

THE PROBATIVE VALUE OF CIVIL-STATUS RECORDS: INFRINGEMENT OF STATE SOVEREIGNTY OR PROTECTION OF THE STATE

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Today still, and perhaps even more so than in the past, civil status is perceived by the population as being the memory of men and families. A recent study in France by lawyers and sociologists shows people's obvious attachment to civil status. Some describe it as recognition of their situation by the law, a 'consecration of the reality of families'¹. This popular perception of civil status, in fact, is not devoid of meaning. Whatever the reason for a person to address himself to an administrative or legal service, whether it is in order to obtain a residency permit, constitute a marriage file, prove his/her right to inherit... he will need to justify his status. A person's status is what makes that person exist in legal terms, and conditions his legal life. Thus, the ability to be a party to a contract is determined by a person's age, the law applicable to marriage conditions depends on the nationality of the future spouses, which itself depends on their parentage, place of birth, and sometimes on their parents' place of birth... and this list is far from exhaustive.

However, civil status is also a civil police institution. It allows the State to keep under control the status of people located in its territory, or wishing to enter it. There is no doubt, even, that the State is entitled to use civil-status documents in order to carry out these controls. The risks of fraud and infringement of State sovereignty through the falsification of foreign civil-status documents are real. The State's wish to protect itself against fraud is understandable, but even so, it must not lose sight of the double dimension of civil status. However, though it is not possible to deny that civil-status documents continue to be perceived as tools in the service of persons and the State, they are also the object of a certain amount of manipulation. Legislative policies and French jurisprudence are also marked by the proliferation of tests of the probative value of civil-status documents, and by the use of civil status as a means for the State to keep in check the status of people whose civil status was obtained abroad. Today, therefore, civil status is both a tool for knowing one's status (I) and an instrument of control for the State (II).

I. Civil status, a tool for knowing one's status

From its creation, civil status has been conceived as a tool to serve private and public interests (A), but differences that currently exist in the vision of civil status may lead one to doubt the competence of this servant (B).

A. A servant of private and public interests

Numerous rights are linked to people's status, and any person wishing to benefit must, of course, be able to prove his status. Therefore, it is quite paradoxical to note that a person's status is, by nature, immaterial, but that most legal and judicial systems demonstrate a peculiar attachment to a written proof of people's status. In France, and also in many other countries, it is extremely difficult for a person to obtain recognition of his status or a right linked to this status, if he is not able to produce a written document noting this status. However, aside from cases where the person's status has already been the object of a court decision, the only documents a person is able to produce are his civil-status documents. These are the only documents that describe a person's status, the only official documents bearing witness to the individual and familial elements of a person's status. A written proof, though it is not irreplaceable, is at least indispensable for the functioning of societies that are said to be modern. Undoubtedly, there are still ways of making up for the deficiency or non-existence of written documents², but this implies further court proceedings aimed at establishing the non-existence of civil-status registers or the impossibility to produce the required documents, as well as a search for other means of proof tending to establish each element of the person's status. It is always possible to provide proof of people's status outside of civil-status documents, but when those documents exist, the situation becomes a lot less complicated.

¹ C. Neirinck, « L'état civil, une notion incomprise », in *L'état civil dans tous ses états*, edited by C. Neirinck, LGDJ, Coll. Droit et société, Série droit, n° 47, 2008, p. 10.

² For an example in comparative law, See, i.a. Paragraph 44 of the PStG in Germany and Article 90 or the AR in Hungary.

Civil status, then, exists first and foremost to serve people's interests, and is an indispensable guarantor of the serenity of private and family life. A child's birth record, in many cases, proves parentage, and allows the child's parents to obtain family allowances. It can also make it easier to obtain a residency permit, if the family are foreigners and the child was born in France, and it may confer the right to a retirement pension by establishing that the claimant has reached the required age. A marriage record establishes the quality of the claimant to act in proceedings seeking a contribution towards the expenses of the marriage in case of failure on the part of a spouse, but can also facilitate obtaining French nationality for a French person's spouse. The examples are innumerable.

