ADOPTION OF CHILDREN AND YOUNG PERSONS

— by WALLACE PH. GUILIA — LLD., BA., BSc., PhC., MA(Admin) (Manch), D.PA. (London.)

IN THIS PAPER IT IS INTENDED TO GIVE A QUICK BIRD'S EYE VIEW LOOK AT THE TRENDS RELATING TO ADOPTION. IN SUCH A QUICK SURVEY MOST OF THE DETAILS WILL ELUDE US, BUT THE BROAD CURRENTS WILL OBVIOUSLY COME TO THE FORE.

Adoption was recognised by Greek Law and possibly also by Assyrian law (1). Its details in those laws have completely eluded us. In Roman Law it was characterised by formal procedures — amounting almost to a ridiculous ritual (2) with which later Roman Law dispensed, making it possible for a **filiusfamilias** to pass out of his family into that of the adopter. Such formal procedures indicated that the consent of the parties (though hardly of the adopted) was vital, Court consent playing but a subordinate and in a sense minor role which aimed principally at seeing that the consent of the **paterfamilias** and the adopter had been given, and, in later Roman Law, that the prospective adopted did not object. Nor would it appear that Roman Law aimed at using adoption to devise an alternative home for the adopted, so much as the establishment of an heir for the adopter; although in practice it is very easy to surmise that the two —the alternative home and the institution of an heir — must have gone hand in hand, linked together as they have always been by psychological, social and economic factors, though it would not appear that as a rule, **potestas** passed from the original **paterfamilias** to the adopter.

It is likewise interesting to observe that Adoption was sometimes used in Roman Law to confer freedom on a slave (3). The Roman Law concept of Adoption, however, did not pass away with the passing of Rome; for it continued to prevail in general in the emerging countries of Europe so much so that adoption continued to be a well established institution of Continental law in the traditional pattern of later Roman Law and in 1555 it was given the following definition in the Vocabularium utriusque juris (published Venetiis): **"Adoptio est gratuita quedam electio qua aliquem sibi elegit in filium, et hoc faciunt plerumque hi qui filios habere non POSSUNT AD IPSARUM SOLATIUM. Et talisque sic recipitur in filium, dicitur adoptivus quasi a patre legittimo sic ei datur et illi qui sic eum adptat dicitur adoptivus pater."**

With the Code Napoleon adoption was given a fresh lease of life, and preserved the traditional characteristics it had enjoyed in Roman Law, but laid new emphasis on the duties (obligations) of the adopted person, vis-a-vis his natural family (4) of which he continued to form part and permitted adoption to take place in those cases where **"forti debiti di riconoscenza vincolassero l'adottante all' adottato (5) oppure nel caso in cui da almeno sei anni il primo avesse Sovvenzionato il secondo con sussidi e ne avesse avuta la cura non interrotta."** (6).

The Cole Napoleon was, of course, the basis of the Code of Civil Law of many of the countries of modern Eu-

rope. The Belgian, French, Italian and (until recently) Maltese Codes all retained the Napoleonic basic pattern of adoption. Without going into the basic and sometimes subtle differences of detail of these Codes, which for the purposes of a paper such as this would amount to no useful exercise, it can safely be asserted that the basic features of adoption in all these Codes are the following:-

(1) Adoption is not to compete with the basic family structure or to introduce any significant alterations in that structure. Thus, persons with legitimate children of their own may not adopt, and adopters have to be over an advanced minimum age (7) to lessen the likelihood or possibility of adopters having legitimate descendants of their own prior or past to adoption.

(2) Adoption of different persons, be they brothers and sisters, by the same adopter (s provided they are husband and wife) could take place only by means of one and the same act.

(3) The surviving natural parents must consent to the adoption as must the person to be adopted if he is over fourteen years af age.

(4) On adoption, the adopted assumes the surname of the adopter and adds it to his own; the adopter becomes responsible for the education and maintenance of the adopted person, and in the case of a female for dowry on the occasion of mariage, as if he were born in lawful wedlock to the adopter(s); whilst the adopted assumes liability for the maintenance of his adopter(s); but he remains in his natural family and preserves all his rights and duties within that circle too and does not pass into the family circle of the adopter (s).

