Convention on the Rights of the Child, which states that children should not be discriminated against due to the status of their parents' relationship (Article 2 § 2) and that the best interest of the child principle should have a paramount consideration in any decisions affecting children.[1]

The formula 'best interest of the child' is an abstract concept, which is subject to several interpretations according to the concrete context, being linked to the evolution of common sense.[2] For example, as far as non-traditional families' rights are concerned, it is often applied in order to give a legal relevance to con-

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1 Article 3 of the Convention on the Rights of the Child, Rome – 20 November 1989; Article 24 EU Charter of Fundamental Rights, Nice – 7 December 2000.

2 *See* K. Boele-Woelki *et al.* (Eds.), *Principles of European Family Law regarding Parental Responsibilities*, Intersentia 2007.

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crete circumstances that develop in the shape of law. This is true especially where rights are claimed before the European Court of Human Rights on the basis of the principle of non-discrimination (Article 14 of the European Convention on Human Rights)[3] as well as of the right to protect family life (Article 8 ECHR).[4]

In this regard, several European systems introduced new reforms aimed at empowering children's protection within new family models. Three of these cases are discussed in this paper: the enacted Italian reform on filiation and two French and Irish bills not yet approved.

The choice to focus the analysis on the debates which developed in Italy, France, and Ireland is due to two main reasons. Firstly, each system covers a different position towards the legal recognition of non-traditional family models.[5] This gives the opportunity to identify the need to draft a legal status for all children as a distinguished issue in respect to the debates on the recognition of adults' relationships. Secondly, the three systems offer different solutions to grant the best interest of the child in new family models. This allows the selection of pros and cons from each of the models in a wider perspective.

For example, Italy enacted new reforms with the recent Acts n. 219/2012 and 154/2013 which established a general principle of equality between children born in wedlock and children born out of wedlock. The next paragraph illustrates how these provisions are not sufficient to cover the lack of protection for children who are not biologically linked to the family in which they are growing up (*e.g.* LGBTI families).[6] In particular, the analysis describes the manner in which case law often covers such a legislative gap by regulating issues arising within non-protected family relationships through the application of the internationally recognized principle of the best interest of the child.

In the same perspective, the French *Proposition de Loi sur l'Autorité parentale et intérêt de l'enfant* is analysed, which considers the introduction of a new legal tool called *mandat d'éducation quotidienne*, the solution to give relevance to the social parent. The efforts to solve issues emerging from non-traditional families, where the parenting desire could also be reached through adoption, artificial insemination, and surrogacy are discussed. In fact, the access to these legal tools swings between permissions and prohibitions even in the legal systems where same-sex marriages have recently been legally recognized (like France and the UK).

3 *See*, *ex multis*, G. Ifezue & M. Rajabli, 'Protecting the Interests of the Child', *Cambridge Journal of International Comparative Law*, 2013, pp. 77 *et seq*.; U. Kilkelly, 'Children Rights: A European Perspective', *Judicial Studies Institute Journal*, 2004, pp. 68 *et seq*.

4 *See H. v. Finland*, ECHR (2014), Applic. No. 37359/09.

5 In fact, France regulates the gender neutral marriage, the gender neutral PACS, and the *concubinage*; Ireland codifies the heterosexual marriage, the cohabitation and the same-sex partnerships; the Italian civil code includes only the heterosexual marriage.

6 A specific analysis on rainbow families has been presented by the Author at the Rights on the Move Conference, Trento 16-17 October 2014: D. Amram, 'Parent–Child Relationships beyond Blood Ties: Current Debates to Grant Full Equality Between Children', *in* C. Casonato & A. Schuster (Eds.), *Rights on the Move – Rainbow Families in Europe*, Università degli studi di Trento 2014, pp. 241 *et seq*.

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The Irish General Scheme of a Children and Family Relationships Bill is an example of a reform aiming at recognizing and protecting children living in several non-traditional families (*i.e.* unmarried couples, same-sex families, stepfamilies, one-parent families) through the regulation of parental responsibilities beyond the blood ties.