However, these rights often take the form of advantages that domestic legislation grants individuals because of their status, or even the attribution of nationality. Accordingly, it is evidently in the State's interest for civil-status documents to reflect people's actual situation. The State cannot tolerate that individuals benefit from its legislation and obtain, by fraudulent means, rights and advantages provided by its domestic law. It cannot accept that anyone should acquire nationality thanks to irregular, fraudulent or inexact foreign civil-status documents, displaying, for instance, a false place or date of birth. It is out of the question for it to agree to foreign judgments rectifying civil-status documents, if their aim is to carry out benefit fraud, such as obtaining a retirement pension through a change of birth date. It is inconceivable that it should accept an application for a residency permit that is supported by an untruthful record of acknowledgment of a child or a birth record of doubtful legality or accuracy. Similarly, it must refuse to wind up an estate if the death record does not establish the death of the de cujus with certainty.

In this sense, civil-status records are also the means for the State to keep people's status in check, as well as ensure that rights and advantages provided by domestic legislation in function of people's status have been legally obtained. When a civil-status record is established by domestic authorities relative to a foreigner or a national, the State itself determines what rules its services must apply, and the records are established by its own authorities. In this way, it knows how reliable civil-status records thus established can be considered to be. The elaboration of civil-status records by domestic authorities does not protect the State against all kinds of fraud, but it will allow it to implement sufficiently strict and dissuasive rules to keep it under control.

However, if the civil-status record provided in order to obtain such and such a right or advantage is foreign, domestic law no longer has any control over its elaboration. The State may no longer be so certain of its legality and exactitude. The State, in this case, is running a risk, since, if it does not exercise sufficient control over foreign civil-status records, particularly the probative value that may be attributed to them, its legislation may be misused and its finances affected, due to a falsified or erroneous record. The risk of fraud is real, and this scourge is not new. The International Commission on Civil Status already dedicated a report to it in 1996³.

*It is evidently legitimate for any authority to be able to discount records whose contents are obviously erroneous, but checking civil-status records and appreciating their probative value must not be done with excessive mistrust. Rules governing the probative value of civil-status records must attempt to achieve a balance between individual rights and the State's necessity to control means of proving people's status and thereby acquiring these rights. In fact, the Court of Justice of the European Communities confirmed the necessity for a balance of interests as soon as 1997, in the *Dafeki* judgment⁴. But the methods of committing fraud are becoming increasingly numerous. Civil-status records do not always allow for efficient control, whether of people's status, or of whether they have obtained legally any rights and advantages linked to their status. In this sense, one wonders about the competence of this servant.*

B. A competent servant?

Do civil-status records allow States to verify people's status? Do they reflect the reality of people's status? In order to answer these questions, it is necessary to determine what guarantees of reliability are necessary for civil-status records, that is to say the conditions that foreign records must fulfil in order to be considered to be civil-status records attesting to people's status.

In French law, the only text that mentions foreign civil-status records in their entirety is Article 47 of the Civil Code, and it only covers their probative value. It sets up a mechanism aiming to attribute presumed probative value to civil-status records established abroad according to local rules. However, it provides no criteria allowing foreign records presented to French authorities to be qualified as civil-status records. But probative value is only one effect of civil-status records. In order to know whether a foreign record may be taken on French territory as an authentic civil-status record, it is first necessary to know whether it may be

³ I. Guyon-Renard : 'La fraude en matière d'état civil dans les pays membres de la CIEC', Rev. Crit. DIP 1996, p. 541. This study was updated in December 2000 (see ccc.ciec1.org).

⁴ CJEC, December 1997, *Madame Dafeki c/ Landesversicherungsanstalt Württemberg*, Rev. Crit. DIP 1998, p. 329, note Droz.

termed a civil-status record in the sense of French law. It is thus necessary to provide explicit criteria allowing the qualification of a foreign record as a civil-status record.

