

Opinion n° 90

Access to origins, anonymity and confidentiality of filiation

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Access to origins, anonymity and confidentiality of filiation.

Introduction

- Questions

Why should this issue of anonymity, of confidentiality of filiation and access to origins loom larger in contemporary society than it ever has before? Is this due to progress in medically assisted reproduction (MAR) techniques and their growing incidence? To social demands encouraged by different cultures? To developments in international law? Psychoanalytical trends? The rising impact of recognition for the "Rights of Children"? The consequence of increasingly frequent use of family biological and/or genetic data? Contemporary society's infatuation with transparency at any cost? Growing recognition by society of psychological and moral distress which must be assuaged? Increasing dissociation between so-called biological filiation and so-called social filiation, between "emotional" and "symbolic" filiation?

The next issue arising is when is there filiation? What filiation should the law recognise? Are there cases when recognition of filiation by law totally or partially masks one or the other of the actors at the origin of a birth or of an intermediate stage of the birth? If so, for what purpose? To protect whom?

All these questions are well-founded and have led CCNE to consider ethical issues raised by the secrecy and anonymity of filiation at a time when dissociated fatherhood and motherhood are on the increase. Since the publication of Opinion n° 60 on a Re-examination of the law on bioethics CCNE has continued to propose a public discussion on the limits which should be set to the principle of anonymity including the possibility for individuals of obtaining information about their origins, in particular as regards procreation.

At the heart of this debate is the dissociation which may exist between the two dimensions of filiation: biological dimensions connected to the man or woman who are the parents of a child, and the social dimensions connected to the identity the child is brought up with. This dissociation has always existed in conception out of wedlock or through adoption but is now legally recognised including acceptance of MAR with third party donors. It is claimed as a right in extreme forms of "surrogate" motherhood and adoption of a child by two people in a homosexual relationship. The importance and intricacy of these two dimensions of filiation in family relationships has been emphasised by psychotherapists. Some pragmatic legal solutions have been offered, with variations depending on the national and/or cultural context, with sometimes a preference for "the rights of the blood relationship" and of biology (DNA identification in a paternity suit), and sometimes a preference for social considerations by the acceptance of certain established situations.

However, the situation is altogether different when filiation is connected to the procedure for anonymous childbirth (called "accouchement sous X" in the French legal system) or to MAR procedures. Anonymous childbirth protects a mother's identity which remains unknown to her child, the anonymity residing in the masking of a name which could otherwise fit into in a line of descent. Some progress has been made on the possibility of accessing identifying or non identifying information because of the recent creation of CNAOP[□]. However, in the case MAR procedures involving a third party donor, families, parents and

[□] Conseil National pour l'Accès aux Origines Personnelles (National Council for Access to Personal Origins).

children come face to face with essential issues: secrecy, anonymity, identity. The two words, secrecy and anonymity, do not cover the same ground. Disclosing the secret may raise the question of anonymity, but keeping it means that the issue of anonymity cannot even be raised. Secrecy is attached not only to the mode of conception but also to the identity of the person who permitted parenthood. In this case anonymity is akin to secrecy. The secret of the mode of conception is a secret for the child only; the secrecy and anonymity of the source person concerns both parents and children.

The right currently granted to parents to keep secret their mode of procreation is in opposition with the wish to gain access to origins which is ever more frequently expressed in today's society and that some consider to be a right. This opposition demands ethical consideration on the legitimacy of that access and the possibility of putting it forward and obtaining satisfaction. The rights of parents are supported by legislation on filiation which recognises and regulates filiation of children born to a couple (although they may not be the biological children of that couple). It also recognises filiation in single-parent families. Issues regarding secrecy and anonymity are therefore situated at the confrontational borderline between traditional law and a request for access to origins.

Well known medical arguments have always favoured the rights of parents.

Third parties donating male or female gametes or embryos are participating in a voluntary act of generosity. They are not committing themselves to parenting. If that responsibility was thrust upon them by a disclosure of their identities, the effect could be a rarefaction of the number of donations.

Beneficiary parents are accepting parenthood. They are taking the child into their family as though he were one of their own biological children. They do not wish to share their parenthood at a later date with an identified donor who becomes no more than a biological intermediary. Women giving birth under the anonymous childbirth procedure are claiming the right to conceal their identity from the child they have given birth to, by reason of the right to privacy.

And so everything appears to be very simple; anonymity and secrecy are maintained to keep the family peace and/or to respect the right to privacy of all concerned. Attempts to modify this state of affairs have always met with protest from many quarters. As a result, there has been little change.

However new circumstances justify a review of the ethical side of the equation.

- Medical practice is increasingly concerned by the concept of biological traceability, particularly as regards genetic data. For several diseases acquiring information regarding the ancestry and the true or supposed genealogy is helpful.
- Easier access in some countries to genetic testing encourages some genetic "tourism" to dispel doubts on genetic reality.
- The anonymous childbirth procedure is changing to the extent that in certain strictly controlled conditions a child may gain access to his or her origins, thanks to the creation of CNAOP.
- There is growing recognition of the specific rights of children within Europe and further afield. Article 7 of the International Convention on the Rights of the Child adopted on November 20, 1989 by the General Assembly of the United Nations and

ratified on September 20, 1990 by a number of countries, including France, reads, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."*

This disconnection between social and biological parenthood adds further complications to a situation that has always been a cause for scandal. Illegitimate children, if the secret of their birth was known, were for a long time — except in royal families — considered to be children without any rights. However the situation has changed considerably in both legal and social terms. In French law, all differences have been eliminated between legitimate and illegitimate children, and even those born of adultery. As a counterpart, one may ask whether children should have new rights as regards their biological parents or at least be entitled to knowing their identity?

Medically assisted reproduction (MAR) procedures do not by any means, as we have seen, exclude reflection on the confidentiality and anonymity of filiation. Recurrent discussions on the anonymous childbirth procedure have revealed issues which go way beyond simple technical problems. Today, the biological proof of filiation, which used to be an impossibility, is within our grasp. MAR itself is broadening its scope since it offers the hosting of embryos, or even in certain countries the "loan" of a uterus or gestation on behalf of a third party, practices which can be used by homosexual (or non homosexual) couples to satisfy their desire to parent a child. Nor can the essential role of religions and cultures be forgotten in this context. Issues relating to origins and endings connected universally to parental relations are of direct concern to religious and cultural traditions since they are the classic and historical guardians of the interpretations and values which they attach to the subject.

CCNE does not intend to enter into any superficial examination of the views on filiation held by various faiths; however, it is clear socially and culturally, that religions have inscribed in our collective conscious and subconscious philosophies, the existence and expression, at the heart of all human experience, of filiation along dual lines, i.e. I am the father or mother of..., I am the son or daughter of... On their part, the upholders of rationalist philosophies without reference to a religious vision, do not altogether deny the value of such relationships. They simply wish to encourage a freedom of choice that they consider religious traditions do not provide. The various religions, like the rationalist schools of thought, make an important contribution to ethical reflection raised by the new forms of disconnected filiation which are of potential concern to all humankind. As for ethics, in interrogative form here and even less normative than usual, who should be questioned? Parents or children? Should the issue be viewed from the standpoint of those who give life or those to whom life is given? On the surface, it is all very simple — the question is raised by the applicant. However, in order to apply one needs to be informed and this is where the ethical issue arises for both parties. For children to ask questions, their family must give them enough information for the questions to be put. The ultimate issue being the right not to know.

Possible situations are so complex and diverse that each case must be judged on its merits. Questions may arise at different times in the personal history of a child or of an adult, in a medical context or as part of a process of identity-building. Ethical reflection must attempt to

* This text has given rise to several interpretations, some of them excessive and the ambiguity of the drafting needs to be underlined. However, it is related to events in South America, in particular the abduction of very young children to which the Convention was seeking to draw attention and thus prevent forced disappearance and the irregular adoptions which ensued. The right to know one's parents is not equivalent to the right to know the donators of gametes. Parents are not necessarily the genetic parents.

find the best way of coping with the possibilities that today's medical science offers, with a view to having a beneficial effect on the lives of the various actors of family relationships. It must also seek to examine the significance of human parenthood with the help of the social sciences in particular.

- The legitimacy of searching for origins

In Latin, *oriri* means "to come into being, to rise from, to be born". It is interesting to note that the word origin designates both the beginning of something and "that which produced something, the point from which something starts out". The word therefore designates not just an event, a point in the temporal line, but also the previous causal process, the phenomenon which was itself the genesis of the eventful moment.

The two meanings are enmeshed in any "search for origins". When we ponder on why we exist, we do not simply consider the event of our arrival in the world (the "date of birth"). We go further in our search to embrace the temporal process which preceded this birth. We consider our place on the genealogical map which is supposed to tell us why we bear this or the other name and to whom we are related.