(5) Consequently, detailed provision exists relating to the succession of adopters and adopted and provision is made for cases where legitimate issue exists as well as for the cases where no such issue exists (8)

Because of all these limitations, adoption does not appear to be a success in contemporary European Countries. This seems obvious from the alternative provisions which exist in some of these Codes, e.g., the Italian Civil Code (9) for the filiation of minors who have been entrusted to public or private institutions. The basic stumbling block seems to be the fact that the adopted continues to have two feet in two households. At the psychological plane, adoption cannot be a success except where the adopted is fully integrated in the family of the adopter (s) and burns his boats behind him with respect to the natural family. But this concept represents a major difficulty in Natural Law countries; for, how can such a concept uniform itself with the basic natural law assumption of parental rights and duties, except by means of a resort to fictions which are themselves unsatisfactory, raising as they do hornets nests of their own, such as the question whether at Natural Law there is, or could ever be, a forfeiture of parental rights and duties, and whether the sanctions to such forfeiture could be remedied by Positive Law instead of Natural Law itself.

To get out of this quandary, it is submitted that such is the one and only helpful approach to this serious problem; and that this, in fact, represents a much more subtle complex than is usually met with in the problem of the interrelationship between Natural and Positive Law. The problem one usually discusses in that context is that of which law is supreme; which is to give in to the other, and which will in particular circumsances prevail. In Natural Law countries which still abide by the concept of natural law as formulated by Aquinas (10), the answer immediately is: "Natural Law is

to prevail!" But in the approach to the problem posed, the question is not the simple one of which law is supreme; but the more basic, more urgent, intimate and thought provoking one, subtler and, I submit, more constructive approach of how far, in a sense, can positive law complement natural law — so that retaining that superstructure, one at the same time recognises the limitations thereof and tries to provide by means of positive law for filling in the details which the broader implications of natural law may themselves be unable to provide for adequately and satisfactorily.

Adoption was late in coming in the U.K. — until 1926 it was not even known at Common Law (11) — but when the Adoption of Children Act, 1926, was enacted (12) it came down heavily on the side of the contemporary psychological consideration that the adopted should be integrated as fully as possible into the family of the adopter (s). Thus "An adoption order" under that Act, "extinguished all rights, duties, obligations, and liabilities of the parents or guardians of the child in relation to his future custody, maintenance and education, including all rights to appoint a guardian or to consent or to give notice of dissent of mariage. All such rights, duties, obligations and liabilities become vested in, exercisable by, and enforceable against the adopter as though the adopted child were a child born to the adopter in lawful wedlock; in respect of these matters, and in respect of the liability of a child to maintain its parents, the adopted child stands to the adopter exclusively in the position of a child born to the adopter in lawful wedlock. (13)

This solid basis of the new family of the adopted was preserved and carried forward in the Adoption of Children Act, 1958, (14) through the various intermediate and consolidating Acts relating to adoption in the U.K. Indeed this basis in this respect has been rendered more solid still by extending the concept completely to the realms of the transmission of, and succession to, property (other than entailed property) (15).

Furthermore, the English Adoption Law, whilst recognising the importance of the principle of the consent of the natural parents to the making of an adoption order, (the effect of which would, for all intents and purposes, be that of uprooting the adopted from his family and transfering him to the family of the adopter), made inroads into that principle by providing for dispensing with consent, in particular circumstances, such as where the natural parent has abandoned, neglected or persistently ill-treated the prospective adopted; or where he is withholding his consent unreasonably or where he "has persistently failed without reasonable cause to discharge the responsibilities of a parent". (16)

On the other hand, English Law wisely provided for the protection of the normal family unit, in the sense that where the application for adoption is being made by one of two spouses, the consent of the other spouse is a must for the making of the adoption order (17), except in special circumstances (18). Otherwise it would have been simplicity itself for the parent of an extra-marital child to introduce that child into his own family unit in spite of the protestations of his spouse; a factor which could easily lead to the breaekdown of the normal family unit.

