

CIVIL STATUS AND VARIOUS ASPECTS OF TRUTH : LEGAL TRUTH

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I. By way of introduction

'We know truth, not only by the reason, but also by the heart, and it is in this last way that we know first principles; and reason, which has no part in it, tries in vain to impugn them... And it is as useless and absurd for reason to demand from the heart proof... '.

This famous extract from Blaise Pascal's Pensées already demonstrates that several truths exist. In spite of the probative value of civil-status documents, these documents do not always guarantee the truth (II), even though sometimes the civil registrar must search for the truth, as is amply demonstrated by the case of bogus marriages (III). Additionally, civil-status documents reflect the truth only in terms of family law. Sometimes, family law hides the truth, for instance when it prefers social and affective truth to biological truth, or when it denies the right to know one's origins (IV).

II. Civil-status documents and the truth

If a civil-status document is conform to the formal conditions demanded by law, the document bears witness to that person's status, even though in different legal systems the particulars contained in the document may not have the same probative value. Generally, as for instance in Germany, all particulars contained in the document are supposed to be truthful and are authoritative unless proved otherwise¹. However, certain systems, such as Belgian, Spanish and French law, are stricter, and make a distinction between particulars relating to the facts noted by the civil registrar in the exercise of his functions, such as the date or the attendance of the parties, and particulars coming directly from the parties, such as the contents of their declarations. The former are authoritative until declared legally inauthentic, the latter until proved false².

*There is a marked tendency, in several legal systems, to grant equivalent probative value to foreign documents, but sometimes with certain reserves. Thus, French law provides that all civil-status documents concerning foreigners, written abroad in the form utilised in the relevant country, are authoritative, unless other documents available, exterior data or elements taken from the record itself prove, after all relevant checks, that the document is illegal or falsified, or that the facts declared therein are not conform to reality (art. 47 C.civ.).³ According to the dominant doctrine, the appraisal of probative value contains two phases. First of all, the foreign document must qualify as a civil-status document, defined by the French Court of Cassation as being 'a document wherein the foreign public authority authentically records an event on which depends the status of several people.'⁴ The authentication conditions are checked according to the *lex loci registrationis*. Secondly, once the document has qualified as a civil-status document, the probative value is appraised according to the law of the forum.*

The appraisal of the probative value of civil-status documents from member States of the European Communities has been very much reduced by the Court of Justice Dafeki judgment.⁵ Mrs Dafeki, born in Greece, of Greek nationality, had been working in Germany since 1966. Her civil-status documents showed her date of birth as being 3 December 1933. In 1986, this date was rectified by the competent Greek tribunal to 20 February 1929. In 1988, Mrs Dafeki applied to the Pension Fund for an early retirement pension as provided to women having reached the age of 60, based on the new birth certificate and the rectification judgment. The pension fund rejected this application, relying on the un-rectified birth date. In German law, Article 66 of the Personenstandsgesetz as in force at the time stipulated that documents relative to a person's status, in terms of proof, have the same value as his or her civil-status records. According to Article 60, paragraph 1, of this law, these records, if regularly updated, are considered in principle to be proof of marriages, births, and any indications relating thereto. Given the jurisprudence of the Bundessozialgericht and the doctrine in force, Article 66 of the Personenstandsgesetz applies only to German documents, not foreign documents, including those containing later corrections. As a result, when documents have been

¹ Germany : paragraph 54 Personenstandsgesetz (law on civil status) of 19 February 2007. See also Zeyringer, *Int.Enc.Comp.L. V° Registration of Civil Status*, 2-402 ff.

² Belgium : Article 1317 and 1319 of the Civil Code ; Spain : Article 7 of the law of 8 June 1957 on civil status ; France : Articles 1317 and 1319 of the Civil Code. See Chevalier, *JurisClasseur, V° civil-status records*, n° 27-28

³ See Bidaud-Garon, *La force probante des actes de l'état civil étrangers après la loi du 26 novembre 2006*, RCDIP 2006, 49 ff.

⁴ Cass. 14 June 1983, RCDIP 1984, 316, note Ancel.

