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Civil Status and Civil Registry: Current Trends in Spanish Law

Sofia de Salas Murillo

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CIVIL STATUS AND CIVIL REGISTRY: CURRENT TRENDS IN SPANISH LAW

Sofía de Salas Murillo *

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ABSTRACT

Currently, in Spanish Law, civil status is a concept under discussion in regard to its definition, its content, the enumeration of possible civil statuses, and even its very subsistence as a category. The processing given to civil status in the corresponding Laws of the Civil Registry is especially important as precisely this Registry has the main, although not sole, objective to officially verify the “acts” or “facts concerning the civil status of persons,” although other legal facts, which are not classifiable as such, are also recorded. The interdependence of both concepts means that it

is advisable to have combined treatment of both as regards this theme. The Law 20/2011, of July 21, on the Civil Registry (LCR 2011), has entailed a substantial change of structure and management regarding these matters. Besides, there are several *de facto* situations that can have an entry in the new system which cause the concept of civil status lose its identity, and perhaps, its utility.

I. APPROACH

Civil status is a concept under discussion in regard to its definition, its content, the enumeration of possible civil statuses, and even its very subsistence as a category. This is due to the absence of a legal definition of civil status, aggravated by the diversity of situations it refers to, which makes its delimitation particularly difficult.

In a first approach to the concept, the term *status* refers to the *state*—with legal importance—of persons in society, or, in other words, to their legal *situation* in society. In fact, the concept has its origin in the *status* of Roman Law, or position in which each person stood in society, depending on whether he was free, a freedman or a slave (which marked his *status libertatis*), or whether he was a Roman citizen, a foreigner or Latin (*status civitatis*), or whether he was *alieni iuris* or *sui iuris* (which describes his situation in the family, determining the *status familiae*). In this regard, there is a well-known Roman aphorism *persona est homo statu civili praeditus*.

The idea of *status* has continued throughout the centuries, adapting to the changes which have affected, among other areas, freedom (on the abolition of slavery) or the family (due to the evolution of the content of parental authority, which ceases to be understood as subjugation to the father). As well as freedom, citizenship and family, throughout the centuries, other parameters were used at different times and also marked a *status*, such as sex, religion or whether or not one is a member of the nobility.

However, neither the Spanish Civil Code of 1889 (*Código Civil*, hereinafter C.C.) nor any law in our system defines the concept of civil status, nor do they include an enumeration of civil statuses although they refer to the term in several norms, even assigning certain legal consequences to them, which compose a certain common system.

Thus, we find the term *civil status* in several bodies of law:

a) In article 39 of the Spanish Constitution, on referring to the equality of mothers under the law “regardless of their civil status,” identifying it, in this case, with the vulgar meaning of civil status, with reference to marriage according to which it is possible to have the civil status of a single or married person, a widow or widower, separated or divorced person.

b) Article 9.1 C.C. states the norm of Private International Law, which stipulates that the personal law of natural persons—which is determined by nationality—“capacity and civil status” will prevail; article 244.4 C.C., which prevents a person who carried out “actions regarding civil status” with the minor or disabled person from being a guardian; articles 325 to 332 C.C., concerning the Civil Status Register (currently repealed by the Law on the Civil Registry of 2011¹), order that the “acts concerning civil status” are registered in the Register kept for this purpose; and article 1814 C.C., which stipulates that it is not possible to compromise on “the civil status of persons.”

c) The Law on Civil Procedure of 2000 (LCP),² which stipulates that in the “rulings on civil status . . . *res iudicata* will have effects as regards all as from the registration or annotation in the Civil Registry” (article 222.3.II LCP, and in article 525.1, according to which “In no case will they be susceptible to

1. Law 20/2011 of July 21, on the Civil Registry [hereinafter LCR 2011] of July 21, B.O.E. n. 175, Jul. 22, 2011.

2. Law 1/2000 of January 7, on Civil Procedure [hereinafter LCP], B.O.E. n. 7, Jan. 8, 2000.

provisional execution: 1. The rulings issued in proceedings on . . . civil status”)

d) The Criminal Code³ classifies the offence of usurpation of civil status (article 401).

e) In the international area, although there are systems of other countries which have dispensed with the concept, reference can be made to several international conventions, particularly the work of the International Commission on Civil Status (I.C.C.S.), an intergovernmental organization, of which Spain is a member, created in 1948 in order to foster international cooperation in this regard, with special importance, inter alia, in the notarial area. The United Nations also continues to take it into account for the purposes of the *World Programme of the United Nations in Order to Improve Vital Statistics*, approved by the Economic and Social Council through Resolution 1307/1968, and for the *International Programme for Accelerating and Improving the Vital Statistics and Civil Registration Systems*, of 1991. In addition, in the European area, the Green Paper of the European Commission⁴ is notable, with the title “Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status.”

Beyond mere terminology, the processing given to civil status in the corresponding Laws of the Civil Registry is especially important as precisely this Registry has the main, although not sole, objective to officially verify the “acts” or “facts concerning the civil status of persons” (article 1 of the provisional Law of the Civil Registry of 1870,⁵ article 1 Law of the Civil Registry 1957,⁶

3. L.O. 10/1995 of November 23, on the Criminal Code, B.O.E. n.281, Nov. 24, 1995.

4. COM (2010) 747 final.

5. Civil Registry Act of June 17, 1870.

6. Law of June 8, on Civil Registry [hereinafter LCR 1957], B.O.E. n. 151, Jun. 10, 1957.

and in similar terms, article 2.2 LCR 2011⁷), with multiple references to the term throughout their respective articles.

Civil status is recorded in the Civil Registry (we must remember, the Civil Code eloquently called this the *Civil Status Registry*) although in the Civil Registry, other legal facts are recorded which are not classifiable as such. The interdependence of both concepts means that it is advisable to have combined treatment of both with regards to the theme of this treatise.

II. CONCEPTS OF CIVIL STATUS AND CIVIL REGISTRY

A. *The Concept of Civil Status*

From the perspective mentioned, we can consider that *civil status* is a legal concept which includes personal situations, with a certain stability and permanence, evaluated by the legislator as relevant, and, due to this, with the same legal system.

1. *The Same Legal System?*

In fact, this intended common system of civil status is reduced to two aspects, which, as we shall see throughout this theme, are not treated uniformly, which casts doubt on the continuance of the category.

