# RECOGNITION OF A STATUS ACQUIRED ABROAD: FRANCE[*]

# RECONOCIMIENTO DE UNA SITUACIÓN JURÍDICA RELATIVA AL ESTATUTO PERSONAL VÁLIDAMENTE CREADA O MODIFICADA EN EL EXTRANJERO : FRANCIA

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**Abstract:** In the French legal system, recognition of status is a classic issue that attracts diverse responses, depending on the circumstances, from procedural recognition of judgement to conflict of laws and conflict of authorities. In the light of this classic scheme, many foreign statuses are recognised in France without any difficulties, provided that they were legally obtained abroad. However, many obstacles to recognition remains and the current changing legal context in favour of a new subjective right of free movement including the status of persons, has been provoking active academic discussions among French scholars and unprecedented judicial developments. For these reasons, it is important to rethink globally the issue of recognition of status in a broad perspective within the French legal order.

**Keywords:** recognition of status – procedural recognition – conflict of laws – method of recognition – transcription of public documents

**Resumen:** En algunas materias relacionadas con el estatuto de la persona, la jurisprudencia del TJUE y del TEDH ha fomentado el reconocimiento por parte de los Estados de las situaciones jurídicas válidamente creadas o modificadas en otros Estados. Esta jurisprudencia ha cambiado y está cambiando la metodología y práctica propias del Derecho internacional privado de producción interna. Este trabajo analiza los efectos de esta jurisprudencia europea sobre el Derecho internacional privado francés cuando este se enfrenta a una situación jurídica relacionada con el estatuto de la persona que ha sido válidamente creada en el extranjero y que se quiere hacer valer en Francia.

**Palabras clave:** estatuto personal, Ley personal, reconocimiento, situación jurídica relativa al estatuto personal válidamente creada en el extranjero, Derecho internacional privado francés.

**Summary:** I. Introduction II. French classic approach to recognition of status 1. Conflict of jurisdictions concerning cross-border movement of status A) Impact of procedural recognition on recognition of status B) Limits to recognition of status under procedural recognition 2. Conflict of authorities concerning cross-border movement of status A) Impact of conflict of authorities on

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recognition of status B) Limits to recognition of status under conflict of authorities C) Articulation between recognition of status and registration within conflict of authorities 3. Conflict of laws concerning cross-border movement of status A) Impact of conflict of laws on recognition of status B) Limits to recognition of status under conflict of laws C) Adaptation in case of difficulties in identifying the effects of foreign status III. French reaction to the liberalization of recognition of status 1. Reactions among French academia A) Background information on the French legal doctrine in the field of recognition of status B) French PIL textbooks in the field of recognition of status C) Doctrinal research on "unnamed" rules of recognition in traditional French PIL 2. Reactions in French law A) No explicit rule of recognition (example of same-sex marriage) B) Recent rule favouring recognition of status (example of partnerships) C) Recent rule having the effects of a rule of status recognition (example of family name) 3. Reactions in French judicial practice A) In the field of procedural recognition (example of older minors' adoption) B) In the field of conflict of authorities (examples of surrogacy and co-motherhood).

## I. Introduction

**1.** In the past thirty years, an intensification of cross-border flows of individuals worldwide, and notably within the European Union (EU), could be observed, raising important legal issues.[1] The legal treatment of these international situations or relationships concerning private persons is one of them.[2] Private international law (PIL) traditionally provides for diverse methods of coordination between national legal orders in such circumstances.[3] Following this technical background, a political consensus exists to ensure continuity of personal status through national borders, as "limping" status relations create legal uncertainty and administrative difficulties for individuals and families. However, depending on the political objectives followed by the *forum*, the legal treatment of similar cross-border situations may vary, as national legal systems are diverse, in particular in family matters. Nevertheless, the recent increase of individual freedom and fundamental rights has led to a limitation of the national margin of appreciation, even regarding public policy. It is particularly the case within the EU on the basis of the principle of free movement as interpreted by the Court of Justice of the European Union (CJEU)[4] and, more broadly, in Europe on the basis of the caselaw of the European Court of Human Rights (ECtHR)[5]. In this context, a debate on the methodological approach for the legal treatment of cross-border mobility of persons in Europe has arisen, commonly associated with the issue of recognition of status[6] in favour of natural persons.[7] While EU law has not yet endorsed explicit rules of recognition of status in a legisla-

[1] For instance, S. Corneloup, F. Jault-Seseke, J. Verhellen (coord.), *Private International Law in a Context of Increasing International Mobility: Challenges and Potential*, PE 583.157, June 2017.

[2] Cf. H. Fulchiron (ed.), La circulation des personnes et de leur statut dans un monde globalisé, LexisNexis, 2019.

[3] The traditional approach, at least in continental law, is the implementation of private international law methods with the aim of coordinating national legal orders in favour of the private person's interests. See H. Batiffol, « Réflexions sur la coordination des systèmes juridiques nationaux », *RCADI*, 1967-1, t. 120, p. 165-190 ; P. Mayer, « Le phénomène de la coordination des ordres juridiques étatiques en droit privé », *RCADI*, 2007, t. 327 ; P. Picone, « Les méthodes de coordination entre ordres juridiques en droit international privé : Cours général de droit international privé », *RCADI*, 1999, t. 276. 2007, t. 327.

[4] CJEU, 5 June 2018, *Coman*, Case C-673/16, EU:C:2018:385; CJEU, 14 December 2021, *Stolichna obshtina, rayon «Pancharevo»*, Case C-490/20, ECLI:EU:C:2021:1008.

[5] ECtHR, 26 June 2014, *Mennenson v. France*, req. n° 65192/211 and *Labassée v. France*, req. n° 65941/11.

[6] For a general presentation of the discussion, D. Coester-Waltjen, "Recognition of legal situations evidenced by documents", *in* J. Basedow, F. Ferrari, P. de Miguel Asensio, G. Rühl (eds.), *European Encyclopedia of Private International Law*, Edward Elgar Publishing, 2017, p. 1495.

[7] The issue of recognition also affects legal persons, *i.e.* companies, that move within the internal market of the EU. See recently CJEU, 25 October 2017, *Polbud*, Case C-106/16, ECLI:EU:C:2017:804 and the company law package: <https://ec.europa.eu/info/publications/company-law-package_en>. On that topic in the French doctrine, see in particular Th. Mastrullo, *Le droit international des sociétés dans l'espace régional européen*, PUAM, 2009 ; M. Menjucq, *Droit international et européen des sociétés*, Paris, Précis Domat, LGDJ, 5e ed, 2018 (chapters relating to EU company law with a comparison with the French classic approach); C. Mogavero, *La contribution de l'ordre juridique communautaire à la définition du siège social en droit international privé des sociétés*, thèse Lyon 3, 2011.

tive act,[8] some national lawmakers[9] and international institutions[10] have. It seems, therefore, of particular interest to undertake comparative law research and analyse national reactions and practice regarding this new trend of liberalisation of recognition of status in Europe. The French position on recognition of status is outlined below.

**2.** For the purpose of the comparative study, the terms status and recognition are understood broadly[11]. Status refers to the position of the person in a legal order, defined by family law and the law of persons.[12] It is composed of permanent personal characters legally determined, including the name and gender of a person, legal capacity and family relations such as parentage (filiation, adoption, surrogacy), marriage, divorce, and conclusion and dissolution of formalised partnerships. This broad conception is followed in France as a connecting category for personal status.[13] As concerns recognition, it is of a polysemous nature. Here it will be understood as the "receipt" by a legal system of a personal status characteristic that has been legally acquired abroad, *i.e.* in accordance with the law of another state (if relevant, including its conflict of laws). The term is therefore not limited here to one specific PIL methodology – the recognition method – usually described as competing and excluding conflict-of-law rules.[14]

**3.** In the French legal system, recognition of status is a classic issue that attracts diverse responses, depending on the circumstances. Traditionally, French PIL draws a distinction between three main ways of reasoning[15] when recognition of status is at stake.[16] Firstly, in the case of a foreign judicial decision imposing a legal situation, procedural recognition is applied by French court. Secondly, concerning a foreign situation without any judicial intervention, a conflict-of-laws approach applies. The question is not to recognise, in a strict sense, a legal fact that has not been made concrete by the application of a rule of law, but to assess its validity, in the host legal order, pursuant to the applicable law. Thirdly, and in between, acceptance of a foreign public document, separate from a judicial decision, may be requested. This issue is part of the conflicts of authorities. The public document is to be taken as an *instrumentum* delivered by a foreign public authority following the *lex auctoris originis*. With respect to the situation within the public document, called *negotium*, its validity is in principle still submitted to conflict of laws in case of dispute.

**4.** In the light of this classic scheme, many foreign statuses are recognised in France without any difficulties, provided that they were legally obtained abroad. The main obstacles to recognition in France, as in other states, are well known. First, in a comprehensive way, there is a place for a fraud

[8] Comp. regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) n° 1024/2012, OJ L 200, 26.7.2016, p. 1–136 (limited to the circulation of documents).

[9] See, for instance, Articles 45 (marriage celebrated abroad) and 73 (foreign acknowledgement and contest of acknowledgement of a child) in Switzerland's Federal Code on PIL; see also article 2 (recognition of foreign partnerships) of the Dutch Law of 6 July 2004 on conflict of laws in the field of partnerships. See also examples given by G. P. Romano, *in* "La bilatéralité éclipsée par l'autorité. Développements récents en matière d'état des personnes", *Rev. Crit. DIP*, 2006, p. 457-519, mn 19 et seq.

[10] See in particular Article 9 of the Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages (not in force in France).

[11] S. Gössl / M. Melcher, Recognition of a Status Acquired Abroad in the EU – A Challenge For National Laws, *op. cit.*, mn 4.

[12] On that sense, see A. Dutta, "Personal status", *in* J. Basedow, F. Ferrari, P. de Miguel Asensio, G. Rühl (eds.), *European Encyclopedia of Private International Law*, op. cit., p. 1346.

[13] See B. Audit, L. d'Avout, *Droit international privé*, Paris, LGDJ, 8e ed. 2018, n° 198.

[14] Among numerous academic references, see M. Lehmann, "Recognition as a Substitute for Conflict of Laws?", *in General Principles of European Private International Law,* S. Leible (ed.), Kluwer Law International, 2016, p. 11.

[15] See in that sense the Contents (divided in three parts), *in* D. Bureau, H. Muir Watt, *Droit international privé*, T. 1, Paris, PUF, 4e ed., 2017 (Titre 1 Conflits de jurisdictions, Titre 2 Conflits de lois, Titre 3 Conflits d'autorités).

[16] P. Mayer, "Les méthodes de la reconnaissance en droit international privé", *Le droit international privé : esprit et méthodes, Mélanges en l'honneur de Paul Lagarde*, Paris, Dalloz, 2005, p. 547-573. Comp. S. Gössl/M. Melcher, Recognition of a Status Acquired Abroad in the EU, *op. cit.*, mn 5.


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exception[17] as for a public policy exception.[18] Secondly, specifically related to conflict of laws, the divergence between national PIL systems may lead, in the host country of a foreign status (France, for instance), to a clash between the law applied pursuant to the conflict-of-laws system of the country of origin and the applicable law pursuant to the French conflict-of-laws rules. Such a clash blocks recognition (in a wide sense), as the situation created abroad cannot be similarly created in France.[19] However, the current changing legal context described above, in favour of a new subjective right of free movement including the status of persons, has provoked active academic discussions among French scholars and unprecedented judicial developments. For these reasons, it is important to rethink globally the issue of recognition of status in a broad perspective within the French legal order.

**5.** The French classic approach to recognition of status is outlined below in the light of PIL methodology (*II*), and then the French reaction to the new trend of recognition of status in the EU, underlying most recent evolutions under the influence of European law and caselaw, is described (*III*).

## II. French classic approach to recognition of status

**6.** In French PIL, recognition of status is ensured following different reasonings based on a key distinction between legal provisions and rulings.[20] This distinction has been structuring the contemporary French PIL methodologies for nearly 50 years. Depending on the presence of a legal provision (to be applied) or of a judgment (to be issued), a different reasoning applies: conflict of laws for the former, conflict of jurisdictions for the latter, while, in between, a third reasoning may be followed for public document (to be issued by a national authority), conflict of authorities.[21] In the specific context of recognition of status, this methodological trilogy is applied according to the source of the foreign status at stake: a legal situation, a judicial decision (or an equivalent act) or a public document. The study of these three possibilities for a civil status to circulate internationally, in relation to the relevant French PIL methods, allows us to state that French PIL developed, over a long period, different legal tools that promote cross-border free movement of status, even if some restrictions remain.

**7.** A short presentation of each field and its methodology will now be put forward, putting an emphasis on their strengths and weaknesses in relation to the increasing need to recognise status within the EU.