The very ordinariness of having a date of birth and a last name conceals the symbolic importance that these chronological markers play in the construction of our identity. To be convinced of this fact, one need only consider the difficulty that people whose name is unknown and exact date of birth open to question generally experience in constructing an identity for themselves. They lack this "recognition by others" that modern philosophy and phenomenology have so rightly emphasised. It is through the experience of self-recognition by the group that human beings become conscious of themselves and of their identity, that they structure their relations with others and their vision of the world. The same is true for parents and grandparents when they refer to their children and grandchildren. The distress felt by some grandparents when they are told or discover for themselves that their grandchildren are not directly the offspring of their own children, is sometimes ignored.

A significant fact in this context is that, until quite recently, when people were asked their name, they replied in terms of lineage: "I am the son of, I am the daughter of". To introduce oneself as the "son" or "daughter of" was a way of expressing the impossibility for men to conceive of themselves independently from their ancestors. Modern thinking, evolving on a more individualistic path, has led people to think of themselves more in isolation and unrelated to any line of descent: I am "myself". And yet the search for genealogical trails which a growing number of people nowadays are interested in is evidence enough that this need to relate to ancestry is far from over and done with. By anchoring our existence as a link in the family chain, our family tree moderates the irrationality of our presence in this world.

Although in some cases it may border on obsession, a search for origins is a natural and necessary phase in everyone's process of constructing a personality. It can occasionally become somewhat pathological, generally because it was provoked by others, by the testimony of others, without always giving the subject an opportunity to verify the authenticity of the statement. Is this man who says he is my father, for example, really my father? Even though he may seem sincere, perhaps his statement is supported by intangible proof? How do I know that he is not mistaken or has not been deceived?

For that matter, proof of biological parentage does not provide anyone with the ultimate key

to origins and to presence in the world. Whilst accepting it as legitimate, Pascal described the vanity of man's ultimate quest for origins which leaves him "lost in this remote corner of the universe, ignorant of who put him there, what he came to do and what will happen to him when he dies¹."

- Consequences of scientific progress on biological traceability

Scientific progress in genetics have given rise to great therapeutic expectations. Genetic tests and prints have become commonplace which in turn has brought about an increase of offers. Human beings, be they sick or in good health, are increasingly demanding regarding their personal biological data. They want more and more information, genetic or otherwise, so that this knowledge can help them face up to whatever fate awaits them. The notion of family genetic information, enshrined in the law dated August 6th, 2004, views it as an essential component of healthcare and prevention. Should the benefits of this biological "traceability*" be reserved for those whose lineage was not subjected to the dissociation mentioned above (with obvious reservations regarding the biological truth of such statements)?

- The social/biological contrast?

As Françoise Héritier wrote: "procreation cut off from sexuality is radically changing our 'centuries old concept of lineage'. Children are no longer necessarily conceived or born in their mother's womb and there can be more than two parents. This compromises the equation between giving life and lineage. Biological truth, and even more genetic truth, must be accepted as not being nor having ever been the only or even the main criterion on which to base lineage. This situation prevails everywhere: social fact cannot be equated to biological fact²." However, biology cannot be excluded from social reality, as is explained by Jean-Louis Bruges: "Biology, or genetics, is not a neutral foundation on which a personality is built owing everything to cultural relations and social exchanges. To an extent which it is impossible to determine with precision, but which is surely considerable, it determines that personality... My body links me to those who preceded me and from whom I inherit. It is my "heritage". It will sustain me throughout my life. It reminds me that although I may fashion myself, I also inherit at least as much. Both sperm and oocyte express my genealogy. Both of them represent memory, source, history and therefore future promise."³ Rather than speak of biological truth, perhaps we should use the term "biological information" which is not sufficient alone to describe the reality of a person. The distinction between sexuality and procreation, to which in certain cases is added the distinction between conception and giving birth, must encourage us to question our traditional model of filiation.

This tension between the biological and social components reminds us that, despite the Napoleonic Code which in 1804 gave the status of father to the mother's husband and not to the biological father, thereby stating the primacy of social filiation, it is difficult to reject the traditional model according to which biological reality is the foundation of filiation. Our filiation system, so-called bilateral or cognate, is founded on the genealogical model which was conceptualised by Françoise-Romaine Ouellette, an anthropologist from Quebec, as follows: "Every individual is the issue of two other individuals of a previous generation and

¹ Pascal, *Pensées* Fragment 693, section XI

* The word seems more appropriate to veterinary or commercial subjects and seems demeaning when applied to people...

² Françoise Héritier, *Masculin / Féminin. La pensée de la différence*, Odile Jacob, 1996.

³ Jean-Louis Bruges, *Communio*, Fayard, 1989

of different sexes who, in principle, are that individual's parents, his or her father and mother⁴. This model is based on the notion that filiation is a fact of nature and that it is exclusive, with each child having a single father and a single mother.

The MAR and anonymous birth procedures produce variations in that tension.

Voluntary paternity in France is based on rules of law regarding physical filiation, unmodified by the reform in Order n° 2005-759 of July 4th 2005: if the couple is married, the husband is considered to be the father of the child by presumption of paternity; if the couple is unmarried, a man must recognise the child to become the child's legal father. Rulings derogating from the Code of Law reinforce the notion of physical filiation:

- Consent given to medically assisted reproduction disallows any subsequent legal action to contest filiation or claim status.
- Once consent to sperm donation has been given for his own couple, a man who does not recognise the child born of the procedure, is responsible for mother and child: the discretionary act of recognition becomes an obligation.

Once paternity is established, French law provides it with considerable stability. The *Code Civil*, modified in 1994, but left unchanged on this point despite the debate on medically assisted reproduction on the occasion of the law on bioethics dated August 6th 2004, establishes the principle that: "consent given to medically assisted reproduction disallows any subsequent legal action to establish or contest status." In medically assisted reproduction, the difference between father and biological father is established. As a consequence, this paternity which is purposely inaccurate in biological terms, is in principle unassailable — unlike traditional paternity (unless it can be proven that fertilisation was not the result of insemination by the donor's sperm but through the natural intervention of a "third man").

When it is the oocyte or the embryo which is donated, maternity is recognised for the mother who gave birth, and for her alone.

With anonymous childbirth, paternity is completely ignored (except in cases where the father has been informed and can, of course, recognise the child within two months of birth or as long as no adoption procedure is underway; but recognition is only possible if the father knows of the date and place of birth.) whereas the mother's identity is simply not given.

- Influence of the environment on the construction of the child's personality

The complex relationships that are built up during pregnancy between mother and foetus are evidence of the considerable importance of the maternal environment at the start of life. Filiation reduced to biological considerations ignores the fact that a child's brain continues to develop after birth and particularly during the first few months, hence the impact of that period of life on an individual's destiny. Stress, indifference, multiplicity or hostility are major sources of present and future anxiety for a newborn child. Examples abound of children whose destiny has been more powerfully influenced by the favourable or unfavourable nature of a family environment in the first few months or years of life than by a well-established social filiation.

⁴ Françoise-Romaine Ouellette, "Les usages contemporains de l'adoption", in Agnès Fine (dir.), *Adoptions : ethnologie des parentés choisies*, Paris, Maison des sciences de l'homme, 1998, p. 153.

I The various situations and their sociological, legal and historical components

Can or should such a variety of birth situations be considered in the same light: the anonymous childbirth procedure with subsequent adoption, artificial reproduction by gamete donation or embryo hosting or a child born of normal physical reproduction but wishing to verify "biological origins"? Such diversity deserves separate analysis, at least in the first approach.

I.1. Anonymous childbirth

I.1.1. The historical approach

Anonymous childbirth, or maternity kept secret, is part of an historical tradition, justified by the fact that its purpose was to ensure the survival of newborn babies and help their mothers in difficult circumstances to give birth in a reasonably hygienic environment. The practice of giving birth in secret motivated the creation by Vincent de Paul in 1638, of a charitable institution for the protection of foundlings, which was the successor of the very ancient tradition of baskets placed in church porches to fight against infanticide as early as the 4th century. Later, the baskets were replaced by turnstiles at the entrance of hospices so that infants could be left anonymously to be taken into a charitable home.

I.1.2. The sociological situation

Anonymous childbirth was established in France for humanitarian reasons and continued for public health reasons: it allowed a woman in difficult circumstances to give birth without charge and in the healthcaring environment of a hospital, and it saved the newborn infant from being simply left on the streets. Since the Neuwirth and Veil laws on contraception, these occurrences are rare but their circumstances are always dramatic. According to a study commissioned by the Ministry of Employment and Solidarity in 1999, an estimated 670 women avail themselves of the possibility each year in France. Two thirds of them are under the age of 25. They comprise young girls from very deprived social backgrounds, in particularly precarious circumstances (close on half of them are in the Paris region); they are unemployed, job seekers, or students, in a miscellany of social circumstances). 20% of these pregnancies are the result of rape or incest. Abandonment is frequently the result of pressure from society, family or of economic reasons. Some young women conceal their pregnancy and give birth secretly.

