White Paper 10

civil status

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Introduction

Civil status concerns everyone, yet the legal issues it raises remain unknown.

The term 'civil status' is polysemous.

In a broad sense, it refers to the legal situation of the person from birth to death, which French law also refers to as the person's condition. In this sense, which brings civil status closer to the notion of identity, as defined by the State, a number of elements differentiate each person in terms of enjoyment and exercise of civil rights: filiation, nationality, marriage or registered partnership, surname, first name, domicile, capacity, sex and even absence or disappearance. In a narrower and more common sense, civil status means the legal family situation resulting from filiation and marriage.

Civil status also refers to the public service responsible for recording, in public registers, the instrumental acts stating and registering facts or acts concerning the status of a person, even though curiously, the Court of Justice of the European Union has recently invited to dissociate the recognition of status from the recognition of civil status records.

Finally, and most importantly, civil status is very closely linked to the person's identity. By registering the birth, the State officially recognizes the child's existence and formalizes his status under the law. It gives him an identity that constitutes the legal basis for his sense of individuality/personality.

This White Paper mainly considers civil status as the means to identify the person, which necessarily implies in the society of the twenty-first century to evoke digital identity but also look at its implications regarding cross-border mobility.

The elements of civil status, on the basis of which the identification of the individual is carried out, are generally objective. However, there is a tendency to subjectivize such elements in various parts of the world. Individualisation becomes a reality and affects the administrative police dimension of civil status, traditionally recognized when the individual seeks control over his status. This perspective takes on a new dimension with the development of digital identity, which facilitates the phenomenon of multiple identities for the same individual, unless limited to a sovereign digital identity, which is known to be expanding at an incredible rate (see, in particular, within the European Union, the eIDAS Regulation). The individualisation of civil status mainly affects name and sex: these characteristics, these ele-

ments, previously considered objective and unavailable, are becoming malleable and may be modified under increasingly liberal conditions.

Thus, freedom of choice of name has increased considerably; transgender people are seeking a change of first name and a change of sex; intersex people refuse to be necessarily described as "male" or "female", and the question of neutral sex or third sex is being raised. These last two claims lead to whether sex should remain an element of identification of the person.

Simultaneously, debates around parenthood are lively. People of unknown paternity, because they were born under X or by medically assisted procreation using a third-party donor, want to have access to their 'biological' identity; parties to a surrogacy agreement wish to be recognized as (intended) parents. In this regard, the definition of filiation and its place in civil status are being questioned.

These few elements invite reflection on the role of international law, in its dual public and private dimension, in matters of civil status at different levels.

The first issue is access to civil status, beyond which lies the right to identity. In the "Identification for Development" (ID4D) program framework, the World Bank revealed that one billion people worldwide, more than half of them in Africa, could not prove their identity. Without access to an effective civil registration system, people are deprived of their fundamental rights, such as the right to education, the right to health, social security, political rights, freedom of movement, and access to civil rights, including property rights. Without civil status, the person is vulnerable and subject to violence, exploitation and trafficking. The invisible child is highly vulnerable to prostitution, forced begging and slavery. It is likely to fuel child trafficking. The subject is already well established, and many initiatives have given concrete expression to Article 6 of the Universal Declaration of Human Rights (1948), which was the first international text to enshrine the right of everyone to recognition everywhere of their legal personality. Thus, Article 7(1) of the 1989 United Nations Convention on the Rights of the Child declares the right of every child to be registered after birth and acquire a nationality. It follows from it a guarantee of the right to identity, which is consubstantial with the rights recognized elsewhere in the Convention, and a commitment to restore the identity of those illegally deprived of it as soon as possible. Awareness of the need for a reliable civil status is important. Nevertheless, the difficulties remain major, and it is not insignificant that the IDI 2021 Resolution on Human Rights and Private International Law provides in its Article 12 that ‘Every person has the right to be

registered immediately after birth, and to have their identity, including name and date of birth, recorded in a document accessible to the public and portable across border'. Even more remarkably, target 16.9 of the United Nations Sustainable Development Goals is 'By 2030, (to) ensure legal identity for all, including through birth registration'.

Birth registration, an unavoidable challenge

The first challenge facing international law on civil registration remains the large number of 'ghost children'. Hundreds of millions of children under five do not have birth certificates. Therefore, they are without rights. In some countries, the situation is dramatic. The birth registration rate is close to zero. The causes are diverse. The obstacles are both practical (geographical distance, costs, etc.) and legal (gender-based discrimination in registering a child, requirements for parents to be married, etc.) or even political (lack of will, for example, to avoid developing electoral lists). It is essential to strive to limit such obstacles. However, this issue will not be developed in this White Paper, as awareness is high and has been so for a long time. See, in particular, the Unicef Birth Registration program.

The next point, mainly because of the movement of people, is the question of civil status records circulation, which necessarily leads to mentioning the importance of civil status issues in migration matters. For the registration of civil status events and the recognition of civil status records, digitalisation seems unavoidable.

Finally, the definition of the elements of civil status and their permanence must be questioned. Behind the right to identity stands a kind of right to personal self-determination to which the development of virtual identities that characterizes our time - think of the perspective offered by metaverse - only responds in a staggered manner.

Different forces structure the role of international law in civil status matters. Here again, conflicting objectives need to be reconciled. The objective of civilian police, which makes secular civil status, as conceived during the French Revolution, a tool for registering citizens and monitoring their activities, remains very relevant in the context of policies to control migratory flows. Citizens' registration is also a means of giving them access to rights, and it is in this context that international texts clearly enshrining the right to birth registration can be understood. The democratic issue is underlying: the play of democratic rules, whatever they may be, presupposes that the persons making up the people are reliably identified. For example, the Bamako Declaration adopted on 3 November 2000 links civil status and human rights protection, civil status and democracy. Its Chapter IV - B relating to free, reliable and transparent elections, includes the commitment of States and governments to strengthen the national capacities of all the actors and structures involved in the electoral process, mainly through the establishment of a reliable civil registry. In contrast to the policing function of civil status, the fundamental right to identity, which derives from the right to privacy, is emphasized, but in a very unequal way in the different parts of the world, to enable individuals to take ownership of their condition.

As the facets of civil status are multiple, it was quickly decided, during the preparation of this White Paper, to select some themes rather than attempting to draw up an exhaustive list of questions that could only be addressed in an extremely incomplete manner. Two main areas have been selected, that of the organisation of civil status, its efficiency and its adaptation to contemporary technical challenges (I), and that of civil status in the face of changes in society and morals, which today tend to place civil status at the service of the person's self-determination (II). The two issues are not disconnected from each other, as shown, if need be, by the situation, following Russia's aggres-

sion on Ukraine, of children born as a result of surrogacy in Ukraine in March 2022 and entrusted to their intended parents before their birth certificate was established[1].

Note 1 S. Cordier et C. Bouanchaud, Le désarroi des couples qui recourent à la GPA en Ukraine : « S'il faut aller récupérer notre enfant là-bas, nous le ferons », Le Monde 18 mars 2022.

1.

necessary
adaptations
to the organisation
of civil status

A. Taking civil status seriously through a dedicated international organisation and competent staff

1. Overview: a plurality of actors

International civil status is marked by the intervention of several actors whose work is not coordinated, which leads to numerous inconsistencies and a complex legal system that is not very clear. It is particularly the case with regard to the circulation of civil status records.

Two generalist international organisations have intervened on an *ad hoc* basis in this area.

The first one is The Hague Conference on Private International Law. The Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents is indeed an essential tool in international civil status practice. As its title indicates, this text aims to generalize the exemption from lega-

lising public documents in relations between Contracting States[2]. Admittedly, civil status records are not specifically targeted. However, there is no doubt that they fall within its scope[3]. The Convention does not stop at simply abolishing legalisation. An alternative and simplified system is implemented, the affixing of an apostille, issued by the competent authority of the State from which the document comes and intended to "attest the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp" with which the document is covered[4]. This "Apostille" Convention has been highly successful worldwide. One hundred and twenty-one States are currently parties to it[5]. This text thus constitutes considerable progress and contributes to simplifying the circulation of civil status records. It is an essential mark of international cooperation.

The second international organisation is the Council of Europe. The Apostille Convention excludes documents drawn up by diplomatic or consular agents from its scope. To fill this gap at the European level, the Convention of 7 June 1968 on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers was signed in London on 7 June 1968. Once again, civil status documents undoubtedly fall within the scope of this text. However, only twenty-four States are currently bound by such a text. Its success is, therefore, relative[6].