### 1. Conflict of jurisdictions concerning cross-border movement of status

### A) Impact of procedural recognition on recognition of status

**8.** The term recognition, traditionally used in the field of conflict of jurisdictions, describes a legal way to accept foreign judgments[22] in the *forum* addressed.[23] It is sometimes referred to as a pro-

[17] B. Ancel, Y. Lequette, Les grands arrêts de la jurisprudence française de droit international privé, Paris, Dalloz, 5e ed., 2006, n° 6, Case *Princesse de Bauffremont*.

[18] B. Ancel, Y. Lequette, Les grands arrêts de la jurisprudence française de droit international privé, op. cit., n° 19, Lautour.

[19] See B. Audit, L. d'Avout, *Droit international privé*, op. cit., n° 328 et seq.

[20] P. Mayer, La distinction entre règle et décision et le droit international privé, Dalloz, 1973. See also, D. Bureau, H. Muir Watt, Droit international privé, T. 1, op. cit.

[21] See, in particular, P. Mayer, V. Heuzé, *Droit international privé*, op. cit., n° 146 et seq. (conflict of laws), n° 285 et seq. (conflict of jurisdictions) and n° 486 et seq. (conflict of authorities); D. Bureau, H. Muir Watt, *Droit international privé*, T. 1, op. cit. n° 323 et seq. (conflict of laws), n° 55-1 et seq. (conflict of jurisdictions) and n° 583 et seq. (conflict of authorities).

[22] The term judgment has to be understood broadly, including a decision by competent foreign administrative or religious authorities.

[23] See Articles 509 et seq. of the French Civil Procedure Code.

cedural recognition[24] or a traditional recognition.[25] However, it is not a uniform technique.[26] In a broad sense, it describes the admission of the effects of a foreign judgment in France (*méthode d'efficacité des decisions*). Narrowly defined, it refers to the admission of all types of effects of a foreign judgment in France, apart from those leading to the enforcement of the judgment. A methodological distinction is consequently made between a recognition limited to the *res judicata* of the foreign judgment (*autorité de chose jugée*), including its substantial efficiency,[27] and its enforcement (*force exécutoire*) in France.[28]

**9.** In terms of legal regime, the (*res judicata* limited) recognition is delivered automatically (*reconnaissance de plano*, as meaning *ipso jure* effect*)* in the field of personal status.[29] Therefore, no judicial proceeding is needed. A judicial examination (similar to an enforcement procedure, i.e. *exequatur*) only takes place if the international validity of the decision is challenged, for instance on the grounds of violation of public policy,[30] or if enforcement actions are requested before the French host court. For the purpose of opposability to third parties, a mention or a transcription of the foreign judgment in the French Civil Status Registry (as a divorce or a full adoption by a French national pronounced abroad by a foreign authority) is recommended.[31] For foreign judgments outside the scope of EU law, a verification procedure (similar to an enforcement procedure) by the Public Prosecutor is generally required, before the intervention of the Registry officer.

**10.** By comparison, the enforcement of foreign judgments requires an enforcement proceeding (*exequatur*) in order for the judgement and the possible status contained in it to be recognised. Pursuant to article 509 of the French Civil Procedure Code, judgments given by foreign courts and public documents issued by foreign public officers are enforceable in France as provided by French law. In practice, this procedure is also used for personal status decisions (mentioned above) in order to secure the legal situation and facilitate its implementation in the French legal order, or to obtain specific effects. For instance, a foreign judgment of adoption is recognised automatically (*reconnaissance de plano*) in France,[32] but an enforcement procedure is necessary to confer French nationality on the adopted child.[33] The modern regime of such enforcement procedure – outside the scope of EU PIL and international treaties concluded by France – arises from the 2007 *Cornelissen* Case.[34] Three conditions are requested and implemented by the French court addressed: verification of the indirect competence of the foreign

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[24] K. Funken, Das Anerkennungsprinzip im internationalen Privatrecht – Perspektiven eines europäischen Anerkennungskollisionsrechts für Statusfragen, Mohr Siebeck, 2009, p. 36.

[25] S. Gössl/M. Melcher, Recognition of a Status Acquired Abroad in the EU, *op. cit*., mn 8 et seq.

[26] "Reconnaissance des jugements", *in* G. Cornu (eds.), *Vocabulaire juridique Capitant,* Paris, Quadrige/PUF, 7e ed., 2005.

[27] Substantial efficiency corresponds to the normative content of the foreign judgment and should be distinguished from its probative effect. See D. Bureau, H. Muir Watt, *Droit international privé*, T. 1, op. cit. n° 247.

[28] See D. Bureau, H. Muir Watt, *Droit international privé*, T. 1, op. cit. n° 246.

[29] V. Cass. Civ. 28 Feb. 1860, *Bulkley*, 1869 (*jugement constitutif*) and Cass. Civ. 9 May 1900 *De Wrède* (*jugement déclaratif*). See *in* B. Ancel, Y. Lequette, *Les grands arrêts du Droit international privé*, Paris, op. cit., n° 4 and n° 10. See also CE, 24 Nov. 2006, n°275527, ECLI:FR:CESSR:2006:275527.20061124, note A. Boiché, *AJ Fam* 2007, p. 225.

[30] See, for instance, Civ. 1re, 14 May 2014, n°13-17.124, ECLI:FR:CCASS:2014:C100523 (French divorce validly pronounced by a French court, despite a previous foreign *talaq* judgment mentioned on the margin of the marriage act at the French Civil Status Registry, on the basis of violation of (French) public policy by the foreign judgment, pursuant to Article 5 of the Protocol 7 of the ECvHR on spouses' equality). On that decision, see M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.* Question (66).

[31] In practice, indeed, French administration often refuses to give effect *de plano* to foreign judgments and requires judicial recognition by a French judge, contrary to the positive law stated by caselaw since 1860 and confirmed recently by the administrative Supreme Court (*Conseil d'Etat*); see references *supra.*

[32] On the effects in France of a foreign adoption, see *infra* on Article 370-5 of the French Civil Code (unilateral conflict of laws), mn 28 and mn 34.

[33] Civ. 1re, 17 June 1980, *Rev. crit. DIP*, 1981, p. 73, note. P. Lagarde.

[34] Civ. 1re, 20 February 2007, n°05-14082. It may be noted that *revision au fond* is forbidden in France since 1964: Civ. 1re, 7 January 1964, *Munzer*.

judge,[35] absence of fraud in law, and absence of violation of public policy (*ordre public international*).[36] When these three conditions are met, the foreign judgment is enforceable in France. Conflict-of-laws rules are not involved anymore in that proceeding.[37]

### B) Limits to recognition of status under procedural recognition

**11.** In the French legal order, the method of procedural recognition has three main limits as concerns the recognition of status. The first brake on recognition of status, already mentioned above, is the potential intervention of a public policy exception or of a fraud exception.[38] In the European context,[39] such intervention may be contrary to fundamental rights and to the EU freedom of movement.[40] However, already before the development of European law, the French legal system had developed a "limited" effect of public policy (*effet atténué de l'ordre public international*) in its famous *Rivière* case[41] on recognition of a foreign divorce, at a time of prohibition in France of divorces by mutual consent.[42] The main idea with this technique is to facilitate the recognition in France of foreign status legally acquired abroad by a judicial decision,[43] although the same situation would never be created in France, as prohibited by French domestic law. The technique is based on a classic distinction between creation of rights in France and efficiency of rights (created abroad) in France. The protection of personal status stability and of private interests comes first, in confrontation with French public interest in an international context.

**12.** Examples in the field of adoption can be given. Although full adoption is restricted in France to *married* couples,[44] the Versailles Court of Appeal judged in 2014 that French public policy cannot be opposed to the enforcement in France of a foreign adoption by a same-sex non-married couple.[45] A

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[35] That means a sufficient proximity between the case and the competent judge abroad, allowing the exclusion of any fraud to jurisdiction. See, in particular, *Simitch* Case: Civ. 1re, 6 February 1985, Bull., I, n° 55: "… *le juge étranger doit être reconnu compétent toutes les fois que la règle française de solution des conflits n'attribue pas compétence exclusive aux tribunaux français, si le litige se rattache de manière caractérisée au pays dont le juge a été saisi et si le choix de la juridiction n'a pas été frauduleux*".

[36] On the French regime of *exequatur*, see D. Bureau, H. Muir Watt, *Droit international privé*, T. 1, op. cit., n°263-1 et seq.

[37] See *infra* mn 56 (methodologic link with recognition of status).

[38] For instance, in the field of adoption by same-sex parents (before the French law of 2013 opening same-sex marriage and adoption for same-sex spouses), see Civ. 1re, 7 June 2012, n° 11-30.261, *AJ fam*., 2012, p. 397, note B. Haftel, *Rev. crit. DIP*, 2013, p. 587, note L. Gannagé*: Refusal of the enforcement in France of a foreign adoption pronounced in the UK in favour of a same-sex non married couple, as same-sex parentage was prohibited in France at that time (but stating that article 346 of the French Civil Code [adoption limited to married couple] is not part of the French international public policy)*. On the new interpretation of that solution in positive law, see *infra*, mn 12 and mn 60.

[39] Comp. in EU PIL instruments which generally do not mention the fraud exception to the enforcement of decisions. Therefore, the French Court of Cassation has, for instance, refused the intervention of public policy against the enforcement of a foreign maintenance decision to sanction a fraud to the competent jurisdiction of origin in the framework of the maintenance Regulation 4/2009 (art. 24, a) : Civ. 1re, 25 May 2016, n° 15-21.407, ECLI:FR:CCASS:2016:C100712. On this decision, see M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.*, Question (87).

[40] See (most recently) *Coman*, Case C-673/16, *op. cit*. and *Pancharevo*, Case C-490/20, *op. cit*.

[41] See Civ. 1re, sect., 17 April 1953, *Rivière*, in *Grands arrêts du droit international privé*, op. cit., n° 26. See also on the decision, A. Gavalda, "Remarques sur l'arrêt Rivière", *in Travaux du Comité français de droit international privé 1951-1954*, 1955. pp. 115-148. Available at: https://www.persee.fr/doc/tcfdi_1158-3428_1955_num_14_1951_1326

[42] On the various forms of public policy exception, as this limitation (*effet atténué*) can also be set aside in favour of re-implementation of a full public policy (*ordre public plein*) in case of strong links ("proximity") of the situation/status with France (*ordre public de proximité*), see D. Bureau, H. Muir Watt, *Droit international privé*, t. 1, op. cit., n°459 et seq., and n° 472. This is particularly the case where a French national is involved.

[43] Or an equivalent decision (as the term has a generally broad meaning in the context of cross-border circulation of decisions in France) delivered by an administrative or religious competent authority of instance or even a public act (see *infra* on conflict of authorities).

[44] See Article 343 of the French Civil Code, which limits full adoption to married couples.

[45] CA Versailles, 20 March 2014, n° 13/03655 (on the basis of article 346 of the French Civil Code considered as not being part of French international public policy). On this decision, see M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.*, Question (147).

similar decision was issued by the French Court of Cassation regarding the share of parental authority between the mother of a child and her partner who had adopted the child. To this end, the court took the view that the prohibition of adoption by the partner of a parent in French domestic law cannot be seen as part of the French public policy.[46]

**13.** A second limit exists obviously in the absence of judgment. How can foreign status be recognised outside this classic methodological way, in particular given the uncertainties of conflict of laws due to the non-harmonised systems of conflict of laws in personal and family matters?[47] This observation was certainly one of the starting points of the academic reflection on a new method of recognising foreign legal situations.

**14.** The third limit, which is closely linked to the latter, relates to public documents without the nature of judicial decision, but that have more effect than a simple certification of a legal situation. This is the case, for instance, of the assignment of a patronymic family name before the registrar. Should these public documents benefit from procedural recognition? This question is resolved in the framework of conflict of authorities.

## 2. Conflict of authorities concerning cross-border movement of status

### A) Impact of conflict of authorities on recognition of status

**15.** Conflict of authorities deals with the competence of national public authorities without any judicial power (such as a regional prefect, a registrar or customs services) and also with the effect of foreign public documents concerning private law relationships.[48] Public documents, even limited to private law aspects, are a very broad category. They cover the intervention of a national public authority in order to produce legal effects in private law matters.[49] There is a real difficulty in distinguishing such a public document from a judicial decision when this public document is a condition for the validity or opposability to third parties of the private situation within (e.g. a marriage or a family name).[50] Here is the core distinction between the "envelope" of the public document called *instrumentum* (e.g. a civil status record) and its private content known as *negotium* (e.g. a marriage or parentage). The intervention of the public authority allows the will of private parties to be authenticated but also, sometimes, gives it a legal basis.