There is no text setting out the conditions a foreign record must meet in order to qualify as a civil-status record. The only clues are to be found in jurisprudence. In a judgment, « *Suhami c. Venture* » given in 1983, the Court of Cassation⁵ provided a definition of foreign records that should be considered to be civil-status records. The High Jurisdiction declared that 'A civil status record is a record wherein public authority authentically notes an event on which depends the status of one or several persons'. French jurisprudence, then, would seem to invite reasoning in terms of equivalence, of comparison with French civil-status records. French civil-status records are authentic records established by public officials in conformity with certain formalities. Of course, French law cannot demand that foreign records be entirely identical to French ones in every way. It is certain that foreign law alone is competent when it comes to determining competent authority, required formalities, and the information contained in the record. But for the foreign record to be considered to be a civil-status record by the French authorities it is submitted to, this authority must, in a sense, recognise itself in this record. It must be possible to allow this foreign record as much credit as would be granted a French record.

However, each State has its own idea of civil status, linked to its history, its geography, its level of economic development and its political organisation. Certain States entrust all or part of their civil-status related functions to religious authorities, as is the case in Israel. Others have public bodies in charge of civil status, but also confer civil effects on certain religious acts. For instance, Greek religious weddings have a civil effect even before the religious act is transcribed into national civil-status registers⁶. Conversely, in Italy, the religious act must necessarily be recorded in the State registers in order for the marriage to produce effects, but it is not necessary for a public officer to preside over the ceremony⁷. As for African States, sometimes civil-status services have only recently been established. Sometimes, previous events have been recorded in registers, but long after they took place. Former colonies, or countries formerly placed under protectorate, have much older civil-status services, but the records were often destroyed when the countries became independent. For example, approximately 90% of Comorian registers were burned when France pulled out in 1976. Moreover, elements of people's identification, such as forenames and surnames, are not as immutable as they are in French law. Some legal systems permit changes through a simple declaration. In other countries, people change forename or surname several times over the course of their lives, without any authority registering those changes. Civil status updating processes are also vastly different. Certain systems are centralised, others proceed by adding marginal annotations as is the case in France, but other countries, such as the United Kingdom, never update any civil-status records. All of these differences mean that it is extremely difficult for records to circulate from one country to another. A country's jurisprudence and authorities, when they do not recognise the characteristics of their own records in foreign documents, prefer to dismiss them for fear that they might be erroneous or falsified, and that they might make fraud possible.

Some differences do not pose any real problems, such as records established by a religious authority. French jurisprudence, it is true, does demand that records have been established by a public authority. However, only foreign law is competent to determine which authorities it allows to draw up civil status records in its name. This rule is based on the principle of State sovereignty, and has been affirmed by French courts since 1840⁸. Similarly, including information that is not covered or that is forbidden by French law, such as religion or cause of death, has no consequence on the probative value of the record. This information is simply not included if the foreign record is ever transcribed onto a French register.

Then again, other differences between French and foreign records pose more problems. In particular, it is impossible to submit as a civil-status record foreign records that do not have a French equivalent. In 1987, the Paris Court of Appeal⁹ specified that only foreign records corresponding to events recorded within French civil-status registers might qualify as civil-status records, that is birth, death, marriage, child acknowledgment records, and death records of children who died before their birth was recorded. No foreign record of any other event or quality can be considered a civil-status record in the eyes of French law, even where local law would allow this record such status. Acceptance of differences between systems is also

⁵ Cass. civ. 1^{re} 14 juin 1983, Rev. crit. DIP 1984, p. 316, note B. Ancel

⁶ Article 1367 of the Greek Civil Code provides that religious marriages must be registered in civil-status registers to be binding on third parties of good faith, but that they have a civil effect immediately after the religious celebration.

⁷ Law n° 847 of 27 May 1929 and law n° 121 of 25 March 1985 (G.U. 10 April 1985, n° 85), relative to the ratification and execution of the agreement signed in Rome on 18 February 1984 modifying the Latran Concordat of 11 February 1929. Law n° 449 of 11 August 1984, relative to the relationship between the State and the Italian Union of Christian Churches of the 7th Day. Law n° 517 of 22 November 1988 relating to the relationships between the States and Assemblies of God in Italy. Law n° 101 of March 1989, relating to the relationship between the State and Hebraic communities. Law n° 116 of 12 April 1995, relating to the relationship between the State and the Evangelical Baptist Christian Union of Italy. Law n° 520 of 29 November 1995, relating to the relationship between the State and the Evangelical Lutheran Church of Italy.