I.1.3. The French legal system

Originally centred only on charitable care for abandoned newborn infants so as to avoid infanticide, the tradition of assistance and care for newborns was supplemented by protection of confidentiality through various legal instruments (decree-law of September 2nd 1941. Later, sanitary and social regulations were added to the Code on Family and Social Assistance).

In general, the text of former article 47 (L. 222-6 of the Family and Social Assistance Code is based on the law dated January 22nd 2002) is designed to provide assistance free of charge, secretly and with the possibility of anonymity: "No identification is required and there is no investigation". The law dated July 5th, 1993 incorporated secret childbirth into the Code Civil (Art. 341.1⁵ C.civ.). The law dated July 5th 1996 on adoption attenuated the irreversible and absolute nature of arrangements regarding anonymous childbirth and the subsequent handing over of infants to social services.

⁵ "At the time of giving birth, the mother may request that her admission and identity remain confidential".

Many reports have been made on anonymous childbirth⁶, giving rise to a recent law dated January 22nd, 2002⁷ regarding access to origins of adopted persons and wards of state⁸. Presented as a well-balanced law, it was voted unanimously. Its aims are to make access to their origins easier for those concerned. It modernised the legal framework for secrecy of origins in anonymous childbirth by confirming the trend established in the law dated July 5th 1996 for the reversibility of secrecy on condition that the mother gives specific consent. While it retained the possibility of giving birth anonymously, the law removed some of the legal and administrative obstacles in the path of access to personal origins and created a National Council for Access to Personal Origins (CNAOP), tasked with helping adult offspring in their quest, facilitating the reunion of parties concerned and smoothing out possible difficulties. In order to avoid any ambiguity, the new Article L 147-7 of the Family and Social Assistance Code stipulates that access to a person's origins has no effect on identity and filiation. "It does not give rise to any obligation, benefit or support of any party". The European Court on Human Rights rejected on February 13th 2003 in Strasbourg, the request of a person aged 37, who had been abandoned under the anonymous procedure and had later been adopted, who claimed that the secret of birth and the resulting impossibility of obtaining access to origins was a violation of rights as guaranteed by Article 8 of the Convention and discrimination contrary to Article 14 of the Convention. The right to respect of her privacy for a woman giving birth was clearly stated by the Court. This decision confirmed the position taken by French law on January 22nd 2002 regarding access to origins for people who had been adopted and for wards of the state.

There is however a further difficulty regarding the wording of Article L147-6 of the Social Assistance and Family Code; it is possible to access the mother or father's identity after their death, on the condition that he or she had not expressed any objection when the child had formed a request for access to origins. No consideration was given to the possible adverse effects of such tardy revelation. The present wording of the text does not permit the mother or father to express during their lifetime a pure and simple objection to any revelation of identity after their death. As a result, those born anonymously are inclined to await a parent's death to avoid a refusal⁹. This raises a major ethical issue.

I.1.4. Feedback

The creation of CNAOP was designed, as we have already observed, to facilitate access to personal origins for people born of anonymous childbirth¹⁰. However this creation has also generated some unexpected tension. For some people, it was understood as meaning that they had not just the possibility, but also the right to access their origins, even though nothing of the kind has existed at the time and the practices of social services were very patchy.

⁶ Report by the Conseil d'Etat on the status and protection of children, May 1990. Opinion by the CNCDH (National Consultative Commission of Human Rights) of January 14th 1999 "Parenthood and Human Rights in relation to legal regulations and social practices". Report of the Working Group chaired by Mme Françoise Dekeuwer-Défossez on the Renovation of Family Law dated September 1999. Report on "Childbirth under X and secrecy of origins, Understanding and assistance", Department for Women's Rights, Ministry for Employment and Solidarity, Dec. 1999. Report by the Medical Academy April 2000. Report by J.L. Lorrain, Opinion in the name of the Commission for Social Affairs on the draft bill, adopted by the French National Assembly on access to origins of adopted persons and wards of the state, Sénat, n°77, Nov. 15, 2001. Report AN n° 3086, May 23rd 2001, V. Neiertz, p. 14.

⁷ H. Gaumont-Prat, The reform dated January 22nd, 2002 and the European Court on Human Rights' decision of February 13th, 2003. *Revue Droit de la famille*, May 2003.

⁸ JO January 23rd 2002, p. 1519.

⁹ If of course their request is made after the mother's death.

¹⁰ 2004-2005 CNAOP Report, May 2005

The first president of CNAOP¹¹, Roger Henrion, considers that the effects, positive or negative, of the new legislation encouraging mothers to provide some information about themselves, cannot yet be evaluated for lack of sufficient experience: "There is a danger, if women believe that their privacy could be violated, that sealed envelopes are found to be empty of any information or contain false information. There was also a risk of a return to previous high levels of the number of anonymous childbirths, or worse, abandoned children and infanticides. The key to the problem resides essentially in better care, entirely clear and honest information provided on available options and better psychological counselling for women in maternity wards, at the time the decision has to be made, or even in the following weeks. He points out that the very first meeting between a birth mother and a person born anonymously took place in February 2003 (cf CNAOP's activity report for 2004). Nevertheless, the percentage of adults born anonymously who turn to CNAOP is very low (approximately 1-2%).

The rather short time given to a woman to change her mind about abandoning her child, at present set at two months, poses difficult problems. On the one hand, it does facilitate adoption and protects the child at a crucial time of its young life, from suffering the trauma of abandonment; on the other, it may not leave sufficient time for the mother to think and perhaps change her mind. This situation leans in favour of the child so that it is not left, for purely legal considerations, in a situation of emotional vacuum.

I.2. Adoption

I.2.1. The historical approach

The purpose of adoption is to give a family to a child who does not have one and to give him the possibility of becoming a full member of that family. However, the legal and practical aspects of adoption have undergone considerable modification. As regards the secret of adoption, which used to be recommended practice, from the 50s onwards there was a gradual move to recommend that children should be informed as soon as they arrived in their adopted families. Full adoption is possible in certain circumstances, but these are very different depending on whether children are wards of the state, born and declared abandoned by judicial decision, or born of parents consenting to adoption. The possibility of full adoption also exists for children from another country. In some, but not all cases, children may have access to the identity of their biological parents if secrecy has not been specifically requested.

I.2.2. The sociological situation

Society's attitude to single mothers has changed and the growing presence of single-parent families no longer generates the kind of disapproval which once might have been a reason for abandoning a newborn child. Simultaneously, this change of heart has been of benefit to adopted children whose rights within their adopted family are gradually being recognised. The number of children for adoption in France is steadily diminishing, both because of the stagnating birth rate and of successive and more permissive laws regarding parenthood (the Neuwirth law of 1967 on contraception, the Veil law of 1975 on elective abortion). The reduction of children available for adoption in industrialised countries has encouraged would-be parents to consider the possibility of adopting abroad. International adoption is becoming more commonplace and contributes to giving more prominence to the question of the secrecy of adoption which can no longer be treated in the same way when there is an obvious physical

¹¹ National Council for Access to Personal Origins

discrepancy. This growing trend to international adoption has therefore led families to reveal an increasing amount of information on the geographic origins of children and the circumstances which orphaned them. Since international adoption has given rise to making such information more routine, national institutions and communities are more inclined to provide it when it is available.

I.2.3. The French legal system

In substantive law today, full adoption has the effect of giving the same rights to an adopted child as those enjoyed by a legitimate child of the adopting parent, by full inclusion into the family and in particular rights to the name, inheritance, support, parental authority. In correlation, the child loses all legal and practical ties with his own bloodline.

Once full adoption has been awarded, a transcription of the decision is recorded on the registers of the place of birth of the adopted child which replaces any other such document previously held by the child and contains no indication of the original filiation. The full copy of the birth certificate that an adopted child may need and request does contain limited reference to the adoption decision, so that the child may find a trace of his original filiation if the latter has been legally established. This goes by the name of "substitute filiation".

What French law calls "simple adoption" which is a form of partial adoption, leaves however considerable room for retaining links with the biological dimensions of filiation which are not obliterated by the social dimension. This bears the name of "additional filiation".

Not all those who wish to have children or adopt can do so and it is a well-known fact that the procedure can be difficult and inquisitorial as regards the prospective adopters. Society considers itself the protector of the child's interests and demands a number of moral, economic and social assurances. Adoption was formerly reserved for married couples or else, within a marriage, to one of the spouses wishing to establish a stronger link with his or her partner's children if they no longer had an established filiation with their other natural parent. It was later opened to single people so as to give a greater number of children the possibility of finding a home, albeit in a single-parent configuration. Access of single people to adoption was a first step in the direction of allowing adoption by homosexual couples insofar as sexual orientation cannot be a factor in evaluating the suitability of a person to bring up a child. Today the issue of adoption by a single person is still in debate at a time when there are powerful demands being made to open up adoption to unmarried couples who, according to French law as it now stands, cannot legally adopt as a couple. These demands include those of homosexual couples, and those cohabiting in a heterosexual relationship or in a civil law partnership (PACS).

