

# LEGAL TRANSFER OF FRENCH TRADITIONS? GERMAN AND AUSTRIAN INITIATIVES TO INTRODUCE ANONYMOUS BIRTH

BARBARA WILLENBACHER\*

## ABSTRACT

When anonymous birth, baby boxes or baby nests were proposed in Switzerland, Austria and Germany, those who defined the social problem in terms of panicking young mothers in distress pushed the legislatures to introduce legal anonymous birth. In Austria, they succeeded. Similar initiatives failed in Germany, but baby boxes or baby nests have been instituted nevertheless. In contrast to practices in France, anonymous birth contradicts the German legal tradition that focuses on biological descent as evidence in case of children born out of wedlock. Partisans of anonymous birth aim at preventing infanticide and child abandonment especially by mothers of minor age. However, socio-legal research reveals that the reasons for abandonment and infanticide are indistinct. The recent legal arrangements of the legitimate alternatives, abortion and adoption, are presumed to impose demands on rationality that young women, over-represented in neonaticide cases and, in France, in cases of non-recognition, cannot cope with. The ideological pro-life mix concerning anonymous birth is favoured by Protestant, Catholic, social and state welfare agencies whose purposes include ruling out the conflicting rights of the respective parties (adoptive children and biological parents) and procuring adoptable children.

## 1. INTRODUCTION

When anonymous birth, baby boxes or baby nests were proposed in Switzerland, Austria and Germany, arguments previously associated with moral campaigns against child abandonment and infanticide emerged once again. In times when the numbers of potential adoptive parents are increasing and the numbers of children available for adoption are decreasing, children become valued goods.

In the German case, non-governmental organizations (NGOs) such as Protestant clinics, Catholic lay organizations, private welfare organizations, and others pushed the legislature to introduce legal

\* Law Department, University of Hannover.

anonymous birth and failed. Nevertheless baby boxes or baby nests have been instituted. In Austria, a different mix of actors – medical doctors, social (state) welfare, and the Socialist Party – succeeded.

## 2. BABY BOXES AND NESTS IN GERMANY

Although baby boxes are illegal in Germany because they aid in fraudulent alteration of civil status and failure to fulfil one's statutory maintenance obligations, approximately 50 to 70 baby boxes have been established by local clinics and social welfare agencies, in which about 100 babies were found in two years. Leaving a baby in this manner is not interpreted legally as abandonment. Mothers who change their minds within eight weeks of giving up their child can regain their parental rights if they can prove they left their baby. Otherwise, a designated legal guardian replaces the unknown parent in the adoption process (Wolf, 2003).

## 3. BABY NESTS IN AUSTRIA

Baby nests are run by hospitals in cooperation with youth offices that counsel pregnant women and cover the clinic costs. Advertisements are targeted at individuals potentially interested in this practice. Anonymity is guaranteed by a comprehensive clause stating that the mother is not required to reveal her identity if she proves she is in a state of distress that would endanger her own and/or her baby's health. Evidence of this state of distress is a consistent refusal to provide any clues to identity. The social (state) welfare agency dominates the situation: it organizes baby nests, pays clinic costs, counsels mothers, offers opportunities for explanation and decides whether the reasons for secrecy are adequate. This agency is traditionally the official guardian of foundlings and arranges adoptions. Mothers may stop the adoption procedure if they reclaim the baby during the first weeks.<sup>1</sup> These prerequisites represent an equivalent of anonymous birth.

In contrast to Germany, family law in Austria had already safeguarded the autonomy of unmarried mothers in matters of descent, as they could refuse to name the father of the non-marital child without any negative legal or financial consequences. In Germany the mother who refuses to name the child's father faces financial sanctions, since she cannot receive public advanced maintenance payments available for children living in one-parent families who do not receive sufficient maintenance due to the father's lack of income.<sup>2</sup> However, the child might be entitled to means-tested income support benefits dependent upon the mother's income.

#### 4. THE FAILURE TO ESTABLISH THE INSTITUTION OF ANONYMOUS BIRTH IN GERMANY

Three proposals to institute anonymous birth failed in Germany (2000, 2001, 2002) (Scheiwe, 2004a). Its advocates tried to extend the time period in which clinics are required to register new-borns and their parents. This would have made anonymous birth possible in the interim, as failing to report new-borns and the identity of their mothers to the registration office would be only a minor administrative offence. Nonetheless, anonymous birth has not been legalized because of the principle of the indissoluble parent–child relationship in German family law and because of the emerging unresolved discrepancies between the secrecy option and German family law, especially in the disregard of fathers rights' and entitlements (Benöhr, 2001; Hepting, 2001; Scheiwe, 2001). Advocates still continue their efforts although opposed by other NGOs, such as *Terres des Hommes*, the association of midwives, the association of adoptees, the German association of child protection, the German bar association and others.