⁸ Cass. Civ. 23 November 1840, S. 1840, 1, p. 929.

⁹ CA Paris, 15 December 1987, D. 1988, I.R., p. 25. See also IGEC paragraph 486-3

limited by the provisions that French law considers to be mandatory. Thus, it has happened twice at least that the Court of Cassation¹⁰ has refused to transcribe onto French civil-status registers a foreign birth record established in compliance with an adoption judgment pronounced by the authorities of the adopted child's country of origin, because it mentioned a fictitious place of birth for this child¹¹. In both cases, a French couple had adopted a child from a foreign country, in one case Romania, and in the other case Poland. However, the legislation in both of these countries provided that the adoption judgment should lead to the establishment of a new birth record, indicating the adoptive parents' place of residence as the child's place of birth. In both cases, respect for foreign procedures and mention of the child's place of birth were not enough. The place of birth would have needed to be in accordance with reality for the reliability of the record to be satisfactorily established, and for the record to be usable.

From these cases, it is apparent that civil-status records do not always suffice to prove one's status or obtain access to a right or privilege related to said status. It is also necessary for this civil-status record to be recognised as such in the country where it is used. French jurisprudence even seems rather 'embarrassed' by the problem of the equivalence of the guarantees of reliability. Its approach consists in shifting the problem from the realm of qualification to that of probative value. Few decisions have been made in this area, but, in virtually every case, the response of the court in question relates to probative value, whereas the question originally posed implied a line of reasoning more related to qualification of records. This attitude is understandable. What is at stake, through the probative value of foreign documents, is often a pecuniary advantage at the cost of the French State, but this must not lead to being excessively strict when accepting foreign records. It is perfectly legitimate for French law to demand certain reliability guarantees, before conferring on a foreign record the status of civil-status record, and granting it privileged probative value, but it cannot demand that other judicial systems conform to its own models when it comes to drafting records, without being accused of implementing a policy tainted by unjustified French legal hegemony. Such a policy could only be detrimental to diplomatic relations and make the situation extremely complicated for immigrants¹². The fear of fraud by means of civil-status records seems to have instrumentalised civil-status records through the modulation of their probative value.

II. Civil status, an instrument of control for the State

The evolution of French legislative policy and jurisprudence highlights an awareness of the role of civil-status records in immigration policy disputes. Besides the weakening of the presumed probative value that French law grants foreign records, (A) civil status tends to become an instrument for controlling the validity of a person's status when it is acquired abroad (B).

A. The weakening of the presumed probative value of foreign civil-status records

Changes to nationality and residency law seem to go hand in hand with the increased ease of calling into question the probative value of foreign civil-status records. As the main proof of a person's status, civil-status records are systematically invoked in support of French nationality or residency requests, and their probative value seems to be diminishing, in these areas, from one legislative reform to the next.

Going back to the 70s, French law was characterised by a willingness not to restrain access to French nationality. Whether one envisages the 1945 order in its original version, or else the law of 9 January 1973¹³, French law and policy showed a great flexibility in terms of immigration, simply due to the post-war situation and French industry's need for labour. Jurisprudence therefore appraised the probative value of foreign civil-status records quite flexibly. The Court of Cassation did not even hesitate to consider that proof of being born in France was furnished by a birth record established in Russia by a Russian civil registrar, indicating Nice as the place of birth¹⁴. Certainly, the version of Article 47 of the Civil Code regulating the probative value of foreign civil-status records in force at the time only required respect for local formalities in order to imbue foreign records with probative value, but the flexibility of the Court seems quite remarkable today.

¹⁰ Cass. civ. 1^{re} 12th November 1986, Rev. crit. DIP 1987, p. 557, note E. Poisson-Drocourt ; D. 1987, p. 157, note J. Massip ; JDI 1987, p. 322, note H. Gaudemet-Tallon ; RTD civ. 1988, p. 715, J. Rubellin-Devichi. Et Cass. civ. 1^{re}, 18th July 2000, Rev. crit. DIP, 2001, p. 349, note H. Muir-Watt.