To view with a generous and open heart the status of a child who, like any other is brought up by parents, but whose parents are homosexual, is the way to protect from discrimination a child who has already had to bear separation from his biological parents. This is not meant as an encouragement to create or promote this kind of situation as a new standard. Nevertheless, it is clear that a child in a homoparental home may be more likely to ask questions about his or her origins.

I.2.4. Feedback

In the last few decades, it has become customary to tell children that they were adopted as soon as possible¹². All the professionals agree that it is important and that there are very positive consequences if a child is told that he was adopted even if this does not necessarily give rise to information about identity.

¹² J.F Mattéi, *Enfant d'ici, enfant d'ailleurs, La documentation française, 1995*

I.3. Birth after MAR

To overcome infertility, medically assisted reproduction is now commonplace and in France, these procedures are regulated by the so-called "bioethics laws" of July 29th, 1994 and another law on bioethics passed on August 6th 2004. This technology includes in particular the possibility of securing gamete donation of embryo hosting by people who are unconnected to the couple who wish to become parents. The well-established experience of CECOS (organisations in France for the study and conservation of human eggs and sperm - Centre d'Etude et de Conservation des Oeufs et du Sperme humains) and the more ancient tradition resting on human blood and organ donation led to an acceptance of the principle of anonymity between donors and beneficiaries. The principle was incorporated in the *Code Civil* by the 1994 law.

I.3.1. Sperm donation

I.3.1.1. The historical approach

Artificial insemination with a third-party donor has been performed for a long time with the objective assent of the medical profession. But the anarchical — or even ambiguous — nature of certain practices led to the creation of CECOS in February 1973 so that the system could be organised and rationalised. In France, 23 public structures and a private institution which is not a CECOS (IFREARES in Toulouse) have made it possible to supply couples with the sperm "straws", provided by voluntary donors, who remain anonymous for the recipient couple but not for CECOS. The donors are selected by CECOS practitioners on the basis of a minimum number of morphological characteristics matching those of the recipients. Donors are never told whether their donation was followed by procreation. Recipients never gain access to donor identity. Only CECOS has access, which can serve at some future date to provide traceability. This mode of action by CECOS has served as the basis for the rules established in the 1994 and 2004 laws.

I.3.1.2. The sociological situation

Sperm donation often helps to heal the wound of masculine infertility and to recover from the impossibility of biological paternity. Nevertheless, men sometimes experience a feeling of exclusion from this purely social parenthood. They need generosity and love to be able to accept this intrusion by a third party. For this reason, the discovery of ICSI*, ten years ago which permits fertilisation using very deficient sperm provided by a hitherto infertile father has diminished by half recourse to AID* (1,400 new requests per year since 1997 as compared to 3,000 from 1983-1993).

I.3.1.3. The French legal system

Gamete donation is defined in Article L. 1244-ICSP. When intraconjugal procreation is impossible, the law authorises on a subsidiary basis assisted reproduction with the aid of a third-party donor. The fact that there is de facto dissociation between the biological father and the social father raises the issue of whether the donor's identity should be made known.

The laws requires anonymity and prohibits any research to determine the identity of donors, based on the general principle stated in the *Code Civil* (Article 16-8) and reiterated in Article

* IntraCyttoplasmic Sperm Injection

* Artificial Insemination with Donor sperm

L. 1211-5 of the Public Health Code: "Neither donor nor beneficiary may be informed of each other's identity. No information enabling an identification of either the donor of a component or a product of his or her body, or of the person who receives it can be divulged. In case of therapeutic necessity, only the physicians of either the donor or beneficiary may have access to information which can identify them." Sanctions are set out in Article 511-10 of the *Code Penal* : "Divulging information which can identify an individual or a couple who have donated gametes and/or the beneficiary couple is punishable with two year's imprisonment and a €30,000 fine."

Consent from the requesting couple must be secured in legal form by a magistrate or notary in conditions guaranteeing secrecy.

In fact anonymity is relative and it concerns the allocation of the donation. There is no anonymity at the time the donation is made, since the donor's identity is known to the medical professionals who have specific information regarding his medical, personal and family history as the law requires, and of various morphological characteristics which ensure a degree of resemblance to the father of the beneficiary couple. The law also states that consent from the donor and the other member of the couple are secured in writing following interviews with the physicians. It is only later that the case file is made anonymous as the law requires so that what was perfectly identifiable becomes anonymous and the donor becomes a transparent supplier of a "genetic product". The law stipulates that once the women's husband has consented to AID, he can not contest paternity.

I.3.1.4. Feedback

Very little research has been done on this question. A study in Lyons, after a call for testimony in the national media, was based on about twenty interviews with adult children conceived by artificial insemination with third-party donor sperm¹³. All the children mentioned their parent's "courage" and did not appear to be destabilised by the manner of their conception. The study shows the importance of openness concerning the mode of conception whilst maintaining full respect for the privacy of parents and the need to retain the principle of donor anonymity. The author of the study mentions that child psychiatry studies report that children conceived by AID do not constitute an at-risk population as were, at one time, adopted children. It would appear, according to CECOS reports, that very few children born through AID request the disclosure of biological anonymity. Of course, in order to do so, they need to be aware of the mode of their conception, which is not by any means always the case .

I.3.2. Oocyte donation

I.3.2.1. The historical approach

Collecting oocytes is much more complex than collecting sperm. Ovarian stimulation and vaginal ultrasound-guided follicular puncture are required, as is the case for any form of IVF (in vitro fertilisation). The oocyte is not easily frozen and must therefore be fertilised immediately after retrieval. This explains why oocyte donation could only be considered once human extracorporeal fertilisation became a possibility. The conditions in which oocyte collection take place are more intrusive so that donors are less forthcoming than their male counterparts. Approved centres for oocyte donation generally ask a beneficiary couple to help recruit a donor to maintain the supply of oocytes. The question of anonymity therefore arises in a very different context. A women may wish to receive oocytes from a sister or some other member of her family, in which case the eternal ambiguity prevails that keeping the donation

¹³ See records of auditions (audition of J.L Clément, psychologist with a CECOS), Senate, 1st reading, Draft bill on bioethics, December 18, 2002, in Rapport d'information de S. Desmarescaux, January 2003

"in the family" maintains in a way the fiction of a reassuring lineage.

I.3.2.2. The sociological situation

As previously mentioned, oocytes are rare gametes (8-10 oocytes produced on average in a cycle with stimulation, whereas every day millions of sperm cells become mature and available) so that in certain countries there is an actual market for them, with morphological identifying data more typical of irresponsible marketing than of sound medical management of a couple's infertility. The major difference between oocyte and sperm donation is that the woman who carries and gives birth to a child as a result of oocyte donation is, in the eyes of society and French law, the mother of that child. The child therefore has two mothers, a genetic mother and a uterine mother, whereas in the case of fatherhood, there is a social father and a biological one. The female donor's role can be more easily concealed than is the case for a sperm donor, although we do not actually have any comparative data.

I.3.2.3. The French legal system

The 1994 bioethics law was unchanged on this point in the 2004 review and applies to oocyte donation the same conditions of anonymity based on reputedly satisfactory CECOS practices. The six-month embryo quarantine¹⁴ obligation has now been revoked. This will certainly facilitate the management of oocyte donation since it will no longer be mandatory to freeze the embryos received by donation.

I.3.2.4. Feedback

The concomitant MAR situations through anonymous and identified donation have evidenced a clear demand for identified donations within the family circle. A child's perception of a visible obvious mother who gave birth to him, and of a donation of a cell and a genetic heritage which was passed on to him, is probably more difficult to materialise than sperm donation. An oocyte donor is not socially identified as the mother, no more than a sperm donor is socially identified as the father. The beneficiaries are identified as the parents which could imply that in the case of surrogate gestation, the surrogate mother might be viewed as the real parent. A mother receiving an oocyte donation experiences, and this can never be the case for a father, through her pregnancy and intra-uterine exchanges a certain form of biological experience of motherhood so that the social and legal filiation follows on naturally.

I.3.3. Embryo hosting¹⁵

I.3.3.1. The historical approach

The law on bioethics defined in 1994 (Article L152-4 and 5) the various procedures for embryo hosting. However, the implementing decree n° 99-925 was not published until 1999. It inserted into the Public Health Code a section headed Embryo Hosting (Article R2141-2 to 13) describing the procedures.

IVF and ICSI techniques produce, through ovarian stimulation, an average of five embryos per cycle. In order to avoid the risks attached to multiple pregnancies, only one or two embryos are generally transferred and the "surplus" embryos are frozen for conservation. Most of the frozen embryos (85%) are used by their own parents to pursue their parental project. When couples have kept embryos after their project has reached completion (fruitfully or otherwise), they can choose to simply cease conservation, donate for research or to another infertile couple (embryo hosting). Although 22 centres are at present approved for embryo hosting, the activity has been delayed for several reasons. The centres wished for

¹⁴ This means that embryos are kept frozen during six months before reimplantation to ensure that the oocytes were not carrying an undetected disease...