The baby nest project of the NGO *Sternipark* was nevertheless realized in Hamburg after a dead baby was found in the garbage. This project is based on the assumption that children will be handed over to the organizing NGO so that an adoption can be arranged. Mothers are given several weeks to consider their decision to stay anonymous and get counselling whilst the child is living in a foster family, the prospective adoptive family. During this period, the mother may have contact with the child, although the name and address of the foster parents are not revealed. The following alternatives are in play:

(i) Mothers may regain parental rights and take the baby back. The right of the mother to regain parental rights is heavily stressed;

(ii) The requirements of incognito adoptions are relaxed. Incognito adoption, the dominant form of adoption in Germany, ensures that birth mothers/parents do not maintain contact with adoptees and consent to an adoption not knowing the identity of the adopting parents. Biological mothers lose all parental rights and obligations as the bond of filiation is altered and have no right to contact or see the child unless the adopting parents agree. However, forms of open adoption where some kind of contact between the child and the birth mother may be arranged by the adoption agency of the youth office are increasingly practised and favoured by adoption experts (Textor, 1988);

(iii) Incognito adoption takes place with the help of a legal guardian<sup>3</sup> and without registering the identity of the biological mother. This is equivalent to anonymous birth without the proper legal prerequisites of anonymous birth.

*Sternipark* reports that the young mothers targeted preferred solutions (i) and (ii) and that only about 20 per cent chose anonymous birth.

## 5. SOCIAL IMAGERY

In the political debate, the embryo's eminent right to life is stressed. The pro-life movement offers help to presumably young panicking mothers. The social imagery refers to mothers oppressed by the baby's father or their families, tormented by rape, incest or forced prostitution. The characteristics of the supposed clientele, who presumably have no recourse to counselling, abortion or adoption, have never been studied. Social scientists are thus sceptical, as no knowledge exists about the motives of this presumed clientele. Neonaticide is better documented than abandonment, and abandonment is not an exclusively female offence.

Christine Swientek has therefore posed the following questions about who may profit from anonymous birth: to which clientele do baby boxes appeal? Why do women want to deliver anonymously and reject incognito adoption? Why do women who avoid family and pregnancy counselling want new kinds of counselling from integrated birth clinics? Are they acquainted with this new service? Where are babies abandoned and where should new baby boxes be installed? (Swientek, 2001a).

Swientek stresses the argument that neonaticide and abandonment did not decline after baby boxes were introduced in Germany and Austria (Swientek and Bott, 2003). She argues therefore that the institution of anonymous birth sets up a new market for the legal abandonment of children and hence can lead to pressure from relatives and partners on pregnant women, similar to the pressure faced by women who decide to have an abortion or give up their child for adoption (Swientek, 2001b).

## 6. RESULTS OF SOCIO-LEGAL RESEARCH

In contrast to the social clientele consisting of women who have abortions, give up children for adoption or commit neonaticide, little is known about the social characteristics of women who abandon their babies, endangering their lives.

Research reveals the following about women considering abortion. They are ambivalent, changing their minds about abortion during pregnancy in at least 50 per cent of cases; they are living in unstable partnerships or are dependent upon the father of the unborn child, or the biological father rejects paternity; they have reduced earning capacity and belong to lower income groups; and they have a low educational level or have not finished their education (Pelikan and Münz, 1978; Oeter and Nohke, 1982).

The same social phenomena apply to mothers who give up children for adoption. Disproportionate percentages of these women have been in care, have reported that it was too late to resort to an abortion and

said that their relatives and/or the biological fathers pressured them into the adoption process (Wendels, 1994; Textor, 1996).

Women who commit neonaticide additionally tend to be very young, are disproportionately members of ethnic minorities and psychologically vulnerable (Wilczynski, 1977). They tend to conceal their pregnancy and fear their parents' reaction, typically 'a combination of being angry and upset and worried' (Lee, 2004).

Lower educational levels and poorer family backgrounds also characterize young women who choose motherhood (Scheiwe, 2004b). Thus, these variables characterize different groups of women. Nothing precise is known about the supposed clientele who will abandon their helpless babies because only a tiny minority is detected and prosecuted, and judicial evidence is extremely scarce in these cases (Munkenbeck-Dicke, 1994).