The International Commission on Civil Status (ICCS), a specialised organisation, has been working since 1949 for international civil status. The organisation's objectives are mentioned in Article 1 of the ICCS Rules: to facilitate international cooperation in civil status matters and promote the exchange of information between civil registrars. Thirty-four Conventions and eleven Recommendations have been adopted, establishing genuine international cooperation in civil status matters. The greatest

Note 2 Articles 1 and 2.

Note 3 See the examples from the Handbook on the Practical Operation of the Apostille Convention, Hague Conference on Private International Law, 2013, No 124.

Note 4 Article 3.

Note 5 The status of the Convention is available on the Conference website: https://www.hcch.net/fr/instruments/conventions/status-table/?cid=41

Note 6 For the status of signatures and ratifications, see: https://www.coe.int/fr/web/conventions/full-list/-/conventions/treaty/063/signatures?p_auth=H4NtrpOZ

success of this organisation is Convention No. 16 on the Issue of Multilingual Extracts from civil status records, signed in Vienna on 8 September 1976. This instrument, currently binding in twenty-four States, greatly facilitates the circulation of civil status records (birth, marriage and death certificates). A modernised version of this text entered into force on 1 July 2022 between Belgium, Germany and Switzerland, namely Convention (No 34) on the issue of multilingual and coded extracts from civil status records and multilingual and coded civil status certificates, signed in Strasbourg on 14 March 2014. Beyond the mere circulation of acts, the other instruments concern the harmonisation of law and direct cooperation between civil status authorities.

The final key actor in this area is the European Union. Administrative procedures can be complex for Union citizens when they have to produce, for their daily life-related needs, civil status documents drawn up in a Member State other than the State of residence. It appeared necessary to introduce a more accessible legal regime as such constraints could be considered obstacles to the European Union's freedoms of movement. Despite the importance of international conventions in this area, loopholes remained. For this reason, a Regulation was adopted based on Article 21(2) of the Treaty on the Functioning of the European Union, namely Regulation (EU) 2016/1191 of the European Parliament and the Council of 6 July 2016. As such, it promotes the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012. Its purpose is to establish a barrier-free circulation of public documents within the European Union.

2. Statement: the need for a specialised organisation

The plurality of actors could mean that everyone contributes. However, it also has significant disadvantages.

The first drawback is obvious and concerns the articulation of the texts. The main current difficulty concerns the coexistence between the "public documents" Regulation and the ICCS Conventions. A form of alternativity is established, each set of rules being applied in its sphere without regard to the other.

It is, therefore, often difficult to have explicit knowledge. Admittedly, the situation is the same in many other fields. However, there are some particularities concerning civil status. Indeed, when the civil registrar is not a legal professional, as is often

the case in France and other countries such as Italy (see below), it is illusory to think that they will be able to untangle the knot.

The second downside is less obvious but just as essential. When texts are drafted by non-specialised institutions, they are not necessarily adapted to the needs of the subject. This is the case with the "public documents" Regulation, which, while inspired mainly by the ICCS Conventions, deviates from them on some key points. For example, the multilingual forms annexed to the Regulation have no independent legal value, unlike those annexed to ICCS Conventions Nos 16 and 34. The Regulation, therefore, appears to be a simple translation support, whereas the ICCS Conventions directly ensure the circulation of fully-fledged civil status documents.

To achieve suitable texts, knowing the practice's needs is essential. The structure of the ICCS makes this possible. Indeed, thanks to the existence of national sections composed mainly of practitioners, the organisation can permanently identify the main problems in the field of civil status, find appropriate solutions through exchanges within the organisation and draft texts to respond to them.

It is thus striking that many ICCS Conventions focus on specific issues and do not seek to enshrine general solutions (see, for example, Convention (No. 29) on the recognition of decisions recording a sex reassignment, signed in Vienna on 12 September 2000, Convention (No. 21) on the issue of a certificate of differing surnames, signed at The Hague on 8 September 1982, and Convention (No. 20) on the issue of a certificate of legal capacity to marry, signed at Munich on 5 September 1980).

In addition, when implementation problems arise due to, for example, changes in society or the development of technology, these can again be discussed at a general meeting, and an interpretative resolution can be adopted to clarify the texts. There is no need to wait for a court to decide on the meaning of a provision or adapt it to new needs.

Despite the advantages of having an international organisation specialised in civil status matters, its many achievements and the success of its instruments in practice, the ICCS is in such difficulty that its survival is now at stake.

3. The challenges: the renewal of the ICCS

In recent years, many States have withdrawn from the ICCS. Most of the time, departures are motivated by the adoption and subsequent entry into force of the Public Documents Re-

gulation. Many EU Member States withdrew because they considered that this new text was the future and would replace most of the conventional instruments. They no longer saw any point in remaining involved in a specialised international organisation. After Greece's withdrawal in 2021, only five States have remained in the ICCS: Belgium, Spain, Luxembourg, Switzerland and Turkey. However, the States that have decided to leave the organisation have also affirmed their commitment to its Conventions and continue to apply them in practice.

Because of the danger of the organisation's disappearance caused by such departures, the ICCS Bureau reacted by adopting a Resolution on 25 September 2019. Several measures have been adopted. Some examples can be provided.

The first one is the introduction of bilingualism within the organisation. English has become the second official language of the organisation, along with French, which has been so since the beginning. Thus, the bilingualism introduced should make it possible to attract new non-French-speaking States to the ICCS.

The second example is financial. Member States' contributions have been suspended. This means that joining ICCS no longer entails any financial cost. Again, the desire to attract new member States is obvious. This measure is also justified by the fact that the current member States bear alone the operating costs of the organisation, while all the States parties to the various conventions benefit from their day-to-day implementation.

The third example is more technical but equally essential. The conditions for membership have been softened. The procedure has been simplified since the General Assembly has become the sole decision-maker in this matter. Moreover, from now on, in addition to States, it is possible for international organisations, regional economic integration organisations and any other international entity to become members. The European Union or Mercosur, for example, could thus become members of the ICCS. If the Union became a member of the ICCS, as it did with The Hague Conference on Private International Law in 2007, better coordination of instruments and policies would undoubtedly result. Consideration is also being given to the possibility of amending the ICCS Conventions to allow such organisations to join.

The organisation has therefore chosen to act in order to avoid its disappearance. However, it should be noted that beyond this proactive approach, the Resolution also States that in the absence of renewed interest in the ICCS from other States or international organisations, the Bureau will no longer be able to play its role in ensuring the sustainability of the organisation

and, therefore, the functioning and monitoring of its Conventions beyond 31 December 2025. A deadline has therefore been set. There is a real risk that the ICCS and, by extension, its instruments will disappear through a form of obsolescence. These are living instruments. Indeed, the Conventions in particular give rise to numerous operations: declarations, notifications, reserves, etc., which may be modified or withdrawn. States may ratify, accede to or approve them. In the absence of the ICCS, this work would no longer be carried out. The ultimate consequence would therefore be the paralysis of the Conventions and their gradual disappearance, which would constitute a dramatic setback for international cooperation in civil status matters.

Assuming this first challenge has been met, it would still be necessary for stakeholders within the various legal orders to understand the issues related to civil status and be sufficiently informed about the tools available to them.

However, as has been said, in several States, particularly in Europe, civil registrars are not legal professionals. However, civil registrars are increasingly called upon to assume functions of a legal nature that are often quite complex. Thus, the registration of foreign records in national civil status registers implies carrying out control with regard to public policy. In Italy, for example, civil registrars must check whether the foreign record complies with the fundamental principles of domestic law. Suppose the civil registrar considers that the foreign act is contrary to public policy. In that case, he may refuse to register it in the Italian registers, which will *de facto* make it impossible for the person concerned to invoke this act before any Italian administrative authority, as long as a judicial authority has not ruled on the question of recognition of the foreign act. In other words, a civil registrar is given the power to paralyse the exercise of a person's fundamental rights (rights linked to being a wife, father, son, etc.).

A choice seems to be necessary.

It may be wished to maintain the current system, which confers critical missions on civil registrars. If so, creating a body of public officials and ensuring their professional training would be essential. It would be normal to require a civil registrar to have at least a law degree, which would provide basic legal training. It is currently not the case, especially in France and Italy, where it is extremely difficult for civil registrars to understand the issues, particularly the legal issues linked to the recognition of a foreign record. Working in the field of international civil status requires specific knowledge of national private law, comparative law, public international law, private international law, and ad-

ministrative law. This requirement is not currently met in most legal systems.