**16.** Recognition of status is often reliant on conflict of authorities as many elements of personal status are established through a public instrument, such as gender, marriage, partnership, assignment of a family name or parentage. In this context, the regime of the cross-border movement of such public instruments related to personal status is of great importance. The main issue is the possible implementation of article 509 of the French Civil Procedure Code and, more globally, of the procedural recognition in that case. A positive response was given in past judicial decisions.[51] In particular, the Parisian Court of Appeal ruled, in 1994, that "a foreign public document on father's recognition of paternity should be recognised *de plano*, producing its full legal effects [in France]; it does not need to be submitted to an

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[46] Civ. 1re, 8 July 2010, n° 08-21740.

[47] See, in particular, the risk of conflicts of systems, *infra*, mn 30.

[48] On that definition, P. Mayer, V. Heuzé, *Droit international privé*, op. cit., n° 486; D. Bureau, H. Muir Watt, *Droit international privé*, t. 1, op. cit., n° 583.

[49] P. Mayer, V. Heuzé, *Droit international privé*, op. cit., n° 489.

[50] This is why Professor Pamboukis suggested in his PhD thesis that the category of "*acte quasi-public*" should be created, *in L'acte public étranger en droit international privé*, LGDJ, 1993.

[51] See CA Paris, 2 April 1998, *Soc. Barney's Inc., c. C. M. C.*, note Ch. Pamboukis, *Rev. Crit. DIP*., 1999, p. 102 (in business law matter); TGI, Paris, 17 October 1991, note H. Muir Watt, *Rev. Crit. DIP*, 1992, p. 508 (enforcement of a foreign divorce issued by declaration of the spouses at the town hall of Tokyo; TGI, Paris, 10 May 1990, *Rev. Crit. DIP* 1991, p. 391, note H. Muir Watt (enforcement of a foreign divorce issued by declaration of the spouses before a registrar of the Thai embassy in London).

enforcement proceeding (*exequatur*), in the same way as civil status records are regarded as constituting proof, as long as its invalidity is not judicially established on the initiative of an interested party".[52] Therefore, foreign public documents on personal status should benefit from a similar regime of recognition as foreign judgments,[53] which means *de plano* recognition of the *instrumentum*, a possibility of enforcement pursuant to an *exequatur* proceeding if enforceability measures are required, and control of its validity in case of dispute. On the last point, the evolution of the French enforcement regime since 2007 (*i.e.* suppression of the control of the law applied by the foreign authority)[54] generates uncertainty about how to control the validity of the foreign public document.[55] It may be argued that, if no conflict-of-laws reasoning takes place for the control of the *instrumentum*, the same does not apply to the *negotium*. Its validity assessment implies, in principle, a conflict-of-laws reasoning.[56]

**B) Limits to recognition of status under conflict of authorities**

**17.** The same limits as for the classical recognition of judgments applies here, which means a possible public policy exception or a fraud exception, preventing a foreign status from being recognised in France. Moreover, as the private situation contained within the public document (*negotium*) is still, in principle, submitted to conflict of laws, in the case of its validity being challenged, the discrepancies between conflict of laws (and then substantial family laws) within national legal orders may prevent its international circulation in France.[57]

**18.** This would be the case, for instance, if a French national had decided to get married in a foreign country,[58] before local authorities who applied their domestic law (regardless of the connecting factor used), although this law does not comply with the mandatory provisions of French marriage law.[59] Indeed, from the French legal order's perspective, the applicable law to marriage is the law of the spouses nationality.[60] Therefore, if the foreign authority applied domestic provisions (*lex fori*), which did not impose, for instance, free consent to marriage and, for this purpose, the presence of the two spouses at the ceremony,[61] the marriage would not be seen as valid in France.[62] Therefore, a valid marriage abroad of a French national may be invalid for the French legal order. As concerns the "envelope" of the public document (*i.e.* the *instrumentum*), French authorities may refuse to deliver the "certificate of legal

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[52] (unofficial translation) Civ. 1re, 12 Jan. 1994*, M. Tonon c. Office cantonal de la jeunesse de Tuttlingen,* note Ch. Pamboukis, *Rev. Crit. DIP*, 1994, p. 557 (recognition of a foreign public document on father's recognition of paternity): "*… toute reconnaissance volontaire d'un enfant naturel faite en pays étranger produit de plein droit ses effets sans qu'il y ait lieu de soumettre à exequatur l'acte instrumentaire qui la contient de la même manière que font foi les actes de l'état civil, tant que son invalidité n'a pas été constatée judiciairement à l'initiative de celui qui y a intérêt".*

[53] Pursuant to the procedural recognition, the distinction between the twofold dimension of the public document (*instrumentum*/*negotium*) is ignored and therefore the cross-border circulation of the private situation (*negotium*) is facilitated.

[54] Cornelissen Case op. cit.

[55] For a conflict-of-laws assessment before the *Cornelissen* Case, see TGI, Paris, 10 May 1990, op. cit. (assessment on the basis of the French conflict-of-laws rules for divorce [ex-Article 310, current Article 309 of the French Civil Code], considered as non-relevant because of its unilateral nature and substituted by the equivalence theory applied to the substance of the foreign law applied related to French law on divorce).

[56] Even if some authors propose suppressing the conflict-of-laws reasoning. Previously, Ch. Pamboukis suggested in his PhD thesis the creation of the category of 'acte quasi-public', in *L'acte public étranger en droit international privé*, op. cit., n° 426 et seq. More recently, in the framework of a new method of recognition, see P. Lagarde, « La reconnaissance mode d'emploi », *Vers de nouveaux équilibres entre ordres juridiques, Mélanges en l'honneur de Hèlène Gaudemet-Tallon*, Paris, Dalloz, 2008, p. 481-501. See also *infra* mn 37 et seq.

[57] On this limit, see also *infra* mn 30.

[58] See Articles 171-1 et seq. of the French Civil Code.

[59] See Article 171-4 of the French Civil Code, referring in particular to Articles 144 (minimal age of 18), 146 (free consent), 146-1 (presence at the ceremony), 147 (prohibition of bigamy), 161 (prohibition of incest).

[60] Article 202-1 of the French Civil Code.

[61] Articles 146 and 146-1 of the French Civil Code.

[62] Pursuant to Article 171-1 of the French Civil Code, the validity of a French national foreign marriage implies its compliance with the relevant provisions of the French Civil Code.

capacity to marry" which is generally[63] asked for the transcript of the marriage certificate on the French Civil Registry. If the transcript is not necessary for the foreign marriage to produce civil effects *inter partes* (*i.e.* between the spouses and their children) in France, it is compulsory for the marriage to be enforceable ("*opposable*") against third parties.[64] Nevertheless, in practice, the absence of a certificate of legal capacity to marry should not prevent the transcript, which will take place if there is no doubt on the validity of the marriage under French law.[65] If such doubts appear, the registrar shall advise the Public Prosecutor, who decides if the transcript is allowed or not, depending on the validity of the foreign marriage under French law. In order to take action for the annulment of the foreign marriage before French courts, he shall ask for a limited transcript for the purpose of the judicial action. Recognition of status, understood here *via* the validity of foreign status, is therefore closely linked to the transcript of civil records. However, a refusal to transcribe a public document does not have a direct impact on the validity of the private situation crystallised within this document.

### C) Articulation between recognition of status and registration within conflict of authorities

**19.** The previous example of French national foreign marriage is a relevant illustration of the articulation between recognition of status – here the acceptance in France of the marital status acquired abroad, more precisely its validity – and the registration of the foreign marriage certificate at the French Civil Registry. There is not a perfect match between the two concepts. A valid foreign marriage under French law produces civil effects between the spouses without any transcript. However, to have its full effects (i.e. *erga omnes*), a transcript is necessary, and the transcript is indirectly reliant on the validity of the marriage, as explained above. Therefore, the easiest way for the French spouse to enjoy his/her marital status in France is to request the transcript of his/her foreign marriage, even if it is not compulsory.

**20.** As concerns methodological approach, a brief comparison in the context of international circulation of public documents shall be drawn between procedural recognition applied to some foreign public documents (as explained above) and registration of foreign documents or judgments at the Civil Status Registry within the field of conflict of authorities. The former deals with issues of recognition (or enforcement) of status contained within a foreign judgment or, in some cases, also in a foreign public document, conferring proof, *res judicata* (including substantial efficiency) or enforceability in the *forum* addressed. The latter relates to the mention or the transcript of a foreign civil status record or of a foreign judgment on civil status (divorce, adoption, etc) in order to confer proof and effectiveness ("*opposabilité"*) against a third party. Only the public envelope of the document (*instrumentum*) is at stake. In practice, French nationals may ask for the transcription in the French Civil Registry of foreign public documents by French consular or diplomatic authorities.[66]

**21.** Regarding their effects, foreign public instruments have *de jure* a probative force pursuant to article 47 of the French Civil Code,[67] if the local foreign forms have been respected (*locus regit actum*),[68]

[63] But the certificate is not compulsory for the transcription.

[64] Article 171-5, al. 1, of the French Civil Code. It reads as follows: "*Pour être opposable aux tiers en France, l'acte de mariage d'un Français célébré par une autorité étrangère doit être transcrit sur les registres de l'état civil français. En l'absence de transcription, le mariage d'un Français, valablement célébré par une autorité étrangère, produit ses effets civils en France à l'égard des époux et des enfants*". See Civ. 1re, 7 December 2016, n° 15-22.996 P (transcript after the death of one spouse, having a retroactive effect to the day of the marriage), *AJ fam*. 2017, p. 146, obs. A. Boiché.

[65] Article 171-7, al. 1, of the French Civil Code.

[66] For instance, in the case of a foreign marriage involving a French spouse, see Articles 171-5 et seq. of the French Civil Code.

[67] "*Tout acte de l'état civil des Français et des étrangers fait en pays étranger et rédigé dans les formes usitées dans ce pays fait foi, sauf si d'autres actes ou pièces détenus, des données extérieures ou des éléments tirés de l'acte lui-même établissent, le cas échéant après toutes vérifications utiles, que cet acte est irrégulier, falsifié ou que les faits qui y sont déclarés ne correspondent pas à la réalité*".

[68] For instance, Civ. 1re, 17 December 2008, n° 07-20293 (a foreign birth certificate drawn up by a foreign authority in conformity with foreign formal requirements has a probative effect in France). See also, as concerns a foreign birth cer-

without their transcript in the French Civil Status Registry being necessary. The same applies to foreign judgments on civil status, as explained above. It follows from the above, indirectly, that there is a presumed validity of the private situation (*negotium*) crystallised within the public document, which facilitates the effects in France of foreign status. Article 47 adds that, in the case of irregularity or falsification of the record, a transcript in the French Civil Registry is forbidden. It is also the case if the facts stated in the public document do not correspond to reality. If a foreign judgment on personal status coexists with a public instrument,[69] a request for ineffectiveness (*inopposabilité*) of the judgment[70] may also lead to preclusion of the transcript in the Civil Registry.

**22.** In this context, serious difficulties occurred in France regarding foreign birth certificates of children born after a gestational surrogacy, when the foreign record mentions the two intended parents as legal parents, since surrogacy is prohibited under French law. [71] French courts refused to register a foreign birth certificate because of its non-conformity with the "reality" regarding parentage.[72] Neither the same-sex partner or husband of the intended biological father (as second intended parent), nor the wife (as intended mother and even sometimes genetically biological mother) of the intended biological father can, in principle, be recognised as the second parent of these children;[73] only the intended biological father and the surrogate mother are. More recently, the French *Cour de cassation* ruled, on the contrary, that the full transcript of the foreign birth certificate was allowed pursuant to article 47 of the Civil Code, on the sole condition that this complies with the foreign law under which the certificate was established.[74] To put an end to this liberal caselaw, in breach of the French prohibition of surrogacy, the French lawmaker decided to amend article 47.[75] The revised provision lays down, more precisely, that "the reality [of the facts stated in the public document] is to be assessed according to French law".[76] Since French law prohibits surrogacy, neither the intended second father (in a same-sex couple) nor the intended mother (who did not give birth to the child) should in principle be mentioned as second parent of the child by transcription into the civil status registers. However, it should be pointed out that another reasoning has normally to be followed to respond to the issue of parentage (as family status), beyond the sole issue of civil registration. The refusal to register the foreign birth certificate entirely has technically no direct legal impact on the validity of the *negotium*, which means on the private situation (here the parentage) in the civil status record. Conflict-of-laws rules shall be applied in order to determine the validity of the legal situation (*i.e.* the parentage) contained in the foreign public instrument. The probative force of the foreign public document shall be distinguished from the validity of the situation contained

tificate after a surrogacy, CA Paris, 25 October 2007, n° 06/00507, *JDI* 2008, p. 145, G. Cuniberti (the Court refused the request of annulment of the transcript of the birth certificate on the ground that (*inter alia*) the Public Prosecutor did not claim for the irregularity of the public instrument pursuant to article 47 of the Civil Code). However, this judgment was quashed by the *Cour of Cassation*: Civ. 1re, 17 December 2008, n° 07-20468 (based on article 16-7 of the French Civil Code, which precludes surrogacy).