⁵ ECJ 2 December 1997 (Dafeki/Landesversicherungsanstalt Württemberg), Rec. 1997, I-6774, RCDIP 1998, 329, note Droz.

established in a different member State, they do not benefit from presumed exactitude, so that the tribunal will examine the documents submitted to it following the rule of free appraisal of proof. In the context of this examination, the tribunal must take into account a jurisprudential rule which presumes that, in case of conflict between several successive documents, generally, in the absence of other sufficient proof, the document which is chronologically closest to the event described will prevail, in this case the first birth certificate. This practice is due to the fact that, generally speaking, foreign rules on updating civil-status records, and more specifically on authentication and correction, are not always identical to German rules.

By a request for a preliminary ruling addressed to the Court of Justice, the Hamburg Sozialgericht asked whether Article 48⁶ of the EC Treaty requires that, in procedures aiming to determine the right of migrant workers who are nationals of a Community member State to claim social benefits, national institutions which are competent in terms of social security and national domestic courts of a member State must respect any certificates and equivalent documents relative to a person's status emanating from other member States' competent authorities. (§ 8).

The Court recalled that, following the terms of Article 48, paragraph 2 of the Treaty, free movement of workers implies the abolition of all discrimination based on nationality between workers from all member States regarding employment, pay and other work conditions (§ 9). The situation of Mrs Dafeki, a national from another member State, who held paid employment in a different member State, where she applied, concerning this activity, for a retirement pension, is within the field of application of this disposition (§ 10). The Court observe that, in order to invoke a person's right to a social security benefit depending on the exercise of free movement of workers which is guaranteed by the Treaty, workers must necessarily justify certain information featuring on their civil-status records (§ 11). The consequence of the German provisions, as they are presented by the requesting court, is that the probative value attributed by them to civil-status documents emanating from another member State's competent authorities is inferior to that which is granted documents established by the German authorities (§ 12). So, it becomes necessary to point out that, although it is applied independently of the worker's nationality, in practice, this rule works to the detriment of nationals from other member States. (§ 13).

The Court took into consideration, on the one hand, the considerable differences existing between national legal orders regarding the conditions and procedures permitting a decision to rectify a birth date and, on the other hand, the fact that member States have not yet ensured the consistency of these decisions, or implemented a system for mutual recognition of these decisions (§ 16). It underlined the fact that a member State's legal and administrative authorities are not required, by virtue of Community Law, to respect the equivalence between later corrections of civil-status documents carried out by the competent authorities of their own State and those coming from the competent authorities of a different member States (§18). Nevertheless, it notes that :

'Nevertheless, exercise of the rights arising from freedom of movement for workers is not possible without production of documents relative to personal status, which are generally issued by the worker's State of origin. It follows that the administrative and judicial authorities of a member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question.' (§ 19).

Under these conditions, the Court rejected

'a rule of national law which establishes a general and abstract presumption that, in the event of inconsistency between several documents of differing dates, it is the document closest in time to the event to be proved which prevails in the absence of other sufficient evidence, cannot justify refusal to take account of a rectification made by a court in another member State.' (§ 20),

This led to the following response:

'in proceedings for determining the entitlements to social security benefits of a migrant worker who is a Community national, the competent social security institutions and the courts of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question.' (§ 21).

The Court recognised that, in the current state of Community law, rules governing civil status do not fall under Community competence. But, as the Court underlined in the *Konstantinidis* judgment on the romanization of names,⁷ it confirmed that civil-status legislation is exclusively within the competence of member States, but that this legislation must be compatible with Community law. Even though the Court believed that member States are not obliged to treat rectifications of civil-status documents by a foreign authority in the same way as internal rectifications, it concluded that, given workers' freedom of movement guaranteed by Article 48, the authorities of a member State are obliged to take into consideration civil-status documents emanating from another member State. General suspicions of fraud are not enough to

⁶ Now art. 39.

⁷ ECJ 30 March 1993 (*Konstantinidis/Stadt Altensteig*), ECR 1993, I-1991, CMLR 1994, 395, note Lawson, ERPL 1995, 483, note Gaurier/Schockweiler/Loiseau, RTDH 1994, note Flauss, ZEuP 1995, 89, note Pintens.

invalidate the foreign document, even though a member State had noted a large number of migrant workers of Greek origin using the rectification procedure in order to obtain a more favourable birth date. Since workers may exercise their rights arising from freedom of movement only on the basis of a civil-status document from their State of origin, concrete indications linked to the document and raising serious suspicions of fraud are necessary. Although it places the emphasis on the autonomy of member States, the Dafeki judgment leaves such a narrow field of action that it assimilates the probative value, and therefore the truth, of a civil-status document from a member State to that of an internal document.