These two aspects, simply stated, are as follows:

a) the *state actions*, which is the generic manner which doctrine uses to refer to judicial actions in order to assert civil status, either by declaring those already existing (declaratory actions), or by modifying them precisely by the ruling resulting from this action (as occurs with disability, where the ruling would have constitutive value); in fact, the procedural aspects are those which, in a fashion, have imposed the notion of civil status on the

7. *Supra* note 1.

legislator and on doctrine so that the theory of civil status started as a theory of *state actions*,⁸ and

b) the peculiarities of the proof of civil status, marked by the evidentiary privilege which is attributed to the resources provided by the Civil Registry, will be seen in the terms below.

It is not possible to speak of a common system regarding the acquisition and loss of civil statuses as some of these are attributed due to the existence of one or several legal facts (e.g., in the case of Spanish nationality acquired by *ius sanguinis*, due to the fact of being born to a Spanish progenitor); others are judicial creations (e.g., the judicial modification of the capacity to act can only be done by a ruling, which is of a constitutive nature); others are the result of a declaration of the will of the persons concerned (e.g., marriage or the recognition of a child out of wedlock), etc.

2. The Influence on the Capacity of the Person to Act does not Form Part of the Concept of Civil Status

From the definition of civil status as explained above, it can be deduced that unlike in previous epochs, currently it is not a common characteristic of civil statuses to affect the *capacity to act*.

The classical definition of civil status by Federico de Castro, as the “legal quality of the person due to his special situation (and consequent condition as member) in a legal organization, and, as such, this characterizes his capacity to act and the environment of his power and responsibility”,⁹ according to the historical records and the legal provisions in force at the time, this supposes that civil status determined the capacity of a person to act. At that time, for example, the situations of husband and wife determined their capacity in regard to the matrimonial economic system,

8. JOSÉ LUIS LACRUZ BERDEJO ET AL., I-2 ELEMENTOS DE DERECHO CIVIL 25 (6th ed., Dykinson 2010).

9. FEDERICO DE CASTRO Y BRAVO, 2 DERECHO CIVIL DE ESPAÑA 70 (Civitas 1949; rev. ed., 1984).

specifically restricting the capacity of the wife to act, even regarding her own exclusive goods.

At the present time, and especially after Law 11/1981, of May 13,¹⁰ on the modification of Civil Code regarding filiation, paternal authority and the economic system of the marriage, the unity of the concept “does not lie in its influence on the capacity to act but in its defining value of the basic legal situation of the person in society, besides and beyond the sole aspect of his capacity.”¹¹

Indeed, some civil statuses influence the capacity to act, such as those derived from age or the possible legal modification of this (i.e., disability); however, others, such as marriage or filiation, do not affect this capacity at the present time.

B. Concept of Civil Registry

As has been said, it is advisable to mention the concept of Civil Registry in these initial sections, among other things, because the question of the enumeration of civil statuses has to be connected with the list of facts and acts which can be registered in the Civil Registry, the terms of which will be given below.

The Civil Registry is the instrument for the verification and publicity of the legal facts, and acts regarding the civil status of persons, and of those others which do not refer to civil status, are determined by the law.

Registration is currently regulated by Law 20/2011, of July 21, on the Civil Registry (LCR 2011),¹² which entailed a substantial change of structure and management with regard to the system of the previous Law (Law of the Civil Registry of June 8, 1957, LCR 1957¹³), in force until the entry into force of the LCR 2011, which took place three years after its publication in the official register

10. B.O.E. n. 119, May 19, 1981.

11. ANTONIO GORDILLO CAÑAS, *CAPACIDAD, INCAPACIDADES Y ESTABILIDAD DE LOS CONTRATOS* 56 (Tecnos ed., 1986).

12. *Supra* note 1.

13. *Supra* note 6.

(*Boletín Oficial del Estado*), therefore, on July 22, 2014. The LCR 2011 would be reformed through the Draft Bill of the Law on the Integral Reform of Registries (LRIR), by virtue of which and in regards to the Civil Registry, would also be assumed by the Property Registrars.

With the LCR 2011, changes were made:

1) From a Registry controlled by Judges to a Registry controlled by *specialized civil servants* (Property Registrars, according to the aforementioned project).

2) From a register of *facts*, which were registered in the respective sections of the Registry (1st: Births and General, 2nd: Marriages, 3rd: Deaths, 4th: Guardianships and Legal Representations), which made it necessary to have a complex system of internal cross-references between the books of the four existing sections, changing to a system in which these sections disappear, as this was a register of *persons*. The Law of the Civil Registry establishes an individual registration system based on a *single personal file* which shows the civil record of each person from birth, and the registration will be assigned a Personal Code, which will serve for all the processing which the person needs to carry out with the Civil Registry. Most of this processing can be made electronically. In any case, in the new system, Public Administrations will have access to the registration information required for the exercise of their functions.

3) From a Registry which responded to the concern for the territorial verification of the aforementioned *facts* concerning the persons, and which gave rise to a territorially-dispersed structure, this transformed into a *single electronic registry* for all of Spain, in which the application for registration and the registration itself can be carried out at any of the General Offices of the Civil Registry, regardless of the place in which the facts which can be registered occur.

Although the organization of the LCR 1957, based on the registrations made by Judges and divided into four sections, is

destined to disappear, a long process of the execution of the restructuring is still expected. In addition, the procedures and files initiated prior to the entry into force of the new Law, as well as the questions concerning the books not digitalized (Transitory Provisions 4 and 5 LCR 2011¹⁴), will continue to be regulated by the LCR 1957; thus, it is advisable to know its system and general lines.

The changes made by the LCR 2011 do not affect the function of the institution, which continues to be the *official confirmation*—with the effects and the objectives applicable in each case—*of the facts and acts which refer to the civil status of persons and the others determined by Law*.

This affirmation requires two considerations:

a) In fact, the ultimate purpose of the Registry is the *official confirmation*, thus, its registrations have a confirmation or *declarative* value. However, precisely due to their *official* nature, this makes it possible to have a means of quickly and simply proving civil status, and they constitute a title of legitimation of the exercise of the rights which result from each condition or specific civil status of the person in the form shown in the entries of the Registry.

In other cases, the Registry serves for more than just confirming or declaring facts, as is necessary in order to constitute a new civil status: in these cases, registration has *constitutive* value. This will be dealt with below.

b) Until a short time ago, although the Civil Code has continued to refer to the “Civil Status Civil Registry”),¹⁵ for a long time, this Registry has included personal data and circumstances other than those included in the concept of *civil status*. The design of the new Civil Registry stipulates an area of application even more extensive than that stipulated by the LCR 1957, regarding

14. *Supra* note 1.

15. *See* arts. 325 to 332 C.C., derogated by the LCR 2011.

facts and acts which can be registered, which distances it from the strict limits of the traditional civil status, as we shall see.

