

ANONYMOUS CHILDBIRTH AND ITS LEGAL EFFECTS

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Anonymous childbirth is but one component of a system governing civil status questions and the filiation of children that is already complicated in itself.

- At present, maternal filiation does not always follow from the particulars included in the birth certificate : account must also be taken of the mother's marital status. This is because the naming of the mother in the birth certificate establishes maternal filiation in the case of a married woman (independently even of the operation of the presumption of paternity – see Art. 313-2 of the Civil Code (CC)), whereas it does not have this effect in the case of an unmarried woman ; she must in principle recognise the child even though she has declared him or her under her name in the birth certificate. Of course, in the latter case, there are correctives (the role played by generally recognised enjoyment of a status (possession d'état) – see CC Art. 337 – or even indirectly by recognition of paternity – see CC Art. 336, a contrario), but these are ex post facto solutions.

- The birth certificate does not always name the parents of the child : it is perfectly compatible with the French Civil Code for the child's birth certificate to remain silent as regards the parents' identity. CC Art. 57 expressly so provides for the parents of a child born out of wedlock (« If the identity of the father and mother of a child born out of wedlock, or one of them, is not furnished to the civil status official, no indication on this subject will be entered in the registers »). However, the possibility for the person making the declaration to say nothing about the mother's identity derives in a general way by implication from CC Art. 56, which lays down an obligation only as regards the actual fact of birth. This system does not of itself constitute what is commonly called anonymous childbirth, but it makes it possible to reinforce the protection of anonymity by other means. It is these other legal provisions which, strictly speaking, constitute anonymous childbirth.

- Childbirth itself may be shrouded in anonymity, following a tradition that goes back to Ancient Law. A Legislative Decree of 2 September 1941 made it possible for the person about to give birth to request, on being admitted to the medical institution, that her identity be kept secret. The woman will be admitted under the name of « Mrs X », hence the appellation of « birth given by X » (accouchement sous X). A Decree of 29 November 1953 confirmed this right to anonymity and the Act of 6 January 1986 (Article 47 of the Family and Social Assistance Code) provides for the costs to be borne by the Child Care Agency of the Department. Moreover, since the Act of 8 January 1993, the notion of anonymous childbirth has been introduced into the Civil Code, Article 341-1 of which provides that « at the time of giving birth, the mother may request that her admission and identity be kept secret ». After very lively debates that divided the National Assembly and the Senate on the implications in civil law of anonymous childbirth, the effect of CC Art. 341 is that such a request for anonymity constitutes a ground of inadmissibility of proceedings to establish maternity. It should, however, be noted that theoretically recourse to such anonymity does not prevent the child's father or mother from being named in the birth certificate (see Art. 47 in fine of the Family and Social Assistance Code), but it is obvious that if the aim is really to prevent any identification of the woman who gave birth, the birth certificate too will be silent as regards that identity.

- Finally, if the child's filiation has been established, it can be retroactively obliterated for a certain period of time : this will be a consequence not of the possibility of contesting maternity by proving in court proceedings that there never was a birth, but of the possibility, under Art. 62 of the Family and Social Assistance Code, of handing the child over to the social services with a request that the parents' identity be kept secret. Pursuant to CC Art. 58, a fresh civil status certificate will then be drawn up to serve as a birth certificate for the child – it is called a « provisional birth certificate » –, in order to remove any indications concerning filiation. Since the Act of 5 July 1996 reforming the law on adoption, this possibility has been confined to children who are less than one year old.

It is this complicated and not always coherent collection of texts that has for some years been at the centre of very lively discussions as to its justification. We shall confine our report to anonymous childbirth properly so-called, which has attracted the principal criticisms and against which a real indictment has been drawn up.