[69] For instance, a judgment of adoption and a public document on parentage.

[70] Based, for instance, on the violation of public policy by the foreign judgment.

[71] Article 16-7 of the French Civil Code: *Any agreement concerning procreation or surrogate motherhood is void*.

[72] The so-called "reality" is, under French family law, that the mother is the sole woman who gives birth and the father is only the biological father. Therefore, French court held that the refusal to register a foreign birth certificate because of its non-conformity with the reality regarding parentage, in case of surrogacy, is lawful: CA Rennes, 28 September 2015, n° 14/05537, obs. F. Granet-Lambrechts, *Rec. Dalloz*, 2016, p. 857, obs. J. Hauser, *RTD civ.,* 2016, p. 78, and CA Rennes, 7 March 2016, n° 15/03855. For nuances and further analysis, see below mn 58.

[73] Under French law, the mother is the women who gives birth; however, for an exception see, recently: Ass. Pl., 4 October 2019, n° 10-19.053, ECLI:FR:CCASS:2019:AP00648 (see also below, mn 58). As concerns the father, co-fatherhood does not exist. Consequently, the child cannot have more than one father.

[74] Civ. 1re,18 December 2019, n° 18-11.815. The ruling is an extension of the specific solution given to the *Mennenson* Case following the ECtHR ruling and opinion: Ass. Pl., 4 October 2019, n° 10-19.053, op. cit.

[75] Loi n° 2021-1017 du 2 août 2021 relative à la bioéthique.

[76] Article 47 *in fine* of the French Civil Code. On the amended provision, see A. Karila-Danziger, F. Guillaume Joly, "Transcription à l'état civil français des actes de naissance étrangers dressés dans le cadre d'une GPA, « Fin de partie »", *AJ Famille* 2021 p.582 ; L. Pailler, "À propos de l'article 7 de la loi n° 2021-1017 du 2 août 2021 relative à la bioéthique", *Recueil Dalloz*, 2021, p. 1928.

within (such as marriage, name and here parentage).[77] It only creates a presumption of validity.[78] In practice, the applicable law or a public policy exception and the subsequent substitution of the *lex fori* may lead to a coherent solution: on the one hand, the refusal to register; on the other hand, the illegality of the situation in France.[79] In practice, once the transcript is made, the validity of the situation constituted *ex lege* is, generally, not challenged.[80]

**23.** Finally, as concerns the effects in France of foreign public documents, they are the same as the effects of similar French public documents, provided that their validity is not challenged. In this context, the French Public Prosecutor has a key role; he is able to challenge a foreign civil status document before the judge when, according to him, public policy is violated.[81] Moreover, when a French judge is seized to give effect to a foreign public document outside the scope of the Regulation (EU) 2016/1191 on the circulation of public document[82] or of international conventions in force in France[83], he shall request for its legalisation[84] pursuant to an international custom.[85] Legalisation imposes the translation of the original instrument into French. The competent authority is most often the French embassy of the country of origin of the public document.

## 3. Conflict of laws concerning cross-border movement of status

### A) Impact of conflict of laws on recognition of status

**24.** Conflict of laws is the classic way of reasoning in the face of a foreign private law situation constituted *ex lege*. Here, the reasoning is not a recognition process in a strict sense because of the absence of decision, but a control of the validity of the foreign situation. Because of the diversity of national systems of conflict of laws as well as because of deep discrepancies in substantial family laws, this methodology is, nowadays, more and more criticized. Conflict of laws is accused of preventing foreign status to freely circulate worldwide.[86] What is the state of play of this methodology in French law in the case of cross-border movement of status?

[77] For instance, on parentage see Civ. 1re, 20 November 1979, n° 77-13297 (conflict-of laws reasoning to determine the effect of the public document in terms of paternity).

[78] For instance, Civ. 2e, 12 February 2015, n° 13-19751 (presumption of validity in favour of a foreign polygamous marriage as long as it has not been declared null and void pursuant to a conflict-of-laws reasoning; consequently, the second spouse has to be considered as a surviving spouse under social security law and may benefit from the reversionary pension of her husband). See also, in the field of voluntary recognition of paternity performed abroad (i.e. *de plano* recognition of a foreign act of acknowledgement of a child), Civ. 1re, 12 January 1994, n°91-14.567 P.

[79] As concerns the intended mother, the applicable law to legal parentage pursuant to article 311-14 of the French Civil Code is (firstly) the national law of the mother. Therefore, a French intended mother, by application of French law, will not be allowed to be the mother of a child born after a gestational surrogacy (only the woman who gives birth can be a mother under French law). However, the new article 342-10 of the Civil Code may change this reasoning in the future since it introduces the co-motherhood in French family law (see infra mn 58 to 60).

[80] The option to ask for the annulment (or rectification) of a civil status record is laid down in Article 1049 of the French Civil Procedure Code.

[81] Article 423 of the French Civil Procedure Code.

[82] See *infra* mn 50.

[83] Such as the ICCS Conventions n°16 and n°24 or the Hague Apostille Convention of 1961. On this issue, see N. Nord, "La circulation des documents publics familiaux", in E. Bernard, M. Cresp & M. Ho-Dac (ed.), *La famille dans l'ordre juridique de l'Union européenne / Family within the legal Order of the European Union*, Bruylant, 2020, pp. 399-417; (same author) "Une harmonisation des actes?", *in* H. Fulchiron (ed.), La circulation des personnes et de leur statut dans un monde globalisé, op. cit., pp. 323-330.

[84] Legalisation is understood as the authentication of the signature by the foreign public authority. See: https://www.service-public.fr/particuliers/vosdroits/F1402

[85] For instance, Civ. 1re, 13 April 2016, n° 15-50018 (dealing with a foreign birth certificate legalized by the foreign authority *but not by the French authority* and invoked before a French court to prove a parent-child relationship in order to benefit from a French nationality declaration in favour of the child's father but producing a collective effect; in this context, refusal by the French court to give effect to the foreign public document).

[86] The alternative would be, for some scholars, to replace conflict of laws with recognition. In that sense, see *infra* mn 38.


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**25.** For the record, conflict of laws was traditionally developed in order to ensure the continuity of personal status. Therefore, French law as part of continental law adopted, on the one hand, connecting factors based on the objective location of legal relationships and, on the other, a unique regime for all issues of personal status (marital status, parentage, name, etc) in favour of nationality as a connecting factor.[87] An example of the implementation of this bilateral conflict of laws may be given to show how foreign status may circulate in France and produce effects. This is the case of a religious marriage legally performed abroad. The main issue here is the discrepancies of substantive family laws, as in France only civil marriages are admissible[88] contrary to some foreign countries. However, the prohibition on celebrating a religious marriage in France is not a brake to international circulation of such foreign union there. Indeed, pursuant to French law, the issue of *religious* or *civil* celebration is a formal requirement[89] and, therefore, the applicable law pursuant to article 202-2 of the French Civil Code is the *lex loci celebrationis*. Since foreign law required a religious celebration, the marriage was legally concluded abroad and shall be accepted as such in France.[90] The legal reasoning here does not aim to respond to an issue of recognition (in a strict sense) but to assess the validity of the foreign marriage in France. Such reasoning could be necessary to check, for instance, if the spouses are then allowed to conclude a civil marriage in France.[91]

**26.** Other examples confirm that cross-border circulation of personal status is possible outside any specific "recognition rules", in the classic context of conflict of laws. Still, in the field of marriage, polygamous marriage legally performed abroad may benefit from the "limited effect" of public policy (*effet atténué de l'ordre public*).[92] As ruled by the French Court of Cassation, the public policy exception does not prevent rights from being acquired in France on the basis of a foreign situation legally constituted abroad in conformity with French conflict-of-laws rules.[93] If the national law of both spouses is implemented, as applicable law to the substantial requirements to get married pursuant to article 202-1 of the French Civil Code, and allows polygamy, the foreign marriage can produce some effects in France, for instance in the fields of social security rights[94] or maintenance claims.[95] As concerns foreign child marriage, no specific prohibition clause exists in France. Even if the minimum age for marriage in France is 18,[96] younger spouses may see their foreign marriage accepted as valid in France pursuant to conflict-of-law rules whereby their national law allows them to get married.[97] Of course, under a certain

[87] See article 3, §3 of the French Civil Code (national law as applicable law to personal status or legal capacity of natural persons). See for instance Civ. 1re, 13 April 1932, *in Grands arrêts du Droit international privé*, op. cit., nº 14. On the advantage of nationality, ensuring "harmony with the personal identification which is mainly issued and administrated by the state of nationality", A. Dutta, "Personal Status", *Encyclopedia of Private International Law*, op. cit., p. 1348.

[88] Article 165 of the French Civil Code.

[89] Civ. 1re, 22 June 1955, *Caraslanis*, *in Les grands arrêts du Droit international privé*, op. cit., n°27.

[90] See CA Paris, 16 October 2012, n° 11/22096. On that decision, M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.,* Question (16).

[91] In the case mentioned above, the Paris Court of Appeal had to check the validity of a religious marriage performed abroad, to then assess the validity of a civil marriage concluded some months later in France between the same spouses, as bigamy is forbidden in France pursuant to Article 146 of the French Civil Code. As the foreign marriage was valid pursuant to (current) Articles 171-1 and 202-2 of the French Civil Code, the second marriage was held null and void.

[92] This is not the case if the second spouse is a French national as French national law prohibits bigamy.

[93] Civ. 2e, 2 May 2007, n° 06-11418 (op. cit.): "*Mais attendu que l'ordre public français ne fait pas obstacle à l'acquisition de droits en France sur le fondement d'une situation créée sans fraude à l'étranger en conformité avec la loi ayant compétence en vertu du droit international privé*".

[94] Civ. 2e, 12 February 2015, n° 13-19751 (presumption of validity in favour of a foreign polygamous marriage as long as it has not been declared null and void pursuant to a conflict-of-laws reasoning; consequently, the second spouse has to be considered as a surviving spouse under social security law and may benefit from the reversionary pension of her husband). See also Civ. 2e, 2 May 2007, n° 06-11418. On this decision, see M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.*, Question (11).

[95] Civ., 28 Jan. 1958, *Chemouni*, *Les grands arrêts du droit international privé,* op. cit., n° 30.

[96] Article 144 of the French Civil Code, even if derogations are possible for "serious reasons", pursuant to Articles 145 et seq. of the Civil Code.

[97] As a free consent to marriage is a crucial condition, its assessment in relation to minors (under French law) should be very strict. In any case, this assessment shall be done following the French conception of consent even in the face of foreign spouses (pursuant to Article 202-1, al. 1*, in fine*, of the French Civil Code). The consent of the parents of the underage spouse, for instance, may be required.


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age, the marriage of minors is prohibited as "child marriage" according to the most fundamental values of French society and, in this case, the full exception of public policy would prevent such a marriage from being valid in France.[98]

### B) Limits to recognition of status under conflict of laws

**27.** The implementation of conflict-of-laws rules may be confronted with classic limits that usually prevent foreign status from circulating in France and from producing effects there. This is the case, firstly, of overriding mandatory provisions (*lois de police*), even if they are not common in personal and family matters. An illustration of such mandatory provision may be given in the field of "civil effects" of international marriages, with the consequence of excluding some personal effects of the marriage normally conferred by the applicable foreign law. In other words, the foreign status – the marriage – is valid in France but is not allowed to produce part of its foreign law effects there. In principle,[99] such civil effects of an international marriage in France between foreigners living in France depend on the law that is applicable to the marriage, namely the law of the nationality of the spouses.[100] However, regarding the *personal* effects of marriage, as, for instance, the duties of joint living, fidelity or mutual respect and assistance,[101] the French *Cour de Cassation* ruled that French duties between spouses have an international imperative nature.[102] In other words, they shall be applied as overriding mandatory provisions. Therefore, if the national foreign law of the spouses provides, for instance, for a woman's duty to obey her husband, this provision cannot be implemented in France because it would be in breach of the French duty of mutual respect, which is thus directly applicable *ex ante*.[103] Foreign marital status cannot develop its full effects in France following conflict of laws.