## 7. ADOPTION TRENDS

Supporters of anonymous birth want to prevent neonaticide and abandonment and favour adoption, but they ignore the experience of pregnancy counselling agencies, as reports indicate that pregnant women contacting these agencies are decreasingly willing to consider the adoption of their prospective children, whereas pregnant women considering adoption contact adoption agencies directly.

The trend towards preserving anonymity stands in opposition to the emerging trend towards a greater relaxing of the rules on incognito adoption. Such rules have already been relaxed by all agencies arranging adoptions in Germany in recent years. Agencies arranging adoptions have developed a long-term relationship to all parties involved in adoption (Grimm, 1995). They inform biological mothers about the development of their children on request, without revealing the identity of the adoptive family, or they introduce forms of open adoption, though only in a minority of cases (von Schlieffen, 1994). These agencies act on the supposition that more mothers will try to trace the whereabouts of their children than adopted children will try to contact their biological parents. Research findings about the ratio of adopted children who seek to contact their biological parents vary, but psychologists confirm that adopted children's knowledge of their origins is crucial for identity development (Helms, 1999).

## 8. FACTS AND FIGURES ABOUT ANONYMOUS BIRTH IN FRANCE

In France, the number of all children born out of wedlock without parental names on their birth certificates amounts to 1,000 per year (Munoz-Pérez, 1994). This number is much greater than the figures for

neonaticide and abandonment, which have diminished steadily everywhere in Europe (Danova, 2003). As will be seen from Table 1 the figures show that only a tiny minority of all non-marital children remain without filiation, a decrease that occurred after the liberalization of abortion laws.

Table 1

	Estimated no. of children born without filiation <sup>a</sup>	As percentage of all non-marital children
1965–1970	2,000	3.8
1975	1,325	3.5
1980	1,220	2.1
1985	885	0.6
1990	1,095	0.5
1994	1,080	0.4

*Source:* Francisco Munez-Pérez (2000: 669–70).

<sup>a</sup> Birth register without registration of mother and father.

According to the recognition principle, in French family law non-filiation of non-marital children can result from one or more factors:

(i) the father and mother refuse to acknowledge the child (the parents' name may even be on the birth certificate, but if they refuse to recognize the child, no legal bond of filiation is established);

(ii) the child's birth is not declared on the state register (Rubellin-Devichi, 1994);

(iii) the mother demands anonymity at birth;

(iv) the parents legally abandon the child before its third birthday (the child is then placed under state custody);<sup>4</sup>

(v) the child's paternity and maternity have not been established by the courts.

Francisco Munoz-Pérez's data demonstrate further that the clientele using non-recognition, anonymous birth and legal abandonment has changed: underage mothers, ethnic minorities and unemployed persons have been disproportionately represented in the last decade, although the ratio of underage mothers declined in general, and the levels of educational and professional achievements of unmarried mothers rose.

Socio-legal research in France from the 1960s and 1970s showed that the majority of mothers giving birth anonymously were not minors. In fact, underage mothers, Maghreb migrants and foreigners made up only a minority of those giving birth anonymously. Brigitte Trillat even wonders whether these data were influenced by visa requirements and restrictions on Algerians during that time (Trillat, 1994).

Mothers who consider adoption seem generally to avoid acknowledging their children. Because of the mother's lack of legal status, consent

to adoption has to be provided by the state. Legally abandoned children become 'pupilles de l'État', and the adoption is arranged and consented to by social (state) welfare as 'conseil de famille', practically as guardian ad litem (Lefaucheur, 2001). Filiation then results from adoption. Although the 'loi Matthéi' provides for the collection of non-identifying data about birth mothers asking for anonymity, and states that these birth mothers may end their anonymity at any time (Lefaucheur, 2004), mothers who demand and maintain their anonymity deprive adopted children of access to the documents of their birth. Lefaucheur's investigation (concerning a small number of cases) demonstrates that half the birth mothers had left identifying data and most of these mothers agreed to end their anonymity.

Genevieve Delaisi and Pierre Verdier (1994) ask 'Who profits from anonymous birth? Whose interests are endangered when children born anonymously regain access to birth documents upon becoming adults?' They argue that, from a psychoanalytic point of view, secrecy of descent does not serve the interests of either biological mothers or their children because it represses mourning and leave-taking. They state that the interests of adopting parents and the state welfare agency arranging adoptions are predominant in preserving secrecy. In some cases, counselling agencies even confused the declaration of consent to adoption with the demand for secrecy and vice versa.

Nonetheless, the French legislature rejected a reform proposal to repeal the laws on secrecy of birth and open records of anonymous birth to all children upon reaching the age of maturity. Because it is against the will of the biological mother, children still have no right to access documents revealing the biological mother's name.