From this perspective, the comparative analysis shows the necessity to design a new model for children's protection. The model should be based upon the principles stated in the Convention on the Rights of the Child, by which the child should not be discriminated against because of their parents' characteristics.[7] In particular, from the child's viewpoint, living in a non-regulated family should not be different from living in a traditional one.

B The Italian Reform on 'Filiation without Adjectives'

Italy has recently enacted an important reform[8] on filiation which established a status for all children, removing the differences included in the civil code concerning the former status of *figli naturali* (biological children born out of wedlock) and *figli legittimi* (children born during the marriage – legitimate children).[9] In the previous system, in fact, different procedures and different rules were applied to establish parental authority (today parental responsibility) and even different courts were asked to establish guardianship, child custody, and visitation rights. For this reason, the reform introduced by Acts No. 219/2012 and 154/2013 has been called the act on 'filiation without adjectives', since children should have the same rights regardless of their parents relationship.

However, although the intent was to grant equal treatment to all children in parent–child relationships, this reform did not consider it necessary to give relevance to social parentage. Therefore certain parent–child relationships remain excluded from equal treatment. For example, children of same-sex parents can only benefit from the reform in respect to their relationship with the biological parent, since the social parent continues to be excluded from the child's interests and relations as stated in the civil code. Despite the fact that same-sex couples' rights are recognized just as *de facto* couples, since no regulation is provided, the Italian courts often apply the principles of non-discrimination and best interest of the child in order to solve the cases involving same-sex families. For example, since 2006 lower courts have stated that sexual orientation is not relevant in the assessment of parent's suitability to take care and educate his/her biological child. From this perspective, the courts have often considered[10] the homophobic behav-

7 Article 2 of the Convention on the Rights of the Child, Rome – 20 November 1989.

8 Act 10 December 2012, n. 219 'Disposizioni in materia di riconoscimento dei figli naturali' and Act 28 December 2013, n. 154 'Revisione delle disposizioni vigenti in materia di filiazione, a norma dell' articolo 2 della legge 10 dicembre 2012, n. 219.

9 *Ex multis*, P. Schlesinger, 'Il D.lgs 154 del 2013 completa la riforma della filiazione', *Famiglia e diritto*, 2014, p. 443.

10 *Ex multis*, Tribunale of Genoa, 30 October 2013, in <www.articolo29.it>; Tribunale of Bologna, 7 July 2008, in *Giurisprudenza Italiana*, 2009, p. 1164.

iour of a parent towards the other parent, who started a homosexual relationship after the marriage, unacceptable. In 2013, the Italian Supreme Court confirmed this approach, stating that "the mere prejudice that to live together with a same-sex couple is harmful for the correct development of the child" reverses the burden of the proof.[11] Indeed, it is up to the claimant to prove that the other parent's family environment is in contrast with the best interest of the child to exclude the joint custody. In the same year, three different courts[12] considered a stable same-sex couple suitable for third party temporary custody in cases where there was a temporary abandonment of a child.

The lack of a specific prohibition in Italian law and the legal relevance of the concept of 'legame familiare' (*i.e.* family relationship) – which includes same-sex couples – are the main reasons used by the *Tribunale per i Minorenni di Palermo* to grant the same-sex couple's third party custody request.[13] These principles stated by the mentioned case law contributed to the granting of a step-parent adoption to the homosexual partner of the biological parent of a child as well. Last summer, the Tribunale per i Minorenni di Roma[14] observed that in particular circumstances, even if the requirements stated by article 1 of the Italian Adoptions Act[15] (*e.g.* abandonment) are not fulfilled, the article 44 of the same act allows single persons to adopt a minor. The *ratio* developed from the need to consolidate relationships between the child and his/her parent's relatives or his/her caregivers. This is possible only if the adoption by a relative, spouse (or partner) of the child responds to the child's best interest, as both article 44 and 57 expressly state. This new interpretation of the Italian law gave legal relevance to an existing *de facto* relationship between the claimant and the child. In fact, the latter is already growing up and living with her mother's same-sex partner, whom she calls 'mum'. Unfortunately, the fact that the case law fills the legislative gap determining what is the best interest of a particular child in a given context by considering the supranational and international legal framework is not sufficient to grant full equality to all children. Many aspects of the daily routine still need to be regulated for children living together with their social parents.