**28.** In the field of adoption, a brief comparison between overriding mandatory provisions, as limiting the foreign effects of foreign status under the applicable law, and article 370-5 of the French Civil Code related to the effects in France of foreign adoptions, can be made. As described below, this provision aims to give the effects of French substantial law to foreign adoptions in France, under certain conditions. These unilateral conflict-of-law rules have the same impact as an overriding mandatory provision, namely the "francisation" of foreign status regarding their legal effects in France (*i.e.* making them French). This trend may be criticised as it does not fully respect foreign cultures, even if the global issue is, most probably, more complex. Moreover, an irremediable limit of respect for foreign culture remains: the compliance of foreign status effects with public policy.

**29.** Secondly, the public policy exception may be implemented to set aside a foreign law designated by the French conflict-of-laws rules, because its substance is contrary to the most fundamental values of the French legal order. This would be the case for a foreign marriage between two foreign spouses of whom at least one is under the legal puberty age, as mentioned above (*apropos* child marriage).[104] However, a limited effect may also be given to the public policy exception in order to favour the circulation of foreign status in France, as explained above regarding polygamous marriages.[105]

[98] Under the French general instruction on civil status (*Instruction générale relative à l'état civil, IGREC,* 11 May 1999, JUSX9903625J), the foreign law that sets the legal puberty age (marriageable age) under the natural age of puberty should be considered as contrary to public policy (IGREC, op. cit., n° 548). The applied foreign law in the country of origin will be set aside in favour of French law (as *lex fori*) and the foreign marriage will have no existence and no effect in France.

[99] It should be noted that the category of "civil effects" of marriage is, however, quite an empty shell as many specialised categories take precedence over it, such as divorce, parentage, maintenance, etc. See M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit,* n° 137 and n° 140.

[100] See Civ., 17 April 1953, *Rivière* and Civ., 15 May 1961, *Tarwid*, *in Grands arrêts du droit international privé*, op. cit., n° 26.

[101] See articles 212 and 215, al. 1, of the French Civil Code.

[102] Civ. 1re, 20 Oct. 1987, *Cressot, Rev. Crit. DIP*, 1988, p. 540, note Y. Lequette.

[103] On that sense, see M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit,* Question (27).

[104] See *supra*, mn 26.

[105] *Ibidem*.

**30.** Thirdly, a last limit may be analysed, namely the conflicts of systems (of conflict of laws) that have their origin in worldwide discrepancies between national conflict-of-laws systems.[106] These conflicts arise when a different response is given, at the stage of the designation of the law applicable to an international situation, by the conflict-of-laws system of the *forum* and that of the legal order designated by the conflict-of-laws rule of the *forum*. One expression of this conflict may be the clash between connecting factors of the two conflict-of-laws systems concerned. Although the applicable law under the conflict-of-laws rule of the *forum* (A) is the law of nationality (B), the conflict-of-laws rule of this legal order (B) designates the law of the *forum* (A) or of a third legal order (C); for instance, the law of domicile. If the supranational unification of conflict-of-laws rules automatically mitigates this issue, it still exists and constitutes a real brake to cross-border movement of status. Of course, the additional discrepancies of substantial laws are the concrete cause of the refusal of a host country to consider a foreign status as valid. In this context, the recognition of family name is a famous example in the EU. In the *Grunkin-Paul* case, the refusal of German authorities to transcribe the name certificate legally drawn up in Denmark, under Danish law designated by the domestic conflict-of-laws rule (*i.e.* the law of habitual residence), had its origin in a positive conflict between connecting factors, as German law designated the law of nationality.[107]

**31.** If such conflicts are not excluded in the French legal order, some techniques, more or less recent, exist to limit their negative impacts on recognition of personal status. This is the case of the equivalence theory, which has recently renewed the attention of scholars.[108] Used, in the past,[109] in the field of international circulation of judgments, in order to recognise a foreign decision even if the law applied was not the one designated by French conflict-of-laws rules,[110] this technique has also been implemented in conflict-of-laws matters.[111] While equivalence has not recently been applied in a context of cross-border movement of status detached from a judgment (to the best of our knowledge), one could imagine this possibility. It would favour the validity in France of the foreign situation legally constituted abroad, setting aside the discrepancies between conflict-of-laws systems. Other means have been used, more recently, to evacuate conflicts of systems and their negative impact on cross-border movements of status. They will be examined below, as concrete reactions of the French legal order to the liberalisation of recognition of status in Europe.

### C) Adaptation in case of difficulties in identifying the effects of foreign status

3**2.** Conflict of laws also pays a fundamental role regarding the effects in France of foreign situations, acts or decisions on personal status. Indeed, those effects depend in principle on the applicable law under French conflict-of-laws rules. A specific difficulty occurs when a plurality of laws is designated to regulate a cross-border situation and its effects in France.[112] In this case, French conflict of laws provides for the adaptation[113] of the applicable law.

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[106] See D. Bureau, H. Muir Watt, *Droit international privé*, T 1, *op. cit*., n° 434.

[107] See CJEU, 14 oct. 2008, *Grunkin Paul*, Case C-353/06. See also M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit,* Question (77). On this issue, see *infra* mn 53 et seq.

[108] See D. Bureau, H. Muir Watt, *Droit international privé*, T 1, op. cit., n° 369; H. Gaudemet-Tallon, "De nouvelles fonctions pour l'équivalence en droit international privé", *Mélanges P. Lagarde*, Dalloz, 2004, p. 303 ; S. Godechot-Patris, "Retour sur la notion d'équivalence au service de la coordination des systèmes», *Rev. crit. DIP* 2010, p. 271.

[109] Before the *Cornelissen* Case, in 2007, *op. cit.*

[110] For instance, Civ. 1re, 28 January 2003, n°00-15344 (dispute on the enforcement of accessory measures attached to a foreign divorce: "*Mais attendu que la cour d'appel, ayant souverainement retenu que la loi israëlienne appliquée avait permis la concertation des parents sur les mesures accessoires concernant les enfants, a pu en déduire une équivalence substantielle de cette loi avec le droit français applicable, justifiant légalement sa décision sur ce point*"). See also D. Bureau, H. Muir Watt, *Droit international privé*, T 1, op. cit., n° 276.

[111] See, for instance, Civ. 1re, 11 January 2005, n° 01-02.473 (on the laws applied and applicable to a guardianship measure regarding a German national living in France), *Rev. crit. DIP* 2006, p. 85, note M. Scherer.

[112] See D. Bureau, H. Muir Watt, *Droit international privé*, T 1, op. cit., n° 474 et seq.

[113] The notion comes from the German Private International Law concept of *Anpassung*.


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**33.** This is the case, for instance, of the inheritance rights of the second spouse of a polygamous man as, in France, polygamy is prohibited and, consequently, the law of succession only applies to one of the surviving spouses. In this context, is it possible to regard (French) monogamic marriage as equivalent to (foreign) polygamous marriage under the two different applicable laws – on the one hand, the law of succession and, on the other, the law of marriage – ? A positive response to that issue of substitution was given by the French *Cour de Cassation*.[114] The status of surviving spouse for the distribution of the estate of the deceased under French law (designated by the French conflict-of-laws rule in matters of succession) shall be determined by the law of the nationality of the spouse (as applicable law to marriage). Therefore, in the case of foreign polygamous marriage legally performed abroad, the second spouse is allowed to become an heir, as the second marriage is seen as valid pursuant to the "limited effect" of public policy.[115] Therefore, an *adaptation* of the foreign marriage under the law applicable to succession had to be made. This means in practice that the two surviving spouses should share the inheritance portion allocated in principle to the single surviving spouse.[116]

**34.** The same reasoning is followed by French law in the field of international adoption. Pursuant to article 370-5 of the French Civil Code, the adoption legally performed abroad produces the legal effects of either a full adoption (*adoption plénière*), if it broke irrevocably and completely the parentage link of origin, or of a simple adoption (*adoption simple*) if it did not.[117] The objective of the provision in applying French law[118] to the effects of a foreign adoption is to ensure a uniform regime for all adoptions in France and, thus, to facilitate the integration in France of the adopted children, even if these effects may differ from the original ones pursuant to the foreign judgment. On the contrary, *adaptation* is not allowed for foreign legal situations that differ from a French adoption,[119] as *kafala* for instance.[120] In this case, French law refuses the adoption because the personal law of the adopted child does not admit the institution of adoption.[121] Consequently, these foreign statuses cannot be given the effects of French adoption in France.[122] Such refusal complies with article 8 ECvHR, as rules by the ECtHR.[123]

## III. French reaction to the liberalisation of recognition of status

**35.** The French reaction to the liberalisation of recognition of status in the European context can be reported among both academia and positive law. As French scholars are particularly interested in the methodological approach of PIL,[124] the need to facilitate recognition of status in Europe has been a great input to renewal of classic analysis of the matter. What is specifically analysed by authors is the possibility for the French legal order to recognise the validity of foreign situations constituted *ex lege* without any conflict-of-laws assessment. From a methodological perspective, such recognition would be detached from a judicial decision (associated with procedural recognition) and, despite this, would

[114] Civ. 1re, 3 January 1980, *Benddedouche*, n° 78-13762.

[115] See *supra* on the concept of the "limited effect" of public policy (*effet atténué*) and polygamous marriage, mn 12.

[116] See D. Bureau, H. Muir Watt, *Droit international privé*, T 1, op. cit., n° 483.

[117] The provision adds that a transformation of the foreign simple adoption into a French full adoption may take place conditionally upon the consent of the child's legal representative. See M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.*, Question (155).

[118] The application of French law has been described as a form of French "naturalisation" of foreign adoptions, by B. Audit & L. d'Avout, *in Droit international privé*, op. cit., n° 828.

[119] Under French law, an adoption shall create a parentage link. See also article 2, §2 of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

[120] Civ. 1re, 15 December 2010, n°09-10439 (validity of the Court of Appeal's refusal to convert a *kafala* established abroad into a French adoption, under Article 20 of the 1989 Convention on the Rights of the Child). See also See M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.*, Question (149).

[121] In particular, child nationals from Maghreb countries.

[122] For instance, Civ. 1re, 12 January 2011, n° 09-68.504 (regarding "adoption protection" in Malian law).

[123] See ECHR, 4 October 2012, *Harroudj v. France*, req. n° 43631/09 (no violation of art. 8).

[124] See, in particular, H. Batiffol, *Le pluralisme des méthodes en droit international privé, RCADI*, 1973, t. 139 ; L. Gannagé, *Les méthodes de droit international privé à l'épreuve des conflits de cultures*, *RCADI*, 2013, t. 357 ; H. Muir Watt, *Discours sur les méthodes du droit international privé (des formes juridiques de l'inter-altérité)*, *RCADI*, 2017, t. 389.


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imply the exclusion of conflict-of-laws rules by the French host legal order. On the contrary, conflict-of-laws reasoning would remain at the stage of creating legal situations in France. In a way, conflict of laws would be turned into conflict of authorities, with each authority (in the State of origin and in the host State) applying its proper law (*lex auctoris*).

**36.** As concerns French law and judicial practice, mainly indirect influences can be observed. In some specific cases, however, real evolution of French positive law has occurred, as, for instance, in the fields of name and surrogacy. In any case, the French lawmaker has not yet adopted explicit rules of recognition as imagined *de lege ferenda* by scholars or identifiable in comparative law.

### 1. Reactions among French academia

#### A) Background information on the French legal doctrine in the field of recognition of status

**37.** Status recognition has been discussed in France among PIL specialists since the early 2000s, mainly in the light of PIL methododologies[125] and not only in the European legal context.[126] But already in the 1990s, scholars had pointed out the relevance of using the traditional method of procedural recognition (*reconnaissance d'efficacité des décisions*) in favour of some public documents on private law elements, even if they do not have substantially the nature of a decision.[127]

**38.** During the first decade of the 21st century, French legal doctrine started working on drawing up the main features of a new PIL method based on recognition of status, seen as a kind of transposition of the procedural recognition[128] to legal situations constituted abroad.[129] This new method was called the "method of unilateral recognition"[130] or "method of situations recognition".[131] Currently, the expression "recognition method" (*méthode de la reconnaissance*) is most often used. The main technical element of this prospective method is the removal of conflict of laws in the legal reasoning of the judge addressed (*i.e.* in the host State of the foreign status). More recently, many authors focus on the impact of EU law (in particular the freedom of movement) and/or of fundamental rights (under the ECvHR) to explain and justify this ongoing methodological evolution.[132] At the same time, some scholars have developed a critical approach to recognition, preferring a renewal of the conflict-of-laws approach.[133]

[125] P. Lagarde, "Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjonctures", *RabelsZ.*, 2004, p. 225-243; "La reconnaissance mode d'emploi", *Vers de nouveaux équilibres entre ordres juridiques, Mélanges en l'honneur de Hèlène Gaudemet-Tallon*, Paris, Dalloz, 2008, p. 481-501.