Another highly significant provision of English Law is that relating to the care and possession of the infant to be adopted by the prospective adopters for a minimum period of three consecutive months, immediately preceding

the date of the order, not counting any time before the date on which the infant attained the age of six weeks.

Again the integration of the adopted in the adopter's family is also consolidated by the provision that the adopted following the adoption order, may be known by a name (s) of the choice of the adopters and not by any previous name. In making the adoption order the Court should naturally see that such provision is exercised as seems reasonable in all the circumstances of the case.

In England the aim obviously is to make adoption a relatively simple exercise; in this respect the minimum age for adoption was considerably reduced from the Napoleonic fifty to twenty-five and, in special circumstances, e.g., where the applicant is a parent or relative of the prospective adopted, even less. Furthermore, the disability against a number of adoptions by the same adopters does not feature in English law so that it is possible, and in practice it frequently happens, that adopters adopt more than one child at different periods, thus simulating the natural growth of a natural family.

These provisions of English Law have been recently followed in Eire and in Malta. As has been said the Malta Civil Code has at its basis the Code Napoleon, but the provisions relating to adoption have recently been substituted **in toto** by provisions which have been obviously culled from English Law. It can be asserted without hesitation that the law of adoption in Malta today is with but few and in a sense minor variations identical with the law of the U.K. by which it was inspired and on which it was obviously based. In the circumstances it appears more worth while to concentrate, in a paper such as this, on the points of difference between the two systems and to try to establish the reason for such variations.

The basic differences between Maltese and English Law on the subject may be reduced to three:-

a) The minimum age at which a person may adopt.

b) Dispensing with consent; and

c) the time limit starting with marriage and ending five years thereafter, within which persons may not adopt.

It has been seen that in the U.K., an applicant for adoption must be at least twenty-five years of age, except in special circumstances, such as where the applicant is a parent or a relative of the person to be adopted. Prior to 1961 that age in Maltese Law without any exception whatsoever was fifty, the justification traditionally given being that adoption is a very serious step indeed in the life of both the adopter and the adopted. Age twenty-five represents a slashing of that age by exactly one half. Although by contemplorary sentiment, age twenty-five may seem mature enough, after all infancy terminates completely at twenty-one and at that age a person becomes entitled to vote and thus exercise the most serious of civic rights, nonetheless in an adoption context, twentyfive may be too low, especially when we bear in mind that many people are not even married at that age.

Although in the meantime the position had been thoroughly reviewed in the U.K., and the Curtis Report had not commented in any way about that age being too low, the Eire Adoption Act, 1958, which followed the U.K. model pretty closely, had departed therefrom where the age was concerned, and provided that an applicant for adoption had to be of a minimum age of thirty five or forty. The Malta Ordinance provided for a minimum age of thirty — an age which plays safe, with-

out being too safe and provides the best ten years in a person's life (30-40) when the family, normally speaking, is being set up. Another justification for age thirty rather than thirty-five is that if the Malta view that during the first five years of marriage a couple should not adopt (**vide infra**) is correct then age thirty would appear to be just right, especially where young people tend to get married in the midtwenties instead of their late teens.

The second major departure from U.K. Law to be found in Maltese Law are the provisions relating to dispensing with consent. It has been seen that English Law allows the Court to dispense with consent where the parent has failed to discharge his parental responsibilities without just cause or fails to give his consent unreasonably. (19) In general it may be said that Maltese Law does not provide for dispensing with consent on these grounds of English Law. Semble, that at Natural Law the parent has a fundamental right and duty to look after the child which the father may not be forced to renounce; suffice it that the parent may, if he so chooses, and in any case with the Court's permission, in the greater interest of the child, pass on his responsibilities to a willing third party; but forfeit those responsibilities, even where he has not fulfilled the responsibilities of parenthood, he may not. In Maltese Law the provisions relating to dispensing with consent refer to the minor circumstances when the person concerned cannot be found or "is incapable of expressing his views'. (20)

The third major departure is the provision that "An adoption decree may be made on the application of two spouses, who have been married for a period of not less than five years and are living togeteher, authorising them jointly to adopt a person and may not be made on the application of one only of such spouses." (21) It is well known that newly married couples are usually anxious to have children of their own, an anxiety state that may itself impede conception. Such couples may rush into adoption as a means of allaying their anxieties and when children of their own turn up, they could easily regret the step they took and come to look on the adopted as an outsider within the family circle — a situation which is not desirable at all. It is understood that a similar provision exists in a recent Netherlands Law on Adoption which was anterior in date to the recent Maltese Law of Adoption.

