

CONCLUSIONS BY THE GENERAL RAPPORTEUR

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It is, for me, a particularly joyful occasion to be celebrating the 60th anniversary of the ICCS with a large number of former acquaintances and old friends. I still remember the colloquy we held here in Strasbourg for the 50th anniversary of this organisation. In those days, as President of the ICCS, it was my duty to open the conference. Today, it is my duty to close it with these conclusions.

The topic of our conference is 'civil status'. What characterises 'civil status'? It is completely obvious that the cornerstones that are birth, marriage and death reflect a person's status. To that end we have registers of birth, marriage and death records in all ICS member States. But, looking a little more closely, doubts begin to appear. Is nationality also part of a person's status? This is the case in Switzerland, but not in Germany. Is a registered partnership a part of a person's civil status? In the Netherlands, there is no doubt whatsoever that it is. In Germany, it is possible to hesitate, since a registered partnership is not a marriage, even if it has the appearance of one, all doubt has been removed by a law creating a register of registered partnerships. In France, the Civil Solidarity Pact (PACS) is a contract between two adult persons. But such contracts are not, in principle, recorded in civil-status registers. Similarly, many of you will be surprised to learn that in Germany, even since the 2007 reform, the religious affiliation of a person is still recorded as a part of his or her civil status. By consulting my marriage certificate, you will be able to ascertain that I am a Catholic, whereas my wife is a Protestant. And here is a final source of questions: if a child is born of a surrogate mother, in certain countries such as Greece the name of the commissioning mother will be entered on the child's birth record. In other ICCS member States, the commissioning mother will be liable to penal sanctions and the Greek birth record with the name of the commissioning mother will not be recognised, so that the child will be deprived of this birth record.

Having studied the question of what characterises a person's civil status, there is no doubt that, in continental Europe, civil status is purely a question of law. According to Mrs Bidaud-Garon, 'A person's status is what makes that person exist in legal terms, and conditions his legal life'. Civil status provides no information regarding family relationships in fact. Returning to Mr Sami Aldeeb's presentation, civil-status registers in Algeria are structured the same way as in Europe. There are birth records, marriage records and death records. If a child is adulterine on his father's side, it will be impossible to determine his paternal parentage, and the father's name will not be mentioned on this child's birth record. Algerian law does not determine fatherhood in function of biological reality. The legal situation is the same as it previously was in France, where the paternal parentage of adulterine children could not be established for a long time. What Mr Aldeeb taught us about Algeria is still fundamentally true in France, where, even though the parentage of adulterine children can be recognised, this is not always the case for children resulting from incestuous relationships. If a child is born in wedlock, the principle in most European legal systems is that the mother's husband is automatically the child's legal father, and not the child's biological father. This is even true if the husband's residence has been unknown for years or if he is serving a life sentence in prison, precisely because it is not biology that determines a child's civil status, but the law of each State. Often, the

law does not even allow the biological father to establish in law his fatherhood. Thus, the Swiss Federal Tribunal had a curious case to decide (ATF 108 II 347):

The mother of a child was married. She had been living apart from her husband for three years. Her lover, who was also the father of the child, had promised to marry her. Not long before the birth of the child, the mother became reconciled with her husband. In spite of the vigorous protests of the biological father, the husband was registered on the birth record as the child's father. The biological father then attempted to dispute the fatherhood of the husband, which was not possible according to Swiss law. But all parties were unanimous concerning the fact that the former lover of the mother was the biological father of the child. The biological father told his friends and acquaintances that he was the father of the child. The mother and her husband then took the biological father to court by an action in nuisance, as he was not supposed to state publicly that he was the father of the child, even though this allegation was true. The Swiss Federal Tribunal forbade the biological father of the child once and for all to tell the truth.

This example clearly proves that a person's civil status has nothing to do with objective reality, and that the law can, consequently, even go as far as forbidding citizens from telling the truth.

Allow me, also, to return to another example given by Mr Sami Aldeeb: Algerian law does not recognise marriage between an Algerian woman of Muslim faith and a Christian. Children resulting from this marriage cannot be registered by an Algerian civil registrar in the father's name, or carry his family name. They will be registered in the mother's name, and will have a name is attributed to them by the civil registrar. This is not to criticise Algerian law which is heavily influenced by religion, but rather to explain that civil status registration is able not only to ignore existing family relationships, but also to contradict them willingly.

Mr Pintens also includes, under the heading 'Civil Registrars and the Search for Truth', sham marriages, which is to say marriages which do not aim to create a common marital life, but whose objective is to benefit from advantages normally associated with marriage, such as, for instance, obtaining a residency permit. This example also shows that civil status is purely a legal concept. The first question any continental European lawyer will ask is that of the validity of such a marriage. If this marriage is valid in France, in Italy, or in Spain, is it possible to demand its annulment? And, even if the marriage is not annulled, can the fraudulently-obtained residency permit be revoked? Responding in the affirmative to the latter question could be problematic, as one of the effects of a valid marriage would thus be called into question, even though, for a legislator, this effect would be automatically recognisable, without taking into account the quality of the marriage. This shows the limits of the juridification of family relationships in the case of sham marriages.

