CIVIL STATUS AND THE PROTECTION OF THE INDIVIDUAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Luis SILVEIRA

President of the National Data-Protection Commission , Lisbon (P)

I. Introduction

The European Convention on Human Rights may justly be considered to be a 'constitutional instrument of European Public Order' (European Court of Human Rights, Loizidou v. Turkey judgment, 23 March 1995).

And this is the case as much in formal as in material terms.

Formally, within normative hierarchy, the European Convention is at a superior level to national legislations, and this, not only in countries which have integrated it into their internal legal order, but also in States which consider it to be only an instrument of international law. Through its material influence, it has inspired the most pertinent European instruments in terms of fundamental rights - the most important of which is, without a doubt, the Charter of Fundamental Rights of the European Union – but also numerous laws internal to Council of Europe member States relating to the rights that it has defined.

And, moving from 'law in books' to 'law in action', it is of course impossible to forget the forceful inspiration exerted by the European Court of Human Rights jurisprudence, whose judgments reach far beyond simply judging cases and always show a willingness to respond adequately to the evolution of social life.

It is, then, perfectly understandable that the Convention should exert a considerable influence on various topics relating to civil status, and it is necessary, on this subject to underline that this influence is not only present when civil status has a mainly probative value, but also in cases where its nature is truly constituent.

II. The right to private and family life

Of all the rights recognised by the Convention, the right to private and family life, consecrated in Article 8, is probably the right that is the most directly and strikingly applicable to civil status, under several forms.

A. The right to registration

From birth, a child is truly entitled to registration in the civil-status registers. The right to private life implies, beyond its strictly biological content, the right for a person to be an integral part of society or political institutions, and this right to assert one's individual personality before others and before society is, as we know, one of the structural elements of the Rule of Law.

The Convention is not content with just formally affirming these rights, but, according to the jurisprudence of the European Court of Human Rights, they must be real and effective, and the registration of births in civil-status registers must be done as quickly as possible in accordance with the truth.

In order to guarantee the registration of births in civil-status registers, national legislation must lay down, as widely as possible, who is able to declare a birth – one of the parents, another family member, and so on – but if none of these people takes the initiative of declaring the birth, it is up to the State itself (for instance, through the Office of the Public Prosecutor) to take on this obligation. This solution seems the most appropriate in order to implement children's real right to registration. A pragmatic way of ensuring quick registration in the civil-status registers could be to set up a system directly in maternity wards, where the presence of competent officers would allow the drafting of a record as soon as a child has been born.[1]

Late registration in civil-status registers can have particularly grave consequences, notably for the more disadvantaged classes in society. For countries with large immigrant populations, the absence of registration can be a serious social problem, particularly among illegal immigrants, who fear any contact with the authorities. This type of situation represents a serious violation, with dramatic consequences, of the right of entry into social and legal life and, in the end, of the right to private life. It is self-evident that lack of

[1] See the *"Naitre citoyen"* programme instituted by the Portuguese Ministry for Justice.

registration in civil-status registers can create difficulties, to the point of being incapacitating when it comes to certain social rights, such as education, public health, or social security. Furthermore, in the context of social Rule of Law, full citizenship implies the ability to enjoy these social and cultural rights free of undue obstacles or discriminations. However, situations where the absence of registration deprives a person of the partial or total enjoyment of his or her rights are unfortunately quite real, and more numerous than you might imagine.

B. The right to identity

In order to enjoy fully the right to private and family life, a person must be in possession of a legally-recognised or recorded identity, based on various elements of physical description and civil status. An individual should be able to be distinguished from the community surrounding him, and be differentiated from any other physical person, far or near. An individual's identity is, as we shall see, closely linked to the name he bears. But the name is not the only element; there are certainly other factors making up identity, such as place and date of birth, or family relationships. In fact, this proves that identity is linked to private life, but also family life.

Identification through registration in civil-status registers is also a structural element of the right to private and family life. Lack of identification creates a kind of invisibility for the child, an invisibility whose risks were thoroughly underlined by the European Parliament in its resolution of 16 January 2008 – "Towards an EU strategy on the rights of the child'. Thus, the European Parliament declared that absence of identification, or even doubts in the matter, is likely to make it easier to violate a person's rights, particularly where children are concerned. Lack of identification may, in terms of family relationships, create inroads for illegal adoption or marriage before a marriageable age. Furthermore, in extreme cases, invisibility due to absence of identification can create risks in terms of trafficking of people or organs, or for the recruitment of child soldiers.