III. ENUMERATION OF CIVIL STATUSES

There is no unanimity as regards which facts or situations must be considered to be civil status and which are not, since, as was stated above, there is no legal enumeration; thus, some authors restrict civil statuses to those derived from the permanent social links of citizenship or of a regional nature and family situations.

The Laws of the Civil Registry (of 1957 and 2011) have lists of facts and acts which can be registered and which can be considered as possible enumerations of civil statuses, but the headings of the articles recognize that not everything contained therein are civil statuses: as was stated, *all those which exist are there* because if they are considered to be civil statuses they must appear in this list due to the finality of the Civil Registry—precisely, the official confirmation of civil status—but *not all are there* because there are simple legal facts which are not civil statuses. This was already stated in article 1 LCR 1957,¹⁶ but it is even clearer in the LCR 2011: “The Civil Registry is intended to officially confirm the facts and acts which refer to the civil status of persons and the others determined by this Law.”¹⁷ Article 4 adds that:

Access to the Civil Registry is possible for the facts and acts referring to identity, civil status and other circumstances of the person. Therefore, the following can be registered:

1. Births.
2. Filiation.
3. Name and surnames and their changes.
4. Sex and change of sex.
5. Nationality and place of residence.
6. Emancipation and the benefit of legal age.
7. Marriage. Separation, annulment and divorce.
8. The legal or agreed matrimonial regime.
9. Paternal – filial relations and their modifications.
10. The legal modification of the capacity of persons, as well as that which derives from insolvency proceedings of natural

16. *Supra* note 6.

17. Article 2.2 LCR 2011, *supra* note 1.

persons. 11. Guardianship, and other legal representations and their modifications. 12. The acts related to the constitution and regime of the protected private assets of disabled persons. 13. Self-defence and preventive powers of attorney. 14. Declarations of absence and demise. 15. Death.¹⁸

Considering all of these, the following civil statuses related to those above are considered to be the following:

1) Marriage, depending on the whether the civil status is single, married, widower, widow, divorced or separated.

2) Filiation, in wedlock, out of wedlock or by adoption, so that the person is a son, daughter, father or mother.

3) Nationality (Spanish or alien).

4) Civil residence (the residence of common law, Aragon, Catalonia, etc.).

5) Age, by virtue of which, a person is a minor, of legal age or an emancipated minor.

6) The judicial modification of the capacity to act which can determine the civil status of the disabled person (now called a person with judicially modified capacity), and in the environment of State legislation, that of prodigal.

As can be deduced from the heading of article 4 of the LCR 2011, some items mentioned are not civil statuses, but refer to *identity* (No. 3 should be noted here), others are *circumstances of the person* which determine his very existence (Nos. 1, 15), or the regime of their goods in the event that they are married (No. 8), or of their legal guardianship if their capacity has been judicially modified (No. 11), or the recourse to certain mechanisms offered by legislation when there is a disability, which does not necessarily entail that the capacity to act is affected (Nos. 12 and 13).

There is no unanimity with regard to the quality of civil status of sex (No. 4), of prodigality, of the declaration of insolvency, and even disability (the three are related to No. 10), and declared

18. *Supra* note 1.

absence (No. 14). We will return to these questionable civil statuses below as it is advisable to first examine those concerning the possible legal characters and regimes of civil statuses.

IV. CHARACTERISTICS OF CIVIL STATUSES

Despite the difficulty involved in establishing clear criteria on what is and what is not civil status, we should mention some common features of these:

1) *Personal* character, in the sense that civil status is united to and classifies the person. Due to this, this is noted in the Civil Registry in the margin of the birth registration of each person (LCR 1957), or in the current system (LCR 2011) on the individual sheet or registration.

This personal character means that:

a) Every person has one or other status classification (he is Spanish, alien or stateless; emancipated or not emancipated, etc.) and the person has several compatible statuses (he is Spanish, with civil residence in Aragon, emancipated, married, etc.).

b) This immediately affects personality; therefore, it is of a personal nature and deserves protection similar to the person. In fact, de Castro stated that although civil status is not a “legal right”, it is a “personal legal situation” and an attack against it or ignorance of it are illicit so that, if either of these economically or morally cause damage, they must be compensated by the person causing the damage through article 1902 C.C.¹⁹ It must be added that subsequent to the work of Federico de Castro, the Criminal Code of 1973 classified offences against the civil status of persons in articles 468 et seq.,²⁰ referring to the supposition of birth and the substitution of babies, the usurpation of, and the holding of illegal marriages. Current regulation, the result of the reform carried out

19. DE CASTRO Y BRAVO, *supra* note 9, at 72.

20. Decree 3096/1973 of September 14, publishing the Criminal Code, B.O.E. n. 297, Dec. 12, 1973.

in 1995, only maintains the offence of usurpation of civil status;²¹ however, it introduces a Part on the *offences against family relationships*²² in which neither the concept nor the term civil status are used.

c) Civil status has a very personal character in the sense that: 1) civil statuses do not form part of inheritance and, therefore, they are not transmitted *iure successionis* to the heirs, without prejudice to the fact that, in specific cases, the law attributes the possibility for the heirs of a person concerned to once the person has died; and 2) that the creditors could not exercise these rights by subrogation (article 1111 C.C.), e.g., claiming the paternity of their debtor in order to try to more easily recover what is owed to them.

d) The personal character is compatible with each civil status having consequences regarding estates: e.g., the recognition of a minor entails the obligation of the father to feed him, the minor becomes his heir to the legitimate part of the estate, etc. These consequences concerning estate do not have the same characteristics of civil status, and, consequently, can, for example, be the subject of a transaction (Ruling of the Supreme Court of October 13, 1966).²³

2) The character of *public order* as the condition of the person is of interest to the very structure of the community, insofar as it indicates the person's position and legal meaning. This feature determines that the norms regulating civil status are of a compulsory nature, transaction is not possible (article 1814 C.C.) nor is submittal to arbitration (article 2 of Law 60/2003).²⁴ Generally, it is possible to speak of the unavailability of content, which is not incompatible with a certain degree of freedom of action with regard to some of the facts determining civil status.²⁵ It

21. *Supra* note 3, at art. 401.

22. *Supra* note 3, at Tit. 12.

23. S.T.S., Oct. 13, 1966 (Roj. 972/1966).

24. B.O.E. n. 309, Dec. 26, 2003.

25. Juan Roca Guillamón, *Comentario al artículo 2* in COMENTARIOS A LA LEY DEL REGISTRO CIVIL 100 (Thomson-Reuters-Aranzadi ed., 2012).

also justifies the need for the intervention of the Prosecutor's office in the proceedings concerning civil status (article 3.6 of the Organic Statute of the Prosecutor's Office, according to which it corresponds to the Prosecutor's office "To take part in proceedings concerning civil status in defence of legality and the public or social interest"²⁶), as well as the very system pre-constituting an official proof of civil status provided by the registration in the Civil Registry, as we shall have occasion to see.