As far as same-sex families are concerned, a bill which will introduce same-sex partnerships and allow step-parent adoption has been introduced in the Italian Senate.[16] However, at this stage the content of the proposal does not seem to design a legal status for children in LGBTI families nor ensures their protection, it will be another wasted opportunity towards children equality.

11 Cass. 11 January 2013, n. 601, in *Famiglia e diritto*, p. 570.

12 Tribunale per i Minorenni of Palermo, 4 December 2013; Tribunale per i Minorenni of Bologna, 31 October 2013; Tribunale of Parma, 3 July 2013 available at <www.articolo29.it>.

13 The decision recalls the supranational legal framework, such as the European Charter on Fundamental Rights and the case *Schalk e Kopf v. Austria*, ECHR (2010), No. 30141/04. In fact, issues emerging from social and habits changes need to be evaluated not only in light of the national statutory law but also considering the Constitutional and supranational legal framework.

14 Tribunale per i Minorenni di Roma, 30 July 2014, available at <www.articolo29.it>.

15 Italian Adoptions Act, n. 184, 'Diritto del minore ad una famiglia', 4 May 1983.

16 Atto Senato, n. 1211, 'Modifiche al codice civile in material di disciplina delle unioni civili e dei patti di convivenza', <www.senato.it/leg/17/BGT/Schede/Ddliter/43663.htm>.

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C The French Proposition de Loi sur l'Autorité Parentale et Intérêt de l'Enfant

The French approach on the necessity to adapt the existing law to current society brought the *Sénat* to amend the bill on the *Autorité parentale et intérêt de l'enfant*.[17] This leads to a general reform involving many aspects of the civil code including the introduction of a new general legal tool called *mandat d'éducation quotidienne*. According to the proposed new Article 373-2-1-1 of the French civil code, in fact, the biological parent could agree to authorize a third person to take daily decisions for his/her child in the child's best interest.[18]

The general reference to a 'third party' as the addressee of the *mandat* has the advantage of flexibility because no one is legally excluded, but at the same time, many disadvantages can be identified when the third party is the social parent of the child.

In particular, as remarked by scholars,[19] in case of separation/divorce of a same-sex couple, the biological parent will have a stronger position than the other parent, who is still a 'third party' even if he/she plays an effective parent role in the child's life. In fact, according to the bill the step-parent's legal relevance will be subject to the biological parent's consent. Moreover his/her rights and responsibilities will always be under judgment of courts, since the proposed asset endorses their discretional power in the evaluation of the third parties role in the child's life. These negative effects are due to the refusal to recognize the filiation link between the child and the non-biological parent. This leads to a reverse burden of proof in respect to heterosexual couples: the social parent, like other third parties, should prove that maintaining a relationship and contact with the child corresponds to the child's best interest, while if his/her role of parent would be recognized this would be presumed, as it is presumed for the biological parent.

The debate on this new bill shows that the French family law system is facing an *impasse* due to the fact that same-sex couples can get married and adopt,[20] but they cannot get access to medically assisted reproduction and surrogacy, which

17 <www.senat.fr/dossier-legislatif/ppl13-664.html>.

18 Art. 373-2-1-1 "Sans préjudice de l'article 372-2, le parent peut, avec l'accord de l'autre parent, donner un mandat d'éducation quotidienne à son concubin, partenaire lié par un pacte civil de solidarité ou conjoint avec lequel il réside de façon stable pour chacun des enfants vivant avec le couple. Le mandat, rédigé par acte sous seing privé ou en la forme authentique, permet au concubin, partenaire ou conjoint d'accomplir les actes usuels de l'autorité parentale pour la durée de la vie commune.

Le mandat peut être révoqué à tout moment par le mandant. Il prend fin de plein droit en cas de rupture de la vie commune, de décès du mandant ou du mandataire ou de renonciation de ce dernier à son mandat".