C. The right to a name

The right to a name can be considered to be one aspect of the right to personal identity. But its specific nature justifies handling it autonomously.

In fact, this perspective corresponds to the sense of the jurisprudence of the European Court of Human Rights. Indeed, the Court decided twice, in 1994, that the right to a name is covered by the right to private and family life consecrated by Article 8 of the Convention. It said this in the Burghartz v. Switzerland judgment of 22 February 1994, specifying that a name is a means of personal identity and link to a family. This was confirmed, not long after, in the Stjerna v. Finland judgment of 25 November 1994. Two years later, on 24 October 1996, in the Guillot v. France (Fleur de Marie) judgment, the European Court of Human Rights, after declaring that the right to a forename or surname was covered by article 8 of the Convention, invoked its link to 'family life', emphasising the fact that the forename is often chosen by parents for affective and family-related reasons.

In a perhaps even stronger and more determined manner, the Court emphasized the influence and pre-eminence granted the Convention when, in the Tekeli v. Turkey judgment of 16 November 2004, it considered the legal rule in Turkish law obliging women to take their husbands' names to be contrary to Article 8. The Court even recognised that any change to this system could cause organisational problems for the administration of Turkish civil status. However, it decided that the defence of the right to private and family life provided by Article 8 of the Convention was more important than maintaining the rules of civil status.

The essence itself of the right to a name presents two opposing aspects, one negative, and the other positive. From the negative or defensive point of view, it is possible to say that no one may be deprived of his name, or have it forcefully changed by anyone else. Thus, each person has the possibility to use his name and protect it against the actions of third parties. In positive terms, it is possible to change one's name, if one can provide a legitimate motive for such a decision.

The close relationship between forenames and private and family life explains and justifies certain restrictive obligations. Thus, a person's forename cannot allow any doubts as to the gender of its bearer. Analogous reasons mean that the same forename may not be attributed to brothers or sisters – although this is sometimes allowed when one is born after another has already died – as a forename must allow distinction between different members of the same family, and any other solution may compromise the identity which is necessary to the perfect exercise of the right to private life of each and all of them.

Another typical case is that of abandoned children who must, naturally, receive a forename the same as anyone else. However, it would be an infringement of their private life – and, in a way, even their future family life – if they were given a name likely to reveal their condition of abandoned children ('esposito', for instance).

However, the right to private and family life is not the only one consecrated by the Convention which is relevant to the question of names. The right to non-discrimination and the right to religious freedom, linked to the right to private and family life, may also have an influence on the name as it is registered in civil-status records. Thus, in particular, civil-status systems must, in principle, allow foreign names linked to the national origins of the family of the child to be registered or, also, to the religion the family belongs to.

Finally, the European Court of Human Rights also based itself on the principle of non-discrimination in order to declare (Pilar Moscoso and Others v. Spain judgment of 28 October 1999) that aristocratic titles are only complementary elements of names, and are not a part of people's identities, even if the titles are registered as part of a person's civil status.

And, thinking of surname (or forename) changes, it seems self-evident that the safeguard of the right to private and family life may provide the main justification for such a measure. Thus, it is possible to observe the multiple and multidirectional influence of the right to private and family life on the surname and forename of individuals.

D. Transsexuality

Certain people feel, sometimes during their childhood or sometimes later on, that, psychologically, they do not belong to the sex corresponding to their physical and hormonal characteristics or civil-status records. This situation can cause such profound psychological troubles that people often decide to undergo surgical interventions or endocrinal treatments in order to acquire the characteristics of the other sex.

The question then arises of whether it is possible for these people to change their sex as it is registered in their civil-status records. And the solutions offered by the law of different countries are not uniform in this regard. Certain countries reject this possibility. Others allow it, either by direct decision of civil-status authorities, or after a court decision. What seems undeniable is that this question directly and profoundly affects these people's private lives.

The European Court of Human Rights has started, cautiously, to consider this question. According to its usual procedure, the Court attempted, first of all, to find out whether, among Council of Europe member States, there was any consensus on the matter. If this is missing or insufficient, the Court will allow member States a margin of appreciation inversely proportionate to the level of consensus.