3) *General* character which determines the efficacy *erga omnes*, to the extent that it has to be respected by all, and its guardianship remains under the protection of the State, which supposes that if one is married or emancipated, this is with regard to all and not only some. Another point is that for determined purposes, this *erga omnes* character makes it depend on the registration of the ruling which determines this status in the Civil Registry.

4) Other authors add, as a consequence of the character of public order, the note regarding *security, stability and a certain permanence* of civil status, which does not mean that civil status cannot be modified, but it is subject to certain formalities or guarantees, such as declarations made before the competent civil servant or before a judge, etc. (articles 20, 73.3, 120, 317 C.C.).²⁷

Furthermore, although one's civil status can be modified within certain limits, the civil status of another cannot be changed as it is considered that civil status is inherent to the person; only in determined circumstances is this allowed. For example, the legal representative of a minor or disabled person can choose a determined nationality for the minor or disabled person (article 20 C.C.), and, precisely due to the character we are examining, only with special precautions and guarantees, such as judicial approval.

26. Law 50/1981 of December 30, B.O.E. n. 11, Jan. 13, 1982.

27. M^a ÁNGELES PARRA LUCÁN ET AL., CURSO DE DERECHO CIVIL I: DERECHO PRIVADO. DERECHO DE LA PERSONA, 392 (4th ed., Colex 2011).

With arguable criteria, which led to debate, the Courts have also permitted that, on behalf of the disabled person, the legal representative can exercise the action of separation (Ruling of the Constitutional Court 311/2000, of December 18) and even the action of divorce (ruling of the Supreme Court of September 21, 2011²⁸). From the promulgation of Law 15/2005, of July 8,²⁹ the exercise of neither of these actions requires the allegation of causes. This exercise of action entails the automatic change civil status; in this case, it is supposed that the precautions of judicial approval, etc., are included within the marriage proceedings.

V. CHARACTERISTICS OR PRINCIPLES WHICH REGULATE THE CIVIL REGISTRY

At the beginning of this theme, mention was made that the common legal system of civil statuses is that which refers to the actions of status and the proof. In both cases, the Civil Registry has a fundamental role so that, in order to correctly classify this system, it is necessary to have a general view of the *principles* which inspire the functioning of the Civil Registry, extracted from the LCR 1957 and the Regulations of the Civil Registry of 1958 (RCR 1958)³⁰ temporarily in force, and expressly formulated in the LCR 2011.

A. *The Principle of Legality*

Applied to the Civil Registry, the principle of *legality* is shown in the classification powers attributed to the person responsible for the Civil Registry; until now, this was a Judge and in the new Civil Registry, a “qualified civil servant”, who, according to the Draft Bill of the Law on the Integral Reform of the Registries, will be a property registrar.

28. S.T.S., Sep. 21, 2001 (Roj. 5855/2011).

29. Law 15/2005 of July 8, B.O.E. n. 163, Jul. 9, 2005.

30. Decree of November 14 on the Regulation of the Civil Registry [hereinafter RCR 1958], B.O.E. n. 296, Dec. 11, 1958.

In fact, the LCR 2011 does not mention *classification* but *verification* and *examination* (article 13) and of *control of legality* (articles 30 to 32), although this may be considered *classification* in the sense of “activity of an eminently legal nature, . . . which consists of a judgment of value, an appreciation of the factual circumstances, carried out with the objective of adopting the decision to register, not register or suspend the registration.”³¹

Thus, article 13 of the LCR 2011 stipulates that: “Those responsible for the Civil Registry will ex officio verify the reality and legality of the facts and acts whose registration is intended as results from the documents which accredit and certify these, in any case, examining the legality and precision of these documents.”

This question is developed in a specific chapter, dedicated to the *control of legality* (articles 30 to 32 of the LCR 2011), which entails, as was done by the previous legislation, the “legality of the extrinsic forms of the document,” but also the “*validity of the acts and the reality of the facts contained therein*” (article 30.2.I). In the same chapter, it is stipulated that, in the examination of the applications for registration and declarations, “the identity and capacity of the applicants or declarers will be verified and, if applicable the authenticity of the signature will be checked” (article 31).

This control is preceded or accompanied by the duty to care for the concordance of the Registry and extra-registry reality which is also imposed on the person responsible for the Registry (article 16.1 LCR 2011, including the *Presumption of precision*, which we will deal with below). In this regard, as explained by the Prosecutors’ Council: “The need to ensure the concordance of the registration expression of the facts of civil status which could be registered and the reality of these facts required that any fact which could be registered was registered; that the registration expression of the fact was a true reflection of this fact and, that only legally

31. Consejo Fiscal, *Informe sobre el Anteproyecto de la Ley del Registro Civil 2011* at 31-32 (<http://www.fiscal.es>).

efficacious were registered through formally correct entries. This was determined by the triple requirement of integrity, reality and legality of the Civil Registry which transcends all registration legislation.”³²

B. The Principle of Official Nature and Obligatory Registration

Article 14 of the LCR 2011 includes the principle of official nature and provides that:

Those responsible for the Civil Registry must make the due registration when they have the required certificates. The natural and legal persons and the organisms and public institutions which are obliged to foster registrations will facilitate those responsible for the Civil Registry with the data and information required to carry these out.

If the registration legislation of 1957 and 2011 imposes carrying out this activity *ex officio* on the person responsible for the Civil Registry, the procedural legislation imposes a concordant and complementary task on the judges of civil law who issue rulings which can be registered. Thus, the LCP imposes the *ex officio* communication of the rulings of the Civil Registries:

When applicable, the rulings and other resolutions issued in the proceedings referred to in this Part will be communicated *ex officio* to the Civil Registries in order to make the corresponding entries. On request, these will also be communicated to any other public registry for the purposes applicable in each case.³³

Despite the fact that that the initial expression may lead to understanding something else, this article imposes the obligation to communicate the rulings and proceedings which might be relevant for the registrations contained therein to the Civil Registry, and

32. Consejo Fiscal, *supra* note 31, at 26.

33. Article 755 LCP 2000, *supra* note 2.

this is to be done immediately once the resolution which must be registered has been issued and published.³⁴

This principle of an official nature, which we have just described, is the only one which openly contrasts with the principle of the Property Registry, where the principles of rogation and voluntariness of registration govern, except in regards to the goods and rights of the Public Administrations, regardless of whether these are of the public sector or estate, with regard to those stipulated in the obligatory registration, as per article 36.1 of Law 33/2003, of November 3, on the Assets of the Public Administrations.³⁵

Moreover, the point of view imposed by the new law should not be ignored as it recognizes the “right of registration” of the facts and acts which refer to identity, civil status and other personal conditions which the law stipulates (article 11.b LCR 2011), complemented by the right “to foster the registration of determined facts and acts intended for the protection of minors, persons with judicially modified capacity, persons with disabilities and elderly persons” (article 11.i LCR 2011), understanding that, in many cases, it will not be the persons referred to who take care of the effectiveness of their right to registration.