¹¹ France is not the only country to have encountered this difficulty. V. not. M. Werwilghen, J.-Y. Carlier, C. Debroux, et J. de Burlet, 'International adoption in Belgian law', Trav. Law Faculty, Catholic University of Leuven, Bruylant, 1991, n° 148.

¹² For an example of the non-recognition of records from another State within the European Union and for an illustration of the difficulties this can entail for the lives of the people concerned, see written question E-3123/02 put to the Commission on 30 October 2002, OJ EU n° C192E of 14 August 2003, p. 95.

¹³ P. Lagarde, « La rénovation du Code de la nationalité par la loi du 9 janvier 1973 », Rev. crit. DIP 1973, p. 431.

¹⁴ Cass. Civ. 1^{re}, 9 January 1974, *Durassow c. proc. Rép. Nice*, Rev. crit. DIP 1975, p. 257, note A. Huet; Gaz. Pal. 1974, p. 380, note J. Viatte ; JCP 1974, II, n° 17834. For the Appeal Court judgment relating to this case : CA Aix, 24 November 1942, D. 1943, p. 142.

Foreign populations' integration difficulties did not become a political matter and were not brought to light until 1986, leading to the establishment of a Nationality Commission in 1987. It is also precisely in 1986 that several Court of Cassation¹⁵ judgments revealed a decrease in the presumption of probative value of foreign civil-status records. These decisions were not all given in disputes about nationality and residency, but the decrease in probative value they highlight is particularly significant. One of the decisions declares that 'no legal text gives irrefutable probative value to foreign civil-status records'¹⁶. This argument is correct, as Article 47 of the Civil Code never established irrefutable presumption of probative value. However, it also contained no mention of cases when this presumption could be denied. Certainly, it had already been decided that the probative value of civil-status records could not exceed the limits of verisimilitude¹⁷ and this position is perfectly logical. But the decision in question is content to declare that in the estimation of the courts below more proof was necessary, without explaining why the civil-status record, in this case a Turkish one, could not be taken on its own as proof of its subject's age. There is no explanation as to whether verisimilitude was called into question and, precisely, whether the individual's appearance created doubts regarding the reality of the birth date mentioned on the foreign civil-status record.

The laws of 22 July 1993¹⁸ and 16 March 1998¹⁹ have instilled a much more elective idea of French nationality, implying a willingness to become integrated and adhere to republican values. The second reform seemed to relax the conditions of access to French nationality laid down by the first, but this did not mean that it went back on the idea that access to French nationality was possible only on the condition that the applicant is willing to respect the superior principles of the Republic whilst living in France. In parallel, jurisprudence manifested increased strictness towards foreign civil-status records. In a decision of November 29 1994²⁰, the Court of Cassation declared that the probative value of foreign civil-status act was a matter for the sovereign appreciation of the trial and appeal courts, without attempting to find out whether the Court of Appeal had or not taken into account the presumption of probative value contained in Article 47 of the Civil Code, and it has relied on legal reasoning to overturn this presumption.

Until 2003, Jurisprudence alone contributed to the decrease in probative value of foreign civil-status records. Certainly, the government of the time was perfectly conscious of the existing difficulties, particularly concerning the increasing amount of fraud carried out using foreign civil-status records. In fact, a memo from the Ministry of Justice, dated April 1 2003²¹ and destined for the courts, recommended judges to use the greatest care in their appreciation of the probative value of foreign civil-status documents. It was mentioned that in certain regions of French consular host countries, 90% of records produced were fraudulent. However, Article 47 of the Civil Code was not revised until the law of 26 November 26 2003²².

