

ADOPTION AND SECRECY OF ORIGINS (IN FRENCH LAW)

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Introduction

In the current French legal scene, the relationship between adoption and secrecy of origins is paradoxical. The two questions are often linked : it suffices, for example, to recall that it was an Act of 5 July 1996 on adoption that made provision for a register of « non-identifying data » concerning parents who hand their children over to the Child Care Agency. Yet the law of adoption makes no mention, either express or implied, of secrecy of origins, and we shall see that, strictly speaking, such secrecy is not linked to adoption.

Reference should first be made, in order to exclude it, to the case of anonymous donors of gametes in the context of medically assisted procreation. In fact, anonymity in that case does not precede an adoption but the establishment of a biological filiation that does not correspond to reality. It accordingly falls outside the scope of my report.

The same applies to simple adoption. There are two kinds of adoption in France – simple and full. Only full adoption severs the links with the family of origin. Simple adoption leaves the previous links intact, so that the child will at the same time have one (or two) biological parents and one (or two) adoptive parents. This type of adoption, far from being exceptional, is the more common, a large number of cases arising from adoptions within the family such as the adoption by one spouse of the other spouse's child. It obviously involves no question of secrecy of origins.

We shall also leave out of the discussion the case of adoptions of foreign children as a result of judgments emanating from their country of origin, because the differences between legal systems make any generalisation impossible. It is only adoption pronounced by a French court that will be dealt with here.

An initial observation that must be made is that the notion of « secrecy of origins » does not have a very precise content in French law. Some texts speak of « secrecy of birth » (Art. 58 of the Civil Code), others of « secrecy of the mother's identity » (Art. 47 of the Family and Social Assistance Code, Art. 57 and 341-1 of the Civil Code) and yet others of « secrecy of the parents' identity » (Art. 62 of the Family and Social Assistance Code). It should be pointed out at once that none of these texts concerns adoption. They all relate to the case of a child whose mother did not wish to reveal her identity at the moment of birth, or who was handed over at a tender age to the Child Care Agency with a request for secrecy. At that stage, the adoption proceedings have not yet begun, even if they can already be foreseen in the near future.

An important feature of French law on full adoption can be noted at this point. It is strongly opposed to open adoption, in the sense of the handing over of the child by his parents of origin to his adoptive parents. Such a procedure is considered to be dangerous on account of the trafficking to which it might give rise. For children less than two years old who do not already belong to the adopter's family, passing through an intermediary (the Child Care Agency or adoption societies) is obligatory. Logically the procedure leading to adoption will take place in two stages : first separation from the family of origin, and then adoption. Between these two stages there is an interval during which the child is registered as a ward of the State, for whom the Child Care Agency, a body attached to the relevant Department, is responsible. It is this division into stages, rather than the actual court adoption procedure, that obscures the question of secrecy of origins.

Once pronounced, adoption will reinforce the secrecy of origins. In order to protect the child from ill-intentioned curiosity, a system of padlocking access to the birth certificate was introduced, making it impossible to discover origins as a fact. But, above all, adoption has radical effects as regards establishment of the filiation of origin. It excludes for good, sometimes in questionable circumstances, any possibility of transforming biological filiation into legal filiation (first part). And, to reinforce the legal fiction, adoption impedes discovery of origins as a fact (second part).

First part : adoption and creation of a legal relationship of filiation

It is useful, at this point, to return very briefly to the principal characteristics of French adoption procedure. To start with the child is made adoptable, either by a judgment declaring that he has been abandoned – which creates no secrecy of origins – or by consent on the part of the parents. Such consent is given in a notarial deed if the child is entrusted to an adoption society, or when he is handed over to the Child Care Agency. At that time, the parents can ask for their identity not to be disclosed. One can note, in passing, the legal difficulties occasioned by anonymous childbirth : given that the woman who gave birth to the child is unknown and is not legally his mother, she has no capacity in which to consent to adoption. The formal record of the handing over of the child is signed not by the « mother » but by the welfare assistant who takes charge of the child.

There follows a period during which consent can be withdrawn – this used to be three months but was reduced to two months by the 1996 Act. During this period the child can be taken back by the person who handed him over. In the case of anonymous childbirth, this option of withdrawing consent is available, provided that the mother first establishes the relationship of filiation with the child.

If the child has not been taken back during this period, he will be placed with a view to full adoption. Under Art. 352 of the Civil Code, placing with a view to adoption excludes any subsequent establishment of a blood relationship. The drastic nature of this rule can be explained by the well-known case of Novack, in which biological parents and an adoptive family snatched a child from each other throughout long years of court proceedings (Civ. 1°, 6 July 1960, D 1960, 510). Watertight legal barriers were then erected to prevent any repetition of such cases, but it is not certain that they are not now giving way.