C. The Principle of the Registry’s Publicity

The registration or recording of the *facts and legal acts* related to the lives of persons in the Civil Registry is intended to provide publicity of the same.

In this regard, the finalities which the Civil Registry achieves require that the registration be public, that is to say, that its content be accessible or knowable by all those which the legal system considers to be the holders of a legitimate interest.

34. JULIO BANACLOCHE PALAO, *COMENTARIOS A LA LEY DE ENJUICIAMIENTO CIVIL 1273-1274* (Civitas ed., 2001).

35. B.O.E. n. 264, Nov. 4, 2003.

1. Legitimized Access to the Data Contained in the Civil Registry

a. Access to the Data

Legitimate interest exists, by definition, in the data itself. Thus, article 15 LCR 2011 designs a *principle of the Registry's publicity* stressing its aspect as the right of the citizen in regard to his data: "1. The citizens will have free access to the data which appears in their individual registrations." This is also designed as one of the subjective rights recognized by the Law: "The right to access the information requested regarding the content of the Registry, with the limitations stipulated in the present Law" (article 11.c)

b. Access of the Public Administration in Order to Carry Out their Functions

After the reference to the right to access one's own data, article 15 LCR 2011 states that, "2. The Civil Registry is public. The Administrations and civil servants can access the data contained in the Civil Registry in order to carry out their functions under their own responsibility."

Access is facilitated in article 8.2 of this law, through the use of electronic means:

In the exercise of their competencies and under their own responsibility, all the Administrations and civil servants will have access to the data which is recorded in the single Civil Registry with the exceptions related to the specially protected data stipulated in this Law. This access will also be made through electronic procedures with the requisites and technical prescriptions established within the National Interoperability Scheme and the National Security Scheme.

It seems to be necessary to establish some type of control or requisite to be complied with by the civil servants who intend to access the information contained in the Civil Registry, delimiting the very wide content of the indeterminate legal concept "carrying out their functions." Of course, the information of the private persons which the Public Administration gathers for the aforementioned *carrying out of their functions* cannot be made

public indiscriminately. The idea could be expressed that all those who require this information—the Notary to authorize a document, the Registrar to register it, the Procurator’s office in order to carry out the work entrusted to it involving checking and monitoring, etc.—may have all the information, both quickly and simply, but only those who really need it for the protection of a person with a disability, or for their own interest if this is related to the information, may have it. The mention that the action of civil servants in this regard is carried out “under their responsibility” (articles 8.2 and 15.2 LCR 2011) lays the bases for control of possible excesses in this regard, but *a posteriori*.

c. Access to the Data of Others by Private Persons

If the data is the person’s own data, we have seen that article 15.1 LCR 2011 proclaims the free access to this data by the holder. Logically, the system changes if the data is of another person. In this case, article 15.3 of the LCR 2011 provides that, “Registration information may also be obtained through the publication resources stipulated in articles 80 et seq. of this Law when they refer to a person other than the applicant on condition that the identity of the applicant appears and there is a legitimate interest.”

In this case, the knowledge of the data by private persons requires a reasonable justification, and not mere curiosity or the indiscriminate publication of information which is of no interest to the public. For this reason, there exists a *legitimate interest*.

In this case, the question is not only to delimit this indeterminate concept of *legitimate interest*, but to determine who is to accredit this.

In the system provisionally in force (although it is true that it is a precept at regulation level), there is a presumption that: “The interest in knowing the entries is presumed for whoever requests the certification.”³⁶

36. Article 17.II RCR 1958, *supra* note 30.

There continues to be data especially protected based on the constitutional right to personal and family privacy, which will be subjected to the system of restricted access (articles 15.4, 83 and 84 LCR 2011), which are adoption or unknown filiation, rectification of sex, marriage in secret, the reasons for the deprivation or suspension of parental authority, the changes of surnames authorized when the applicant concerned is the victim of gender violence, or other legally authorized changes of identity. In these cases, there are no restrictions if the person concerned applies for this. The LCR 2011 also expressly recognizes “the right to privacy in relation to specially protected data subjected to the system of restricted publicity” (article 11.e).

2. Formal and Material Aspects of the Registry’s Publicity

In this context, the concept of publicity, as it has been consolidated in mortgage legislation, includes *formal and material publicity*. This is transferable to the area of the Civil Registry, with the necessary due adaptations.

a. The Principle of Formal Publicity

The LCR 2011 includes two formal publication instruments:

- 1) Electronic certification (although it may be issued exceptionally by non-electronic means), and
- 2) Access to the registration information by the Administration when it acts in the exercise of its functions and under its responsibility (articles 80 to 82 of the LCR 2011).

Furthermore, the latter is conceived “as the preferential instrument of publication so that, only in exceptional cases, must the citizen submit certifications of data of the Civil Registry” (Preliminary Recitals IV LCR 2011), which, as can be appreciated, entails a change of conception of the formal publicity. It is not the person concerned who has the burden of proof of the facts of the civil status, thus obtaining the evidence of the Civil Registry, but it is the Administration which must and may directly access the data.

b. The Principle of Material Publicity

The most characteristic principle of Registry's publicity, as explained by Lacruz Berdejo when referring to the mortgage principles, is that which refers to the effects of the registration and:

[I]s in turn traditionally broken down into another two principles: one, of *legitimation*, which states the exactness of the Registry to the benefit of the holder registered unless there is evidence otherwise. The other is that of *public witnessing or publicity in the strict sense*, in favour of the acquirer in good faith.

In the words of Jerónimo González:

Once the principle of publicity is focused from this substantive or substantial point of view, it has two aspects, one positive and the other negative, depending on the truth of the registration declarations or their irreproachability. That is to say, the registration is exact as it corresponds to the full, legal reality, as it is complete. What is registered is *real*, and there is nothing beyond the registration of this nature.³⁷

Now an analysis must be made whether such principles and presumptions govern the functioning of the Civil Registry in general. To do this, we will start from the distinction made by the doctrine of *positive value* and *negative value* of the Civil Registry. As regards the *positive value* applied to the registration, mention must be made of its usefulness as a means of proof, as certification of legitimation and constitutive certification, and as regards the *negative value*, this brings up whether the absence of registration can give rise to a special protection of the third parties who ignore the change of civil status, which has occurred in reality and is not yet registered.