¹⁵ The word "hosting" is in itself revealing of the censorship exercised over the notion of embryo "donation"...

time to reflect on the various issues raised by the psychological and social dimensions of this mode of reproduction and to define a biological and genetic framework for the allocation and matching of the embryos. A shortage of human and material resources attributed to the newly created centres for the management of such donations did little to help implementation. Activity of this kind in fact began in 2003-2004 and the first births occurred in 2004. It may of interest and a source of astonishment that a double donation of gametes, amounting in fact to the donation of an embryo, equivalent biologically speaking to an abandoned embryo, is prohibited by law even though the decision process is different.

I.3.3.2. The sociological situation

Donating an embryo is not as simple as it appears to be since it bears a relationship with adoption despite statements to the contrary, and involves contradictory and possibly strange prohibitions. For example, a widowed mother is not authorised to implant her frozen embryo because the father has died. This same embryo can on the other hand be implanted in the uterus of the wife of an applicant couple, with the widow's authorisation who might thus be obliged to accept — if she wishes to ensure the survival and development of her embryo — handing it over to another couple who would bring up the child without her being allowed to see it* (with the important reservation that such handing over is not in fact possible because of the absence of information on the serological status of the procreator due to the fact that he is dead). Embryo donation is powerfully correlated to a feeling of abandonment on the part of parents and there is clearly a need for psychological and sociological study in this respect.

I.3.3.3. The French legal system

In exceptional circumstances, embryo donation is acceptable, in the event that an embryo conceived in the context of MAR is no longer needed for the parental project of the couple who are its biological parents. This surplus embryo can then be given to another couple for whom medically assisted reproduction without a third-party donor cannot have the desired effect (not necessarily through double infertility). Obtaining this embryo is subject to stricter regulation than is the case for the donation of gametes, and there has to be a judicial decision. Articles L. 2141-5 and L. 2141-6 CSP stipulate that the consent of the donor couple must be expressed in the presence of an authorised practitioner and given in writing. This document, the contents of which have been set by decree, must be approved by the Tribunal de Grande Instance (County Court) of the catchment area of the MAR centre, who may audition the donor couple. The Judge of the Court also records the consent given by the couple and orders an enquiry by social services to determine whether the couple concerned are fit to bring up the unborn child.

Article L. 2141-6 CSP is a reminder of the principle of anonymity: "The couple hosting the embryo and the couple who have agreed to its transfer are not allowed to know each other's identities. However, in the event of therapeutic necessity, a physician may have access to non-identifying medical information concerning the couple who gave up the embryo." As is the case for gamete donation (sperm and oocyte donation) articles 311-19 and 311-20 of the *Code Civil* govern the mandatory filiation as regards the recipient couple who entered into a medically assisted reproduction procedure, and no liability case may be made against the donor.

Could embryo hosting be likened to prenatal adoption? On this subject, Article L. 2141-6 CSP (supra) states that it is up to the Judge to "investigate whether the recipient couple is able to offer the unborn child a satisfactory environment" and it would seem to be a serious

* CCNE opinion n°40 December 17th, 1993

encroachment of the principle of strict protection of confidential data relating to this procedure. It is not so much the confidentiality of the data itself which is at risk, but the confidentiality of the procedure. It must however be recognised that actual practice varies a great deal from one Court to another and that most Judges do not request the investigation by social services.

I.3.3.4. Feedback

In June 2005, 6 out of the 22 approved centres had initiated the embryo hosting activity. There were 98 completed case files for donor couples, corresponding to 318 available embryos and 68 completed case files for recipient couples. The 55 embryo transfers performed had led to 18 pregnancies (32.7% per transfer), 6 children delivered and 10 gestations in progress, 2 of which were twin pregnancies.

I.3.4. Surrogate motherhood

This procedure has been prohibited several times over by French law. CCNE, in its Opinion n° 3 of October 23rd, 1984, did not favour it since it could serve commercial interests and give rise to material and psychological exploitation of the women concerned. The few births that have taken place through this procedure, despite the prohibition, continue to give rise to unease which is motivated by much more than anonymity and secrecy. However, the legal prohibition of this kind of reproductive technology does not prevent the continuation of ethical reflection on the subject.

It is not CCNE's role to take a stand regarding the legitimacy or illegitimacy of the method, but simply to report on a situation which does have a marginal existence and on its impact on the issues of confidentiality and/or anonymity connected to this mode of reproduction and the consequences that could ensue as regards information to be given to children.

I.3.4.1. The scientific approach

Surrogate motherhood is not the proper expression because it embraces two different realities: gestation on behalf of someone else, i.e. the "loan of a womb" to carry the egg fertilised by the gametes of the intended couple on the one hand, and on the other, conception on behalf of another followed by gestation for another when it is necessary not just to lend a womb but also to use the sperm of the husband in the intended couple, or the sperm of a third-party donor to fertilise the oocyte of the wife or of a third-party donor. This situation, where there may be no biological link between the parents and the child, with variations depending on the number of third parties involved, raises the issue of preference for a mode of surrogate gestation rather than adoption, in which there is an identical absence of any genetic link. The only difference is that the choice of gamete donors for conception on behalf of another is no longer anonymous.

I.3.4.2. Sociological data

As regards at least the technique of motherhood on behalf of another, kept within a family to help out a sterile woman, the practice is very ancient, although it was infrequent and remained very discreet. However, with the new MAR technologies, the practice has become more public.

I.3.4.3. The French legal system

More emphasis is placed on contractual relations between parents than on the child's identity. Be it in the framework of surrogate mothering or surrogate gestation, the public order Article 16-7 of the Code Civil following the "bioethics" laws of 1994, is based on the principle that contractual arrangements for both surrogate mothering or surrogate gestation are null and void

to the extent that if a judge is informed of their existence in the context of a subsequent application for adoption, he must reject it.

It is true that these practices stretch to a maximum degree the fragmentation of parenthood by multiplying the number of people involved in the reproduction process. As a result, the question of origins is also made more complicated although legislation in other countries does not approach the secrecy and anonymity issues from the same angle as French law. This is also true of the contractual, not to say commercial, surrogacy arrangements that may be entered into.

Apart from the ethical aspects, the illegal character of such practices in France has serious consequences as regards the establishment of legal filiation for the children concerned. In French law, only paternal filiation can be established through voluntary recognition and registration at birth. For mothers, apart from the natural process of giving birth, filiation must be established by court order and the "contracting" or "intended" mother come up against serious judicial reticence to obtain recognition of her maternal rights. Children who are conceived through surrogacy and later arrive on French territory are in fact devoid of maternal filiation. These practices which are forbidden by law are nevertheless a reality, albeit a marginal one, and therefore raise problems^{16, 17}. It is up to the courts to solve these difficulties in the best interest of the parties concerned.

I.3.4.4. Feedback

The number of children born of surrogate gestation is still too restricted to have any clear idea of their feelings. However, what we do know is that there are situations where the surrogate mother refuses to hand the child over at the last minute and even in a recent case, held an auction to give the child to the best bidder. Biological parents are in this case in a distressing situation which is akin to the theft of a child. It is not hard to imagine the possibly dire psychological consequences twenty years on for a child sold in such circumstances. The risk of merchandising surrogate pregnancies is at the core of ethical reflection. Contracts for rent and delivery, with cancellation clauses would be outrageous. Such de facto commercialization, which of course is not the general case, probably signifies that a child should not learn of the circumstances of the sales contract in which he was involved.

I.3.5. Access to MAR for single people and/or homosexuals

The substantive question regarding the claim for homosexual couples to be entitled to access MAR is not centred on anonymity, but on the denial of sexual difference as a constituent dimension of human generation. The Committee does not intend to pronounce itself on this point. However, were it deemed legitimate ethically and legally to disregard this gender difference, the issue of anonymity would arise in a new context.

If it is considered that the sexuality of a parent is not in ethical terms a criterion for refusing or accepting adoption, can the same be true of access to MAR? French law is categorical since it

¹⁶ Créteil County Court, September 30, 2004, Rev. Dalloz 2005, 476. In such an event, anonymity or secrecy on the part of parents has serious legal consequences since there can be no establishment of filiation. The recent decision to dismiss in criminal proceedings initiated in the Créteil County Court against a couple who had arranged for surrogate mothering in California (the civil case is still in progress), has given new impetus to this question since the decision will no doubt encourage other attempts so that the question of what information should be given to children will arise ever more frequently.