Even absolute probative value does not guarantee that a civil-status document reflects the truth: it guarantees the truth of the facts that the civil registrar's mission consists in noting;⁸ it does not entirely guarantee the truth contained in the parties' statements.

III. Civil registrars and the search for truth: the example of bogus marriages

Many legal systems reveal a pronounced tendency to imbue civil registrars with a proactive role in guaranteeing the truth of the document contents. The most relevant example is probably that of bogus marriages. But other examples are numerous.⁹

The recent study on this subject by the ICCS provides an overview of the principle reasons for bogus marriages.¹⁰ These reasons are linked to the advantages of marriages, particularly in terms of right of entry, residency and acquiring nationality, although, in several ICCS member States, marriage tends to facilitate access to other advantages, such as those of social security.

As for the right to enter and residency, let us first of all mention European directive 2003/86/CE of 22 September 2003 concerning the right to family reunification. This directive aims to harmonise the necessary conditions for foreign nationals residing legally within the territory of a member State in order to allow them to bring in their spouse or minor children.

Generally, it is notable that marriage functions as a regulating influence on the laws of ICCS member States in terms of right to enter and residency. Marriage with a national of the State in question facilitates, first of all, the obtaining of the right to enter into the country, as well as residency. Thus, in France, the foreign spouse of a French person is automatically issued with a temporary residency permit, with the mention 'private and family life'.¹¹ Then the majority of member States use the continuity of marriage as a regulating influence for the kind of residency permit issued. In Germany, for instance, marriage with a German national only provides you with a residency permit with a time limit. After living together for only three years, the foreign spouse will receive an unlimited residency permit.¹² Let us however note the specific system in place in the Netherlands, where marriage itself is not considered to be a ground for obtaining a residency permit. Marriage is but one of the conditions laid down by Article 3, paragraph 1 of the Law on foreigners.

Generally speaking, a foreigner married to a national of an ICCS member State benefits from favourable treatment in terms of acquiring the nationality of the member State.¹³ This is taken the form either of fewer requirements, such as time limits to be respected, as in Spanish, Greek and Dutch law, or of the application of simplified procedures, as is the case in Luxembourg law.

Because of these advantages, the phenomenon of bogus marriages is increasing in member States.¹⁴ For instance, in France, the number of marriages submitted to the public prosecutor's department under suspicion of fraud has doubled over ten years. Moreover, several countries, such as Belgium, the Netherlands and the United Kingdom, have seen a decline in bogus marriages since implementing more strict measures not only through post factum controls, but also preventative controls.

1. Post factum sanctions

It is possible to distinguish three types of sanctions : civil, penal and administrative.

As regards civil sanctions, there are two tendencies.¹⁵ Most ICCS member States allow the annulment of a bogus marriage by a court, as in Germany, Belgium, France, Spain, Italy or Portugal. Nullity as a specific sanction is unknown to a few ICCS Member States, such as Croatia, Greece, Hungary, Poland and the United Kingdom. In these countries, marriage may be annulled only for a separate motive, such as, for example, bigamy.

⁸ Comp. Cass. 21 février 1993, S. 1933, I, 361, note Niboyet.

⁹ Voy. Lepinois/Van Gysel, *L'état des personnes, les officiers d'état civil et le droit administratif*, *Actualité du droit de la famille* 2009/1, 1 e.s. which gives numerous examples of the active, or even almost inquisitorial role of the civil registrar as, for instance, regarding affiliation and transsexualism.

¹⁰ ICCS, *Bogus marriages*, www.ciec1.org

¹¹ ICCS, o.c., p. 7-8.

¹² *Aufenthaltsgesetz (loi sur le séjour)* § 27-30.

¹³ ICCS, o.c., p. 11e.s.

¹⁴ ICCS, o.c., p. 4-5.

¹⁵ ICCS, o.c., p. 22.