It may also be considered reforming the system by transforming the role and function of civil status in national and international contexts. Civil status registers would thus become an 'open book' of information, records and news about people's lives, without the need for 'substantial control' over the records to be registered.

Simultaneously, the registration of civil status records would no longer have any legal effect. The recognition of the legal validity of the record, according to national law, would be entrusted exclusively to courts, with the civil registrar simply having to deal with the material activity of managing the information.

A reflection on the role of civil registrars and, in general, the function of civil registers seems necessary, as the circulation of foreign records corresponding to very different legal models is intensifying.

B. Civil status in the digital age: the shift to digital records

1. The challenges

The increasing cross-border mobility of people is a characteristic of our times, and many civil status situations include foreign elements. Simultaneously, the digitisation of national civil status registers has become commonplace. It is unavoidable to support the modernisation of public administration and the administration of justice by means of technological tools. Technological advances, in turn, have been accompanied by a decisive regulatory action based on the principles of functional equivalence and technological neutrality, to grant the same value and effectiveness to digital documents as traditional analogue documents in paper format.

The digitalisation of acts is a growing legal reality, thanks to the generation of technological infrastructures that increasingly offer a high level of efficiency and legal certainty to citizens, as well as an adequate level of legal certainty and protection of their personal rights (including personal data protection).

However, in the context of the increasing international mobility of persons, new normative solutions are required to appropriately adapt to the digitalisation processes and address the need for the secure acceptance of foreign public documents in a digital form. Therefore, new and unique challenges affect cross-border cooperation in the recognition and international circulation of foreign civil status records that have been digitised and reflect the underlying personal or family legal relationship with foreign elements.

The desire to facilitate the international circulation of public documents, and in particular civil status records, presupposes a significant codification effort at the international level and, in particular, an adaptation of the texts in force. This codification process should lead to the adoption of legal mechanisms that promote the cross-border recognition of individual and personal situations and civil-status records generated under a foreign legal system while also protecting fundamental rights and personal data. In this regard, the regulatory work that national legislators may carry out, although indeed commendable, to understand international relations appears to be clearly insufficient in today's highly globalised world. It fails to adapt to the rapid and heterogeneous normative developments taking place at the national level. National legislative developments fail to consider the international element that could affect digital civil status records and offer purely national legal solutions to cross-border situations. The diversity of national solutions, which is reflected in the uneven incorporation of technological tools in the digitalisation processes of national public administrations, makes coordination attempts very difficult. As a result, international institutions such as The Hague Conference on Private International Law (HCCH) or, due to its specialty, the International Commission on Civil Status (ICCS), have to play an active and important role. Meanwhile, it is worth highlighting the regulatory unification efforts made by the European Union (EU).

2. State of play

In recent years there has been a growing number of national experiences related to the digitalisation of civil-status records and registers, also affecting their cross-border dimension and the acceptance of foreign public documents. Most States are implementing interactive digital tools and platforms that require citizens to use digital signatures or even a digital identity system. The aim is to develop a legally secured and respectful use of interconnected digital systems, which are complemented by legal provisions on the need for ensuring the protection of ci-

tizens' personal rights and, in particular, integrating an adequate legal framework for the protection of personal data into this electronic framework.

Several countries have developed normative solutions, which, from a cross-border perspective, seek to admit foreign digital documents (which have been drawn up by competent authorities in digital form). Examples include the Argentinian TAD Platform, the Brazilian Integrated Civil Registry System (SIRC), the Malaysian MyKad, the French "RECE" System, the Portuguese Integrated System of Register and Civil identification (SIRIC), the Spanish "DICIREG", or the Swiss "Infostar".

However, the most significant developments affecting the cross-border dimension of the digitalisation of civil status records and registers can be observed in the area of international and regional codification.

From the perspective of the HCCH, the instrument that has traditionally played a major role in this area relates to the significant *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.* However, the decisive service provided by the HCCH 1961 Apostille Convention poses essential challenges concerning new technological issues and the unstoppable digitalisation process of civil status records and registers. Thus, it is worth highlighting the development of the "electronic Apostille Programme" ("the e-App"), which consists of two main technological elements: e-Apostilles - issued on an electronic form by competent national authorities in the country of origin, they are attached to the national document in digital format later on- and e-Registers - maintained in a publicly accessible and electronic form, they can be accessed online by recipients.

In addition, one international organisation stands out for its willingness to adapt its normative action to technological developments. The International Commission on Civil Status (ICCS) seeks to promote the use of digitalised civil status records in civil status registers, which are increasingly electronic. In this respect, it should be first underlined the publication of Recommendation (No. 8) on the computerisation of civil registration, adopted in Strasbourg on 21 March 1991, whose analogical precedent was to be found in Recommendation (No. 4) relating to accessibility to the public of civil status registers and records, adopted in Rome on 5 September 1984. Besides, several ICCS/CIEC Conventions have followed the path previously outlined in Recommendation No. 8 (*i.e.* Convention No. 25) on the coding of entries appearing in civil status documents, signed in Brussels on 6 September 1995. In this respect, the critical Convention

(No. 30) on international communication by electronic means was signed in Athens on 17 September 2001 and complemented by Convention (No. 33) on the use of the International Commission on Civil Status Platform for the international communication of civil status data by electronic means, signed in Rome on 19 September 2012.

The ICCS's interest has not ceased at the level of providing the legal conditions to allow the international circulation of digitalised civil status records and combat fraud. It has sought to develop an ICCS Platform for the international communication of civil status data by electronic means. This significant initiative has been complemented by the adjustment of the model certificates drawn up in the framework of Convention No. 34 for computer processing and direct electronic transmission between the State authorities and their utilisation may even be extended beyond the scope of the Commission's own objectives and instruments.

The coding system is particularly at issue. Introduced by Convention (No 25) on the coding of entries appearing in civil status documents, signed in Brussels on 6 September 1995, it consists of attaching a code number to each entry appearing on a civil-status record. All these statements and numbers are compiled in a lexicon that can be consulted to understand the record. Such a lexicon can be integrated into a computer programme, which allows for automatic reading and translation of the record into the local language.

Despite its advantages and the remarkable effort invested in its design and development, it should be noted that the works leading to the implementation of the Platform were suspended in 2017, so it is not yet operational.

From a regional perspective, the EU has also shown for years a keen interest in the field of intra-European circulation of public documents and has been sensitive to the changes brought about by technological developments, being strongly inspired by the precedents developed at the HCCH and the ICCS/ CIEC[7]. This interest is closely related to the fact that it directly affects EU policies related to the development of an area of freedom, security and justice, as well as facilitating the free movement of persons (its legal basis being Article 21(2) TFEU).

In relation to this, it is relevant to mention Regulation (EU) 2016/1191 of the European Parliament and the Council of 6 July 2016 on promoting the free movement of citizens by simplifying

Note 7 See Green Paper "Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records" (COM (2010) 747 final).

the requirements relative to the submission of certain public documents within the European Union. It is the first European instrument to deal specifically with the problem of the free movement of authentic acts within the EU. Based on the principle of mutual trust, it aims to provide a specific and simplified uniform response regarding administrative formalities, requirements, and formalities to be fulfilled by some public documents and certified copies thereof (including certain civil status records) issued by the authorities of a Member State (in accordance with its national law), for their presentation in another Member State, and thus promote their intra-European circulation.

Regulation (EU) 2016/1191 is based on the free movement of authentic acts issued by the authorities of a Member State under its legislation. It is based on the presumption of the authenticity of the instruments that it covers, but only in their extrinsic dimension; consequently, it does not refer to the effects which they have because of their content or their recognition and does not affect the obligation to recognise the underlying personal situations and family relationships. The Regulation establishes a system of cooperation between Member States' central authorities to monitor cases of fraud and possible falsification of the documents that it covers *via* the Internal Market Information System ("IMI"), obliging Member States to provide a series of information to be publicly available on the European e-Justice Portal[8].