Anonymous childbirth is alleged to have the drawbacks of :

- being a source of unnecessary distress : on one side for the child, since anonymous childbirth prevents him almost definitively from discovering his origins ; on the other side for the woman, whose maternity it denies and who can regret her gesture and remain a captive of momentary pressures and of her immaturity. In both cases, it is not so much a question of legal filiation as of an existential quest for details of one's identity.
- being applied at random : the ease with which recourse can be had to anonymous childbirth and its drastic effects have encouraged its utilisation in some circumstances where there was perhaps no need to go so far as watertight secrecy (pressures from members of the family, standard practices in social work...). Anonymity has sometimes even been granted retroactively when the child was, for example, born with a mental defect and the parents cannot endure it (the practice of « false X's »).
- facilitating trafficking in children and abuse of institutions in the family domain that are difficult to control : recourse to « birth given by X » is the basis for the process of substitute maternity and for abuses of adoption (see the wording of CC Art. 339, deriving from the Act of 5 July 1996). Just recently current events showed how effective anonymous childbirth could be as a means of eliminating the father.
- being the fruit of lobbying and no longer of a social need : the continued existence of anonymous childbirth is alleged to be due above all to the favour it enjoys in adoption circles on account of its ability to procure very young children who are rapidly adoptable (currently there are between 600 and 700 anonymous childbirths each year). In any event, it is alleged not to derive any longer from a primary social need, on account of the evolution of morals and the renewal of the social context since 1941, characterised by : less disapproval of childbirth outside marriage ; rarity of real denials of maternity ; ineffectiveness of the prevention of abortion or infanticide, the incidence of which is said to be no greater in countries that do not know the institution of anonymous childbirth ; as a result of an increasing familiarity with psychology, suppression of pathogenic secrets and a change in attitudes in favour of discovery of origins.

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- *being contrary to the international undertakings entered into by France and especially to the international Convention on the Rights of the Child that is said to comprise, in Article 7, a right for a child to know his origins (« a child... shall have ..., as far as possible, the right to know and be cared for by his or her parents. »). It has also been claimed that, by sheltering a woman definitively against the establishment of filiation whereas a man does not enjoy this possibility, anonymous childbirth created a discrimination on the ground of sex that could be contrary to the rules contained in the European Convention on Human Rights.*

These arguments probably do not all have equal weight but, taken together, they are impressive and make it necessary to enquire closely into the justification for the institution of anonymous childbirth. Scrutiny of the system leaves a feeling that the law is adrift to an extent that requires a search for a fresh balance.

I - THE LAW ADRIFT

Whereas the evolution of morals and culture seems to militate in favour of respecting the life-history of individuals and preserving the basic details of their identity, the implications of anonymous childbirth were reinforced by the legislature in 1993. This movement against the trend appears indeed to have transformed what was a measure ensuring that maternity was surrounded by discretion into a real fiction that proves to be embarrassing.

A/ Ensured discretion

Originally the system seems to have been devised above all with the sole aim of ensuring discretion :

- *It is a provision that is addressed to medical institutions and comprises two parts :*
 - *a part relating to anonymity properly so-called : it sets out how this anonymity is to be secured : see Article 47 of the Family and Social Assistance Code : « no identity document is to be required and no enquiry is to be made », a rule repeated in Article 20 of Decree 74-27 of 14 January 1974 governing the operation of hospitals ;*
 - *a financial part, providing that in the event of a request for anonymity, the costs of accommodating those giving birth and of the birth itself are to be borne by the Child Care Agency of the Department in which the institution has its headquarters.*
- *It is one of the provisions that falls to be supplemented by other rules derived from the ordinary law which may have the effect of reinforcing the anonymity :*
 - *the rules on professional secrecy, breach of which is a criminal offence (Article 226-13 of the New Penal Code) and which apply both to members of the medical professions and to the staff of the Child Care Agency who may have assisted the woman before the birth and thus know her identity ;*
 - *the rules on communication of administrative documents, deriving from the Acts of 17 July 1978 and 11 July 1979, the indiscriminating application whereof to the identity of the woman mentioned in certain files would be at least questionable ;*
 - *the procedural rules which prevent the utilisation in court proceedings of evidence that is not legally admissible because it was obtained in breach of a secrecy protected by the law (see Art. 143 of the New Code of Civil Procedure).*

Anonymous childbirth was above all a measure designed to ensure that childbirth was surrounded by discretion : it was thus essentially a measure of social law, warranted by the distress experienced by some women and, as such, applicable to marginal situations. In civil law it had no real echo, in that it erected only a factual – and not a legal – obstacle to proceedings to establish maternity. This transparency in civil law also explained why recourse to anonymous childbirth can be had by a married woman in the same way as an unmarried woman and by a person who has attained her majority in the same way as a minor. Law designed to deal with distress is exceptional and humanitarian and – unlike the civil law – is not intended to lay down the essential rules required for the structuring of civil society.