19 E. Mulon, 'L'article 371-4 du Code civil : un dispositif utile, mais insuffisant en cas de séparation d'une couple homosexuel', *Gazette du Palais*, 16 September 2014, No. 259, pp. 10 *et seq*.

20 Loi No. 2013-404, *Loi ouvrant le mariage aux couples de personnes de même sexe*, 17 May 2013.

are limited to people suffering medical impediments.[21] This is confirmed by the Conseil Constitutionnel, which stated that allowing same-sex couples to adopt does not mean the proclamation of a 'right to a child'.[22] The new bill on the *Autorité parentale et intérêt de l'enfant* reflects and endorses this approach. The lack of provisions on the role of the biological parent's partner/spouse in respect to a child born through medical assisted reproduction abroad could be contrary to the child's best interest.

In this regard, the recent ECHR judgements *Mennesson v. France*[23] and *Labassee v. France*[24] concerning the refusal to grant the filiation link between children born in the U.S. through surrogacy and the intended parents (husband and wife) constitutes an important milestone for the development of the debate. In both cases, the Court declared a violation to the child's right to respect for private life (but not a violation of the intended parents and child's right to respect for family life) under Article 8 of the Convention. In fact, according to the decisions, the balance between the public interest of France in prohibiting surrogacy agreements and the private interest of the claimants to have children should be considered in light of the best interest of the child, which corresponds to giving legal relevance to the *de facto* circumstances.

The French debate suggests that regulating adults' relationships by introducing a gender neutral marriage is not sufficient to grant the best interest of the child in new family contexts, if the system does not give relevance to the concrete relationship between the child and his/her non-biological parent.

D The Irish General Scheme of a Children and Family Relationship Bill

In the last years, Ireland has been implementing important reforms to pursue the best interest of the child in contemporary society. In 2012, a referendum validated the new Article 42A of the Constitution which removed the discrimination between children based upon the marital status of their parents when it comes to child care proceedings, family law proceedings, access to adoption, and consideration of their best interests and views.[25] The amendment of the Constitution also clarified the State's role in protecting children when parents are failing in their

21 Authors identified a contradiction emerging from the current French legal framework: the Act 2013-404 that introduced the gender neutral marriage model, replacing the words "husband" and "wife" with "spouse" in the civil code and amending the article 143 with the formula "*Le mariage est contracté par deux personnes de sexe différent ou de même sexe*" did not affect the access to medical assisted reproduction. This brought to deny full protection to rainbow families. *See* H. Fulchiron, 'Le mariage pour tous. Un enfant pour qui ? Loi n. 2013-404 du 17 mai 2013', *La Semaine Juridique*, Ed. Générale No. 23, 3 Juin 2013, doctr. 658 *et seq*.

22 Conseil Constitutionnel, decision No. 2013-669 DC, 17 May 2013, *in JOFR*, No 0114, 18 May 2013, p. 8281, No. 10.

23 *Mennesson v. France*, ECHR (2014), No. 65192/11.

24 *Labassee v. France*, ECHR (2014), No. 65941/11.

25 A. Parkes & S. McCaughren 'Viewing Adoption through a Children's Rights Lens: Looking to the Future of Adoption Law and Practice in Ireland', *Irish Journal of Family Law*, 2013, pp. 99 *et seq*.

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duties towards their child.[26] In addition, in January 2014, a General Scheme of a Children and Family Relationships Bill 2014 has been introduced by the Minister of Justice and it is currently being assessed by the Irish parliament.