Regulation (EU) 2016/1191 is fully consistent with the current technological reality. Firstly, Article 12 deals with developing electronic versions of multilingual standard forms, which will be placed on the online European e-Justice Portal. Secondly, central authorities cooperate by using 'IMI'. In addition, the exchange of good practices covers the use of electronic versions of public documents. Finally, the Regulation does not affect the European *acquis* on digitalisation, which provides various Regulations on electronic signature and electronic identification or mechanisms of administrative cooperation.

It is essential to underline that such a codification process linked to the digitalisation of civil status records and registers must be consistent with the protection of fundamental rights (especially when the international transfer of such records is at stake). In relation to this, it must be underlined that all the mentioned instruments make due reference to the need to comply with the existing legal framework designed to protect personal data.

Note 8 At https://e-justice.europa.eu/561/EN/public_documents?clang=en.

This common concern shared by all codification centres – international and European - has been seriously considered by national legislators when developing their normative solutions with respect to the digitalisation of civil status records and registers.

3. The questions

The internationalisation of civil status issues resulting from a significant increase in cross-border mobility of people, as well as their digitalisation following the development of the information society, lead to a review of the modalities relative to the management of civil status registers. Although the advantages of digitisation are undeniable, the fact remains that it must be regulated by international law.

Currently, regional and international codification is characterized by significant complexity arising from the plurality of codification sites and instruments. The solutions offered by international law are fragmentary.

There is a need to deepen the dialogue and cooperation between the various organisations involved in this field while building on the different works initiated by each.

In particular, Regulation (EU) 2016/1191 offers a complex and unfinished solution, even though it constitutes a significant step forward. Its scope of application and effects are limited. Its subsidiary nature leads to a high level of legal fragmentation. It would have been advised to adopt a more ambitious position on the issue of intra-European circulation of digital civil status records and make direct use of the instruments proposed by the International Commission on Civil Status. The technical solutions proposed by the European legislator in Regulation (EU) 2016/1191 are insufficient. They do not offer adequate answers to such sensitive issues as the establishment of multilingual digital standard forms that would be binding on Member States' authorities; the uniform digitalisation of civil status records and registers at the European level, which would require harmonisation of the architecture of the underlying computer systems; technological tools facilitating direct electronic communication between public authorities and even the interconnection of civil status registers. These points remain to be dealt with, as the European legislator acknowledges when it mentions the review of the said Regulation (Article 26).

Thinking about the architecture of IT systems in a coordinated way is one of the keys to the circulation of civil status records. It should be designed with particular attention to the issue of

data protection in international situations (due to the unequal level of protection worldwide) and fundamental rights (such as privacy). The increasing use of video surveillance mechanisms and facial recognition, as well as the possible use of biometric data (boosted by Artificial Intelligence tools), may be a real (both legal and ethical) danger.

This touches on the challenges of digital technology for international law (White Paper 16).

Finally, it is difficult to conclude on the digitalisation of civil status without wondering whether the digital revolution is not ultimately synonymous with the disappearance of a segment of civil status. The identification of the person would exclusively use biometric data.

Seeking to facilitate the circulation of documents in order to facilitate the circulation of people calls for a redefinition of the role of key civil status actors and the use of the tools offered by digital development.

This circulation of documents is complex, even when there is agreement on the main statements that must be included in them (form) and their meaning (substance).

A fortiori, it runs into significant difficulties when this consensus is lacking.

However, scientific progress and the increasing individualisation of society have led to new aspirations in terms of personal status. Therefore, international law has a role to play in coordinating the different systems without seeking to impose a model that would be unacceptable to many legal orders.

2.

civil status
at the service
of personal
self-determination

Considering civil status from the point of view of personal self-determination has become a necessity, given the numerous identity claims and the diversity of family models. There are many facets to the issue. Two examples have been chosen for this White Paper, surrogacy and the mention of gender as an element of civil status.

A. Surrogacy, the impossible balance of interests

B. Sex, a contested element of civil status

A. Surrogacy, the impossible balance of interests

1/ Which surrogacy? Regarding the definition of surrogacy, several approaches are possible. For some, there cannot be surrogacy without the contribution of the genetic heritage of one of the intended parents[9]. In the context of a reflection on the role of international law, the definition adopted must be broad: no distinction will be made according to whether it is altruistic or commercial, whether the intended parents are heterosexual or homosexual, whether the parent-child relationship is established in the country of origin by a judgment or by a civil status document, whether the intended parents bring their genetic heritage - both or only one - or not.

2/ What internationality? With regard to the internationality element, the hypothesis is that a single person or a couple established in country A (which generally restricts access to

Note 9 This is a possible interpretation of the ECHR judgment 27 January 2015, no. 25358/12, *Paradiso and Campanelli v. Italy*.

surrogacy)[10] takes steps abroad, in country B (which allows the legality of surrogacy), to have a mother agree to carry the child and hand him over to this person/couple, who then returns to settle with the child in State A. Another example is the situation of bi-national couples that resort to surrogacy in their country of residence and seek to have the situation recognised in the State of nationality of one of them.

3/ What is the current situation? Paradox of surrogacy. On the one hand, a very strong movement in favour of surrogacy, in the name of the best interests of the child born of it, push countries which prohibit surrogacy in their domestic order (for example, France, Italy, Spain) to find all sorts of ways to make it effective in an international context: private international law is a real 'Trojan horse' from this point of view in favour of the liberalisation of domestic law on surrogacy[11]. This liberalisation also takes into account other factors, in particular the fact that it is now almost impossible to adopt internationally. Thus, all the usual obstacles to the recognition of foreign surrogacy, in particular fraudulent evasion of the law and international public order, have been removed in most countries (France, Belgium, Italy), under pressure, it is true, in Europe, from the European Court of Human Rights. On the other hand, the protection of the child born through surrogacy is still not fully guaranteed: a whole series of obstacles remain to the recognition of the child's filiation. It is enough to mention the biological mother who refuses to hand over the child, the difficulty in establishing the child's filiation with the intended parent who is not the biological parent, the obstacles in obtaining a residence permit, a passport, or when registering for social security ....

Note 10 It should be noted that the obligation to use surrogacy abroad may be the result of a radical prohibition on surrogacy in domestic law (French, Spanish or Italian law) or its modalities. For example, payments made in the UK to surrogate mothers will not be tolerated, so parents wishing to contract with a surrogate mother in the UK would effectively be forced to travel to other countries, as surrogacy on UK soil is only allowed if it is free of charge. Furthermore, in the UK, international surrogacy would not establish filiation, and the intended parents would still be required to apply for a Parental Order.

Note 11 S. Williams, D. Eskenazi, M.-L. de Sanna, M. Valentin, "Le statut légal de la gestation pour autrui en Europe, approche de droit comparé entre les droits britanniques, français, italiens et espagnols", AJ Famille 2022 p.329.

Example 1

In the tragic UK case of Re X [2020] EWFC 39, the biological father died before his child, born through surrogacy, was born.
His wife, having no genetic link to the child, was, therefore, unable to apply for a Parental Order under the HFEA because she was not eligible. Judge Lucy The judges of the highest court in England and Wales relied on the Human Rights Act 1998 - which incorporates the ECHR into UK law - to relax the eligibility requirement, which would not be incompatible with "the scope of the 2008 legislation" and "was in line with that Act".
Therefore, the wife was declared eligible to a Parental Order and her filiation with the child was established.

1. The present: the forced adaptation of civil status to surrogacy

a) Multiplication of transnational surrogacy path:

The prohibition of surrogacy has been maintained in most national legislations, both in Europe (except in the United Kingdom, Greece and Portugal, where more or less comprehensive provisions have been adopted) and outside Europe (China, Singapore, Thailand, India, Japan). On the contrary, other countries either fully authorise surrogacy (Russia, Brazil, Israel, New Zealand, South Africa, California) or tolerate it (Australia, Hong Kong). Despite this fact, transnational surrogacy is not decreasing; on the contrary, it is increasing due to the legal recognition of same-sex couples by several European countries and the social legitimacy thus acquired by same-sex families. It encourages the desire of same-sex couples to have children. Additionally, access to medically assisted procreation has been opened in several countries to female couples and single women. The same desire to create a family leads many male couples to circumvent legal prohibitions and use surrogacy by going to a country that allows it.