A deliberately bogus marriage statement falls under the application of general dispositions on fraud, or even false pretences.¹⁶ Certain countries apply specific sanctions in this case : Belgium, France and Switzerland. Not only is the person making the false statement taken to court, but also any other person organising or assisting in the organisation of such a marriage.

Administrative sanctions are numerous.¹⁷ For instance, in the majority of ICCS member States, there exists the possibility of withdrawing or not renewing a residency permit (for example in Germany, Belgium, France, Greece, Hungary, Italy, the Netherlands, Poland and Switzerland). Furthermore, in Belgium, the possibility of forfeiture of nationality also exists, in accordance with Article 23 of the Code de la Nationalité. In a few countries only, such as Croatia, Spain, the United Kingdom and Turkey, administrative sanctions are unknown.

2. Measures for preventative control

Following the increase in bogus marriages, most ICCS member States (excepting Luxembourg, Turkey, Poland and Portugal) took the view that post factum control was insufficient, and put in place preventative control measures.

Considering the great number of measures taken, it is possible to distinguish two types of preventative control, depending on the capacities and obligations of a civil registrar.¹⁸

Thus, for the first type, the civil-status department only gathers, analyses and reports information. This is the case, for example, in France. Any person wishing to get married must first provide the department with a file containing precise documents (art. 70 and 71 C.civ.) and undergo a preliminary interview. If there is any doubt regarding marital intentions, the civil registrar is obliged to refer the case to the Public Prosecutor. Only the Prosecutor will be able to decide the outcome of the case (whether to proceed with the marriage, stay it, or oppose it), while giving the grounds for his decision. The spouses-to-be may then appeal against this decision to the President of the Regional Court.

In a second type, the civil registrar has a greater field of action. As well as his or her role as described for the first type, he or she has wide powers of control and appraisal. For instance, in Germany, a civil registrar must actively seek out the intentions of the parties by summoning them, and requiring that they produce certain documents or make declarations under oath.¹⁹ On the basis of this information, the civil registrar will, in person, be able to decide on the matter, giving the grounds for his or her decision. If in doubt, he or she may request a Court decision.²⁰

Finally, let us dwell on the interesting case of the United Kingdom. Each foreigner who is not a national of a European Economic Area State must obtain a marriage visa or an engagement visa from a British consulate or High Commissioner or a Certificate of Approval from the Home Office, in order to make a marriage declaration. As a dissuasive measure, the price of the visa and certificate has gone up from 135 Pounds to 295 Pounds. Only marriage according to the rites of the Church of England or the Church in Wales would not fall under this legislation, although certain Dioceses apply this system. This policy regarding certificates was challenged in the Court of Appeal as being contrary to Articles 12 and 14 of the European Convention for Human Rights. The Court of Appeal recognised, in its judgement of 23 May 2007, that the State may promulgate certain restrictions contradicting Article 12 as long as the proportionality criterion is respected. In the present case, this was not the case, as the certificate policy is based only on the status of the person concerned, under immigration legislation, and not on the quality of the marriage.²¹ The House of Lords, in its judgment of 30 July 2008, confirmed the position of the Court of Appeal, considering that this certificate policy was illegal. The Lords even criticised the high price of the certificates.²²

3. And what of the principle of freedom to marry?

Legislatures use, or rather abuse, family law, and more particularly the function of civil registrar, to solve problems concerning immigration through norms on bogus relationships.²³ The struggle against fraud is understandable, and absolutely necessary, but by implementing preventative checks, it incurs a great risk.²⁴ It touches on the principle of freedom to marry, a principle of the highest value, enshrined as a fundamental right in Human Rights conventions.²⁵ European constitutions guarantee this freedom through the right to respect for private and family life.²⁶ For this reason, except in the Netherlands, the legality of a person's

¹⁶ ICCS, o.c., p. 24 e.s.

¹⁷ ICCS, o.c., p. 26 e.s.

¹⁸ ICCS, o.c., p. 16 e.s.

¹⁹ § 13 Personenstandsgesetz.

²⁰ § 49 2^o al. Personenstandsgesetz.

²¹ Secretary of State for the Home Department v Baia & Ors [2007] 4 All ER 199.

²² Baia & Ors, R (on the Application of) v Secretary of State for the Home Department [2008] 3 WLR 549.