[126] For a classical international perspective, S. Bollé, "L'extension du domaine de la méthode de reconnaissance unilatérale", *RCDIP*, 2007, p. 307-355; P. Mayer, "Les méthodes de la reconnaissance en droit international privé", *Le droit international privé : esprit et méthodes, Mélanges en l'honneur de Paul Lagarde*, Paris, Dalloz, 2005, p. 547-573; C. Pamboukis, "La renaissance-métamorphose de la méthode de la reconnaissance", *Rev. Crit. DIP*, 2008, p. 513-560.

[127] Ch. Pamboukis, *L'acte public étranger en droit international privé*, Paris, LGDJ, 1993. See also P. Callé, *L'acte public en droit international privé*, Paris, Economica, 2004.

[128] In the same period, in the framework of enforcement of foreign judgments (*exequatur*), the French Supreme Civil Court gave up controlling the indirect legislative competence: Civ. 1re, 20 February 2007, *Cornelissen,* **n°05-14082.** On that case, see above mn 10 and below mn 56.

[129] P. Lagarde (ed.), La reconnaissance des situations en droit international privé, Paris, Pedone, 2013.

[130] In particular S. Bollé, "L'extension du domaine de la méthode de reconnaissance unilatérale", *op. cit.*

[131] In particular P. Mayer, "Les méthodes de la reconnaissance en droit international privé", *op. cit.*

[132] See recent PhD studies : A. Bilyachenko, *La circulation internationale des situations juridiques*, thèse, Université de La Rochelle, 2016 ; S. Fulli Lemaire, *Le droit international privé de la famille à l'épreuve de l'impératif de reconnaissance des situations*, Thèse, 2017, Université Paris 2 ; A. Panet, *Le statut personnel à l'épreuve de la citoyenneté européenne : contribution à l'étude de la méthode de reconnaissance mutuelle*, Thèse, 2014, Université Lyon 3.

[133] E. Bonifay, *Le principe de reconnaissance mutuelle et le droit international privé. Contribution à l'édification d'un espace de liberté, sécurité et justice*, Institut Universitaire Varenne, 2017, n° 459 et seq. L. Rass-Masson, *Les fondements du droit international privé européen de la famille*, Thèse Paris II, 2015. See also M. Buschbaum, "La reconnaissance de situations juridiques fondées sur les actes d'état civil?, Réflexions critiques sur l'abandon de la méthode résultant des règles de conflit de loi", *Recueil Dalloz* 2011, p. 1094.


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**39.** More globally, French academics have been working on the impact of European fundamental rights, including EU freedom of movement, on personal status and its legal treatment.[134] In this context, a major research project should be mentioned, led by Professor Fulchiron since 2014. It focuses on the legal impact of circulation on personal status worldwide.[135]

**40.** Regarding specifically same-sex marriages, as a hot topic in Europe,[136] their international circulation in France when performed abroad has not been particularly discussed, since they are allowed following a family law reform adopted in 2013.[137] On the contrary, same-sex parentage is a matter of interest.[138] The recognition of foreign partnerships legally created abroad is also discussed with regard to their effects.[139]

### B) French PIL textbooks in the field of recognition of status

**41.** Regarding PIL textbooks in France, they all pay attention to the law applicable to personal status and, among other questions, provide information on the effects of specific foreign status in France: for instance, the effects in France of a polygamous marriage or of a *kafala* performed abroad.[140] However, the authors (mainly) do not draw a systematic distinction between the conditions of creation of a status in France and the conditions for the recognition of a status legally acquired abroad. The conditions for the recognition of each element of foreign personal status in France are, most often, not exposed in detail.[141] The absence of systematic written rules of PIL in France may explain this observation.

**42.** Moreover, a distinction between PIL textbooks may be drawn, between a classic or older PIL approach (Mayer/Heuzé)[142] dealing with recognition in the light of circulation of judgments or public acts and a renewed approach (Bureau/Muir Watt; Geouffre de La Pradelle/Niboyet; Audit/d'Avout)[143] that takes into consideration the increasing impact of EU freedom of movement and EU fundamental rights on PIL solutions and, thus, discusses the emergence of recognition (as a new PIL method) in connection with foreign legal situations. In that sense, a major French PIL textbook devotes part of a chapter on "Recognition of foreign situations" (*la reconnaissance des situations étrangères*).[144] A new perspective has also been recently proposed in a family law textbook dealing with national, European and international dimensions of family relationships, following a judicial approach.[145] The issue of status recognition in family matters is here largely taken into account.[146] Major family law books also pay

[134] See, for instance, H. Fulchiron, Ch. Bideaud-Garon (ed.), *Vers un statut européen de la famille*, Paris, Dalloz, 2014.

[135] H. Fulchiron (ed.), *La circulation des personnes et de leur statut dans un monde globalisé*, op. cit.; (same author) "Interactions entre systèmes ou ensembles normatifs et 'dynamique des normes'. L'exemple du droit de la famille", *RTD Civ.* 2017, p. 271 et seq.

[136] See in particular CJEU, 5 June 2018, *Coman*, aff. C-673/16. EU:C:2018:385 and ECtHR, 14 December 2017, *Orlandi e.s. v. Italy*, req. n° 26431/12, CE:ECHR:2017:1214JUD002643112.

[137] Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe, and Article 143 of French Civil Code.

[138] On the methodological impact, see *infra* mn 60.

[139] On the methodological impact, see *infra* mn 51 et seq. See also M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.,* Question (95).

[140] See, for instance, B. Audit, L. d'Avout, *Droit international privé*, op. cit., n° 780 (on polygamous marriage) and n° 884 (on adoption, including *kafala*).

[141] Only specific situations requesting recognition are explained in relation to the caselaw of the French *Cour de cassation*.

[142] P. Mayer, V. Heuzé, *Droit international privé*, Paris, Montchrestien, 11e ***éd., 2014.*** It should be noted that a new (12e) edition of that book has been realised in 2019, with a new co-author, B. Remy.

[143] B. Audit, L. d'Avout, *Droit international privé*, Economica, 8e ***éd. 2018;*** D. Bureau, H. Muir Watt, *Droit international privé*, T. 1 et 2, PUF, 4e ***éd. 2017;*** M.-L. Niboyet, G. de Geouffre de La Pradelle, *Droit international privé*, LGDJ, 6e ***éd., 2017.***

[144] D. Bureau, H. Muir Watt, *Droit international privé*, T. 1, op. cit., n° 569 et seq.

[145] M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille – Droit français, européen, international et comparé,* Brussels, Bruylant, Coll. *Casebook*, 2018.

[146] See in particular Question (11) on polygamous marriage; Question (66) on repudiation (*talaq*); Question (87) on com-


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greater attention to the issue of recognition of status and explain in detail new legal and academic developments on this topic.[147]

### C) Doctrinal research on "unnamed" rules of recognition in traditional French PIL

**43.** In the framework of the academic debate on recognition of status in Europe, French scholars also worked on finding "unnamed" or "implicit" legal and judicial expressions of recognition of status (in the methodological sense explained above) in classic French PIL. Two main examples may be given.

**44.** The first example is the old theory of conflict of systems in time (*conflit de systèmes dans le temps*),[148] as a derogatory regime *vis-à-vis* conflict-of-laws rules, which was used long ago by French courts to favour the circulation of a personal status legally constituted abroad, without any link with the French *forum.*[149] Out of respect for the parties' forecasting, this theory allows, under certain conditions, admission of the validity of a foreign status regarding the law applied abroad, at the time of its creation, despite the different solution given following the implementation of the conflict-of-laws rule of the *forum*. However, no recent case implements this old theory, to the best of our knowledge.

**45.** The second example concerns article 311-17 of the French Civil Code, related to voluntary recognition of paternity or maternity in the field of parentage.[150] This provides that recognition of parentage, in an international context, is valid if it was performed in conformity with either the law of the nationality of its author, or with the law of the nationality of the acknowledged child. This rule is traditionally analysed as a substantive-oriented conflict-of-laws rule as the classic neutrality of conflict-of-laws rules is set aside in favour of a specific political result, namely the validity of the child's acknowledgement in France. To this end, two alternative connecting factors are laid down. Despite its conflictual nature, confirmed by the French *Cour de Cassation*,[151] the provision is close to article 73, par. 1, of Switzerland's Federal Code on Private International Law, worded as a rule of recognition. Indeed, it provides that "an act of acknowledgment of a child made abroad shall be recognized in Switzerland if it is valid in the State of habitual residence or citizenship of the child or in the State of domicile or citizenship of the mother or the father". However, the two rules are different – and not only because Swiss law provides for more applicable laws, including connecting factors based on domicile. Indeed, the Swiss provision is limited to recognition, although the French one is also applicable to the establishment of a parentage link through an act of acknowledgment (*reconnaissance volontaire*). In the absence of parentage links already established, the applicable law under article 311-17 shall be implemented to check the conditions laid down by the designated law to ascertain parentage. Therefore, as decided by the French *Cour de Cassation*, a judge may have to verify, under the applicable foreign law, if the mention of the father's name on the birth certificate of the child is sufficient to admit a voluntary recognition of paternity.[152] Thus, it may be concluded that article 311-17, regarding its scope and its substance, partially includes a "recognition-oriented rule".[153] In any case, the plurality of connecting factors surely favours the validity of foreign parentage status and consequently its cross-border movement.

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pensatory allowance; Question (95) on registered partnership; Question (112) on tax effects under foreign partnership; Question (137) on filiation; Questions (115) and (158) on adoption; Question (179) on protective measures (example of *kafala*), *in* M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.*

[147] In particular, P. Murat (ed.), *Dalloz Action Droit de la famille*, 7e ed., 2016-2017, n° 512-62 et seq. on recognition of status in the field of conflict of laws, by M. Farge.

[148] On this theory and its origins, see D. Bureau, H. Muir Watt, *Droit international privé*, T. 1, op. cit., n° 572 et seq.

[149] See Court of Appeal of Rabat, 24 October 1950, *Machet* (determination of a matrimonial property regime by application of the foreign conflict-of-laws system by the judge addressed), *in Grands arrêts du droit international privé*, op. cit., n° 23.

[150] See in particular P. Lagarde, "La reconnaissance mode d'emploi", op. cit. p. 492. *Contra*, P. Mayer, "Les méthodes de la reconnaissance en droit international privé", op. cit., p. 565.

[151] See Civ. 1re, 14 April 2010, n° 09-14335.

[152] *Ibidem*.

[153] See also on the presumption of validity in case of (procedural) recognition (with a *de plano* effect) of a foreign public act of acknowledgement (*instrumentum*), Civ. 1re, 12 January 1994, n°91-14.567 P. On that issue, see *supra*, mn 22.

## 2. Reactions in French law

**46.** The question of whether the liberalisation of recognition of status in Europe has influenced positive French law should receive a nuanced response. In examining the legislative changes in French PIL during the last ten years, no major attention has been explicitly drawn to recognition of status and no explicit rules of recognition have been created. At the same time, this trend of recognition of status was not totally ignored. Most often, an impact is certainly tangible but it is indirect or implicit. Indeed, new provisions allow or facilitate recognition of certain elements of civil status. It should also be recalled that French PIL already has different techniques to favour the cross-border movement of foreign situations. It compensates to some extent for the absence of explicit and direct rules of recognition.

### A) No explicit rule of recognition (example of same-sex marriage)

**47.** Despite many opportunities, the French legislator did not adopt any rule of recognition for foreign status as concerns partnerships, family name, divorces or marriages, although these fields have been reformed during the last ten years. If some legislative changes are, however, favourable to cross-border movement of foreign status, as will be seen below (partnerships and name), others are not or, worse, they may be a source of non-recognition. This may be the case with the reform of marriage regarding in particular same-sex marriages.

**48.** In 2013, new rules on same-sex marriage were adopted in substantive family law, with specific provisions on conflict of laws.[154] No attention has been paid to recognition of foreign marriages in France. Nevertheless, it has been explained above that French law has already developed different techniques to favour the cross-border movement of foreign marriages in France, such as the" limited effect "of public policy or the equivalence theory. Even without any rule of recognition, the French legal order has been very liberal regarding polygamous marriages, as they may have civil effects in France, for a long time now.[155] By comparison, neither the EU[156] nor the Council of Europe and its court oppose national refusals to give effect to foreign polygamous marriages.[157]

**49.** Then, the new provisions, by facilitating the conclusion of same-sex marriages in France for foreigners coming from countries that prohibit such marriages, do not take into account the issue of recognition abroad of such marriages.[158] This may certainly lead to conflicts between statuses, *i.e.* married *versus* not married, preventing a same-sex marriage performed in France from being recognised abroad, in particular in the country of origin of one or both of the spouses. Indeed, French law allows, pursuant to article 202-1, par. 2, French Civil Code, the creation of a marital status on the basis of a unique law (most often, in practice, French law) related to only one future spouse, *i.e.* his/her national law or his/her domicile law, while the prohibitive law of the other future spouse is purely ignored.[159] The French lawmaker was most probably fully aware of the negative impact of this provision on recognition of

[154] Articles 202-1 and 202-2 of the French Civil Code created by the "Loi n°2013-404 du 13 mai 2013".