¹⁷ Ass. Plén May 31, 1991, RTDciv. 1991, obs. D. Huet-Weiller ; C.Cass December 9, 2003, J. Rubellin-Devichi, JCP G. 2004, I, n°231. In 1989, the Cour de cassation (final court of appeal) considered that associations created to facilitate encounters between surrogate mothers and "intended" couples were illicit. Following the decision of the Plenary Session of May 31, 1991, case law also considered that a couple in which the wife was sterile could not be granted full adoption rights for a child born of a surrogate mother.

requires the presence of both a man and a woman to initiate a parental project. If MAR were to be made accessible to bachelors and/or homosexuals, this would imply indifference on the part of sperm or oocytes donors as to whether their gametes are given to a heterosexual or homosexual couple or to an unmarried person, without their being given any prior say in the matter. Should cancellation of anonymity be claimed by either beneficiaries or donors in such circumstances, it would paradoxically introduce an element of discrimination. If the great majority of anonymous donors were not indifferent to the ultimate fate of their gametes, there could be a risk of rarefaction of such donations for fear that preferences regarding the fate of their gametes could not be respected. The possibility of a dual circuit with either anonymous or identified donors because of this question alone, depending on the sexuality or celibacy of the beneficiary, raises major ethical problems.

MAR was from the start organised to solve medical* infertility problems rather than to assist in the event of sexual and lifestyle preferences. Giving access to MAR to homosexual parenthood or single people would in fact open it up to anyone who wanted to and might constitute excessive regard for individual interests over collective interests. Medical assistance would simply be called in to satisfy individual rights to parenthood.

II – Anonymity and secrecy

In human relations, secrecy is commonplace, morally acceptable, the right-to-know being reserved for certain predetermined people. Family secrets, medical confidentiality, various forms of professional privileged information are all in current usage.

A major ethical issue as regards secrecy is its relationship with truth and falsehood: secrecy loses its legitimacy if the direct purpose is to deceive. But the definition of terms such as "truth" and "falsehood" have been the subject of philosophical debate since time immemorial and given rise to very different or even contradictory ethical practices on occasions. Today, these differences are amplified by scientific progress. Casuistic discussion on veracity and truth within human relationships is also endless. However, it is common knowledge that people are never happy to discover that they have been deceived. A classic definition of lying is: to speak in the knowledge that what you are saying is untrue with the intention to deceive, so that one could argue that concealment is akin to falsehood when one conceals from a person an important truth which is owed to him or her. The central question then becomes: what "truth" and in what form is it owed? A secret may be between the two halves of a couple (a child born of adultery), but such a secret also concerns the child to whom is refused, for the sake of social order, the truth about his or her biological father. A clear distinction must be made between the construction of a secret, keeping it, and removing the seal of secrecy.

As regards gamete donation, the distinction to be made is:

- the secret of the mode (medically assisted) of conception,
- the anonymity of the donor or donors of gametes or embryo.

Anonymity is not the equivalent of secrecy regarding the mode of conception

Children construct their identity as part of the intimate relationship of the parental couple when conception is natural. They identify their origins through their mother's testimony and the man she designates as the father. This will be confirmed by the social and family environment and the law, following registration of birth. Denial of access to the "primeval scene", the "Noah's mantle", facilitates children's initiatory integration of their own history into that of their family, even though they may sometimes wonder about the truth of their

* and also to bypass the risk of contamination (cf Opinion n° 69 Medically assisted reproduction for couples presenting a risk of viral transmission - Reflections on responsibilities. November 8, 2001.

filiation during a natural psychological process of interrogation concerning origins.

If the mode of conception was medically assisted, the secret may become a factor for destabilisation or even deconstruction when it is perceived as a truth hidden from the child although it is no longer restricted to the nuclear family since it is shared with healthcareers. This can be amplified when the child discovers that the foreign element includes not only members of the medical profession but also the genetic donor, i.e. when to the secret of the mode of conception is added the anonymity of the outsider, the donor of gametes. In addition, discovering the forced abandonment of the initial parental project and its replacement by another project (adoption, anonymous childbirth, embryo hosting) leaves the child born of this procedure with a gap to be filled in the construction of the family history. In this way, secrecy regarding the conceptional mode deprives a child of the chance to enquire about origins and nips in the bud the question of anonymity. The question can only be formulated once the secret is revealed. Anonymity is therefore not the secret itself, but it does justify and encourage it. Anonymity is related to a kind of amputation, whereas secrecy veils an existing truth which must not be revealed. It suggests sharing and protection.

1 - In the case of adoption, the paradox is particularly noticeable. For adopted children, peace of mind is almost always achieved as a result of being informed at an early age. Early revelation has two advantages:

- It defuses the potential drama of the situation: the child can adopt and integrate an item of information that has always been available. The child knows that he is adopted which implies existence before adoption.

- Parents can deliver the information gradually and avoid being taken aback by a question for which they were not prepared.

Secrecy concerning adoption is specific to each case. In the event of international adoption with a difference in physical appearance, the secret is obviously revealed by external circumstances at a very early age. The cessation of anonymity however may be made difficult or impossible by the very circumstances of the adoption (war, natural disasters, eradication of archives, etc.). The same is true with parental homosexuality or adoption by a single parent where there can be no secret. The early awareness of having been adopted may be accompanied by the ontological question "who is my real mother or father?" in the presence of a same-sex couple or "who is my father?" in the presence of a single woman.

In the case of anonymous childbirth, the secret of that special kind of birth for an adopted child comes as an addition to the varying degrees of anonymity chosen by the biological mother.

As we have seen, with adoption secrecy is exceptional. Anonymity is the only issue. Children's demands, which vary considerably from one child to another in the same family, ranging from apparent indifference to obsessive regard to identity, show that despite the quality and earliness of information regarding their birth, a certain amount of uncertainty regarding this quest for non identifying data will always remain.

2 - In the case of children born of MAR with a third party donor, the secret is dual. To medical confidentiality protecting the identities of donors and beneficiary is added the secret which is sometimes maintained by parents as regards the mode of conception. There again, early lifting of the veil of secrecy may circumvent the risks of tardy revelations. Shared by the couple, the secret of the child's biological origins (which parents and medical

professionals may have chosen) is primarily designed to protect the child from singularity and the medical truth of his birth. The secret, reinforced by anonymity and matching (selection of morphological characteristics of the donor to match the beneficiary) makes it possible to conceal the biological truth and the infertility so that a "make-believe" biological status can be maintained. Anonymity, to the extent that it will prevent the child from verifying if he is at the centre of the enigma that he suspects, is a guarantee of the secret the couple makes of the conception of their child and of the child's origins.

In this case, the freedom of access of the child to his origins is entirely subordinated to the freedom of decision that parents still enjoy. Information on origins is not simply a question of anonymity. Is there any reason why MAR should impose on parents moral requirements which are absent in natural reproduction and the revelation of a secret which is totally missing in natural reproduction? Why should the medically assisted nature of the reproduction process impose truthfulness that traditional parenting has not always respected?

Must medicalization strip conception of any element of mystery? Children born of adultery are almost never informed of the truth of their origins. A child born through MAR is for his parents a source of great satisfaction but also of anxiety. Disclosing or keeping the secret of their child's conceptional origins is a reminder of the ambiguous achievement which satisfied a sometimes frantic desire to become a parent. The truth about assisted reproduction concerns the child naturally, but also siblings, grandparents or even in today's society great-grandparents. A child is always part of a bloodline that assisted reproduction with a third-party donor or adoption may interrupt. That is why the secret is important. But the problem is not simply the sum of these two components which are not always linked. A third component is always present, what is left unsaid which can become an invasive guilt-bearing secret poisoning the entire family. Is what is "unsaid" always secret? Probably so when it is associated with avoidance or evasion behaviours that alert children to the secret that is being hidden from them. In such cases, secrecy can become a factor for destabilisation, deconstruction and may be perceived as though it was a truth hidden from the child alone although known to others, and not just the parents but also the doctors. Children who are aware that a secret exists may feel that shame or guilt is attached to the conditions of their birth leading to possible loss of self-confidence later in life. This may be amplified by the discovery that to the medical third party is added a donor third party, i.e. that the secret of the conceptional mode is compounded by the anonymity of the third-party gamete donor. When a child believes that a secret is being kept from him and he discovers what that secret is, it is always a shock which paradoxically leads to demands for revelation of the secret of anonymity. The paradox resides in the probable fact that it is sometimes the secrecy concerning the conceptional mode which provokes the request for identity disclosure. As always, reluctance to supply information creates the need for information. It is important not to confuse anonymity and confidentiality, in the context of MAR with a third-party donor, for example. For the medical world, there is no such thing as anonymity; there is simply confidentiality regarding identifying elements. The distinction between anonymity and confidentiality is very different from the situation of brain-dead organ donors where the medical practitioners harvesting the organ and the beneficiary are theoretically ignorant of each others' identities.

The issue of truth regarding origins goes well beyond a simple reference to biological data. Children wish to know about their personal history, not about their genes. They want to be part of a heritage, a family, rather than relating to a production mode or an assembly line. The debate is always much more complex than would seem at first sight and cannot be limited to only one aspect of reality.