In contrast to this attitude, Irène Théry (Théry, 2001) supports the plurality of social and biological parentage and advocates a legal construct to recognize 'pluriparentalité'. Pluriparentalité corresponds to the practice of open adoption. The basic idea is to recognize that a child may have multiple bonds with different persons who are or were 'parenting', even if they are not legal parents.

## 9. LEGAL DEVELOPMENTS IN PENAL LAW

In earlier times, the social imagery of the isolated and oppressed single mother legitimated more lenient penal treatment of unmarried female offenders who committed neonaticide, generally by passive negligence. However, the reduced penalty for neonaticide was abolished in Germany in 1998, because non-marital children no longer meant disgrace for mothers. Since marital and non-marital children have been accorded equal legal status, the percentage of non-marital children has

increased and welfare aid is available for unmarried mothers. The lower number of neonaticides and abandoned children confirms the social change (Frick, 1992; Danova 2003).

The Swiss and Austrian legislatures redefined the offence, and penal law now covers all mothers, regardless of their marital status, who kill their babies during or after birth (Schmoller, 2002), although the authors cited consider the medical principles on which lenient penal treatment is based – reduced culpability due to mental distress during or immediately after birth – to be outdated. Thus the legislature's assumption is viewed as untenable (Wilczynski, 1977; Frick, 1992) because it does not reflect the causes of infanticide.

Even the social characteristics of women committing neonaticide in the eighteenth and nineteenth centuries did not correspond to the social imagery produced by social and legal reformers of that time, as historians have demonstrated; there were no significant differences between the social characteristics of unmarried women who killed their new-born babies and those who did not.

After criminal lawyers deconstructed the image of poor tormented young pregnant women, it re-emerged in anonymous birth and baby box campaigns.

## 10. LEGAL TRADITIONS IN FAMILY LAW

Unlike in France, in Germany women's self-determination or autonomy has no place in the political debate. No German advocate takes the stance of Catherine Bonnet who values the choice of adoption as an act of love. The subjects of her (1992) study concealed their pregnancies, did not get medical check-ups during pregnancy, discovered the pregnancy too late to resort to abortion and did not contact family services. Although these facts are characteristic of infanticidal women, Bonnet nevertheless argues from a psychoanalytic point of view that the right to give birth anonymously represents the right to renounce motherhood. Nonetheless, German law rejects 'the idea that a woman, after giving birth, might make a rational decision not to become a mother' (O'Donovan, 2000).

According to the supporters of anonymous birth in Germany, the right to life outweighs the constitutional right to know about one's origins, even though the German legal tradition, in contrast to the French, focuses on biological descent as evidence. The legal profession is therefore extremely sceptical and fears that anonymous birth and baby boxes may undermine parental obligations. Lawyers likewise fear the consequences of bypassing state control over registration regulations and adoption agencies, as only a few central state-controlled agencies arrange incognito adoptions in Germany.

The importance of biological descent was crucial to Nazi ideology. But the legal concept of filiation by descent has determined non-marital filiation in Germany since at least 1900. Maternity follows automatically from the biological fact of giving birth. Mothers are not entitled to anonymity; they cannot renounce motherhood – as Bonnet would say – other than by adoption. Establishing the legal paternity of a child born out of wedlock requires the father's acknowledgement of the child or affiliation orders of the court. Since the 1950s, biological evidence in paternity suits has been based on standardized medical proof, ie paternity tests. From 1969 on, the youth office was the legal custodian and guardian *ad litem* of all non-marital children in order to establish paternity, child support and inheritance entitlements. Until 1997, the guardianship of the youth office was not terminated unless the mother named the child's father; the underlying reason for this was the best interest of the child (Willenbacher, 1991, 1995). Although the legal custodianship of youth offices was abolished and the autonomy of unmarried mothers to initiate paternity suits was acknowledged through the 1997 family law reform,<sup>5</sup> naming the father and cooperating in procedures to establish paternity are still prerequisites when the right to advanced child maintenance payments is at stake.

On the other hand, legislation passed in 1997 and 2004<sup>6</sup> strengthened the rights of fathers of children born out of wedlock, and the Federal Constitutional Court reinforced their rights in 1995 especially in adoption cases.<sup>7</sup> Youth offices are now obliged to inform the father, as he has the right to object to an adoption. However, before adoption, youth offices and mothers rarely initiate paternity suits. Biological fathers remain unknown in the majority of cases, and only a minority of children adopted incognito have divorced, married or widowed parents. But 'biological' fathers now have the right to paternity suits under certain, limited circumstances even when the child is legitimately born to a married couple: namely, if no 'socio-familial bond' exists between the child and the legal father, and the 'biological' father who seeks to have his paternity established does have such a 'socio-familial bond' with the child.<sup>8</sup>

Furthermore, the constitutional right to know one's origin is guaranteed in cases of incognito adoption. When adopted children reach the age of 16, they may have access to the documents of the registry office. In addition, when they apply for a marriage licence, the original birth certificates are delivered automatically, revealing the name of their biological mother.