This law relates to immigration control, foreign residency in France, and nationality. If the French legislature decided to change the text determining the probative value of civil-status documents in the context of a law concerning immigration policy, this surely means that it considers those two matters to be correlated. There is no doubt that it is conscious of how important foreign records are when it comes to obtaining a residency permit or French nationality. It is perhaps regrettable, however, that this reform does no more than facilitate the calling into question of civil-status records, that is to say a legislative confirmation of previous jurisprudence. In this first reform of Article 47 of the Civil Code, the legislature did not modify the conditions for attributing presumption of probative value to foreign records, nor did it specify the criteria allowing qualification of foreign documents as civil-status records. Textually, it is enough for the record to have been established according to local rules for it to be authoritative in France. However, the 2003 law clarified the motives allowing for the removal of presumed probative value from foreign civil-status documents. Since this text has come into force, the record will be authoritative 'except if other records or documents available, exterior data, or elements taken from the record itself, establish the illegality, or falsification, of the record, or the untruthfulness of the facts it recites'.

¹⁵ V. not. Cass. civ. 1^{re} 12 November 1986, préc. and Cass. Crim. 13 October 1986, Rev. crit. DIP 1987, p. 731, note M. Revillard.

¹⁶ Cass. Crim. 13 October 1986, préc.

¹⁷ CA Pau, 19 February 1873, S.1873, 2, p.85.

¹⁸ H. Fulchiron, « La réforme du droit de nationalité - Commentaire des articles 17 à 33-2 nouveaux du Code civil » (réd. L. n° 93-933, 22 July 1993), JCP 1993, éd. G., I, 3708, p. 407 ; P. Guiho, « La nouvelle révision du code de la nationalité... et son abolition (law n° 93-933 of 22nd July 1993) », D. 1994, chron., p. 1 ; P. Lagarde, « La nationalité française rétrécie (commentaire critique de la loi du 22 juillet 1993 réformant le droit de la nationalité) », Rev. crit. DIP 1993, p. 535.

¹⁹ P. Lagarde, « La loi du 16 mars 1998 sur la nationalité : une réforme incertaine », Rev. crit. DIP 1998, p. 379 ; H. Fulchiron, « Rétablissement du droit du sol et réforme de la nationalité (Commentaire de la loi n° 98-170 du 16 mars 1998) », JDI 1998, p. 343.

²⁰ Cass. civ. 1^{re}, 24 October 2000, Bull. civ., I, n° 263.

²¹ Memorandum 2003-03, of 1 April 2003, relating to fraud in relation to foreign civil-status records produced to French authorities, c/01-04-2003, Bull. off. Min. Just. n° 90.

²² Law n° 2003-1119 of 26 November 2003 relating to immigration control, the residency of foreigners in France, and nationality : P. Lagarde, « Note sur les modifications du droit de la nationalité contenues dans la loi du 26 novembre 2003 », Rev. crit. DIP 2004, p. 533.

There again, the solution is relatively logical. It is self-evident that it is out of the question to allow someone to obtain unduly rights and privileges provided by domestic law. But the text is cruelly imprecise and lacking in any guarantee for the public. Each of these motives for calling into question probative value covers so many possibilities that it is inevitable that the probative value of foreign records will become weakened, and the appreciation of foreign records should not be reduced to purely opportunist considerations.

The text had put in place a special procedure allowing the person whose record was disputed to appeal to the Public Prosecutor in Nantes. This procedure was highly complex, and did not in any case permit any guarantee of legal certainty concerning the probative value of a foreign record. The record could be further called into question later on if it was cited in support of another request. However, this procedure at least had the merit of existing. In the second reform of Article 47, through the law of 14 November 2006 on the control of validity of marriages²³, this procedure was simply removed. The text that is currently in force has maintained the motives for calling into question the probative value of foreign records, but does not mention any procedure whereby the person concerned may dispute the decision taken regarding a foreign civil-status record, whether as a plaintiff or by way of appeal. The reform authorises the court or the administrative body to proceed with checks if in doubt regarding the absence of falsification, the legality or the exactitude of the record, but there again, the text is imprecise. Furthermore, it makes no mention of any appeal by the person concerned against the attitude of a court or an administration which does not proceed with these checks.

As for the order of 24 November 2004 creating the Code on entry and residency of foreigners and the right to asylum, and the laws of 24 July 2006 and 20 November 2007²⁴, they are even more permeated by the idea of chosen immigration, which is made clear by the creation of a contract for the applicant to adhere to republican values, which foreigners immigrating to France henceforth must sign. And not only do they seem to allow French authorities an even greater freedom in appreciating the probative value of foreign records, they also tend to transform civil status into an instrument for controlling the validity of people's status, if this status was acquired abroad.