Simultaneously, there has been a collapse in inter-country adoption. Several reasons can explain such a phenomenon: first of all, the desire to moralise the practice has led to the signing of the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (May 1993), which has now been ratified by 104 States, and which has organised much stricter control of the various stages leading to the adoption of a child from a foreign country. This has undoubtedly resulted in a decline in inter-country adoptions: whereas in 2004, 45,482 minors were the subjects of inter-country adoption, in 2018, there were only 3,718[12]. In France, there were 4,136 international adoptions in 2005 and only 252 in 2021[13].The disaffection of this practice can also be explained by the denunciation of trans-racial adoptions in the name of the cultural rupture that it imposes on the displaced child, cut off from his community values and from the history of his ethnic group, especially if the latter has historically been colonized or a victim of discrimination[14]. In France, in particular, we are witnessing the decline of the "colour-blind" assimilationist model which developed in the 1980s and 1990s, and adoption social services pay extreme attention to the interests of children who come from an ethnic group other than the one of their adoptive parents[15].

b) Normative disorder and judicial tinkering:

The recognition of the filiation of children born through transnational surrogacy by the intended parents' countries of residence has emerged in a legal vacuum which has caused considerable disorder: the variability and instability of the solutions, the do-it-yourself, and the obstacle course, are some of the adjectives that come to mind to describe the jurisprudential solutions that are progressively being implemented in the countries that receive these children.

Note 12 *AJ Fam* 2022.180.

Note 13 See S. Roux, « Enquête sur la fin de l'adoption internationale », Vendémiaire, 2022.

Note 14 A. Gay, *Une poupée en chocolat,* La découverte, 2021 ; Wainwright J, Ridley J. "Matching, Ethnicity and identity: reflections on the practice and realities of ethnic matching in adoption", Adoption and Fostering 2012;36:50–61.

Note 15 S. Brun, « Cécité partielle, Procédure d'adoption et *colorblindness* institutionnelle en France », French Politics, Culture & Society, Vol. 38, No. 3, Winter 2020: 40–63.

Even though situations are multiplying, and the excuse of unpreparedness can no longer be invoked, no country has adopted a private international law provision on the pretext of not encouraging practices prohibited on its national territory. In practice, as the issue is politically sensitive, it is left to the judges alone.

There are several options for judges. A distinction must be made in this respect between what happens outside and inside the European Court of Human Rights sphere of influence. Outside Europe are all sorts of nuances. Some countries maintain the principle of refusing recognition of the parent-child relationship between the child and his or her intended parents on the grounds of public policy. This is the case, for example, in Japan[16]. Others, such as Brazil, allow surrogacy as long as one of the potential parents has family ties to the surrogate mother[17]. Yet, other countries, having opted for a liberal approach, have closed their borders to international surrogacy to stop abuse (India and Thailand). Finally, some countries have a particularly liberal approach: this is especially true of Russia and California. In Europe, however, the path that a majority has chosen is that of its transcription in central civil status registers.

It is guided by the delicate arbitration reached by the European Court of Human Rights in 2014 (ECHR 26 June 2014, No 65192/11, *Mennesson v France*, and No 65941/11, *Labassée v France*): the compromise solution only allows immediate recognition of the biological parent (which is consistent with the biological reading of filiation defended by the Court); however, it should be noted that there has been a shift towards the recognition of (purely) social or intentional filiation (ECHR 24 March 2022, nos. 29775/18 and 29693/19, *CE and others v/ France*). As it stands, it must be emphasized that immediate and full recognition of the birth certificates of children born through surrogacy is rarely obtained. Attempts to organize immediate recognition of the parent of intention (in France, case law of the French Court of Cassation

Note 16 https://www.courts.go.jp/app/hanrei_en/detail?id=883 a judgment from a foreign court which has recognized the establishment of a natural parent-child relationship between persons who are not eligible for such relationship according to the Japanese the Civil Code, is incompatible with the fundamental principle or fundamental philosophy of Japanese rule of law, and therefore must be deemed to be contrary to public policy as prescribed in Article 118, item 3 of the Japan Code of Civil Procedure.

Note 17 But particular and exceptional cases can be analysed by the Federal Council of Physicians according to their deontological rules, updated over time (at present, Resolution nº 2.320 of 20 September 2022); in Brazil, there is no specific legislation regulating medically assisted procreation.

towards full recognition; in Spain, the choice of the General Directorate of Registers and Notaries for a complete transcription) have failed: indeed, in France, the legislator intervened in the Bioethics Act of 2 August 2021 to put a stop to the solution reached by the Court of Cassation between 2019 and 2020. This surge in public policy has generated new confusion. Similar legal insecurity can be found in Spain, where there is a tug-of-war between the civil status administration and judicial courts (see the decisions of the Spanish Court of Cassation of 6 February 2014 and 31 March 2022)[18].

Nevertheless, the European Court of Human Rights has chosen to leave room to States for margin of manoeuvre concerning the establishment of parentage by intention (ECHR opinion, 10 April 2019; ECHR, 19 November 2019, No. 1462/18 and 17348/18, C. *v. France and E. v. France*; ECHR 16 July 2020, No. 11288/18, *D. v. France*). The only way to establish parentage by intention is to use intra-family adoption (plenary or simple if the surrogate mother is mentioned on the foreign birth certificate). This results in France from the Bioethics Act of 2021; in Italy, since the decision of the Court of Cassation 12193/2019, only an "adoption for special cases" has been possible and has more limited effects than traditional adoption. Therefore, in its judgments 32 and 33 of 9 March 2021, the Italian Constitutional Court considered the legal protection of children born through surrogacy inadequate and invited the legislator to intervene[19]. In the meantime, legal uncertainty for children born through surrogacy remains. For its part, and in a singular manner, the United Kingdom persists, in denial of the role of private international law, in applying to transnational surrogacy situations the procedure provided for by domestic law, which implies obtaining a parental order to transfer parentage to the intended mother.

A final solution should be mentioned when a judgment (of filiation or adoption) establishing the filiation of the child born through surrogacy with regard to the intended parent has been rendered in the country where the birth took place. It is then possible for the intended parent to seek the intervention of the national court to enforce the foreign judgment establishing his parentage recognized (exequatur procedure). This route has already been taken several times in France as it avoids the limits

Note 18 S. Williams, D. Eskenazi, M. Ludovica de Sanna, M. Valentin, Le statut légal de la gestation pour autrui en Europe, AJ Fam. 2022, p. 329-335.

Note 19 S. Williams, D. Eskenazi, M. Ludovica de Sanna, M. Valentin, article précité.

introduced by the Bioethics Act of 2 August 2021. It nevertheless requires judicial review[20].

2. The future: surrogacy, an illustration of the necessary changes in civil status

Among the possible scenarios, the first one, which we are only mentioning for the record, is exogenous to surrogacy: it would be a reform of international adoption that would make it more attractive, and would dry up, in whole or in part, the use of international surrogacy. Beyond this delicate and undoubtedly unrealistic question, three scenarios can be evoked. The wisest would be to wait for the adoption of The Hague Protocol on surrogacy, which would allow the implementation of limited international cooperation (1°). Another option would be to consider granting, in the name of the child's best interests, minimum rights to the child without regard to his civil status: in a way, a surrogacy without civil status or, at least, without an established filiation (2°). A third solution would be to get to the root of the problem: it is clear that one of the difficulties faced by surrogacy is the general mistrust of foreign civil status documents. A third scenario could be hence to work on securing these records, which goes beyond the issue of surrogacy alone (3°). In any case, surrogacy shows the need to adapt the use of civil status to the new needs that surrogacy creates.

a) First scenario: Wait for the entry into force of The Hague Protocol

The Hague Conference has set up a working group on filiation in private international law in 2011. Surrogacy would be the subject of a separate optional protocol. At present, the details of the Conference's works are not yet known. All that is known is that the Conference is working on a definition of an "ethical" surrogacy that could be acceptable to the largest number of States. Issues relating to civil registration are excluded.