37. Both quotations (LACRUZ BERDEJO and JERÓNIMO GONZÁLEZ) in JOSÉ LUIS LACRUZ BERDEJO ET AL., III BIS ELEMENTOS DE DERECHO CIVIL, DERECHO INMOBILIARIO REGISTRAL 41-42 (2d ed., Dykinson 2003).

D. Presumption of Exactness and Positive Value of the Registration as a Means of Proof and Certification of Legitimation

1. Presumption of Exactness

Regarding the Property Registry, based on article 38 of the Mortgage Law,³⁸ it has been said that if it is presumed that the content of the Register is exact, the registration holder is legitimized, as holder, to act in the development and in the process (Lacruz Berdejo).³⁹

Likewise, although not in an identical manner, in the case of the Civil Registry, the LCR 2011 starts from a *presumption of exactness*, which brings to mind the stipulations in article 38 of the Mortgage Law: “It is presumed that the facts registered exist and the acts are valid and exact while the corresponding entry is not rectified or cancelled in the form stipulated in law” (article 16.2 LCR 2011).

This presumption is a consequence of the compliance with the obligation which the person responsible for the Civil Registry has in order to care for the concordance between the data registered in the Registry and the reality beyond the Registry (article 16.1). In order to ensure the continuity of this concordance and the exactness, “When the acts and facts registered in the Civil Registry are challenged, the rectification of the corresponding entry must be sought” (article 16.3).

2. Positive Value of the Registration as a Means of Proof

As a result of this presumed exactness and the concordance of what is registered and what is real, the registration has the character of “full proof of the facts registered” (article 17.1 LCR 2011). We will analyse this question more thoroughly as regards the proof of civil status.

38. Decree of February 8, on the official Mortgage Law, B.O.E. n. 57, Feb. 27, 1946.

39. LACRUZ BERDEJO ET AL., *supra* note 37.

3. Positive Value of the Registration as Certification of Legitimation

If the content of the Register is exact, the holder of the registration is *legitimized*, as such, in order to act in the transfer and in the process in accordance with its content; therefore, the registration also functions as *certification of legitimation*.

The Civil Registry is the certification of legitimation *par excellence* of civil status. The registration institution is conceived so that whoever exhibits the corresponding certification or certifications does not have to do anything else: he will be a legitimate, illegitimate or adoptive child, his marriage will be valid, etc. and whoever opposes the consequences of each of these statuses will assume the burden of proof to demonstrate the invalidity or non-existence of the respective certification of attribution. Thus, the principle of legitimation included in articles 1 and 38 of the Mortgage Law for the Property Registry may be transferred to the area of the Civil Registry by stating that the registrations of the Civil Registry are under the protection of the courts. These take effect while their inexactness is not declared by the means established in the Law so, that for all legal purposes, it is presumed that the facts registered exist and belong to their holder in the form determined by the respective entry. The presumption of reality and legality of the fact registered is *iuris tantum* so that the dispensation of proof for the holder and the consequent *onus probandi* for the opponent contributes to facilitating the legal process.⁴⁰

It must be added, in general, that the registrations and their respective certifications have the character of a public document for the appropriate effects (article 7 LCR 1957), as whoever issues them—“The Person Responsible and, by delegation, the Secretary” (article 17 RCR 1958)—who is “a competent public employee

40. Jesús Díez del Corral Rivas, *Comentario a los artículos 1 a 8 Ley del Registro Civil* in IV-2 COMENTARIOS AL CÓDIGO CIVIL Y COMPILACIONES FORALES 35-36 (Edersa 1996).

with the formalities established by the law” (article 1216 C.C.), and “civil servants legally empowered to bear witness in the exercise of his functions” (article 317.5 LCP). Classifiable as public administrative documents are those which give proof as regards third parties or *inter partes*, in the terms and conditions stated in article 1218 C.C.⁴¹

E. Presumption of Integrity and Negative Value of the Registry: Ineffectiveness of What is not Registered

In the mortgage area, the presumption of integrity of the Property Registry is deduced from the content of article 32 of the Mortgage Law, in relation to articles 13, 29 and 37 of this Law, and from this, it follows that what the Registry does not contain or publish at the time of acquisition is considered non-existent. Consequently, what is not registered does not harm a third party.

In contrast, in the area of the Civil Registry, the principle of integrity is not used for regulation, “nor is it necessary to the extent that the fundamental finality of the registration institution is to achieve a means of proof of status quickly and simply, without discarding the possibility of other means of proof;”⁴² the legislator is aware that the changes of civil status may occur in the reality of extra-registration with full validity and efficacy. That is why the Preliminary Recitals of the LCR 1957 stated that, “The Civil Registry does not have the presumption of integrity and, therefore, does not constitute proof of negative facts.”

Consequently, in the area of the Civil Registry, the principle of ineffectiveness does not play a part either (“what is not registered does not damage third parties”), as this principle is based on the presumption of integrity of the content of the Registry, which occurs in the case of the Property Registry. Although it leaves the question open, we are reminded of this by the 2nd Resolution of the Department of Registries and Notaries of January 28, 2008:

41. Díez del Corral Rivas, *supra* note 40, at 32.

42. Consejo Fiscal, *supra* note 31, at 37.

. . . [T]he determining fact of a specific civil status may have occurred extra-Registry and is not even recorded in the Civil Registry, which does not mean that this is unknown by the person affected or the holder of this specific civil status, regarding whom all the implicit effects take place, but the question is whether this civil status which is not registered may not damage bona fide third parties.

Certainly, no direct answers can be found to the question posed neither in the LCR nor in its Regulations.⁴³

The LCR 2011 surprisingly includes a *presumption of integrity* and a *principle of ineffectiveness*, both in article 19:

1. The content of the Registry is presumed to be complete as regards the facts and acts registered. 2. In the cases legally stipulated, the facts and acts which can be registered in accordance with the prescriptions of this Law will be effective against third parties from the time that they access the Civil Registry.