B. The use of civil status for controlling the validity of a person's status acquired abroad

Texts relating to civil status from an international perspective that have come into force since 2003 do not say that foreign civil-status records no longer have probative value or that they are no longer proof of a person's status. However, several of these texts use civil status to control the validity of people's status when it has been acquired abroad.

The first of these texts is the law of 14 November 2006 on the control of validity of marriages. As well as reforming Article 47 of the Civil Code in the manner we have already discussed, it also states that the marriage of one or two French citizens, celebrated abroad by a foreign authority, must be preceded by an audition of the future spouses by French authorities, that this audition is obligatory for the marriage record to be transcribed into French civil-status registers and, especially, that unless the marriage is thus transcribed, it will not be considered as valid vis-à-vis third parties on French soil. In this case, it will only have any effects between the spouses and any children that may be born. This produces a rather curious legal situation: the marriage record of a French person established by a foreign authority has probative value by virtue of Article 47 of the Civil Code, but is not valid vis-à-vis third parties in France if it has not been transcribed into the civil-status registers according to Article 171-5 of this same Code. The creation of a mode of proof devoid of validity vis-à-vis third parties is really quite perplexing. The will of the legislature to combat sham marriages is understandable, but the strangeness of the resulting legal situation is hardly acceptable. The mechanism is clever, as it simply consists of obliging French people marrying abroad to have their marriage, specifically the truthfulness of their matrimonial intentions, controlled via the transcription

²³ Law n° 2006-1376, of 14 November 2006, 'relating to the control of marriage validity', JO 15 November 2006, p. 17113. V. not. J.-J. Ansault, *Les mariages blancs sont dans le rouge*, RLDC 2006, n° 2317 ; C. Bidaud-Garon and C. Nourissat, 'Des conditions du mariage des Français à l'étranger : variations sur la forme et sur le fond', AJ Famille 2006, p. 447 ; Ph. Brunel, 'Le contrôle de la validité du mariage des Français à l'étranger', AJ Famille 2006, p. 440 ; F. Dieu, 'La loi du 14 novembre 2006 et le renforcement du contrôle des mariages', RLDC 2007, n° 2470 ; V. Larribau-Terneyre, 'Conformité à la Constitution de la loi sur le contrôle de la validité des mariages', Dr. famille 2007, comm. n° 1 ; A. Leborgne, 'Contrôle de la validité des mariages : une loi de plus !', RJPF 2007-3/10, p. 8 ; A.-M. Leroyer, 'Validité des mariages – contrôle', RTD civ. 2007, p. 189. A. Devers, 'Actualité du droit communautaire et international de la famille', Dr. famille 2007, chron. n° 7, spéc. n° 23-27.

²⁴ Law n°2007-1631 of 20 November 2007, JO n°270 of 21st November 2007, p. 18993. For a commentary on this law, V. not. N. Guimezanes, « Loi relative à la maîtrise de l'immigration, à l'intégration et à l'asile. – Loi n°2007-1631 du 20 novembre 2007 », JCP G, 2008, I, 215 ; C. Bidaud-Garon « La preuve de la filiation d'un étranger et la loi du 20 novembre 2007 », Rev. Dr. Fam., n°2, fév. 2008, p. 19-23. Et Conseil constitutionnel, décision n°2007-557 DC, du 15 novembre 2007, JO 21 novembre 2007, p. 19001. Sur cette décision, V. G. Carcassonne, « Les test ADN », Dalloz 2007, p. 2992 ; F. Terré, « Les chemins de la vérité. – Sur les test ADN », JCP G, 2008, I, 100 ; M. Verpeaux, « Des jurisprudences classiques au service de la prudence du juge. – À propos de la décision n°2007-557 DC du 15 novembre 2007, Loi relative à la maîtrise de l'immigration, à l'intégration et à l'asile », JCP G, 2008, I, 101.

of its civil-status record into the French register. However, this represents an instrumentalisation of the transcription of foreign civil-status records into State registers that is undeniable. The law of 24 July 2006²⁵ had already made mandatory the transcription of French marriage records obtained abroad to obtain a residency permit, but by generalising the absence of validity of the marriage, the legislature has taken yet another step. It has made this operation an instrument for controlling matrimonial status acquired abroad.