Despite the above-described debates, the Irish General Scheme expressly includes regulations on who should exercise parental responsibilities beyond those with blood ties. For this reason, it represents one of the most significant attempts to reflect the social reality of contemporary family life in Europe, considering children as 'rights holders'.[27] Recalling the above-mentioned UN Convention on the Rights of the Child by which children should not be discriminated against due to the status of their parents' relationship, the Irish Bill sets out how parentage is to be assigned in cases of assisted reproduction, renders civil partners eligible to jointly adopt a child, and allows step-parents, civil partners, those cohabiting with the biological parent, and those acting *in loco parentis* for a specified period to obtain guardianship and/or custody. In particular, Head 35(4) provides factors that courts may consider in the evaluation of the best interest of the child such as the nature of the relationship between the child and each of his parents and with other relatives, as well as the willingness of preserving and strengthening such relationships. The Bill distinguishes the role of the 'relative of the child' – that according to Head 33 could be the spouse, the civil partner or the cohabitant of the child's parent and the step-brother, the step-sister or the child of the child's parent's civil partner or cohabitant – from the parentage when a child is born through assisted reproduction using donor gametes. In fact, according to Head 10, if a child is born as a result of assisted reproduction with the use of eggs provided by a woman and sperm provided by a donor, the parents of the child are the birth mother and the person who was married to (or in a civil partnership with, or cohabiting in an intimate and committed relationship with) the birth mother at the time of the child's conception and consented to be a parent of a child born as a result of assisted reproduction.[28] In accordance with this system, Head 41 establishes that where a child is born through assisted reproduction using donor gametes and the other parent of the child is the civil partner of the mother, she shall be a guardian of the child jointly with the child's mother. In case of cohabitants, the provision is applied if the cohabitation lasts at least 12 consecutive months including at least 3 months after the child's birth.

26 Thirty-first amendment of the Constitution (Children) Bill 2012, No. 78/2012, <www.oireachtas.ie/documents/bills28/bills/2012/7812/b7812d.pdf>.

27 G. Shannon, 'The Children and Family Relationships Bill 2014 – a Children's Rights Perspective', Children's Rights Alliance Seminar, 10 April 2014, <www.childrensrights.ie>, pp. 1 *et seq*.

28 Likewise, if a child is born as a result of assisted reproduction with the use of eggs, sperm, or an in vitro embryo provided by donors only, the parents of the child are the birth mother and a person who was married to (or in a civil partnership with or cohabiting in an intimate and committed relationship with) the birth mother at the time of the child's conception and consented to be a parent of a child born as a result of assisted reproduction.

The Bill identifies who will be responsible for the maintenance of the child as well. Head 67, in fact, gives different definitions of 'dependent child of the family' for each of the main family models.[29]

The most significant achievement of this Irish reform is to grant equality and to give legal recognition to the *de facto* parent–child relationships. The first draft of the Bill also included the regulation of non-commercial surrogacy,[30] which was removed at the last moment. This, as remarked by scholars,[31] precludes the legal recognition (and so from the equal treatment) of children born in a same-sex family composed of two males. However, the latest version of the bill also enables cohabitants living together for 3 years to jointly adopt.

Despite the mentioned exceptions, the main advantage of the Irish reform is that it identifies a legal status for the child regardless of his/her parents' relationship. It will be really interesting to assess the practical effects of this reform once it is enacted.

E Conclusive Remarks: New Notions of Family, Parent, and Procreation

From the previous paragraphs it is clear that although non-traditional families may or may not receive legal recognition, regulating social parent–child relationships is still an open issue. The illustrated debates show how the need to ensure the best interest of the child in these family models is a challenge that many European systems are trying to deal with. Considering the lack of statutory law, courts often face concrete circumstances, giving proper answers for claimed rights in light of the internationally recognized best interest of the child principle. For this reason, the necessity to determine duties and rights which non-related adults have towards children in day-to-day situations is becoming more urgent, especially when children are conceived abroad, breaching national prohibitions to access to medical assisted reproduction and surrogacy agreements.

Nevertheless, it has been argued that the case-by-case approach is not sufficient to design a legal status suitable for all children, particularly in civil law tradition systems, where precedent is not binding. As shown, the Italian case-law efforts to fill the legislative gap can provide a legal status to the family who claimed for their own rights, but not to all children. This is the pursuit of the best interest of 'a', and not 'the', child. In this regard, the need to find abstract solutions to be generally applied (and not limited to those who are involved in a case) becomes more urgent.

29 In particular, in case of civil partnership and cohabitation the dependent child is the one of "both civil partners (cohabitants) or adopted by both civil partners (cohabitants) or in relation to whom both civil partners (cohabitants) are in loco parentis, or of either civil partner (cohabitant) in relation to whom either civil partner (cohabitant) is in loco parentis where the other partner (cohabitant being aware that he or she is not the parent of the child) has treated the child as a member of the family [brackets added]".