²³ Comp. Windel, Status und Realbeziehung, in Lipp/Röthel/Windel, Familienrechtlicher Status und Solidarität, Tübingen, 2006, p. 14.

²⁴ Bénabent, Droit civil. La famille, 11^e éd., Paris, 2003, p. 78.

²⁵ P.ex. art 12 ECHR; art. 9 European Union Charter of Fundamental Rights.

²⁶ P.ex. art. 22 Const. Belge.

residency is not taken into account. So, the French Constitutional Council declared, in its decision of 13 August 1993, that in order to preserve the fundamental principle of freedom to marry, being illegally resident is not of itself sufficient proof of lack of matrimonial volition.²⁷ Nevertheless, preventative checks are mainly aimed at mixed marriages, and run the risk of surrounding these with general suspicion.²⁸ For these reasons, it is preferable to have only a posteriori checks, and accept that a marriage document may not always tell the truth. Dissociation of marriage from the related advantages could help to promote the truth!

IV. Legal truth, blood truth and truth of the heart

Civil-status documents cannot reflect the truth when it is legally admissible not to mention the identity of the people involved, as in the case of anonymous childbirth, which is possible under French, Italian and Luxembourg law, but has been declared unconstitutional by the Spanish Supreme Court.²⁹ This practice prevents not only the establishment of maternal parentage, but also paternal parentage. In the Odièvre case, the European Court of Human Rights had to examine anonymity, not from the point of view of establishing maternal parentage, but in light of the right to know one's genetic origins.³⁰ By denying this right by a small majority, the Court denies access to the necessary proof of parentage. The Court impedes access to truth in civil-status documents, and goes against its Gaskin³¹ and Mikulic³² judgments, which laid the basis for the right to know one's genetic origins.³³ This right was recognised in several later judgments, such as the Jäggi case, where the Court condemned the refusal to authorise a DNA test on the exhumed body of the father, held to be a violation of Article 8 of the European Convention on Human Rights.³⁴ The Court underlined that

'the right to identity, which implies the right to know one's parentage, is an integral part of the concept of private life.' (§ 37).

The legal truth of a birth certificate is mortgaged when family law accepts false acknowledgements because, in the majority of cases, these are laudable. The law believes, as does Graham Greene, that 'The truth ... is a symbol for mathematicians and philosophers to pursue. In human relations kindness and lies are worth a thousand truths'.³⁵ In those exceptional cases where false acknowledgement is abused for reasons relating to nationality, residency permits, or social benefits, the public prosecutor generally has a right of action, as in France or the Netherlands.³⁶ A famous case, which entered into German family-law history under the name of 'der Rächer' (the avenger), was that of a German national living in Paraguay, who acknowledged several hundred children in order to claim benefits for them, with the sole aim of harming the German State³⁷. The law of 3 March 2008 is the direct consequence of this: it allows competent authorities to dispute such an acknowledgement, and even permits preventative refusal on the part of the civil registrar.³⁸

Another example concerns new medical procreation techniques, enabling the donation of gametes, ova and embryos.³⁹ The birth certificate will show the name of the gestational carrier, even if the embryo was formed from another woman's ovum. If the law guarantees the anonymity of the sperm donor, there is no longer any trace of biological fatherhood.

These examples already demonstrate that family law is attempting to reach a balance between biological truth and social, emotional truth.⁴⁰ In systems that place the emphasis on the latter, legal truth is not equivalent to biological truth. This problem traditionally divides families under Germanic and Nordic law and Common Law from Roman family law. Often, it is argued that the former prefer biological or blood truth whereas the latter prefer social and emotional or heart truth⁴¹. Without a doubt, this theory reflects the situation from a historical point of view, but in light of recent developments, it could be said that, in spite of remaining differences, the two types of family law are becoming more similar. International treaties, such as the United Nations Convention on the Rights of the Child and the European Convention on

²⁷ Cons. Const. 13 August 1993, Déc. 93-325 DC, J.O. 18 août 1993, p. 11722

²⁸ Bénabent, o.c., p. 78.

²⁹ Tribunal Supremo 21 January 1999, RJ 1999, 6944.