This same idea recently sparked a controversy in France, but in a completely different area: surrogate motherhood. In the case concerned, a French couple had resorted to the services of an American surrogate mother. A State of California judgment, rendered prenatally, conferred upon the husband the quality of genetic father of the children to be born and upon his wife that of legal mother. The children's birth records replicated this information and showed the French couple as being the father and mother of the twins thus born. When it was requested that the American birth records be transcribed into French consular registers, this was refused. Then, the public prosecutor requested a transcription, but only for the purposes of having it cancelled. This cancellation request was judged to be inadmissible at the first instance and then by the Paris Court of Appeal, on the grounds that neither the validity in France of the American judgment vis-à-vis third parties, nor the probative value of the records thus established were disputed. The Court of Cassation has recently put an end to this case by annulling the Court of Appeal's decision, stating that since the information recorded in the foreign records could result only from a surrogate maternity agreement which is forbidden in France, the public prosecutor had an interest enabling him to take the action he took²⁶. Aside from the multiple domains in this decision, and to dwell on the question of the instrumentalisation of transcription, it is, once more, this operation that allowed for the control of the validity of people's status when it has been acquired, or more accurately, created, abroad. If the parents had not requested that the birth records be transcribed into the French registers, there would have been no dispute, at least not immediately. The transcription operation can be analysed here as a means for French authorities to control the status of French people that has been acquired abroad and to remind them that the rules governing their personal status and the provisions that French law considers to be imperative follow them when they go abroad, whatever the law says in the other country.

As for the law of 20 November 2007, it introduced the possibility, in the context of a family regrouping, for nationals of certain foreign countries, a list of which is fixed by decree, of requesting a DNA test, at the expense of the French State, if they do not have a civil-status record establishing maternal parentage, or if they do have one but the French consular authorities have expressed a serious doubt as to its authenticity which recourse to the notion of *la possession d'état* (factual enjoyment of a certain status) has not made it possible to eliminate. The case envisaged is thus of very limited scope, and probably did not merit the media furore it caused. However, from a more technical point of view, it is notable that it is the control of civil-status records that conditions recourse to a different means of proving status. Or to put it differently, the appraisal by a French authority of a foreign civil-status record is what authorises or forbids a foreigner to request a DNA test to prove maternal parenthood. Certainly, the law continues to affirm that civil-status records are still the main means of proving a person's status. It does not directly harm the probative value French law grants them. However, we are talking about the creation of a particular rule for proving parentage, whose implementation is conditioned by the appraisal by a French authority of a foreign civil-status document. It is true that the test can be carried out only at the foreigner's request, but what choice does he have, if the civil-status records produced in support of a family regrouping request are considered to be of no value?

The legislature must not envisage the question of proving someone's status only from the point of view of consequences in terms of nationality and residency. People's status is not only a means of acquiring rights or advantages, it is also a part of the private and family life of individuals. The laws governing civil status must take into account both dimensions and balance the interests in presence. As understandable as it may be for the legislature to wish to combat civil-status fraud, one should not forget that civil-status records also help to uphold numerous fundamental rights. Instead of implementing multiple procedures and obstacles to the recognition of people's status when it has been acquired abroad, by manipulating the probative value of foreign civil-status records or the obligation to transcribe them, maybe it would be simpler and more acceptable to create a unique procedure allowing one to obtain, in one decision, recognition of the validity of a person's status acquired abroad and the examination of the civil-status record as a document capable of attesting to that status.

²⁵ Law n°2006-911 of 24 July 2006, OJ of 25 July 2006.

²⁶ Cass.civ. 1^{re}, 17 December 2008, JCP G 2008, 10020, note A. Mirkovic et 10021, note L. d'Avout.