However, the chances of success of this multilateral instrument are very thin: the lack of consensus on the orientations that should be favoured, and the collusion of countries prohibiting surrogacy and countries favouring it, play strongly in favour of the *status quo*: the former, like France, do not want the Protocol to lead to an obligation on countries prohibiting surrogacy in domestic law to reverse their restrictive legislation; countries

Note 20 A. Karila-Danziger et F. G. Joly, Transcription à l'état civil français des actes de naissance étrangers dressés dans le cadre d'une GPA, « Fin de partie », AJ Fam. 2022, p. 574-581.

that are in favour of surrogacy do not want a legislative framework that would call into question the liberalism in which they currently operate. The working group's conclusions are expected in 2023.

b) Second scenario: A split in the child's civil status

Remark 1: The first difficulty faced by surrogacy is the relationship between the civil status record, considered as an evidentiary or publicity measure, and the substance of the law, *i.e.* the civil status of the person. A civil status record drawn up in one State may be presumed to be probative in other States, even though those other States remain free to treat the legal relationship evidenced by the act. The jurisprudential treatment of surrogacy has revealed the ambiguities and even the conceptual fragilities of civil status: a measure to publicize the person's status, which is not entirely unrelated to the substance of the law. The formality constituted by the civil status record (or a registration in an authentic national identification register) must therefore be kept in its rightful place (transcription into civil status registers does not prejudge the validity of the recognized relationship, which does not comply with national rules and which could therefore be contested) while reinforcing the probative value of this official document (see remark 3 below). Such a need is all the stronger as, in case law, the distinction between civil status and the substance of the law has been used according to the situations that arose and the results sought. In this respect, it is sufficient to bear in mind the *Mennesson* case law saga in France and before the European Court of Human Rights, which successively exacerbated this confusion before denouncing it.

Remark 2: What is important is the child's interest, its protection, and its concrete, material, psychological and emotional care. We know institutions that ensure the child's well being without establishing filiation. We are thinking in particular of the institution originating from Muslim countries: the *kafala*. A solution of this nature could be considered in surrogacy. Of course, it is only a stopgap measure, as it does not, in most cases, correspond to the wishes of the intended parents.

Remark 3: This solution can be supported by the ECJ's recent case law, in particular, the *Pancharevo* judgment (ECJ 14 December 2021)[21]. Of course, one could argue about the strength of this reference, rendered in the particular context of European law. However, this solution opens interesting perspectives and deserves to be analysed from a broader angle. Indeed, it leads to a subdivision of the personal status of the child conceived through surrogacy who is recognized as having some rights (nationality, residence permit) without accessing full filiation.

This solution also finds support in comparative law, particularly in Belgian law[22] and Spanish law[23].

Note 21 See, for example, L. d'Avout & R. Legendre, « Mobilité européenne et filiation : l'état civil à la carte ? », *D.* 2022 p. 331 and seq. the judgment places 'the Member State of nationality in a position of *laissez-faire*, of forced passivity (letting the child enter the territory) and obliges it to issue, not a conforming civil status document, but a simple identity card or passport if the child is its national and so that the latter can continue to travel with his or her relatives. The Pancharevo judgment does not impose the recognition as such, immediate and active, of the parentage link established in another Member State between the child and two mothers. It requires the recognition of a sui generis link of "parenthood" for the sole purpose of the exercise by European citizens of their rights of movement and free settlement without discrimination', see also H. Fulchiron, note D. 2022, p.565.

Note 22 Interview P. Wautelet. In Belgian law, we have known for a long time, the "unofficial guardianship": a kind of kafala. Reception of a minor child to raise him/her. Guardianship registered before a court. Parental authority is granted to the guardian. So we already have intermediate situations, between no filiation and filiation. We are in the quasi-filiation.

Note 23 Interview C. Gonzales-Beilfuss: Some judgments of the Spanish Labour Court give the right to parental leave: even if parentage is not established, parental leave is granted. The Spanish Supreme Court has ruled in this direction. The same would happen for children enrolled in school or social security. In the landmark decision of 6 February 2014 of the Spanish Supreme Court, the Court considered that Article 10 of Ley [Law] 14/2006 is in line with the Spanish conception of international public order and, consequently, that "the parent-child relationship whose registration in the civil register is requested is in direct conflict with the provisions of Art. 10 of the Law on Medically Assisted Reproduction Techniques and is, therefore, incompatible with public order, which prevents the recognition of the decisions of foreign civil registers with regard to the parent-child relationships mentioned". In the best interests of the child, the Supreme Court tempered its decision by accepting that the relationship between the child and the parents be recognized through the alternatives provided for in Spanish law (such as the action to claim paternity for the biological father or, in the event of the absence of a biological link, adoption or even foster care). This decision has been heavily criticized, as can be seen from the dissenting opinion attached to the decision of 6 February 2014. However, neither the criticism nor the subsequent decisions of the ECHR (which in any case do not call into question the solution of the Spanish Supreme Court) have led to a change in the position of the Supreme Court.

c) Third scenario:

Remedy the mistrust of foreign civil status documents

It is striking to note that in the study of surrogacy, technically, the difficulties stem from the mistrust of foreign civil status documents. The foreign civil registrar is not looked at with the same confidence as the foreign notary or, above all, the foreign judge. It is sufficient to look at the content of Article 47 of the French Civil Code and bear in mind its recent reform to be convinced of this. Similarly, the use of the act of mutual recognition before a notary in the case of medically assisted procreation also reflects a mistrust of civil status acts that have not been drawn up and checked upstream by a notary. This approach should be supported by an analysis of comparative law. Several sub-scenarios follow from such an observation:

The first would be to restore confidence in civil status records by using the means offered by the digitisation of records today (see above).

The second would be to take note of this mistrust and reinforce the legal security of civil status records by related means: one could think of systematically involving a trusted third party or a second public authority to confirm the veracity of the facts contained in the foreign civil status record (notary or judge). It should also be possible for the authorities concerned to cooperate directly (see ICCS Convention No 34).

3. The questions

To ask the right questions, you need to define the needs. What are they? The needs are double. First, uniformity of solutions to curb, or at least control, reproductive tourism and put an end to the limping situations implied by the state of comparative law (1°). Secondly, to ensure minimum legal security for the child, to stabilise his legal status and guarantee him minimum rights (2°).

First question: How to ensure a minimum of international harmony of solutions?

The situation is well known: the diversity of domestic laws[24], which are more or less permissive regarding surrogacy, is at the origin of flawed situations and reproductive tourism (technically, a "fraud to the intensity of international public order"). Assuming the likely failure of The Hague Protocol, it raises several questions: is the path of hard law the right one, or should soft law be preferred? (1°). Is multilateralism the solution, or could we reason on the basis of bilateralism?

1°) *Hard Law or Soft Law?*

The Hague Protocol is *hard law*. A sufficient political consensus has not yet been reached. Perhaps one of the solutions to overcome current blockages would be to abandon *hard law* in favour of the statement of "Guiding Principles of surrogacy", which define a minimum set of values to which the actors of surrogacy must adhere (ethical dimension of surrogacy) and a minimum method of recognition of surrogacy performed abroad. Where appropriate, *soft law* and *hard law* can be combined. For example, it could be envisaged that *soft law* guiding principles are combined with a minimum harmonisation of the conflict of laws rule in relation to filiation.

2°) *Multilateralism or bilateralism?*

Rather than considering a multilateral convention, could we not combine these Guidelines with a bilateral recognition between the child's country of departure and the child's host country? The child's host country would assess the acceptability of foreign surrogacy on a case-by-case basis. Different lists of States (grey, black and white lists) with different controls could be considered. The States on the white list would see surrogacy recognized *de plano* in the other countries that have subscribed to the Guiding Principles, while the States on the black list would correspond to countries in which the modalities and consequences of the surrogacy carried out would not be able to "circulate" (be recognized?) abroad; finally, surrogacy from grey-listed countries would be subject, in order to circulate, to an *in concreto* control by a public authority to be defined (judge?

Note 24 See the five groups identified by J. M. Scherpe, C. Fenton-Glynn, T. Kaan, Eastern and Western Perspectives on Surrogacy, Intersentia.
- Prohibitive: France, Germany, Spain, Italy, China, Singapore;
- Tolerant: Australia, UK, HK;
- Regulated: Greece, Israel, Portugal, Iceland, New Zealand, South Africa: these countries regulate the approach of surrogacy before the child is born;
- Free market: Russia, Ukraine, USA, Mexico;
- From free market to regulation: India, Thailand.

notary? central authority?). Such solutions are close to the English law reform project: in 2018, "the Law Commission confirmed that existing surrogacy legislation would be subject to a comprehensive 3-year review. The consultation paper, published on 6 June 2019, outlined a new pathway to legal parenthood for intended parents. The final report with their recommendations is expected in autumn 2022. To date, this new pathway to parenthood recommends intended parents becoming the child's legal parents at birth, introduces regulation and safeguards, such as independent legal advice and a written surrogacy agreement and recognition of international surrogacy arrangements on a country-by-country basis".

Second question: How to ensure a minimum of legal security?