In contrast to practices in France, biological parents may not opt out of biological descent, as the options of non-recognition, legal abandonment or anonymity are not available. French law distinguishes between (biological) maternity and (legal) motherhood in case of unmarried

mothers, even if only an extreme minority of unmarried women fail to recognize their children (Dreifuss-Netter, 1994). The three legal options that result in children without filiation (anonymous birth, non-recognition or legal abandonment upon demand for secrecy even when married – resulting in birth certificates without parents' names) produce 'pupilles de L'État' eligible for adoption. Parents may object to the adoption only after they have recognized the child and acquired the parental rights to do so.

The notion of biological descent is less important. The importance of social bonds is stressed, as demonstrated by the notion of 'possession d'état': When a person treats a child as his/her own for a longer period of time and the child is socially recognized as being this person's child, then the legal tie between this person and the child cannot be contested. If 'possession d'état' exists between a child and a presumed parent, then no one may object that no biological tie exists between the two and the legal tie of parenthood is safe from any contestation whatsoever.

The restrictions to the judicial establishment of paternity have been dismantled,<sup>9</sup> but paternity suits are restrained by short statutes of limitations (Helms, 1999).<sup>10</sup> French paternity suits are of negligible importance and are much less common than German paternity suits. The two countries have a similar rate of voluntary recognition of paternity, although the percentage of children born out of wedlock is higher in France than in Germany.

## 11. CONCLUSIONS

Practices seem to converge when images of vulnerable babies and minor mothers come into play. But which hidden agenda comes legally into question when supporters demand anonymous birth? This gives rise to many questions, especially because most German socio-legal data on adoption, abortion and neonaticide are based on research dating from the 1980s.

Anonymous birth limits the intensified legal regulation of descent, the obligations of biological mothers, the entitlements of biological fathers and the rights of children to know their origins. The conflicting rights of third parties are ruled out in order to increase the number of children available for adoption. The ideological mix supporting 'biological or anti-biological' legal concepts varies in different decades and countries, as does the coalition of advocates on moral grounds. The pro-life orientation is prominent and ignores even legal traditions and discrepancies, and may prevail – as in the Austrian case – when a centralized state welfare agency is in play.

## NOTES

- <sup>1</sup> Decree of the Federal Ministry of Justice JMZ 4600/42-/1/2001.
- <sup>2</sup> Only when the children are legally entitled to child support.
- <sup>3</sup> No parental consent to an adoption is necessary if the parent's whereabouts are unknown for a significant length of time (para 1747 s 4 German C.C.). In the case of baby nests, however (Sternipark), the mother's whereabouts are known (Schwarz, 2003), because the mothers contact Sternipark at least to arrange visits. By contrast, the 'Moses' project, organized by the Catholic lay organization Donum vitae, offers separate 'anonymous pregnancy counselling' and baby boxes.
- <sup>4</sup> Legal abandonment with request for anonymity.
- <sup>5</sup> Legal Assistance Law: Abolishment of legal custody and revision of legal assistance (to all non-marital children), BGBI I 1997 2846–2850.
- <sup>6</sup> Parent and Child Law Reform, BGBI I 1997 2846–2850, alteration of regulations concerning contested paternity and visiting rights of persons related to the child in the context of primary relations, BGBI 2004 598, 28 April 2004 No. 18.
- <sup>7</sup> *BVerfGE* 92, 158 Adoption II.
- <sup>8</sup> *BVerfGE* 1BVR 1493/96, 1BVR 1724/01 9 April 2003, alteration of regulations concerning contested paternity and visiting rights of persons related to the child in the context of primary relations, BGBI 2004 598, 28 April 2004 No. 18.
- <sup>9</sup> Paternity can be established in paternity suits. Proof of it may be made where there are serious presumptions or circumstantial evidence (Art. 340 C.C.). Courts interpret the presumptions or circumstantial evidence liberally, so that paternity tests may be applied.
- <sup>10</sup> Statutory periods limiting actions to establish paternity (Art. 340.4 C.C.): two years after birth (by the mother representing the child); when the alleged father and mother have cohabited, for a period of two years following the termination of cohabitation; where an action was not brought to court during the minority of the child, the latter may initiate proceedings within two years of his coming of age.

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