Since this waiting period was meant to enable the child's situation to be clarified rapidly and to avoid his languishing in a nursery without being able to establish lasting ties of affection, there was a wish that it be as short as possible.

Whilst a child cannot be left indefinitely at the mercy of the shifts of position and whims of his parents, it remains true that the drastic effect of placing with a view to adoption on relationships of filiation reinforces the devastating effects of anonymous childbirth by rapidly making them irrevocable. This gives rise to some particularly distressing situations, in which the mother, despite a change in her circumstances enabling her to assume her responsibilities, cannot recuperate her child, who will never know what fruitless struggles were made on his behalf.

The main difficulties occasioned by these provisions are due to the fact that the person who hands over the child and consents to his adoption is not necessarily the only person who is interested in and wishes to care for him. Amongst the most distressing cases, one can cite that of the father when the mother has given birth anonymously or that of grandparents who witness, powerless, the adoption of their child or grandchild without being able to object.

In a recent case which attracted much attention (Riom, 17 December 1997, JCP 1998, II, 10147, noted by Garé) and of which Professor Murat has just spoken, a married man had recognised, before the birth, the child his mistress was expecting. However, she did not wish to bring up the child and gave birth anonymously. The father managed to trace the child, but too late because he had been placed with a view to adoption. This judgment has already been mentioned in the context of anonymous childbirth, but it should be noted that whilst the anonymous childbirth rendered ineffective the recognition made before the birth, it was the placing with a view to adoption that prevented the father from recognising the child again, after the birth.

It is not certain, moreover, that this legal obstacle in the way of establishment of filiation will not one day be held by the European Court of Human Rights to be an unwarranted infringement of the father's right to family life, although it is very difficult to predict whether or not the Court will find the result to be justified by the overriding interests of the child (see the different replies given by the Keegan judgment of 26 May 1994 and the Söderbäck judgment of 28 October 1998).

In other cases, it is the grandparents who complain of the fact that all the legal ties with their grandchild are severed by a full adoption. Such a case arose following the death of one parent, when the survivor, who had remarried, consented to the adoption of his child by his new spouse. The legislature has intervened in this sensitive matter on several occasions. Article 345-1 of the Civil Code – which was modified in 1993 and again in 1996 – seeks to avoid these distressing situations by allowing only simple adoption when the child's grandparents are still alive. However, full adoption remains possible if there is still a great-grandparent or if there are uncles or aunts.

There was even a case in which a child born out of wedlock, both of whose parents were killed in an accident shortly after his birth and before his filiation could be established, was handed over to the Child Care Agency and adopted by a couple having no blood relationship with his family, without the grandparents being able to do anything about it (see Ministerial Reply No. 29824, J.O., Senate, 1 January 1996, p. 79).

When confronted with these unsatisfactory situations, the courts sometimes strain legal principles a bit, for example by granting visiting rights to the family of origin with which ties have been severed ! (Pau, 21 April 1983, D 1984, p. 109).

This example shows that even when an adoption has suppressed or prevented the establishment of a tie of filiation, it does not prevent the « secrecy of origins » being lifted in fact. However, in order to reinforce the legal filiation, the adoption judgment puts further obstacles in the way of discovering the child's original filiation.

Second part : adoption and discovery of origins as a fact

With a view to avoiding unhealthy curiosity and prejudicial leakage of information, French law has set up a legal system of «true but false» civil status certificates. The adoption judgment is entered in the civil status records in place of the child's birth certificate, which is «considered to be non-existent» (see Art. 354 of the Civil Code). All that will remain of the child's «origins» is the place of birth, which is not altered. The original birth certificate can henceforth not be communicated to anyone, even (above all) to the person concerned (see Ministerial Reply, J.O., Senate, 31 October 1973, p. 1556).

This radical and expeditious procedure does not, however, totally prevent access being had to the truth. The full copy of the birth certificate contains the references of the adoption judgment, which is public like all court decisions. So nothing stops the child (once he has become an adult) from asking for a copy of that decision.

However, he will probably find the contents disappointing. As is noted in the May 1990 report of the Conseil d'Etat on the protection and status of children, an adoption judgment is rendered in non-contentious proceedings and consequently does not have to be supported by reasons. It does not rehearse the child's history since his birth, but is confined to a recital of the factors that establish the regularity of the procedure. One can therefore find in the judgment the name borne by the child before his adoption and the references to the legal act that made him adoptable. Sometimes these data can be used, as when there is a reference to an earlier court decision finding that the child had been abandoned or to an authenticated deed whereby the parents gave consent to the adoption. The complete identity of the child and his parents can then be discovered. But these cases are in a minority.