[155] See *supra*, mn 26 and mn 33.

[156] For instance, in the framework of EU immigration law, on the basis of directive 2004/38/EC. See also Communication of the European Commission, COM(2009) 313 final, p. 4.

[157] See EComHR, 6 January 1992, *Alilouch El Abasse v. Pays-Bas*, req. 14501/89 ; ECtHR, 6 July 2010, *Green et Farhat c. Malte*, req. n° 38797/07 (decision of inadmissibility), note L. d'Avout, *Rev. crit. DIP*, 2011, p. 665.

[158] On that topic, see ECtHR, 14 December 2017, *Orlandi e.s. v. Italy*, op. cit., and more globally on non-recognition of same-sex marriages in Europe, M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.*, Question (7).

[159] For an illustration, see Civ. 1re, 28 January 2015, n° 13-50.059, ECLI:FR:CCASS:2015:C100096 (validity of a same-sex marriage between a French national and a Moroccan national, even though a bilateral convention on personal status between France and Morocco provided for a public policy exception, not applied by the French Court of Cassation, which judged that same-sex marriage is now part of the international public policy of France). On that decision, see M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.*, Question (6).

such marriages abroad. It is a political choice to favour the fundamental right to marry for all couples in France, regardless of cultural discrepancies worldwide.

**50.** In the European context, it should be noted that no particular political attention has been paid to the adoption of the Regulation (EU) n°2016/1191 on the circulation of public documents.[160] It did not give rise to new provisions in French law and, in practice, the public authorities concerned are used to implement ICCS conventions in the same area.[161] However, when analysing the text of the regulation on public documents, scholars have pointed out the foreseeable impact, even if indirect, of the circulation of public documents organised by the regulation on recognition of status.[162] From a technical point of view, it is easily understandable as the circulation of public documents implies (at a minimum) a presumption of probative force, which itself implies a presumption of validity of the legal situation contained within the document.[163] It may be the case, for instance, of a public document on marital status.

### B) Recent rule favouring recognition of status (example of partnerships)

**51.** In 2009, the French legislator created a conflict-of-laws rule to designate the law applicable to international partnership, but the issue of recognition was not specifically covered by the new provision. Only a single conflict-of-laws rule was adopted pursuant to article 515-7-1 of the French Civil Code.[164] However, the choice of the connecting factor made by the French lawmaker is surely favourable to cross-border movement of partnerships, as the applicable law is the substantive law of the State where the partnership has been registered (*lex auctoris*). This provision should facilitate the admission of the validity of foreign partnerships in France, as this validity depends on the applied foreign law. In that sense, scholars have assessed the links between this new provision and the new method of recognition.[165] In practice, some requirements have to be fulfilled to give effect in France to a foreign partnership: proof of the partnership's registration abroad and translation by an official translator.[166] Moreover, a decision of a first-instance tribunal held that an English-law civil partnership has full legal effect in France, including tax law effects, pursuant to article 796-0 bis of the Tax Law General Code on taxation of inheritance and article 515-7-1 of the Civil Code.[167]

**52.** However, the classic limit of public policy should apply and prevent a foreign partnership from being seen as valid in France and developing its effects there if the "partenarial" status would violate French fundamental values. This would surely be the case in relation to the Belgian type of partnership (*cohabitation légale*),[168] concluded between two brothers for instance, as *cohabitation* is open to all persons living together, even family members and without any obligation for a couple relationship. On the contrary, French law prohibits the conclusion of partnership between family members pursuant to

[160] OJ L 200, 26.7.2016. On the EU regulation in French doctrine, see E. Bonifay, "La circulation des citoyens européens entre États membres au lendemain de l'adoption du règlement 'documents publics'", *JDI,* n° 2, April 2017, doctr. 7 ; E. Pataut, "Et le statut personnel ?", *RTD eur.* 2016, p. 648.

[161] See the state of ratifications of ICCS conventions for France on the website of the ICCS: http://www.ciec1.org/SITECIEC/PAGE_Accueil/PC0AAJaQblBESWxiWmZUVExzeRE?WD_ACTION_=MENU&ID=A23&_WWREFERER_=http%3A%2F%2Fwww.ciec1.org%2F&_WWNATION_=5

[162] For Professor E. Pataut, op. cit., "*il est plus que probable que l'impact d'un tel règlement, malgré son ampleur apparemment limitée, sera beaucoup plus important à long terme. À partir du moment en effet où un acte d'état civil circule automatiquement d'un État membre à l'autre, il est plus que probable que les situations qu'il décrit ne seront remises en cause que dans des cas extrêmement rares et lourdement contentieux. […] Ainsi, c'est probablement à une extension de la méthode de la reconnaissance qu'il faut s'attendre, même si c'est par un biais indirect*", *in* "Et le statut personnel?", op. cit. In the same sense, see D. Bureau, H. Muir Watt, *Droit international privé*, T. 1, op. cit., n° 624-3.

[163] Comp. *supra* on the articulation between recognition and registration, mn 19 et seq.

[164] Created by the "Loi n°2009-526 du 12 mai 2009".

[165] See, in particular, P. Hammje, "Réflexions sur l'article 515-7-1 du Code civil", *Rev. Crit. DIP*, 2009, p. 483-491.

[166] See Ch. Butruille-Cardew, "Le pacte civil de solidarité et éléments d'extranéité", *AJ fam*., 2012, p. 528.

[167] TGI Bobigny, 8 June 2010, n° 09/03968.

[168] See Articles 1475 et seq. of the Belgium Civil Code.


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article 515-2 of the French Civil Code, exactly as for marriage, on the basis of prohibition of incest. This is why a Belgian partnership between brothers, legally registered in Belgium, should not be accepted in France and not be allowed to produce any effect there.[169]

**C) Recent rule having the effects of a rule of status recognition (example of family name)**

**53.** In 2016, among numerous legal changes aimed at modernising access to law and justice, the French lawmaker adopted new provisions on family name in the Civil Code.[170] The articles 61-3-1 and 311-24-1 aim to ensure the compliance of the family name of a person in France with his/her name registered abroad. This is the direct and concrete expression of the European caselaw in the field. In that sense, the circular of the French Justice Minister for judiciary members[171] specifically mentions the *Garcia Avello* and *Grunkin-Paul* cases of the CJEU[172] and the *Henry Kismoun v. France* case of the ECtHR.[173] France had to adapt its civil law to ensure the unity of family names for people in cross-border situations within the EU but also at international level.

**54.** As concerns article 61-3-1 of the French Civil Code, it takes part of the chapter related to name change. It provides that all persons registered both in the French Civil Status Registry (*i.e.* on the basis of the registration of a birth certificate) and in a foreign registry can ask the French registrar to modify the (French) name, in order to convert it into the (foreign) name acquired abroad. However, "in case of difficulties", pursuant to the third paragraph of the provision, the registrar involves the Public Prosecutor, who can oppose the name change. How can this provision be understood in terms of PIL methods? Firstly, the rule forms part of transcription matters. This means that it is not directly a rule of recognition but it is part of the conflict-of-authorities methodology. Indeed, the validity of the name, as a legal situation constituted abroad *ex lege*, may, in theory, still be challenged in France. Only the mere public document, *i.e.* the *instrumentum*, circulates in France on the basis of the transcript. Secondly, as concerns the *negotium*, its validity is still submitted to conflict-of-laws rules; here, certainly, French law[174] regarding French nationals. In this context, the provision would fail to meet the objective of cross-border unity of status (i.e. one name in international context) if the validity is contested because of substantive differences in name between the foreign law applied abroad and the French applicable law. However, in practice, such action challenging the validity of the foreign name will not happen because, if the Public Prosecutor decides to refuse the transcript, he shall do it *ex ante*. But should he refuse the transcript in the case of presumed invalidity of the foreign name under French law? Certainly not, in our opinion, otherwise the new provision would be an empty shell. Therefore, the new article 61-3-1 has the effect of a recognition rule, setting aside the conflicts-of-laws reasoning. The only acceptable limit should be the public policy exception, supplemented by the "limited effect" theory (*effet atténué de l'ordre public*).

**55.** As concerns article 311-24-1 of the French Civil Code, it is part of the chapter related to the attribution of the child's name, and specifically concerns children born outside of France but with at least one parent who has French nationality. It provides that the transcript of the foreign birth certificate shall keep the name as acquired abroad and mentioned in the foreign birth certificate. However, the parents of

[169] On that analysis, see M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.*, Question (95).

[170] V. "Loi n°2016-1547 du 18 November 2016" (article 57), which creates the new articles 61-3-1 and 311-24-1 of the French Civil Code.

[171] Circulaire du 26 July 2017 de présentation de diverses dispositions en matière de droit des personnes et de la famille de la loi n° 2016-1547 du 18 Nov. 2016 de modernisation de la justice du XXIe siècle, NOR : JUSC1720438C

[172] CJEU, 2 October 2003, *Garcia Avello*, Case C-148/02 and CJEU, 14 oct. 2008, *Grunkin Paul*, Case C-353/06.

[173] ECtHR, 5 December 2013, *Henry Kismoun v. France*, req. n° 32265/10. On that decision, see C. Doublein, *AJ fam*. 2014, p. 194.

[174] The connecting factor for the name is not clearly established under French conflict-of-laws rules. An uncertainty exists, depending on the situation, between the law of the nationality and the law applicable to the effects of the status (marriage, parentage, etc) on which the name depends. See D. Bureau, H. Muir Watt, *Droit international privé*, T. 1, op. cit., n°623 et seq.

the child can choose French law as applicable law to the attribution of the child's name. Thus, this provision is more complex than the previous one. First, it provides for the same recognition effect pursuant to article 61-3-1, without being directly a rule of recognition, but being part of the conflict of authorities. However, the difference between the two provisions here is that no pre-existing name was registered as the child has just been born abroad. Consequently, to comply with European caselaw mentioned above, article 311-24-1 imposes the transcript of the foreign name as it was attributed. In principle, as a transcription rule, the validity of the name (*i.e.* the *negotium*) may still be challenged. But, contrary to article 61-3-1, par. 3, no specific intervention of the Public Prosecutor is mentioned. In any case, as stated above, a request concerning the invalidity of the name seems to be very unlikely. Secondly, article 311-24-1 provides for a limit to the automatic transcript of the name of origin: the parents can express a different will, in favour of French law on name (assuming it provides for a different substantial solution). In that sense, the provision makes room for private autonomy.[175] An implicit and indirect choice of law regarding the child's name attribution is offered between the foreign law designated by the conflict-of-laws rule of the birth State and French law as the law of the nationality of the child.[176] This possibility complies with European caselaw; private autonomy is indeed a natural complement to recognition of status.[177]

## 3. Reactions in French judicial practice

### A) In the field of procedural recognition (example of older minors' adoption)

**56.** As mentioned above, in 2007, an important reversal of decision came from the French *Cour de Cassation*, on the traditional recognition of judgment,[178] outside the scope of EU PIL. This change was partly read by some academics in the light of the new trend of recognition of status.[179] The decision had modified the enforcement-of-foreign-judgments regime (*exequatur*): the French court deleted the control of the indirect legislative competence.[180] This means that French courts are no longer allowed to make the recognition of a foreign decision conditional on the similarity of the law applied to the case by the foreign court to the law designated under French conflict-of-laws rules[181]. The setting-aside of conflict of laws in the enforcement proceedings is, indeed, similar to the new methodological approach of recognition of status. In that sense, this judicial development is perfectly in line with this context of the gradual erosion of the conflict-of-laws paradigm.[182] Nevertheless, the existence of a judgment in the former case (*i.e.* in the context of procedural recognition) may justify *per se* the withdrawal of conflict of laws, as modern conflict of laws is not yet to be seen as a sovereignty dispute. On the contrary, in the latter case, only a foreign legal situation created *ex lege* exists and the issue is that of its validity in the *forum*.

**57.** Some other developments in favour of status recognition in the field of conflict of jurisdictions may be expected in the near future, regarding the increasing influence of fundamental rights and the regular uses of such legal bases, principally under the ECvHR by French courts. It is true that, for now, French caselaw offers more examples of refusal of recognition based on the fundamental rights argument. That is the case, for instance, of foreign *talaq* (*repudiation*) under article 5 of Protocol 7 of ECvHR, which

[175] This is remarkable since private autonomy traditionally exists only in French conflict-of-laws rules on patrimonial family matters.

[176] In fact, the child will be a French national if one of his parents is French.

[177] See, for instance, J.-J. Kuipers, "Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law", *Eur. J. Legal Stud*. 66 (2008-2010).