However, it is immediately appreciated that the mention which article 19 makes of the presumption of integrity is circumscribed exclusively to the facts and acts *registered*, which, in the opinion of the Council of the Judicial Power is not, despite the title of the article, only a reaffirmation that:

. . . [T]he Civil Registry does not have the presumption of integrity and, therefore, this does not constitute a proof of the negative facts As an example, articles 70.4 and 73.2 of the Draft Bill include the legal system stipulated in article 18 [in the LCR 2011, article 19] as regards tacit emancipation or independent life, the authorization of age and the legal measures regarding the custody or administration and regarding surveillance and control of these guardianships.⁴⁴

Integrity of the facts and acts *registered* is, therefore, presumed, rather than those of the Registry as a whole. That is to

43. Ministerio de Justicia, *Resoluciones de la Dirección General de los Registros y del Notariado (Registro Civil)*, *Boletín de Información*, Año LXII, Sup. 2, n. 2074, Dec. 1, 2008, at 339.

44. Consejo General del Poder Judicial, *Informe al Anteproyecto de Ley del Registro Civil 2010*, 35-36 (<http://www.poderjudicial.es/>).

say, it is not that the Registry is presumed to be complete in itself in such a way that what is not registered does not damage third parties, but that what is already registered is presumed to be full and complete. Thus, it does seem clear that the new LCR is not intended to change the state of things by introducing an authentic presumption that the Registry is complete, and, therefore, exhausts the legal reality regarding the facts or acts in its area; if such a presumption existed, the consequence should be that it also serve as proof of negative facts in such a way that what is not registered is not effective against third parties.

What is certain is that, on the one hand, in regard to negative facts, proof is not established, but, only *the declarations with the value of simple presumption* continue to be upheld,⁴⁵ to which we also refer when speaking of proof.

On the other hand, the coherent consequence with a principle of integrity is the effectiveness of what is registered and the ineffectiveness of what is not registered. What the LCR 2011 provides regarding effectiveness or ineffectiveness is that, in the cases in which a law states, with regard to a fact or a specific legal act, if it is not registered it is ineffective; such a legal consequence of substantive legislation is, we should say, “endorsed” by registry legislation. This does not contribute any rules on effectiveness as it is limited to making a dynamic legislative referral and to making, if appropriate, the commencement of the consequence of effectiveness. Not even on this point is the mention useful as it is not clear what “from when they access the Civil Registry”⁴⁶ means since this may refer to the application for or actually the making of the entry. Taking all of this into account, the new law does not seem to contribute much, but can, however, create certain confusion.

Apart from this, if it is said that effectiveness against third parties begins from when they access the facts and acts in the Civil

45. Chapter 3 of Part IX, arts. 92-93 LRC 2011, *supra* note 1.

46. Article 19.2 LCR 2011, *supra* note 1.

Registry; until that time, they are ineffective. However, according to article 19, it is only “In the cases legally stipulated.” But apart from these cases, it seems that the rule continues to be the same: in the Civil Registry, what is not registered (except for the cases of constitutive registration) exists and takes effect in regard to third parties, including bona fide third parties.

VI. LEGAL REGIME OF CIVIL STATUS

Apart from the common characteristics examined, the maintenance of the notion of civil status is of an eminently instrumental nature, insofar as there are common aspects of its practical legal regime.

The first of these concerns the aforementioned actions of status and the second concerns its proof.

A. The Actions of Status—Especially, the Need for the Registration of the Rulings on Civil Status in the Civil Registry so that they May Be of an erga omnes Nature

With regard to civil status, judicial rulings may be involved: e.g., on separation of married couples, or emancipation by judicial concession judicial; some civil statuses are even constituted through rulings—this occurs, for example, with disability. The actions which commence the judicial proceedings that tend to achieve a specific pronouncement on civil status are called *actions of status*.

We have already seen some questions concerning these:

1) in the LCP, they do not receive autonomous treatment, but in connection with the special processes on capacity, filiation, marriage and minors (articles 748 et seq. LCP), which are processes related to determined actions of status;

2) the Prosecutor's office must intervene in these proceedings in defence of legality and the public or social interest (article 3.6 Organic Status of the Prosecutor's Office⁴⁷ and article 749 LCP);

3) in these processes, it is not possible to conduct transactions (article 1814 C.C.) nor, we now add, renounce or accept the same, and desisting is limited to certain cases;

4) the provisional enforcement of these rulings is not possible (article 525 LCP, expressly referring to "civil status").

These are procedural questions, whose in-depth study is not relevant now, but we are going to take time to deal with the specific point of the registration of the rulings in the Civil Registry which are a result of these actions of status

In general, the rulings produce their effects as material matters judged from the time that they are definitive, and from that time, they affect ". . . [T]he parties to the process in which the ruling is issued and their heirs and successors . . ." as provided generally for the material *res iudicata* in article 222.3.I LCP.

However, and as an exception to the general rule, the second and third sub-sections of article 222.3 LCP establish cases of extension of the *res iudicata* to subjects who have not been parties in the previous litigation. Specifically, in the "rulings on civil status, marriage, filiation, paternity, maternity and disability and reintegration of capacity, the *res iudicata* will take effect as regards all as from the registration or annotation in the Civil Registry."⁴⁸

This extension *erga omnes* of the *res iudicata* is based on the idea that nobody can have a civil status in relation to determined persons and lack this as regards others, and it means that:

a) Third parties not legitimated (to exercise the action of status in question) must observe the civil status recognized in the ruling, and

b) Those legitimated are forbidden to initiate a second process on the same question.

47. *Supra* note 26.

48. Article 222.3.I LCP, *supra* note 2.

In fact, article 222.3 LCP does not suppose an absolute novelty as there were already articles which provided for the recording in the Civil Registry of several judicial resolutions on civil status: on the separation of married couples (article 83 C.C.), divorce (article 89 C.C.), filiation (articles 112 et seq. C.C.), disability (the repealed article 214 C.C.) and guardianship (article 218 C.C.). What must be stressed is that “for the first time it is said that it is necessary to have the confirmation of these types of resolutions in the Civil Registry so that the effect of *res iudicata* occurs as regards all.”⁴⁹

Apart from this, could the aforementioned article 222.3 LCP be used to base a possible generic effect of ineffectiveness of what is not registered in the Civil Registry? It seems impossible to speak of a generic principle of ineffectiveness in this sense, and there is no sufficient basis to support the possibility that the third party might take advantage of the intended ineffectiveness in order to prevent the annulment of a legal transaction made with the disabled person, for example, on the day following the date on which the ruling is issued, arguing that it was not registered.

It is revealing that the LCR 2011 does not mention ineffectiveness in the case of registration of the modification of capacity (article 72), but does so, however, in the registration of guardianship and its modifications (article 73.2): “These resolutions will only be effective as regard third parties when the due registrations have been made.” In this final sub-section, this is incorporated and reproduced in the registration legislation; the LCR 1957 did not contain this pronouncement of article 218.II C.C., expressed in positive terms.