The legal uncertainty concerning the existence of filiation for the child born through surrogacy, both for the parents and their children, is particularly prevalent in France, Italy and Spain. To such an extent, it is questionable whether the fundamental European principle of the "best interests of the child" is really respected.

1°) Who should be protected? This is the first difficulty, as the diversity of contradictory interests to be protected is large: the child first, the surrogate mother, and the intended parents. Primacy must be given to the child born through surrogacy. However, other interests must not be neglected. The intended parents must be protected against the surrogate mother (because of the mother's possibility of withdrawal and the presumption of paternity of the biological mother's husband). The surrogate mother must also be protected: her consent must be informed, and she must be protected from exploitation.

2°) How should they be protected? This question can be divided into several sub-questions. The first is to know what kind of surrogacy we are talking about. An ethical surrogacy that ensures a balance between the interests involved (child, intended parents, surrogate mother) must be precisely defined. The second sub-question is to determine the share of the child's State of origin and the receiving State in taking care of the child's interests. While both States are necessarily involved in the process, many examples show that an *a priori* control of the surrogacy process in the child's country of birth allows for a much better protection of the child's interests, as such a control allows for a better anticipation of situations and avoids the policy of the *fait accompli* widely practiced in the world and imposed on the States receiving the children. The third sub-question refers to the question of whether and to what extent it is up to civil status to ensure this protection. We have seen that a sound un-

derstanding of the role of civil status in international relations requires a clarification of the relationship between the substance of the law and the establishment of the public record that is the subject of civil status. However, a trend is emerging, promoted by the European Court of Human Rights, which aims to ensure the effectiveness of children's rights independently of their civil status. Such an evolution would be likely to require a redefinition of the role of civil status.

B. Sex, a contested element of civil status

The relationship between gender and civil status has led to serious complications in various ways, particularly since the issue of lesbian, gay, bisexual and transgender (LGBT) or LGBTI (I for intersex) has emerged in many forms in our society. This acronym shows that intersex or transgender issues are treated with those of homosexual persons. This approach can be justified if the protection of minorities and the fight against gender discrimination are emphasized[25]. However, it is essential to address them separately with regard to civil status.

Indeed, for homosexuals, most difficulties in relation to civil status arise when some changes occur in their family life. It is possible to question whether same-sex marriage can be admitted and recognized. We can also wonder about the impact of sexual orientation on filiation, both on the development of parent-child relationships and adoption, but these issues will not be developed in this White Paper.

Intersex people[26], on the other hand, face significant difficulties from birth. In many countries, intersex infants and children are forced to undergo surgery and hormone treatments that may be considered unnecessary[27]. These medical treatments are a

Note 25 See for example, Cortez et al., Equality of Opportunity for Sexual and Gender Minorities, 2021.

Note 26 The United Nations (UN) report defines the term "intersex" as follows: 'intersex people are born with physical or biological sex characteristics, including sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns, that do not fit the typical definitions of male or female' (OHCHR, LIVING FREE & EQUAL, 2016, p. 18).
However, some argue that other people whose physical or biological characteristics do not fit the above definition should also be included in the intersex category.

Note 27 See for example, China, interview with Dr Feng; UNOHCHR, Background Note, 2019, 10

prerequisite for the birth registration of the person concerned. Many countries require gender to be indicated at the time of birth registration. Then, it is necessary to classify intersex children as either male or female, even though their outward appearance does not allow such categorisation. The child's body is forced to match the physical characteristics of either sex. The practice is widespread. Such forced medical intervention is a violation of the human rights of intersex people in many ways. Furthermore, the mere fact of being forced to be assigned a civil status that corresponds to the binarity of men and women produces stronger adverse effects, especially because the person concerned was not able to participate in the decision-making process; such adverse effects may affect an individual for the rest of his life.

For example, gender-based treatment in detention situations has a significant impact on the safety of prisoners. Yet, in many countries, gender determination in detention is based on marital status or gender on identity cards[28].

Note 28 HCDH, LIVING FREE & EQUAL, 2016, p. 44.

More generally, although it has been noted that children whose sex is determined by medical intervention at an early age may suffer dissonance with their own gender identity, many countries remain reluctant to allow registered sex changes for these individuals[29].

To overcome these problems, some countries have begun to try to register intersex people with a different gender from men and women (For example, §22 of the German *Personenstandgesetz* - PStG) - allowing parents of intersex children to leave the gender on the birth register blank or to indicate "miscellaneous", “non-binary” or even undetermined[30] or X. However, these so-

Note 29 HCDH, Background Note, 2019, to 27

Note 30 In Brazil, since 2017, the Supreme Court has recommended that civil registrars allow people to change their sex (from male to female or from female to male) without the need for a court application to do so, but this right is not guaranteed to individuals who consider themselves non-binary (ADI nº 4.275 and Regulation nº 73 of the National Council of Justice). On 13 August 2021, the National Council of Justice issued a regulation (nº 122) that allows the mention of "ignored" for the sex as soon as the doctor responsible for the delivery cannot establish the sex of the newborn, and the registrar will have to recommend to the parents the choice of a name that is suitable for both genders. The subsequent choice of sex (between male and female) and the corresponding change of name is possible at any time. Specifically, in the Department of Rio de Janeiro, since 31 January 2022, in an unprecedented way in the country, adults have been allowed to change their sex classification in their birth certificates and identity documents from male or female to "não binarie" ("non-binary"), with the spelling adapted so as to make the word "binary" neutral as well -this word in Portuguese can be masculine ("binário") or feminine ("binária")-, without having to show any medical particularity.

lutions can lead to the isolation of intersex children, with negative consequences[31]. Furthermore, even if special consideration is given to the registration of intersex people in some countries at the national level, the question arises as to whether such registration can be recognized in other countries. A lack of recognition may hinder the international movement of people.

Several avenues can be explored to improve the rules of international law relating to the civil status of intersex persons. International law is still in its infancy here. The World Health Organisation's decision to remove trans-identity from the classification of mental illnesses only dates from 2019.

First (scenario 1), respect for fundamental rights should lead to a ban on invasive medical interventions designed to assign a specific gender to a person born of undetermined gender.

Note 31 HCDH, information note, 2019, to 4

Scientific evidence and civil status: dangerous tools

While recourse to scientific evidence and, more generally, to medical techniques may be useful to establish some elements of civil status, such as the bond of filiation, it is sometimes dangerous and inappropriate. This is the case when it comes to determining sexual identity or age. Many legal systems recommend bone tests when an individual's age is contested, due to the lack of a civil status record or following a challenge to the validity of the record. However, the test reliability is regularly contested (see, for example, Committee on the Rights of the Child, concluding observations on the fifth periodic report of France, 23 February 2016, §CRC/C/FRA/CO/5, §74 b).

Thus, the right of persons in all countries to obtain civil status without invasive medical interventions should be proclaimed. Such a unified response would facilitate the recognition of civil status in other countries, making it unnecessary to adjust the rules for recognition.

Secondly (scenario 2), the removal of the mention of sex from civil status records could be considered.

It is worth mentioning here the Yogyakarta Principles, which were developed in recognition that sexual orientation and gender identity are integral to the dignity and humanity of every person and should not be a basis for discrimination or abuse, and that the international response to human rights violations related to sexual orientation and gender identity has been fragmented and inconsistent[32].

According to Principle 31, which enshrines the right to legal recognition, States should abolish the requirement of gender registration in official documents. If sex registration were no longer required for civil status purposes, the question of the relationship between the two would be eliminated.

Note 32 These principles are considered by the Belgian Constitutional Council as the international reference standard, see Cons Const, 19 June 2019, no. 99/2019, B.1.2.

The Yogyakarta Principles plus 10 (2019)

Principle 31: The right to legal recognition

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.

States Shall:

A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;

B Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;

C. While sex or gender continues to be registered:
i. Ensure a quick, transparent, and accessible mechanism that legally recognizes and affirms each person's self-defined gender identity;
ii. Make available a multiplicity of gender marker options;
iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third-party opinion, shall be a prerequisite to change one's name, legal sex or gender;
iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

Finally (scenario 3), the growing importance of virtual identity could be acknowledged. Although all citizens will retain links with the real State, activities carried out through their own avatars in virtual spaces, such as the metaverse, become increasingly important compared to their activities in the real world. As a result, the registration of identity in the real world would lose importance and become a mere formality, unlike the registration of virtual identity through the creation of avatars. In virtual space, either gender registration will no longer be necessary, or gender registration will allow for a variety of options rather than being based on a dichotomy, as is the case with gender in real space. This development would largely remove the issue of gender and civil status, including for intersex people.