30 D. Madden, 'Bill Marks First Step in Grapping with Surrogacy', *Irish Times*, 17 February 2014.

31 B. Tobin, 'Same-Sex Couples and Legislative Proposals for the Regulation of Assisted Human Reproduction in Ireland', *in* C. Casonato & A. Schuster (Eds.), *Rights on the Move – Rainbow Families in Europe*, Università degli studi di Trento 2014, pp. 219 *et seq*.

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From this perspective, the Irish General Scheme could be considered the approach to follow, as it implements a new system of legal definitions based on the necessity to regulate the child's sphere of interest within his/her family relationships. The Irish effort should be appreciated also in light of the other European experiences, which focus the debate on the recognition of same-sex marriages without providing a specific reform on child law. For example, ten years since the introduction of same-sex marriages and adoptions,[32] the Spanish case law is still dealing with issues regarding parent–child relationships due to the institutional refusal to recognize their filiation status beyond the blood ties.[33]

In this context, the Dutch and Belgian legislative initiatives on filiation should be mentioned, which allow lesbian mothers to officially recognize their partner's children. The new Dutch provisions state that a co-mother automatically becomes a legal parent when the sperm donor is anonymous. If the sperm donor is known, the co-mother can legally recognize her child by using a procedure *ad hoc* that can already be completed before the birth of the child.[34] From 1 January 2015, the Belgian *Loi portant établissement de la filiation de la coparente*[35] will enter into force as well. This law creates a new legal status for the social mother (*i.e.* the *coparente*), extending all the provisions on filiation (including the parent presumption in case of marriage) to the lesbian partner of the biological mother.

In this regard, it would be more convenient to reform filiation law considering the social changes that brought the necessity to give new definitions to the concepts of 'family', 'parent', and 'procreation'.

In fact, current debates cannot avoid considering the evolution of these three notions and the related consequences in the daily routine of people involved in such reforms. The analyzed legislative initiatives should also be amended to provide a proper and equal legal status for all children, regardless of the legal acknowledgement of the adults' relationship with whom they are living. They should mainly aim at regulating parent–child relationships also if this means that other matters are affected.

32 Ley 13/2005, 'Ley Modificación del Código Civil en materia de derecho a contraer matrimonio', 1 July 2005.

33 For example, last January, the Tribunal Supremo denied the application concerning the registration in the Spanish registry of a Californian Birth Certificate of two twins born through a surrogacy agreement because it was considered in contrast to the international public order: Tribunal Supremo, case No. 853/2013, 6 February 2014 <www.articolo29.it>, comments by G. Palmieri, 'Il Tribunal Supremo a proposito di status familiari e maternità di sostituzione'.

34 The new bill that allows co-mothers to enjoy the same rights as those that are already enjoyed by non-biological fathers entered in force on 1 April 2014. *See* M. Vonk, 'Same-Sex Parents in The Netherlands', *in* E. Bouvier de Rubia & A. Voinnesson (Eds.), *Homoparentalité? Approche comparative*, Paris, Societé de législation comparée 2012, p. 13; *see also* M.V. Antokolskaia *et al., Meeroudergezag: een oplossing voor kinderen met meer dan twee ouders? Een empirisch en rechtsvergelijkend onderzoek*, The Hague, Boom Juridische uitgevers 2014.

35 'Loi portant établissement de la filiation de la coparente', C 2014/09353, 5 May 2014, <www.ejustice.just.fgov.be/mopdf/2014/07/07_1.pdf#Page9>. *See* A.M. Lecis Cocco Ortu, 'La presunzione di maternità presto in vigore in Belgio', *in* <www.articolo29.it>.

As observed and also in light of the above-mentioned experiences, the Italian reform on filiation is incomplete, since it did not deal with the variety of non-traditional families. Likewise, the fact that the proposed French bill is introducing a general tool, which does not distinguish between the 'social parent' and 'other relatives', is a clue that also this reform is still far from properly pursuing the best interest of the child.

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