III. Components of the ethical debate

The startling revelation of the conditions of reproduction is always a psychic upheaval. The law is not competent to cope with it entirely. This subject is at the core of a being's innermost intimacy and identity.

Generally speaking, the question of access to origins affects the reality of human reproduction in both of its dimensions, biological and social. It arises in very different situations. In the case of adoption, the decision to rescue an existing child from material and emotional distress combines with the wish of a couple, or of a single person, to experience fatherhood or motherhood. Anonymous childbirth is a possibility for a mother to protect herself in a dramatic situation whilst preserving the life of her child. The various forms of MAR respond to the desire to become a parent and have a child when natural reproduction is an impossibility. Embryo hosting is on the boundary line between adoption and MAR. What is at stake is the best interest of the child and of the child's future pursuit of happiness. But the conception and birth of a child is part of the intimate personal and family history of each person, both children and parents. The manner in which conception is experienced and expressed in speech must also have an impact on the extended family (grandparents, siblings, cousins, etc.) and on society. For some, reason must be based on the plurality of interests involved: the child's, the donor's, those of the "beneficiary" family, of the medical world, of society. The view that respecting people is the foundation of the social context may lead to seeking a hierarchy of those interests. A comparison between the interests involved is fraught with the risk of creating a conflictual ethical debate at the outset, whereas parenthood and human lineage should be par excellence ground for alliance between human beings.

Ethics are an encouragement to review the position of filiation within anthropology. The dissociations between the biological and social dimensions of filiation — sometimes ratified by law — cannot mask the fact that conceiving a human being forms a part of the fundamental relations between people in all aspects of their humanity: biological, psychic, social, cultural and spiritual. In any conceptional project there must be due regard for respecting equally the human dignity of both parents and children. Care is required to avoid, consciously or not, reducing the child, in the earliest moments of his life to no more than a biological entity. Similarly, attaching an exaggerated value to the mental projection of a wish for parenthood while neglecting the physical dimensions of conception must also be avoided. We are here at the outer limits of the satisfaction of the wish to have children through artificial reproductive technologies. Their integration into the social framework cannot suppress the serious ethical issues which they continue to raise. Can the wish for a child, perfectly respectable in itself, justify the use of absolutely any conceptional method? Is there not a risk that children could be transformed into a consumer product? Without at this point seeking to revisit the ethical evaluation of these technologies, CCNE wishes to underscore that access to origins, parenthood and filiation must be evaluated in the specific light of equality of respect for all humans.

Generally, the question of origin or origins is one of the essential problems that any child addresses during the course of his psychic development, together with the discovery of sexual identity, progression to autonomy and becoming aware of the family relationship of which he is a part. The child will put questions to adults and formulate them in varying degrees so as to be able to construct his own background.

The ethical evaluation of the replies to be given to such questions will be mainly concerned with the benefit for the child of access, particularly if he requests it, to sufficient knowledge regarding his conceptional origin. Taking account of the circumstances of conception will

enter into the evaluation.

III.1. The case of adoption

An adopted child will ask all the more questions about his origins if the couple formed by his parents loses its unity or if he perceives some kind of muted anxiety underlying his relationship with his parents. If the child is not truly integrated into a line of descent by an unbending family, it can lead to serious distress regarding identity. His status as an adopted child may paradoxically lead him to reject violently the family who adopted him and into an obsessive search for genetic filiation which is all too frequently a source of cruel disappointment and shattered utopian dreams. The important factor, as it is for any child, is to live in a trustful and loving environment so as to avoid the destructive fantasy of genetic origins stepping in to replace social filiation, but to retain a sufficient hold on the reality of the child's history. Is the revelation of adoption after anonymous childbirth traumatic? It is probably the case, if the child perceives the decision of his genetic mother to be separated from him at birth. For that reason the non-identifying information left by the mother regarding the circumstances of the child's conception and abandonment is important, and the creation of CNAOP was a useful one. But here again, the actual conditions of adoption and the emotional fulfilment of the child's life will enable him to overcome this ontological wound. The matter may arise again with more intensity when the child becomes a parent himself.

III.2. Fertilisation with third-party donors

It is probably in that configuration that the secret is best kept, particularly in the case of sperm donation. In fact, fertilisation with a third-party donor leads to a situation which is almost unacceptable in ethical terms: "Either you choose falsehood regarding origins and make the secret into a taboo, shouldered by the parents; or you satisfy the child's right to know his true origins if he so wishes, and he may find himself confronted with a non-existent father."¹⁸ Is the injustice of deceiving a child regarding his conceptional identity to be tolerated to protect him from unbearable trauma?

In the present state of affairs, two arguments plead in favour of disclosure. On the one hand, there is the difficulty of maintaining perpetual secrecy, a cause of tension, in the presence of the very person who is the secret reminder of the hidden truth. The difficulty may be aggravated by the development of genetic testing. Tardy disclosure of a secret is the source of all the more heartache. On the other hand, the prospect of possible disclosure of the secret gives those who request fertilisation with third-party donors the occasion to assess more precisely the consequences of their action on the child they wish to have. However, the authorities cannot and should not interfere in people's private family life by making disclosure an obligation. Donor anonymity, although it does not encroach on the truth of the child's conceptional origins, does deprive him of knowledge regarding his line of ascent. Perhaps there should be a possibility of access to personal origins similar to the arrangements established for anonymous childbirth?

III.3. Embryo hosting

Since the law dated March 6th 2004, a couple who has used IVF may, by special dispensation, consent to their frozen embryos being received by another couple when they are no longer required for their own parental project. This broadening of the range of therapeutic instruments available to reproductive medicine continues to raise ethical problems. Although it may seem preferable to have a hosting procedure provide a frozen embryo with the chance of entering the world after passing some time in a womb rather than be used for research or be

¹⁸ D. Folcheid, J-J. Wunenburger, *La vie commençante*, in D. Folcheid, B. Feuillet Le Mintier, J-F. Mattéi, *Philosophie, éthique et droit de la médecine*, PUF, 1997, p. 205

destroyed, it does seem reasonable to consider that the dissociation with parenthood is excessive after such a tortuous route. Since consent by both the donors and the beneficiaries must be expressed in the presence of a magistrate, yet a further external actor plays a role in the process of a child's birth. What will be the child's heritage?

There again, the registration of non-identifying data, together with information on the initial "parental project" which could not be completed, can help to piece together personal histories and provide answers at a later time, if a request is made in special circumstances (adolescence, motherhood, death). However, care must be taken, in particular as regards information regarding possible siblings born in the framework of the initial "parental project". The child might be made to carry a psychological burden with unforeseeable consequences.

To sum up, it must be remembered that dissociation, of whatever kind, between the biological and social dimensions of filiation is never anodyne. In particular, dissociations brought about by fertilisation with a third-party donor or embryo hosting by a new couple following IVF raise issues of consequence regarding respect for the child subjected to such practices. In any event, they lead to situations which are difficult to accept in ethical terms. As regards disclosure of the secret of conceptional origins, or of the anonymity of one or more of his parents, while the child's interests require in principle the possibility of access to the truth of his conceptional identity, the principle must be tempered by awareness of the psychological consequences that such access could have and all the more so because in the long term these consequences are difficult or even impossible to predict.

III.4. Surrogate mothering

In the case of surrogate gestation, genetic filiation remains clear and undisputable; but the information given to the child regarding this dissociation between gametes and life in the womb may be unpalatable.

In the case of surrogate conception followed by surrogate gestation, the biological link with the "intended" mother is still strong if it is her oocyte which is fertilised with donor sperm; it also remains as strong with the "intended" father if it is his sperm which fertilises the oocyte of the donor or of the surrogate mother. In all these cases, the information which could be given regarding this multiplicity of genetic and uterine actors confuses the genetic, biological and social reproductive event.

IV. **Recommendations**

In the complexity of each type of situation, the balanced solution best suited to the interest of the child, to equity for those concerned and to lasting serenity within families, must be actively sought. The important thing is to remember that this voluntary dissociation of the biological and social dimensions of filiation must not obscure the fact that the child's inheritance is made up of both these dimensions and of the entire process which led to a single filiation and to his conception. The various situations must be considered separately.

IV.1. Anonymous childbirth

It would be preferable to try and limit the use of this possibility by giving better psychological counselling to future mothers during pregnancy and birth.

The ethical values presiding over new legislation led to the law dated January 22nd 2002 and to the creation of CNAOP. The balance is fragile and should be carefully preserved. It would be best to wait for clearer feedback before embarking on modifications. It is important that the mother should be well informed of the possibility of registering at some point, if she wishes to do so, a sealed envelope containing non-identifying information, or identifying information, whichever she prefers, or of being able to reveal identifying information at a

later date. But it should be made clear that she will always be free to refuse. A system where a mother's identity would never be disclosed unless she had consented to it during her lifetime would be a favourable move. Finally, more attention should be paid to obtaining any existing data on paternal origins.