The current situation is far from these scenarios. It results in significant human rights violations.

Despite the recommendations and declarations of various international organisations, including the UN, the obligation to register intersex persons in official documents, including civil status, remains country specific. As a result, the handling of international civil status becomes even more complicated, with the risk of creating internationally lame situations.

In practice, in a number of countries, intersex persons will not be able to marry, either indirectly because of the still frequent prohibition of same-sex unions or directly as a consequence of what appears to be a lack of civil status for some legal systems.

In addition, cultural differences over the treatment of intersex people increase. References to them that go beyond the female/male dichotomy will not necessarily be recognized in other countries. They may lead to refusal of entry into the country or even sanctions and constitute obstacles to the movement of people.

What future for international civil status law on gender?

1. Should civil status records mention the gender of the person, or is it possible to draw up civil status records without including gender information?

In particular, what can be thought of the recommendation of the Yogyakarta Principles Plus 10 regarding the removal of sex from various official documents in the context of civil status?

If it turns out difficult to remove gender information from civil status, what would be the main reason for this and is there a way forward?

2. Assuming that the mention of gender in civil status records is maintained, should this gender be limited to 'male' and 'female', or should a third option be opened? If so, should only those persons whose physical and biological characteristics do not allow them to be assigned to the categories of male and female be allowed to benefit from this option, or should it be opened to persons whose gender identity cannot be distinguished between male and female? Similarly, if a person has intersex physical and biological characteristics and is already registered as a third option gender, but their gender identity has been established as male or female, should they be allowed to register as either sex? If this is allowed, should it be subject to the same substantive and formal requirements as male-to-female or female-to-male sex reassignment, or should it be subject to its own regime[33]?

3. Assuming that the consideration of gender in civil status is maintained and that the treatment of gender continues to differ from country to country, is special consideration required for intersex persons under private international law? If so, which of a conflict of laws approach and a civil status recognition approach is more appropriate? Should the private international law solutions of States, particularly those in force in Germany and Japan, which have not set up a system of civil status recognition, be changed?

Note 33 See note nº 30 on Brazil.

annex 01

international texts

Universal Declaration of human rights (1948), article 6, first international text to establish the right of everyone to recognition everywhere as a person before the law.

Convention on the Reduction of Statelessness (1961)

Convention on Consent to Marriage, minimum Age for Marriage and Registration of Marriages (1962)

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

International Covenant on Civil and Political Rights (1966), article 16 recalling the right of everyone to recognition everywhere as a person before the law and article 4 making the right to identity non-derogable and article 24, the right of every child to be registered immediately after birth, to have a name and to acquire a nationality

Adopted on 8 June 1977, the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts: Articles 1, 2 and 78 establish procedures for the identification of victims and evacuees of armed conflict and civilian personnel. This identification necessarily refers to the identity of the persons without whom the care of victims is impossible.

Convention on the elimination of all forms of discrimination (1979): its Article 16.2 repeats the provisions of the 1964 Convention by prohibiting the marriage of minors and making it compulsory to register marriages in an official register.

International Convention on the protection of the rights of all migrant workers and member of their families (1990): Article 29 sets out the right to birth registration.

International Declaration on Human Genetic Data of 2003, which includes in personal identity the "genetic make-up" characteristic of each individual, while taking care to specify that "a person's identity cannot be reduced to his or her genetic characteristics".

Resolution 74/133 of the United Nations General Assembly adopted on 18 December 2019

Resolution 43/5 adopted on 19 June 2020 by the Human Rights Council after the United Nations Children's Fund estimated that there are nearly 237 million children without birth certificates. The resolution recalls the obligation to register births without discrimination in the country of birth, including when the parents are migrants, asylum seekers, refugees or stateless persons.

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Communication of the Commission: "Digitalisation of justice in the European Union A toolbox of opportunities" (COM (2020) 710 final).

Regional Texts

- Article 8 ECHR
- African Charter on the Rights and Welfare of the Child, 1990, (Article 6: every child's right to an identity, right to be registered at birth) and General Comment on Article 6

See in particular. African Committee of Experts on the Rights and Welfare of the Child, 2014

https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54db21af4

- American Convention on Human Rights 1969 (Pact of San José): Article 18 makes the designation of persons a right; under Article 20, every person has the right to a nationality and may acquire the nationality of the State in whose territory he or she was born, if he or she is not entitled to another nationality.

Specific texts on civil status

International Commission on Civil Status

- Convention of 27 September 1959 on the issue of certain extracts from civil-status records for use abroad
- Convention of 14 March 2014 on the issue of multilingual and coded certificates and extracts from civil-status records
- Setting up a platform

The Hague Conventions:

- The Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents. Legalization, a long and costly procedure, is replaced by the apostille. The convention is binding on 120 States.
- e-Apostille Program (e-App) = database of dematerialized registers of apostilles

Framework law of the Parliamentary Assembly of La Francophonie on the compulsory, free and public registration of births and the legal recognition of children without identity adopted in 2019. This law was adopted as part of the 2019-2022 Strategy to make the Francophone space a "zero child without identity" space.

EU Regulation 2016

The Yogyakarta principles, principles on the application of international human rights law in relation to sexual orientation and gender identity

Council of Europe: Recommendation CM/Rec (2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity.

annex 02

emblematic case law

ECHR, 6 February 2001, no. 44599/98, Bensaïd v. the United Kingdom. The Court stated: “Article 8 protects a right to identity and personal fulfilment".

ECHR, 7 February 2002, no. 53176/99, Mikulić v. Croatia. In this context, the "establishment of the details of one's identity as a human being" contributes to this fulfilment.

HRC, Finding 31 Oct. 1994, Comm. No. 453/1991, A.R. Coeriel and M.A.R. Aurik v. The Netherlands: seized by individuals who had been refused the change of name they wanted for religious reasons, the Committee first noted that the name was part of the individual's identity; then, implicitly referring to the personal choices of the complainant, exercising his religious freedom, it recalled that the notion of private life refers to the area of the individual's life in which he can freely express his identity, whether in his relations with others or alone.

ECHR, Grand Chamber, 13 February 2003, no. 42326/98, Odièvre v. France: right to know one's ancestry, as the identity of one's parents is an important aspect of personal identity.

ECHR, Grand Chamber, 11 July 2002, no. 28957/95, Christine Goodwin v. the United Kingdom; ECHR, 6 Apr. 2017, nos. 79885/12, 52471/13 and 52596/13, A.P., Garçon and Nicot v. France; 11 October 2018, no. 52216/08, S.V. v. Italy. Sexual identity or gender identity is protected not only as an element of private life - which therefore does not have to be disclosed - but also as an aspect of personal identity which must be recognized and protected as such.

ECHR 25 March 1992, Botella v/ France (modification of civil status records of a transsexual)

ECHR 26 June 2014, Mennesson v France and Labassée v France (transcription of foreign civil status records when the elements they contain correspond to the biological truth)

ECHR, 6 Jul. 2021, no. 47220/19, AM and others v/ Russia (parental rights of a transgender woman)

ECHR, 6 April 2017, A.P., Garçon and Nicot v/ France, no. 52471/13, 52596/13, 79885/12 (

Audiencia Provincial de Guipúzcoa, May 2022 [no. 341/2022] recognizing the Spanish nationality of a child born to a Cameroonian mother who gave birth in transit.

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annex 04

persons interviewed

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annex 05

acknowledgemnts

We are grateful to the Centre de recherches Droit Dauphine (CR2D) Université Paris-Dauphine-Psl for funding the review of the English version.

The drafting of this white paper was the result of numerous discussions. These discussions first led to the preparation of a questionnaire. Responses were received from all over the world. We then had interviews with various personalities. The people listed in Annex 4 have in one way or another contributed to our knowledge and reflections. We would like to thank them.

The entire steering committee actively participated in the writing of the text. Although some developments were written by one of the members and bear his or her imprint, the entire text was validated by the committee, which demonstrated a constructive spirit at every stage.

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White Paper n° 21 - Civil status
realisation: November, 2022
graphic design: clémence hivert - *bluclemence@gmail.com*

www.ilaparis2023.org/en

Public consultation to January 31, 2023.

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