B/ The embarrassing fiction

The clamorous introduction into the Civil Code of the anonymity of childbirth as a ground of inadmissibility profoundly modified the philosophy underlying the system. The Parliamentarians wished partly to endow anonymous childbirth with a certain solemnity and a certain publicity : to affirm that it was indeed a situation that was lawful in France, in order to avoid brutal abandonment of children, ill-treatment of children and even infanticide (the real weight of this argument is much disputed). However, in the course of the debates between the National Assembly and the Senate profound divergencies arose as to the effects of anonymity on proceedings to establish maternity : the Deputies' wish was that the woman who had given birth should not be sheltered against such proceedings, whereas the Senate argued for the creation of a ground of their inadmissibility. It was the latter viewpoint that carried the day.

The main argument in the Senate was that a parallel was to be drawn with medically-assisted procreation, but it may be asked whether anonymity is not much more far-reaching in the case of anonymous childbirth, since not only the biological link but also the circumstances surrounding the child's conception and the woman's distress are obliterated.

The system ends by creating a fiction, and it is an embarrassing one.

The fiction consists of the child who cannot have a mother. Merely ensuring discretion on the part of those who had occasion to know about the gestation and the birth did not constitute a fiction ; on the other hand, the impossibility in civil law of having a mother that affects the child from the moment of birth really does. Of course, the law knows fictions and they are sometimes useful, but they have to be justified.

An embarrassing fiction. In the circumstances, the « radiating » nature of the fiction causes it to produce many perverse effects that give reason to doubt its justification. The main perverse effect consists of the repercussions on paternal filiation, as is perfectly illustrated by the Riom case (16 December 1997, JCP 1998, II, 10147, noted by Th. Garé ; Dr. fam. 1998, comm. 150, P. Murat). Broadly speaking, some excesses can be observed :

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- *Questionable rectification of certain civil status certificates in order to bring them into line with the anonymity. The circular of 3 March 1993 contains instructions that are at least surprising : if the identity of the woman has been revealed in a recognition of a child born out of wedlock and if the civil status official becomes aware of the request for anonymity after the certificate has been drawn up, it should be rectified administratively. This is contrary to the wording « all necessary information regarding the birth » in CC Art. 62, which enables a father to effect a recognition before the birth or a recognition of a child whose mother has concealed the place of birth. This possibility also runs counter to the idea that recognition is a personal act that is not subordinated to the wishes of the child's other parent. In this way, civil status offices lend a hand to the making of curious arrangements that belong more to the expression of individual wishes than to a mandate governed by the general interest.*

 - *Ineffectiveness of perfectly valid recognitions of paternity, on account of inability to identify the child concerned and inadmissibility of any action aimed at establishing the reality of the paternal link (commentary on the above-cited Riom case, 16 December 1997). Is it normal to refuse to allow a father who effected a valid recognition to have biological tests carried out that could prove that the child named in the certificate is really his ?*

By introducing anonymous childbirth into the Civil Code in the shape of a ground of inadmissibility of proceedings to establish maternity, the legislature probably weighed insufficiently the secondary effects of its decision and seriously upset the balance regarding what should have remained no more than an exceptional social measure.

II - THE SEARCH FOR A BALANCE

The current French system is probably unbalanced, but does this mean that our tradition of anonymous childbirth is irreparably doomed ? The strongest doubts derive today from the fact that the act is well-nigh irrevocable. De lege ferenda, thought should therefore be given to the incidence of the passage of time on the effects of the request for anonymity.