IV.2. Fertilisation with a third-party donor and embryo hosting

1) Encourage disclosure of the secret of the conceptional mode

- Inform parents of the benefits of early disclosure and the risks of tardy information

Members of the medical professions (doctors and psychologists specialising in reproduction, paediatricians and child psychiatrists, etc.) should give parents the fullest possible information on the risks for the psyche connected to the establishment and continuation of secrecy. They should of course avoid any guilt-inducing statements but help to make clear the devastating effects of tardy disclosure of a secret so that parents are fully aware of the consequences of their action. With no intention of interfering with parental responsibilities, which would be an unwelcome form of "enlightened paternalism", the Committee sounds a warning regarding the dangers of putting off to a later date a decision which becomes of graver consequence as time goes by. It would be advisable to encourage couples to think ahead regarding the question of what their child should know about how he was conceived. Should he be told? If so, when and how?

This attitude is all the more desirable because of the genetic screening facilities that are being created (DNA 'shops' abroad, advertising via Internet) and the financial profit-seeking trends sparked by these new technologies, so that couples wishing to use MAR should understand that there is little likelihood that any secret would be kept inviolate and that this represents a danger for family harmony. It is preferable to anticipate a situation which can become explosive by dispelling the secrecy of the situation without necessarily disclosing identities.

2) Respect the principle of anonymity of donors and beneficiaries, regardless of what other changes in the law may become necessary. Revealing anonymous identities would probably be more disruptive than disclosing the secret. Gametes are not "parents".

- The "double gate" principle, which gives gamete donors of both sexes a choice between an anonymous or an identified donation, and at the same time gives the beneficiary couples a choice between anonymous or identifiable gametes could appear as a system allowing freedom of choice. However, this apparent freedom seems to have generated a number of international failures leading to later preferences for total secrecy or absolute transparency. The existence of informed or non informed children depending on the sole goodwill of parents is an ethical issue insofar as it gives preference to the freedom of parents to the detriment of the freedom of children and necessarily creates discrimination.

3) Allow the child to have access to non-identifying data while maintaining the principle of donor anonymity

It should be possible to give non-identifying data to a **child who has reached the age of majority, if he so wishes**. Information on the reasons for the donation (gametes or embryo) should be registered and could **facilitate mediation** if required. CNAOP's mission could be extended to enable access to personal origins. Since mediation is part of its mission, it could reveal non-identifying data to an adult child in an in-depth dialogue and the case of children

born of embryo donation could receive similar attention.

4) Specific aspects connected to embryo hosting

- 1) Reinforcement of discretion; modifications to the social services enquiry; the decision to inform on the reproduction mode must remain in the hands of the hosting couple without fear of disclosures made by the multiple social and judicial participants involved in the procedure.
- 2) Keeping the identity of the original couple anonymous, or in this situation which is akin to adoption to some extent (prenatal adoption), creation of an extension to CNAOP to be tasked with research for the origins of children born of embryo hosting on the condition, naturally, that the genetic parents agree.
- 3) Review the legislation on the question of the hosting of frozen embryos posthumously*, on the basis of the two arguments which come in addition to the number of previously mentioned ones, including by CCNE (Opinion n° 40 of December 17th 1993).

IV.3. In the case of **double donation of gametes**, a review of legislation is perhaps timely and should not raise opposition in the present context: far from being connected to commercial interests (which have been effectively controlled in France as regards the single donation, thanks to the experience of CECOS) it should be viewed as the expression of a dual altruistic action, on the part of each of the two donors. Furthermore, there is some degree of incoherence if the law allows embryo hosting while the double donation of gametes is still illegal.

IV.4. As regards **adoption**

All steps should be taken to inform a child that he has been adopted.

IV.5. As regards **surrogate mothering**:

The fact that it is practised in other countries and is legal in some of them (California, United Kingdom, Belgium) justifies continued reflection in France.

It will not be possible to institute legal proceedings against French nationals who have used surrogate mothering in another country, which in itself introduces the possibility of this mode of reproduction. The civil law procedure of recognition of filiation or adoption by the wife of the beneficiary couple is denied however. This uncertainty regarding the filiation of children born of this maternal reproduction process is a problem.

The value of the ethical arguments which led Parliament, and before it other national

* Two further arguments in addition to the many already mentioned are relevant as regards this question which had already been mentioned by CCNE in its Opinion n° 40 of December 17th 1993, on the subject of embryo transfer after the death of the spouse (or partner):

- if the widow accepts having *her own embryo* hosted by another couple and if the husband of that couple dies after the transfer of the embryo to the uterus of his wife, she will be carrying and bringing up a child who was refused to his real mother for the simple and sole reason that she was widowed after the embryo had been created but before it was transferred to her own uterus;
- if a procedure, of any kind, allowed a child born of such in vitro fertilisation to research his origins once he had reached the age of 18, after the death of his father, after his mother was forced to abandon the embryo and his subsequent birth in a hosting couple, it would be very difficult to explain why the death of his father precluded his mother from procreating and why this was considered sufficient reason to allow his transfer into another family.

institutions, including CCNE, to refuse the creation of such situations, is not disputed. Assimilating nine months of pregnancy by another woman to gamete donation is perhaps a little hasty; even if oocyte donation represents a greater biological (or at least genetic) transgression than surrogate gestation, but it also all but disregards the bond that may develop between a woman and the child she bears and the alienation she may experience, albeit voluntarily. Furthermore, there is a real and obvious risk that there could be a market for, and commercial exploitation of surrogate mothers, even if it cannot become widespread.

IV.6. Multiparental and homoparental situations. These two cases raise in rather different terms some fundamental issues.

To research one's origins means first of all to be able to piece together a background, give it the unity it was missing and fill the gaps. Multiple parenthood means making all these missing links part of the child's life and making them visible. Will the child be able to construct his filiation on this foundation? Multiple parenthood's corollary is a multiplied and splintered filiation. Does this allow a child to construct himself as a person and to find unity? In parallel with use of the word "multiparental", the expression "homoparental" is voluntarily sexless so that the difference in sex can be categorised as non significant. The issue in this case is the paternal function and the maternal function and their complementarity in a constructive human-building parental/filiation relationship.

Rather than encouraging multiparental or homoparental situations, everything should be done to ensure that children living in these situations are spared a critical or discriminating attitude from society.

IV.7. Prospective and retroactive thinking:

This reflection has an eye for the future and not for the past. That is what makes it so complex. This Opinion does not seek to cast doubt about origins of a filiation and it would be disastrous if, suddenly, every child was to question his origins and, supported by "ethical legitimacy", demand information which existed in a different time and a different culture. Since it was created, CNAOP has had the task of allowing individuals to access data regarding their mother, if she accepts, not to try and solve the painful problems of a time past. This temporal vision is sometimes misunderstood. CCNE is stating with vigour that the aim of this Opinion is not to bring about drastic changes in our common culture, but rather to face the future confidently while taking account of the considerable modifications in our modes of reproduction.

IV.8. Taking into account the request of the applicant

Regardless of the mode of conception, when the question of origins arises and the reply seems enveloped in secrecy, there is potential for deep distress. Society cannot respond to such a request with indifference. It is true that such situations are infrequent, but their very existence which is the crux of this Opinion, justifies that serious attention be paid to them. For this reason, it is important that a structure, which should be part of CNAOP, be set up to provide mediation facilities sufficiently accessible and known to transmit non identifying — or in some particularly agonizing cases, identifying — data. This structure should not confine itself to simple questions of identity. It should be able to hear the pleas or the distress of applicants and assist them, because when there is a longing to do so, return to one's origins becomes a need, even though, as Véronique Margron notes, to allow people to believe that a return to one's beginnings leads directly to origins is misleading. Origins are arrived at by a story told, a message delivered, not by science¹⁹.

¹⁹ La Croix, November 30th 2005

Conclusion

Today the possibility of dissociating filiation, sexuality and procreation continues to raise ethical issues. Filiation, singular or plural, has never previously been subjected to as much attention as now, at a time when there are a multiplicity of participants. Children's interests are being forcibly rearranged to put it mildly by these dissociations where priority seems to be given to the notion of "parental project" which has taken over for its sole benefit the child's status.

The debate on various origins and various reproduction modes is certainly important and absorbing, but it could reduce the arrival of human beings into the world to the single aspect of their conceptional mode. In the complex situations considered above, the important point seems to be to make sure that the child, or the adult that child has become, does not remain isolated in this quest for origins and is included in a rich, aware and committed human relationship where he can face in truth his conceptional background the better to accept it.

It is reassuring to note, at a time when couples are in crisis and individualism is on the increase, that the emotional relationship of parents who bring up children is still a firm ethical reference. Let us hope that it inspires the responsibilities that need to be shouldered.

November 24th 2005

This text was adopted unanimously by the members of CCNE, minus one abstention.