So that the contemporary trend seems to be that adoption should be made easily possible, because in itself it is a very useful and salutary social measure against a number of social evils, such as the problem of the unmarried mother and that of the illegitimate child. It is well known that the Code Napoleon, probably as a reaction to the social evils of the time, had reacted vigorously against illegitimate children whether acknowledged or not, and placed them in a very unfavourable position vis a vis children born in lawful wedlock where rights against their parents were concerned. Natural parents can now, through adoption on this new basis, remedy the mistake and the blemish which is purely theirs and which should in no way be made to attach to the innocent child.

Indeed the United Nations Universal Declaration of Human Rights at Article 25(2) categorically affirms that "All Children' whether born in or out of wedlock, shall enjoy the same rights and protection".

This certainly seems to be the trend in contemporary adoption at the ideal plane: "There are no illegitimate children, there are only illegitimate parents!" Apart from the social benefits

accruing to the community from the adoption of children born out of wedlock by other people who have no children of their own; adoption is a singular system in terms of which illegitimate parents may confer a legitimate status on their children born out of wedlock. And, not that there is any direct correlation between slavery and illegitimacy, one cannot help reminescing here how adoption in Roman Law was sometimes used, as has been said, to confer freedom on a slave!

It seems that this is being increasingly appreciated, for although continental law in general does not seem to have moved in this direction so far, the Council of Europe has recently had occasion to look at adoption law and, from what one hears, seems to have come down heavily in favour of the Maltese experiment which is certainly more than a half way house between the English and the Continental pattern.

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(1) *Novissimo Digesto Italiano*, UTET, I, p. 287 (col. 1).
(2) The *paterfamilias* sold his son to the prospective adopter TWICE OVER: EACH time the prospective adopter manumitting the *filius familias* back to the *paterfamilias*. Thereafter a third sale to a third party was made by the *paterfamilias*, thus DESTROYING THE POTESTAS. Thereupon the adopter "brought a collusive action against the buyer claiming that the person to be adopted was his son, and judgment was given accordingly." *A Manual of Roman Private Law*, Buckland, p. 77. Vide also Novissimo Digesto Italiano, UTET, I, p. 287.
(3) *Novissimo Digesto Italiano*, ibid. col. ii).
(4) Code Napoleon (s. 348).
(5) *ibid.* s. 345.
(6) Ugo Gualazzini, *Adozione* (*Diritto Intermedio*), Nov. Dig. Ital. p. 290 (col. ii).
(7) Belgium, 35; Code Civil, s. 344. France, 40: Code Civil, s. 344; Italy, 50: Codice Civile, s. 291.
(8) Vide ss. 131-153 of the Malta Civil Code, now substituted (infra); ss. 343-370 French Civil Code; and ss. 291-310 Italian Civil Code.
(9) ss. 400-413, Italian Civil Code.
(10) In a nutshell: "That part of God's eternal law which is referable to man and which man discovers by means of his reason — the guide to reason being provided by the Church.
(11) Halsbury's Laws of England, 2nd Edition, Vol. 17, Part VI, para 1406.
(12) 16 & 17 Geo. 5, 29.
(13) Halsbury, *ibid.*, para 1416.
(14) 7, Eliz. 2, c. 5.
(15) U.K. Adoption Act, 1950, S. 13 and Adoption Act, 1958, s. 16.
(16) s. 5.
(17) s. 4 (1) (b).
(18) s. 5 (4).
(19) s. 5.
(20) s. (2) 134 Civil Code.
(21) s. 134 (3) (c) and s. 131 (2) Civil Code.