More often than not, the child is disappointed by the contents of the judgment, because he finds therein only a reference to a consent to adoption given by the State Wards Family Council, a body which is attached to the relevant Department. As for the name borne by the child, there is nothing to show that it is the name of his parents of origin, because under French law it is not obligatory for the parents' identity to appear in the child's birth certificate. French law not only makes provision for anonymous childbirth but also allows a fresh birth certificate with a new name to be drawn up when the child is handed over to the Child Care Agency for adoption with a request that the identity of the parents remain secret (see Art. 57 and 58 para. 4 of the Civil Code). The name borne by the child has accordingly most often been chosen quite arbitrarily by the civil status official.

Persons searching for their origins then request access to the adoption application, in which they hope to find some more interesting data. But the procedural file, unlike the judgment, is not public. Only the parties to the proceedings can have access thereto, but the adopted child is not a party to the adoption judgment. This statement of the position, which cannot be disputed in point of law, is particularly badly received by those whose request is turned down on this account.

In its above-mentioned report, the Conseil d'Etat was persuaded by the argument that the child, as a «third-party» to the non-contentious proceedings, could apply to the court, under Article 29 of the New Code of Civil Procedure, for communication of the case-file, since he could demonstrate a «legitimate interest». This proposition, neat though it is, cannot be guaranteed to be effective. First, it presupposes in any event an application to the court, and would involve only a right of action, not a right of access. Secondly, the court would very probably refuse communication of the file in this way.

This is because a judgment of 12 October 1979 of the Conseil d'Etat (D 1979, p. 606), ruling on the legality of the said Article 29, specified clearly that the court's discretion could not be exercised in a way that would violate respect for private life, of which the court is the guarantor. And it is precisely respect for the mother's right to private life that is the basis for secrecy of origins.

Above all, it seems clear that reliance on Article 29 of the New Code of Civil Procedure would not serve much purpose. This is because this Article relates to the conduct of the non-contentious proceedings and enables third-parties who might be concerned thereby to intervene therein to safeguard their rights. As such, the Article has been seen as a feature of the non-public character of non-contentious matters in general (see Loïc Cadiet, Droit judiciaire privé, no. 1318 ; Droit et pratique de la procédure civile, ed. Dalloz, no. 3252). It is therefore not designed to be used in the case of proceedings that were concluded many years ago and have already produced their full effects as regards the « third-party » concerned.

Anyway it is most unlikely that consultation of the adoption file will enable significant progress to be made in a search for origins. The child will probably find therein the consent to adoption given by the Family Council of the Department in which he was registered as a ward of the State, but no reference to his life before such registration – a meagre harvest.

In fact, as I said before, secrecy of origins, when it exists, was created before the adoption proceedings began, precisely in order to prevent contacts between the biological family and the adoptive family. If there is a gateway giving access to origins, it is situated not in the court registries but in the files of the Child Care Agency or the adoption societies, and it is through the right to obtain communication of administrative files that the « right to origins » might be exercised.

Support for this assertion can be found in a judgment of 28 July 1997 of the Lille Court of First-Instance (D. 1998, p. 213) that attracted attention, where a person who had been adopted sought and obtained the right to consult the file concerning him held by the adoption society. The point of law at issue in that case was whether the right of access recognised by law as regards administrative files, which therefore operates in favour of children taken into care by the Child Care Agency, could be claimed by children placed by private societies. The court accepted this extension, which was actually logical but had a doubtful basis in the texts.

If even adopted children are recognised to enjoy a right of access to personal files, there is nevertheless no real system for discovering origins, because those files may be empty. The last advance made by the 1996 Act is an option given to the biological parent to inform the adoption agency that he agrees to make his identity known. But that agency does not have to transmit this information to the child : the identity of the parents will be entered in the file, and the child will discover it only if he comes to consult the file.

In conclusion, it can be seen that secrecy of origins is not really a result of the adoption, but of the legal rules concerning the declaration of birth and the adoptability of the child, which rules operate before the adoption is pronounced. However, by establishing an exclusive and definitive filiation the adoption judgment reinforces the inaccessibility of origins and in any case makes it impossible for any discovery of origins to have the slightest legal effect.

Nevertheless, the question that arises concerns making the distinction between « origins » and « filiation » legally coherent. In order to protect the child's adoptive filiation, is it essential to conceal his origins ? French law has its own conception of the tie of adoptive filiation, and an instinctive distrust of the relationships that might be formed between the family of origin and the adoptive family. It is true that the tranquillity and security of the child and his adoptive family must be protected. It is also true that adoption does not prohibit conservation of traces of the child's « origins » and access thereto. But access still has to be systematically arranged, in a way that will respect the rights of everyone.