A/ Justification for anonymous childbirth as time goes by

The justification for the anonymity probably does not remain so strong as time goes by : it is very strong at the moment when anonymity is requested, but can diminish later.

- Anonymous childbirth at the time it is requested. This can be seen to have three kinds of good reasons :

- *from the child's point of view : life is preferred to abortion, brutal abandonment, infanticide... This argument is strongly contested and has today probably lost much of its weight.*

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- *from the woman's point of view : whilst it would probably be going too far to plead a woman's liberty, account can at least be taken of the irrational fear that prevails in a certain number of situations, probably numerically quite few if some observers are believed. However, in a bureaucratic society where everything has to be accounted for, there has, since the time when children are no longer born at home, been some justification for not relying solely on professional secrecy or the confidentiality of administrative files as a means of ensuring that childbirth is surrounded by discretion. The law is one thing, but its application in daily life is another... This militates at least in favour of maintaining an anonymous admission to medical institutions.*
 - *from society's point of view : encouraging discovery of details of a person's identity is probably a positive trend, but this objective will probably never be fully attained : anonymous childbirth constitutes no more than tolerance for a very few marginal cases that avoids falling into rule by the police where the excesses could be just as open to criticism as the possibility of anonymity.*
- *Anonymous childbirth over time. Two points warrant reflection :*
- *The request for anonymity should not be a means of totally preventing the establishment of paternal filiation. The mother's individual wishes should not have the capacity to override arbitrarily several social needs that are intrinsically legitimate and have, if taken together, an undoubted weight : depriving the father of his paternity, depriving the child of any blood relationship and denying him the possibility of knowing his mother's identity. One should therefore at least allow sufficient time after the birth for the father to react and give him the means of taking steps to establish that it really is his child who is involved (genetic tests).*
 - *Preference should be given to the possibility of making the anonymity revocable. It is aberrant that when, years after the request for anonymity, the woman who gave birth and the child, each for their own part, are seeking details about themselves, one should be left with no more than the immutable effects of a situation that was created in the past. Revocability of the anonymity has nothing to do with putting in question any optional filiation (adoption) that may have taken place. Knowing one's mother's identity is one thing, legal filiation is another. A step was probably taken, in the Act of 5 July 1996 (see Article 62 of the Family and Social Assistance Code), in the direction of accepting the idea that the secrecy surrounding gestation and blood relationship might not be irrevocable, but the means and organisation of a proper lifting of the anonymity are missing.*

B/ Towards an improved regulation of the time factor

In order to simplify the matter and eliminate its main perverse effects, it is perhaps necessary :

- *to accept in our law the principle that the naming of the mother in the birth certificate establishes a relationship of filiation with her (whilst retaining the possibility of not indicating the mother's identity).*

- *to retain the possibility of anonymous admission to a medical institution to give birth, but without such a request having any particular effect in civil law – other than factual – notably on the establishment of maternity. At this stage one could perhaps imagine giving the woman a choice between two kinds of anonymity : either a definitive and irrevocable anonymity, or an anonymity that could be lifted, in that details of the identity of the woman giving birth would be stored in a safe place. It could, for example, be envisaged that, on admission, the woman would leave a sealed identity document and also a sealed envelope addressed to a centralised agency which would store such details.*
- *to organise a storing and mediation agency which would allow contact between mother and child to be re-established on request.*

In this way, one could hope to have a graduated system :

- *an absolute anonymity deriving from complete silence in the civil status records and the discretion that surrounded gestation and birth. This situation should be exceptional.*
- *a more flexible anonymity reserving the future and a possibility of making contacts after mediation through an agency that would have acted as an intermediary and also been responsible for storing the data on the mother's identity. This situation should be preferred in case of a request for anonymity.*

Framing the questions in the form of a conflict between the individual rights of the mother and of the child – the mother's right to anonymous childbirth against the child's right to discover his origins – takes no account of the effects of the passage of time on the situation and thereby crystallises the opposing positions in an irreversible way which today seems more detrimental than useful. It is probably worth keeping anonymous childbirth, but essential to put it in order.