³⁰ ECHR 13 February 2003 (Odièvre c. la France), JCP 2003, II, 10049, note Gouttenoire-Cornut et Sudre. Voy. Benda, Die "anonyme Geburt", JZ 2003, 533 e.s.; Bonnet, L'accouchement sous X et la Cour européenne des droits de l'homme, RTDH 2004, 405 e.s.; Malaurie, La Cour européenne des droits de l'homme et le 'droit' de connaître ses origines. L'affaire Odièvre, JCP 2003, I, 10049; Michaux, L'accouchement sous X au regard de la Convention européenne des droits de l'homme et de la Convention xde l'ONU relative aux droits de l'enfant, RTDF 2005, 321 e.s.

³¹ ECHR 7 July 1989 (Gaskin c. United Kingdom), RTDH 1990, 353, note Lambert.

³² ECHR 7 February 2002 (Mikulic c. Croatia), JCP 2002, I, 141.

³³ Michaux, RTDF 2005, 326 e.s.

³⁴ ECHR 13 July 2006 (Jäggi c. Switzerland), FamRZ 2006, 1355.

³⁵ Greene, *The Heart of the Matter*.

³⁶ Art. 356 C.civ.; art. 205 C.civ. néerl.

³⁷ Voy. Henrich, Zum Entwurf eines Gesetzes zur Ergänzung der Anfechtung der Vaterschaft, FamRZ 2006, 978; Windel, o.c., P. 19

³⁸ § 1600 1^o al n^o 5; § 44 1^o al. Personenstandsgesetz.

³⁹ Voy. Rigaux, Le droit de connaître ses origines, in Krenco/Puéchavy (éd.), *Le droit de la famille à l'épreuve de la Convention européenne des droits de l'homme*, Bruxelles, 2008, p. 110.

⁴⁰ Voy. Schwenzler, *Tensions Between, Legal, Biological and Social Conceptions of Parentage*, in EFL Series, n^o 15, Anvers, 2007.

⁴¹ Voy. Frank, Die unterschiedliche Bedeutung der Blutsverwandschaft im deutschen und französischen Familienrecht, FamRZ 1992, 1365.

Human Rights, and especially the jurisprudence of Strasbourg Court, have facilitated the establishment of parenthood, and have led national legislatures to favour biological truth.⁴²

But several Roman-law systems still attach great importance to heart truth by placing the emphasis on factual possession of a status, which reinforces the probative value of civil-status documents. In France, for instance, preparatory works for the law of 16 January 2009 remind us that the introductory report on 4 July 2005 order underlines, on the one hand, that 'a balance was sought between the biological and the emotional components of affiliation. Indeed, it is necessary to take into account the complexity of this link, which cannot be reduced solely to its genetic component.', and, on the other hand, that 'the modification of the forms of action, which was made necessary by the development of means of proof, requires greater respect of time-limits, in order to protect children from late claims affecting the stability of their status'.⁴³ Thus, according to French law, no one, excepting the public prosecutor, may contest filial status when factual possession of a status corresponding thereto has lasted at least five years from birth, or from acknowledgement, if this occurred later (art. 333, 2^e al. C.civ.). The public prosecutor's right of action will be exceptional and is only applicable in case of fraudulent evasion of the law, or when clues contained within documents themselves reveal legally-established filial status to be unlikely, covering, for instance, cases of passing off or substitution of the child.⁴⁴ Proof thereof is receivable, and can be made by any means. Belgian law attaches even greater importance to factual possession, while imposing no time-limits. It excludes any action where the document is in conformity with factual possession, even in the case of passing off or substitution of a child.⁴⁵ In all of these cases, factual possession must not be based on the truth, because its aim is precisely to protect a situation that does not correspond to the truth, giving priority to emotional parenthood rather than biological parenthood.⁴⁶ An extreme example is that of a Belgian woman, who gives birth anonymously in France, then returns to Belgium with the child. The child is then acknowledged by another woman. As soon as the acknowledgement is corroborated by factual possession, any contestation becomes impossible (art. 330 1^e al C.civ.).⁴⁷ In effect, Belgian law provides the means to legalise surrogate motherhood. Truth is definitively excluded.