Applying this criterion, the European Court of Human Rights began by considering that the absence of a complete consensus of European States in this matter did not allow it to interpret article 8 of the Convention as meaning that the right to private (and family) life had to be taken as implying that transsexuals should have the right to obtain a change of their sex as it is registered in their civil-status records. Thus, notably, in the cases of Rees (17 October 1986) and B. v. France (25 March 1992), the Court, basing itself on the right to personal development, recognised that transsexuals have the right to change their sexual identity. But it did not go as far as to admit the consequences of this position in terms of civil status.

However, the Court progressively adopted a less partial position. On the one hand, it paid more attention to scientific progress in terms of changing sexual characteristics. And, on the other hand, it has shown itself, in recent years, to be more open to the evolution of, and cultural changes in, society. Following this criterion, the Court sometimes was content with a friendly settlement, when a State announced a change in legislation which previously did not allow a change in civil-status data even after the surgical intervention and hormonal treatment related to the change of sex, as, for instance, in the case of X v. the Federal Republic of Germany, of 11 October 1979. In other situations, this new position of the Court directly led to changes in the legislation applicable in this matter.

In an even more striking way, it has even inspired jurisprudential changes in the area – even though, from a strictly legal point of view, one could wonder if the Court's decisions can be capable of having such force in law. This type of influence can be noticed in the Beldjoudi v. France (26 March 1992) and Poitrinol v. France (23 November 1993) judgments, where European Court of Human Rights judgments induced the French Court of Cassation to change its previous position, which was to refuse transsexuals the right to change their identity as registered in their civil-status records.

But the most pertinent and most profoundly motivated decision in this area was without a doubt the Goodwin v. the United Kingdom judgment of 11 July 2002. The Court started by recognising that the gradual formation of a certain consensus among European countries as to allowing transsexuals to change their sex in their civil-status records. It added that, even if this consensus was not complete, scientific and even societal progress would eventually lead to such a decision. The Court even added that this implied, for Goodwin, the possibility of marrying a person of the opposite sex (to her new identity). In taking this position, the Court also based itself on Article 12 of the Convention, which recognises the right of everyone to marry, underlining the fact that marriage does not necessarily imply procreation.

Very recently, in the Schlumpf v. Switzerland judgment of 9 January 2009, the Court confirmed this position regarding transsexuals' change in sexual identity. Indeed, the Court expressly stated that the right to private life guaranteed by the Convention includes the perspective of sexual identity. Thus, it seems legitimate to affirm that, according to the best and most up-to-date interpretation of Article 8 of the Convention, the right to private (and family) life is intimately linked to each person's sexual identity. If anyone does not see his or her real social identity recognised in his or her social environment, this seriously compromises the development of his or her private life.

As already mentioned regarding the case of Goodwin v. the United Kingdom, one of the central aspects of the right to family and private life is the right to marry. The combination of Articles 8 and 12 of the Convention, by consecrating respectively the right to family and private life and the right to marry, allows us to deduce that one of the most important consequences of allowing transsexuals to change their identity is that they must be allowed to marry a person of the opposite sex (to their acquired sex).

The question remaining to determine – which has already been raised – is whether this position must be maintained if the said transsexual is a national of a country that does not recognise civil-status identity changes for transsexuals. The particular strength of the right to private and family right proclaimed by Article 8 of the Convention suggests that the response should also be positive in such a situation.

Finally, an event which is certainly rare (but has already happened) is a change of sex, biologically as well as in civil-status terms, of someone who has already been married. The question is the object of numerous discussions. A more formalist vision maintains that, in such a case, the marriage must be considered inexistent, and as such, should simply be removed from civil-status records. On the contrary, I consider that the solution that would be the most respectful of both the reality existing at the time of the marriage and the interests of the people concerned (maybe even the children of the couple before the sex change of one of its members) would be to maintain the validity of the marriage as registered in the civil-status records. This also does not prevent the people involved from choosing the solution of divorce later on, but that is another question.

E. Hermaphroditism

Cases of hermaphroditism – that is to say, situations where a person is born with no defined sex – are quite rare. However, some children are born in such conditions. Often, after a certain time, one of the sexes becomes predominant, and the person will develop entirely within that sex. Thus, the right to private and family life guaranteed by Article 8 of the Convention justifies that, once one of the genders becomes predominant, civil status must adapt to this reality.

III. The right to marry

The right to marry recognised to everyone (naturally, having reached a marriageable age) exerts several types of influence on the functions of civil status.