[178] Civ. 1re, 20 February 2007, *Cornelissen,* **n°05-14082.**

[179] See, in particular, B. Ancel et H. Muir Watt, *Rev. crit. DIP* 2007, p. 420; M.-L. Niboyet, "L'abandon du contrôle de la compétence législative indirecte (le « grand arrêt» Cornelissen du 20 février 2007)", *Gazette du Palais*, 3 May 2007, n° 123, p. 2.

[180] On the full regime, see *supra* mn 10 and mn 56.

[181] However, such a control remains if an international (bilateral) convention applicable in France provides for it. In that sense, see Civ. 1re, 22 June 2016, n° 15-14.908. On this case, see Ch. Chalas, "Le contrôle de la loi appliquée par le juge étranger selon la convention France-Émirats Arabes Unis du 9 septembre 1991", *Rev. crit. DIP 2017*, p. 82.

[182] In that sense, see D. Bureau, H. Muir Watt, *Droit international privé*, T. 1, op. cit., n° 280, p. 329.


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lays down the equality principle between men and women.[183] In this context, in the field of adoption, the refusal of French judges to give effect to the foreign adoption of adults or older minors (15 years old or more under French law) is questionable[184] and should be seen as contrary to article 8 ECvHR[185] and to the caselaw of the ECtHR.[186] Even if French law refuses to pronounce adoptions of children aged 15 years and older under article 345 of the French Civil Code,[187] the foreign status, legally created abroad, should be seen as valid in France thanks to the theory of the "limited effect" of public policy (*effet atténué de l'ordre public*).[188] Unfortunately, in practice, the issue is often linked to the acquisition of French nationality based on parentage under article 20-1 of the French Civil Code, and this largely explains, for political reasons, the refusal of international circulation of personal status in this particular case.

**B) In the field of conflict of authorities (examples of surrogacy and co-motherhood)**

**58.** Over the past decade, recognition of status attracts much attention in the matter of surrogacy, and French courts were, and still are, on the front line. The legal issue deals with the recognition in France of the parentage links established abroad between children born from a gestational surrogacy and their intended parents.[189] Since surrogacy is prohibited in France,[190] such a link is, in principle, null and void.[191] In the past few years, the French *Cour de Cassation* consequently refused to authorise the transcript of foreign birth certificates of children born after a gestational surrogacy, even if it was fully allowed in the country of origin.[192] As the French judicial position was condemned by the ECtHR on the grounds of violation of the right to respect for family life as concerns the child,[193] the Assembly of the *Cour de Cassation* reversed its jurisprudence to comply with the fundament right at stake.[194] The registration of biological intended fatherhood is now allowed.[195] However, the judicial reasoning is not based on a rule of recognition, as French law has none, but on article 47 of the French Civil Code which only provides for the probative force of foreign civil status.[196] This means that only the foreign public

[183] In particular, Civ. 1re, 14 May 2014, n° 13-17.124, ECLI:FR:CCASS:2014:C100523. See M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.,* Question (66).

[184] See C.A. Rennes, 23 October 2012, n° 11/077771 (unenforceability in France of a foreign judgment on an older minor's adoption, which means under French law 15 years or older, on the basis of public policy violation).

[185] On that sense, see M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.,* Question (158).

[186] In particular, ECtHR, 3 May 2011, *Negrepontis*, req. n° 56759/08.

[187] Mainly for the reason that integration in the new country (France) may be harder for older minors than for younger children, especially babies.

[188] On this theory, see *supra*, n° 11.

[189] As a legal strategy to subvert the prohibition of parentage based on surrogacy, some parents tried to establish the filiation in France even if the child had been born abroad and already had parentage links. See, for instance, Civ. 1re, 13 September 2013, n° 12-30.138 (acknowledgment of paternity) and Civ. 1re, 6 April 2011, n° 09-17.130 (*de facto* enjoyment). On these cases, see M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.,* n° 802 (and more globally *Question 136* on the issue of establishment of a parentage link for children born abroad from a gestational surrogacy pursuant to French conflict of laws).

[190] Article 16-7 of the French Civil Code.

[191] In a purely domestic situation/case: Ass. plén., 31 May 1991, n° 90-20.105 (refusal of the full adoption of the child born by gestational surrogacy by the intended mother on the basis of the principle of inalienability of the human body and of the principle of the non-availability of civil status).

[192] The decisions were based on different grounds such as the exception of fraud or public policy. See, for instance, Civ. 1re, 13 September 2013, nos. 12-30138 and 12-18315; Civ. 1re, 19 March 2014, n° 13-50005

[193] ECtHR, 26 June 2014, *Mennenson v. France*, req. n° 65192/211 and *Labassée v. France*, req. n° 65941/11. To comply with the judgment handed down by the ECtHR, the new decisions of the French Court of Cassation: Ass. plén., 5 oct. 2018, n°10-19.053 and n° 12-30.138.

[194] Ass. plén., 3 July 2015, n° 14-21.323, ECLI:FR:CCASS:2015:AP00619. See Question (137), *in* M. Cresp (coord.), J. Hauser, M. Ho-Dac (coord.), S. Sana, *Droit de la famille, op. cit.* See also Civ. 1re, 5 July 2017, nº 16-16901 and n°16-50025 ECLI:FR:CCASS:2017:C100825 (the use of surrogacy in a foreign country does not imply the refusal of transcript of the foreign birth certificate which complies with the reality, *i.e.* biological fatherhood, under article 47 of the French Civil Code).

[195] ECtHR, 10 April 2019, Advisory Opinion. On this opinion, see H. Fulchiron, "Premier avis consultatif de la Cour européenne des droits de l'Homme: un dialogue exemplaire?", *Recueil Dalloz* 2019, p. 1094.

[196] On this provision, see *supra*, mn 21.


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document (i.e. *instrumentum*), generally a foreign birth certificate, is accepted in the French legal order. In theory, the private situation within the public document (i.e. *negotium*), namely here the fatherhood, might still be challenged based on conflict of laws.[197].

**59.** Still in the context of surrogacy the motherhood related to the intended mother also gave rise to difficulties in term of recognition, as she is not the one who gives birth in the sense of the French legal conception of motherhood.[198] The French *Cour de Cassation* decided to consult *ex ante* the European Court of Human Rights (ECtHR) under the new Protocol 16, concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.[199] In its advisory opinion, the ECtHR held that "*the child's right to respect for private life within the meaning of Article 8 of the European Convention on Human Rights requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother' [but it] […] does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used*" [200]. Against this background, the implementation of article 47 of the French Civil Code was in no way called into question, and its implementation remains the first way to accept or refuse the legal effects of a foreign parentage in the French legal order (*i.e.* its probative force related to the *instrumentum* and its presumption of validity regarding the *negotium*). As concerns the motherhood of the intended mother, at least when she is not the biological mother (as oocyte retrieval is possible in the surrogacy process), a refusal to provide a transcript of the public document on the maternity link is consistent with article 8 of the ECvHR. At the same time, the establishment of a maternity link with the intended mother should be possible through means other than the legal parenthood (*filiation par l'effet de la loi*). [201] Adoption of the child is a possibility, which complies with the right to respect for the private life of the child.[202] With this solution, the French legal system proceeds in terms of (a kind of) adaptation. Nevertheless, first under very specific circumstances[203] and then more globally,[204] the French *Cour de Cassation* decided to extend the scope of the ECtHR opinion in favour of a "holistic approach" of transcription for all parents – biological or not –. It echoed the recognition trend. The French Court held that "*in the presence of an action for transcription of the child's foreign birth certificate, which is not an action for recognition or establishment of filiation, neither the fact that the child was born as a result of a surrogate motherhood agreement nor the fact that this certificate designates the child's biological father and a second man as the father constitute obstacles to the transcription of the certificate in the civil status registers, when the latter is conclusive within the meaning of Article 47 of the Civil Code*."[205] The same reasoning was applied in favour of the intended mother.[206] However, as explained above, the French lawmaker put an end to that liberal app and amended article 47. The revised provision lays down, more precisely, that "the reality [of the facts stated in the public document] is to be assessed according to French law". Since French law prohibits surrogacy, neither the intended second father (in a same-sex couple) nor the intended mother (who did not give birth to the child) could in theory be mentioned as second parent of the child by transcription into the civil status registers. However, co-motherhood has very recently been introduced pursuant to

197 See *supra*, mn 22.

198 *Ibidem.*

199 Ass. plén., 5 October 2018, n°10-19.053.

200 Gr. Ch., ECtHR, 10 April 2019, req. n° P16-2018-001.

201 The solution should be different if the surrogacy takes place in France (*i.e.* in a purely domestic situation) as it is prohibited and punished by criminal sanctions (Article 16-7 of the French Civil Code and Articles 227-12 et seq. of the French Penal Code).

202 Already allowed by the Court of Cassation *in* Civ. 1re, 5 July 2017, n° 16-16.455 et n° 16-16.901, op. cit.

203 Regarding a litigation lasting more than fifteen years (the *Menneson* case), as no other solution was possible to establish the parentage without violating article 8 of the ECtHR, Ass. plén., 4 October 2019, n° 10-19.053, op. cit.

204 Civ. 1re, 18 December 2019, n° 18-11.815 (for co-fathers) and Civ. 1re, 18 mars 2020, n°18-15.368 (for co-mothers).

205 *Ibidem.*

206 Civ. 1re, 18 March 2020, n°18-15.368 (op. cit.).


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article 342-10 of the Civil Code, in the context of medically assisted procreation which is now open up for women couples (or single women) but not co-parentage by same-sex parents. Consequently, the transcription of a co-motherhood could now be valid in France. The reference to French law pursuant to Article 47 is not fully clear; it seems to create a substance rule based on French family law. It could be problematic in the EU legal context, since the freedom of movement includes a presumption of equivalence in favour of civil status records under the CJEU case-law.[207] And more recently, the CJEU has gone further ruling that free movement of EU citizen provides for the Member State of origin of a child (from which he/she obtained the nationality) "*to recognise, as any other Member State, the document from the host Member State that permits that child to exercise, with each of [the] two persons [of same-sex designated as his/her parents] the child's right to move and reside freely within the territory of the Member States*", although this Member State as others do not allow co-motherhood (or co-fatherhood).[208] This ruling will undoubtfully limit the implementation of the new wording of article 47 of the French Civil Code –regarding co-fatherhood– in the context of EU recognition of personal status.[209]

**60.** The issue of co-motherhood could also be addressed in the context of recognition of status, as other countries have been allowing this new form of parentage as illustrated by the (abovementioned) *Panchavero* Case.[210] French court may be soon confronted with the request of a co-mother. For the record, adoption by a same-sex married spouse has been allowed since 2013 in France,[211] and co-motherhood has very recently been introduced pursuant to article 342-10 of the Civil Code. Consequently, the recognition of a co-motherhood legally created abroad (in Belgium for instance) could now be accepted in France. The French registrar should now accept to register a foreign birth certificate with two women as legal parents, as this does not reflect the "reality" under French law as imposed pursuant to article 47 of the French Civil Code. Within the EU judicial area, this would be in the recent CJEU caselaw based on the freedom of movement of EU citizens.[212] However, what about co-fatherhood? Since there is no French provision which allows this family status, the recognition of co-fatherhood legally created abroad will not be accepted. The French registrar would surely refuse to register a foreign birth certificate with two fathers as legal parents, as this does not reflect the "reality" under French law. This may of course be seen as a discrimination prohibited under the ECvHR pursuant to articles 8 and 14.

**61.** Many issues will therefore still need to be resolved in order to clarify and strengthen the international recognition of personal status from the specific point of view of the French legal order and by relying on the significant and progressive influence of European law.

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[207] CJEU, 2 December 1997, *Dafeki*, C-336/94.

[208] CJEU, 14 December 2021, *Pancharevo,* C-490/20, op. cit. (operative part).

[209] L. Pailler, À propos de l'article 7 de la loi n° 2021-1017 du 2 août 2021 relative à la bioéthique, *op. cit.,* p. 1929.

[210] See also M. Cresp, "La co-maternité en droit français", *Les Petites Affiches*, 16 April 2018, n° 76, p. 14 ; H. Fulchiron, Pour un *aggiornamento* des règles applicables aux « nouvelles » familles, *Recueil Dalloz*, 2018, p. 1083; C. Neirinck, "De la comaternité", *Dr. famille* 2015, repère 3.

[211] Loi n° 2013-404 op. cit., article 6-1 (adoption but exclusion of non-adoptive parentage for same-sex couple) and art. 345-1, 1° of and 360, al. 3, the French Civil Code (adoption by one spouse of the child of the other spouse).

[212] CJEU, 14 December 2021, *Pancharevo,* C-490/20, op. cit.


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