Within systems that attach so much importance to factual possession, new possibilities open up, if the annotations about parenthood are not corroborated by factual possession⁴⁸. In fact, French and Belgian law allow, in this case, to negate the presumption that *Pater est quem nuptiae demonstrant* and accept that the biological father may acknowledge the child without first contesting the legal father's fatherhood.⁴⁹

Even Germanic and Nordic legal systems, which are fundamentally based on biological truth, have traditionally forbidden contestation of legal fatherhood by the biological father, and have accepted acknowledgement on his part only in specific cases, such as the birth of a child after the start of divorce proceedings (for example. § 1599 2^e al. BGB). Recently, and in accordance with Strasbourg jurisprudence, several systems have introduced a specific rule to allow contestation by the biological father, as was the case in German law in 2004 following a Constitutional Court judgment (§ 1600 1^{er} al n° 2 BGB).⁵⁰ But even this German law, which places so much emphasis on biological truth, has one important exception, which is close to factual possession. The biological father can contest paternity only if there is no social or family relationship between the child and the legal father. (§ 1600 2^e al. BGB).

In English law, which attaches almost absolute importance to biological truth, the *Pater est* rule is nothing more than a presumption, which may be refuted at any time by the biological father.⁵¹

V. Conclusion

The traditional function of a person's civil status is to determine, in irrevocable, or at least stabilising, fashion, the relationships between the people concerned.⁵² The primary aspiration of civil status remains absolute truth. The example of bogus marriages shows how the law attempts to reconcile the probative

⁴² P.ex. ECHR 27 October 1994 (*Kroon c. Pays-Bas*), série A, n° 297-C; 24.11.2005 (*Shofman c. Russie*), *FamRZ* 2006, 181, note Henrich. Voy. Granet, *L'application en matière d'état civil des principes posés par la Convention européenne des droits de l'homme*, *RTD eur.* 1997, 657 e.s.

⁴³ Rapport de Richemont, Sénat 2007-08, n° 145, p. 32. Voy. aussi Fulchiron, *Egalité, vérité, stabilité dans le nouveau droit français de la filiation, Droit et Patrimoine* 2006/3, 44 e.s.

⁴⁴ Rapport de Richemont, p. 40.

⁴⁵ Meulders-Klein, *Réflexions sur les destinées de la possession d'état d'enfant*, in Meulders-Klein, *La personne, la famille et le droit*, Bruxelles, 1999, p. 195; Senaev, *Compendium van het Personen- en Familierecht*, 11^e éd., Louvain, 2008, p. 241.

⁴⁶ Verschelden, *Afstamming*, Malines, 2004, p. 122.

⁴⁷ Pintens, *Die Abstammung im belgischen Recht*, in Spickhoff et al. (éd.), *Streit um die Abstammung. Ein europäischer Vergleich*, Bielefeld, 2007, S. 126.

⁴⁸ Voy. Frank, *L'établissement et les conséquences de la filiation maternelle et paternelle en droit européen*, *RIDC* 1999, 33 e.s.

⁴⁹ Resp. art. 316 C.civ. fr. et art. 319 C.civ. belge.

⁵⁰ BVerfG 9 avril 2003, *FamRZ* 2003, 816, note Huber. Voy. Schwab, *Familienrecht*, 16^e éd. Munich, 2008, p. 246. Pour d'autres exemples: Henrich, *Streit um die Abstammung – Europäische Perspektiven*, in Spickhoff et al., o.c., p. 404 e.s.

⁵¹ Frank, *RIDC* 1999, 35 e.s.; Lowe/Douglas, *Bromley's Family Law*, 10^e éd., Oxford, 2007, p. 321 e.s.

⁵² Comp. Windel, o.c., p. 11.

value of civil-status documents with the struggle against fraud, and illustrates how the law attempts to favour absolute truth.⁵³

Civil status does not reflect its own truth, but that of family law. The evolution of European legal systems in terms of filial status is manifest. Filial status depends on biological truth as the logical consequence of the evolution of values, marriage's loss of function, equality of all children, and scientific progress which makes it easier to prove filial status. These developments contribute to the truth of civil-status documents. But sometimes the law on filial status seeks to promote the stability of family relationships rather than absolute truth. When this absolute truth is not experienced in reality, it is subordinated to social and emotional truth. Legal truth then becomes equivalent to the truth of the heart, to the affection and solidarity experienced within families.

⁵³ Bidaud-Garon, RCDIP 2006, 55.