A. The right to marriage and civil-status procedure

To be in keeping with the spirit of the Convention, the right to marry must not be impeded by disproportionate procedural requirements. The application of the rules of civil status naturally implies a serious appreciation of situations within an appropriate time limit. However, the normal exercise of the right to marry implies that the procedures that are adopted must be neither too bureaucratic, nor too expensive or too lengthy.

B. The normal effectiveness of marriage

Marriage, being one of the most important facts of private and family life, is naturally recorded in the civil-status register. Thus, civil status becomes a condition of the marriage's validity, which acquires, in this way, a more important value than simple probative value, since production of the effects of marriage depend on its registration in the civil-status registers.

C. The real nature of the right to marry

In any case, it is necessary to recognise that the right to marry, as set out in Article 12 of the Convention, is prior and autonomous from its registration in civil-status records, as it corresponds to the original contractual concept consecrated by old Canonic Law. The proof of this assertion can be deduced from the fact that, once the interested parties have given their consent, they are married, even if the recording of the marriage into the civil-status register is not done immediately after the celebration. The same conclusion can be drawn from the common acceptance of 'urgent' marriages (celebrated, for instance, in cases where death is imminent), since such a marriage exists and is valid (as long as certain conditions are respected) even when concluded in the absence of a civil registrar.

D. The right to marry and freedom of religion

However, freedom of religion, another right set out in the European Convention on Human Rights (Article 9), does not mean that the right to a religious marriage has to be granted in all European countries. The system of obligatory civil marriage is perfectly compatible with the Convention, as long as a religious wedding following the civil wedding is not prohibited. Nevertheless, it seems legitimate to state that, if in one country a marriage celebrated according to a given religious rite can be recorded in the civil-status register, then the combination of right to marry and freedom of religion means that all marriages celebrated according to the most common religious rites of the said country must be equally admissible in civil-status terms.

IV.Access to procedure

The Convention defines a certain number of principles meant to guarantee rights to a fair trial and preserve access to judicial procedures. From Article 6, paragraph 3, of the European Convention on Human Rights, it is usually deduced that foreigners should have the right to assistance from an interpreter in order to understand how the procedure is being carried out (case of Oztürk, 21 February 1984). Thanks to this same rule, similar assistance has to be provided to certain disabled people, such as the blind, the deaf and the mute.

Although in terms of civil status, procedures are not usually of a judicial nature, it does not seem too untoward to defend the idea that the principles established by the European Convention on Human Rights for the functioning of courts should be applied by analogy to civil status. The non-discrimination rule stipulated by Article 14 of the Convention could even go towards reinforcing this conclusion.

V. Non-discrimination

The jurisprudence of the European Court of Human Rights started by considering, in an (excessively?) prudent manner, that the principle of non-discrimination laid down by Article 14 of the Convention has no autonomous value, but should always be interpreted and applied in combination with other rights guaranteed by the Convention. However, more recently, it has begun to recognise that this rule is increasingly applicable autonomously. In any case, from Article 14, combined with Article 8 on the right to family life, the Court deduced the right for natural children born out of wedlock to have a normal family life (Johnston v. Ireland, 18 December 1984). This consideration had particularly momentous consequences during the years that followed, particularly as respect for the principle of children's superior interest has been established by Article 3 of the 1989 UN Convention on the Rights of the Child.

This interaction between Articles 8 and 14 of the Convention has also been reflected in ICCS Recommendation N° 4 (of 5 September 1984), whose point 1 declares:

> ˝1. Any extracts from civil-status records that are obtainable by any person on request shall contain no indication concerning filiation, religion, the grounds for divorce, separation or annulment of a marriage or the causes of death, nor any other indication likely to infringe the respect due to the private life of the persons concerned .˝

VI.Perspectives

Thus, we have tried, briefly, to demonstrate to what extent the links between the European Convention on Human Rights and civil status are multiple and of very variable range.

1) *A well-organised civil-status system contributes to the effectiveness of the rights set out by the Convention, and facilitates their exercise by individuals.*
2) *Sometimes, legal efficacy (that is to say, the production of legal effects) of certain rights that are recognised by the Convention depends on their being recorded in the civil-status register.*
3) *Even more emphatically, modifying certain personal characteristics that are intimately linked to the right to family and private life can result in obligatory changes to the contents of a civil-status record concerning this person.*
4) *Finally, the strongest relationship occurs when registration with the civil-status system itself is a manifestation of one of the rights guaranteed by the Convention, specifically the right to private and family life.*