While we have gained in clarity by recognising that civil status aims to consecrate the legal existence of a person and reflect that person's personal status, the problem then poses itself of whether a modern civil-status register should be limited to purely legal questions. For instance, here is an example from German law:

In Germany, in 2008, the possibility was introduced of clarifying biological fatherhood with the help of the Courts (§ 1598 a I BGB). A husband who has doubts on the fatherhood of his wife's child can impose a genetic test with the help of the Court in order to discover whether the child is his or not. In contrast with France and England, constraints can be applied, in order to compel someone to submit to blood tests. Once the husband has found out in this way that he is not the father of the child, this has no effect on the legal parentage of the child. In order to call the latter into question, the father must then dispute the establishment of fatherhood. It is up to him to decide whether to bring this action, although it will need to be done before the time limit for appeal expires.

If it is legally established, using the genetic test, that the mother's husband is not the child's biological father, the child's birth record will make no mention of this. Such mention will appear only when legal fatherhood has been successfully disputed. It is interesting to note that in Germany there has been no discussion whatsoever of the possible necessity of mentioning, in a child's civil status, that the mother's husband is not the child's biological father. In German tradition, it is perfectly natural for the civil-status register to have room only for legal fatherhood.

It is necessary to explain, in this context, that this is seen completely differently in England. In English law, the difference between legal father and biological father is in principle unknown. In an article by Nigel Lowe¹, it is mentioned that: 'So far as fatherhood is concerned English Law generally takes the view that it is the genetic father who is the legal father'. This principle works in the same way whether the child is born in or out of wedlock. The father of a child born out of wedlock is always his progenitor, not the one who has recognised the child as his, or has raised the child for years. Recognition of fatherhood, conferring a status which is common in French and German law, is almost unknown in English law. Nobody can, through a false recognition of fatherhood, make a child who is a stranger to him his own. The same holds true for a child born in wedlock. While it is true that English law is also familiar with the saying « pater is est, quem nuptiae demonstrant », in English law, this saying only has the value of presumption. In contrast with German and French law, it does not imply that the child will be legally attached to the mother's husband. As far as the legal status of the child is concerned, the saying « pater is est, quem nuptiae demonstrant » has no meaning in England. Even the concept of 'status' is foreign to English law. A child has no status. He has a father and a mother. These may remain unknown, or it is possible to mistake the identity of the biological father or mother of the child. But English law has never legally recognised fatherhood and motherhood in contradiction with biological reality, and does not make them unimpeachable after the expiry of certain time periods. Consequently, fatherhood disputes are unknown in English law. As the biological father is always the legal father of the child, there is no fatherhood that can be disputed.

If one were to summarise the differences in thought between England and France, one could say that in France, once a man has been registered with the civil-status authority as the father of a child on the basis of false recognition, this registration is considered to be correct. In England, it would be considered false.

Let us return to the question of whether civil status should, in the near future, reflect actual family relationships. I would simply like to indicate here that, over the course of the last hundred years, factual family relationships (family relationships with a child from a different relationship, a child placed in foster care, an unmarried relationship, etc.) have gained considerably in legal importance. The President of the ICCS, Mr Jean Mazars, has justly said that 'our society has evolved, but our civil status has not really evolved'². The more factual family relationships, that is to say actual lived relationships, gain in legal recognition, the more reasons there are to include legally relevant facts in a civil-status register. In this way, the determination of biological parentage, as has been possible in Germany since 2008, also has significance for the recognition or not of a biological father's right to visit his child.

During the first session of this colloquy, we wondered about the structure of a civil-status register which would contain personal information. Mr de Groot wondered whether civil-status registers and population registers were 'battling brothers or Siamese twins'. Registers which contain personal information may also pursue different aims:

¹ Issues of Descent – The Position in English Law, dans: Streit um die Abstammung – ein europäischer Vergleich (Spickhoff/Schwab/Henrich/Gottwald éd.), 2007, 319, 322: „So far as fatherhood is concerned English Law generally takes the view that it is the genetic father who is the legal father.”

² Commission Internationale de l'Etat Civil, Procès-verbal des Réunions du Bureau, Strasbourg, 21 et 22 mars 2007, p. 26

Article 7 of the 1989 International Convention on the Rights of the Child stipulates that children must be registered as soon as they are born. For ICCS member States, this poses no difficulties. This is, however, not the case in Africa or in Asia. According to the Unicef's estimations, in Sub-Saharan Africa more than half of all children under five are not registered, and in Southern Asia, this figure is over 60%. Mr von Senger informed us that thousands of Chinese children are not registered.

