

Respect for Algerian/Moroccan Children's Origin

I am grateful to Horatia Muir Watt to have accepted to react to my post on Adoption of Algerian/Moroccan Children in France.

I certainly agree with Gilles Cuniberti that the prohibition resulting from article 370-3 of the Civil Code certainly lacks nuance. In many cases, it seems clearly contrary to the interests of a child who has been abandoned at birth in her country of origin and is growing up in France with a foster parent under a *kefala*, to refuse to allow the adoption. As Gilles Cuniberti points out, the lower courts are very often ready in such cases to overlook the prohibitive content of the personal law of the child and the *Cour de cassation*'s own approach before the legislative reform in 2001 was to facilitate adoption whenever the natural parents or guardians of the child were fully aware of the radical consequences of an "adoption plénière" under French law, which cuts off all blood-ties between the child and its natural family.

Beyond the policy of discouraging financial transactions between prosperous prospective adoptive parents and young women from poor countries who are ready to conceive and abandon a child for money (a problem not specific to cases involving children from countries where adoption is unknown or prohibited), which is more generally that of the 1993 Hague Convention (under the aegis of which, henceforth, the 2001 channels the flow of inter-country adoptions), the 2001 reform was designed to defer to the refusal of other legal systems to accept adoption, either for religious reasons, or to avoid a generation of children from being drained from developing economies towards Western homes.

This "cultural deference" argument was not based on mere diplomatic considerations – as such it would not have passed muster under the New York Convention, which requires the interest of the child (not of governments) to be paramount – but was formulated in the name of the superior interest of the child. The idea was that the potential trauma linked, in the context of any adoption (whether domestic or inter-country, legal or illegal), to the fact that the child, whose own birth may often already be accompanied by psychologically damaging circumstances, is severed from her natural parents, is likely to be accentuated by

ignoring the cultural content of the child's personal status. "Respect for the child's origins" meant respect for the prohibition contained in the child's national law.

This metaphor must of course be taken seriously. Adoption can be psychologically difficult for the child in any circumstances, however loving and understanding the adoptive parents may be, and when the child has been displaced from a very different cultural environment (be it exclusively pre-natal), involving far-reaching linguistic, religious, social and economic changes in her life, the consequences should not be under-estimated. One may wonder however whether the refusal to go against the prohibitive content of the child's personal status is not taking the (very legitimate) desire to "respect the child's origins" much too far. Forcing the consent of the child's mother, which should of course be severely sanctioned and is so under the Hague regime, is one thing; deferring to the content of the child's national law notwithstanding the present interest of the child is clearly another! This is, at any rate, what the French lower courts seems to think. Particularly when, as seems frequent in practice, the authorities of the country of origin allow the child (who may well not have a family to reclaim it) to leave the territory with a guardian by virtue of a *kefala*, knowing full well that the guardian may later ask for an adoption in France.

It is true that the prohibition contained in article 370-3 is only effective when the child is actually born in the country which prohibits adoption. When a foreign child is abandoned at birth in France, she will be given French citizenship and a brand new personal status (article 19 of the Code Civil). But does it make sense to treat a child differently according to the place in which he has the fortune, or the misfortune, of being abandoned? Of course, if the child grows up in France, she may also accede to French nationality on her majority (article 21-7 of the Civil Code). But is it really worthwhile to maintain the barrier during her childhood? The child will grow up with a status which is not in line with reality. The case-law to which Gilles Cuniberti refers tends to show that the difficulty is very real. It seems to me that an eminently respectable idea such as "respect for the child's origins" should not be used to justify the rigid application of a prohibitive personal status when the child is growing up in France, with the full consent of her natural parent(s), if any, and the tacit approval of the authorities of the country of origin.