Birth registration does not only have a statistical purpose. Without a birth record, children cannot be sent to school at an adequate age. They are not protected against premature marriage or child labour. They can be enrolled in the military at an earlier age, and may encounter difficulties later on in obtaining a passport. The registration of births, as it is encouraged by the 1989 International Convention on the Rights of the Child, is exclusively designed to protect children's rights.

But, even though registering births is one of the basic obligations of each State in the interest of its citizens, there are no details provided as to how this registration should be carried out. Current increases in population movements mean new requirements in terms of the reliability of identification documents. Mrs Ricco and Mr Knopjes mentioned the vision of the traditional means of identification being, in the future, replaced with biometric identification such as, for instance, finger prints.

A population register allows a State to meet its administrative objectives. France is, traditionally, hostile to the idea of a population register. Mr Touraine pleaded in favour of liberty and against State control ('let citizens act freely'). But each State requires certain indispensable information. State records are fundamentally necessary for collecting taxes, establishing electoral rolls, carrying out any procedures relative to passports and identity documents, military service, and so on. In my town of origin, Freiburg, they are also useful if you wish to own a dog or establish taxes for the collection of household waste. In Germany, Belgium and the Netherlands, according to Mr de Groot, population registers get their information from civil-status departments, which is to say from civil-status registers. If, for instance, a certificate of nationality is required, the population register will be informed by the civil-status department concerning the identity of the father and mother of the claimant. The close relationship between population registers and civil status registers has led, in Germany, to these registers being, in a way, like Siamese twins. Mr de Groot has come to the conclusion that 'both types of registers may be compared to Siamese twins'. I know that the ICCS maintains close relationships with Latin America, and that the President of the ICCS, Jean Mazars, recently travelled to South America with Mrs Chantal Nast. There, an organisation named CLARCIEV groups together Latin American countries in terms of civil records, identification, and statistics. This organisation carries out functions which, in many European countries, are divided between civil-status and population registers.

The decisive question in terms of a record is always its objective. For this reason, it is necessary to look back to parish registers, which were the precursors of secular civil-status registers. For churches, it was and still is interesting to know who is a member of the spiritual community. One does not become a member of the Catholic Church at birth, but on the day of christening. In many parish registers, children's birthdates are missing, and the essential date is that of christening. In this matter, the 'civil status' of a Catholic, established according to canonical law, is different to that which is established according to secular law. Today, still, there are differences between European countries regarding their visions of civil status, as is shown to us by comparing French and English law.

This morning we spoke about the future, and how civil status is faced with new technologies. I found the theme 'from the quill pen to cyberadministration' particularly fascinating. This fascination is due to the fact that I am completely unfamiliar with this subject: I was brought up in the days of the quill pen.

When we examine the various ICCS member States, it is noticeable that, everywhere, people are talking about the electronic administration of civil-status registers, but so far this objective has been reached only in a few States and, most of the time, civil-status registers are still kept on paper. In Germany, new legislation on civil status now makes electronic administration of these registers mandatory. However, provisions have been made for a transitional period leading up to 31 December 2013, when the new system will be implemented. The fact that civil-status registers are kept electronically in a certain State does not mean that there is necessarily a central register which guarantees, as in Switzerland with Infostar, that each event will be recorded only once. Mr Bürge then says that ‘we have built a central system for all of Switzerland, or rather to build a system of automated exchanges between decentralised systems’. The situation is similar in Scotland. Thus, Mr Macniven writes that ‘our system allows a Registrar anywhere in Scotland to look up an event in another part of Scotland – for instance, the birth certificate of somebody who wants to get married or has just died’. Mr Macniven then describes what the future will hold: ‘we plan to allow members of the public who want to register a birth or death, to do so online, from their home computer – rather than going to a registry office’. Envisaging the future for Switzerland, Urs Bürge imagines a single central registration service, which would centralise all personal data, which are currently registered within different registers, such as civil-status register or the population register.

Given the big differences which still exist today between the various ICCS member States, it is difficult to maximise the efficiency of new technologies in terms of the circulation of this data over borders. As Mrs Nast has just told us, the ICCS is, however, already working on a ‘project of electronic exchanges between States’.

I would like to add a final word concerning the necessary qualifications of a modern civil registrar. In most ICCS member States, there is no specific training for civil registrars. Before, the civil registrar was, essentially, a public writer. Today, it is necessary for a civil registrar to have knowledge of family law, private international law, nationality law, and the law of persons. A civil registrar must, for instance, determine which type of law applies for the recognition of fatherhood, which means that he is the one who makes the decision when it comes to determining who must be considered to be the father of a child.

And so, I come to the end of my report, and thank you for your attention.