The lack of registration of the ruling, especially considering the mandate of 755 LCP, continues to be anomalous or “pathological”

49. Juan José Pretel Serrano, *La publicidad del régimen económico matrimonial. Relaciones entre el Registro Civil y el Registro de la propiedad* in DERECHO DE FAMILIA Y REGISTRO DE LA PROPIEDAD 225 (Centro de Estudios Registrales ed., 2002).

regarding coordination between official organisms: it is supposed that the rulings on disability are automatically communicated to the Civil Registries, and, even more so, with the new systems of entries with electronic format and storage systems

In this regard, in its report, regarding the Draft Bill of the Civil Registry, the Prosecutor's office proposed that "[it is] the obligation that the Court or Tribunal Secretaries who have issued a definitive judicial result of the modification of capacity, is electronically forwarded to the office of the Civil Registry, with the finality that any alteration of the capacity of a person be immediately registered in the Civil Registry."⁵⁰ Article 34 LCR. 2011 has included this suggestion regarding the entries of judicial resolutions and, in general, provides for civil status, that:

The Court Secretary of the organism which has issued a resolution whose resolution must involve an entry in the Civil Registry as it affects the civil status of persons, must be sent by electronic means to the office of the Civil Registry, as testimony of the judicial resolution referred to.⁵¹

B. Proof of Civil Status and Attribution of Legitimation

The second common aspect in the legal regime of civil status concerns the evidence.

Frequently it is necessary to prove that a determined civil status is held or not held. The most characteristic evidence is that provided by the Civil Registry, whose function is, precisely, the *official confirmation, with the effects and the ends in each case of the facts and acts which refer to the civil status* of the persons and those others determined by Law. In fact, registration in the Civil Registry has had and has the character of *privileged* evidence as regards civil status.

50. Consejo Fiscal, *supra* note 31, at 42.

51. Article 34 LCR 2011, *supra* note 1.

1. Registration in the Civil Registry

The character of *privileged proof* which is attributed to the registration in this Registry (traditionally included in 2 to 6 of the LCR 1957), means two things: the first is that it is only permissible to accredit the facts that are possible to register and those registered, and the second is that the content of the Registry is under the custody of the courts so that it may only be rectified by a definitive judicial ruling.⁵² According to de Castro, this is justified by the fact that “this is a question of pre-constituted evidence within the legal period of time and by the legitimated person (before contestation, the affirmation is not suspicious), under the guarantee of criminal sanction and the control of registration classification.”⁵³

The LCR 2011 attempted to draw attention to the doctrine accrued in the years since the LCR. 1957 was in force and confers on the registration the character of “full proof of the facts registered” (article 17.1). Following the traditional tendency on this point, article 18 of this law clarifies that the other possible efficacy of the registration, the constitutive registration, will only occur “in the cases stipulated in law.” That is to say, the registration serves primarily and fundamentally *to prove* the civil status and to prove this with the characteristic of fullness, but it may also serve *to constitute* a new civil status (for example, in the case of the acquisition of nationality).

The classification as *full*, applied to the proof, which did not appear article 2 of the LCR 1957, does not contradict the possibility that the registration is challengeable, but it refers fundamentally to the “legal privilege of evidential exclusivity of civil status” which the Civil Registry has (as stated by , among others, the Resolution of the Department of Registries and Notaries

52. Articles 3-4 LCR 1957, *supra* note 6.

53. DE CASTRO Y BRAVO, *supra* note 9, at 572.

of June 25, 2007⁵⁴), and which has its logical complement in the principle of the judicial safeguard of the registration entries. However, this must take into account that:

1) In the case of inexact or erroneous registration, the judicial challenge is admitted, for which, logically, other means of extra-registration proof can be provided; a challenge which requires the commencement of the rectification of the entry (article 16.3 LCR 2011: “When the acts and facts registered in the Civil Registry are challenged, the rectification of the corresponding entry must be sought”), and

2) In article 17.2 LCR 2011:

In the cases of lack of registration or in which was not possible to certify the entry, other means of proof will be admitted. In the first case, an essential requisite for its admission will be the accreditation that, previous or simultaneously, the registration omitted or the reconstruction of the entry is commenced and not only the mere application.

2. The Annotations and their Informative Value

As opposed to the full proof of registration, there is another type of entry in the Civil Registry, *annotations*, which have simply informative value (article 38 LCR 1957 and article 40 LCR 2011). They lack the efficacy of full and excluding proof which characterizes registration. Thus, the facts and acts informed of in these types of entries may be proved by other means.

3. The Declarations with the Value of Simple Presumption

As we shall see in the corresponding themes, there are determined civil statuses which are only recorded in the Civil Registry insofar as they are acquired as derived, or are the subject of change, etc. Thus, the nationality acquired by *ius sanguinis* and

54. B.O.E. n. 188, Aug. 7, 2007.

maintained throughout time may never be achieved expressly in the Civil Registry.

In cases like these and in general, when these involve civil statuses which are not expressly recorded in the Civil Registry, this does not have the basis to provide the proof which will make the registration possible. Thus, for some time, the Civil Registry governmental records are reviewed and utilized in order *to declare with the value of simple presumption* determined circumstances related to civil status (article 96 LCR 1957), among which are nationality and original residency, the domicile of stateless persons, or any status not recorded in the Registry. These declarations are also taken into account in the LCR 2011 (articles 92 and 93), and are the subject of obligatory annotation, which does not add more value to these than that of stating the existence of this presumption.

Declarations which, as is stated in the Resolution of the Department of Registries and Notaries of January 28, 2008,⁵⁵ “tend to achieve the proof of the negative facts of the civil status,” but do not have the value of proof of the facts and acts registered, but rather of presumption: the possibility that of dispensing with the proof of the presumed fact for the party which this fact favours, with no need to prove “the certainty that the indicative fact the presumption is based on has been established through admission or proof.”⁵⁶ In this case, it comes from a governmental record and this presumptive value is applied to this result.

4. The Possession of Status

The possession of status is the continued appearance of filiation or marriage accepted by all as real, which may also exist in relation to the other civil statuses.⁵⁷

55. *Supra* note 43.

56. Article 385.1 LCP, *supra* note 2.

57. LACRUZ BERDEJO ET AL., *supra* note 8, at 30.

The Supreme Court has stressed that the possession of status is a question of fact, to be freely appreciated by the Courts of First Instance, and the specific circumstances must be taken into account (rulings of the Supreme Court of November 5, 1987 and of February 2, 1999,⁵⁸ among others). Traditionally, the requisites of *nomen, tractatus, fama* are required. For example, if the matter has to do with possession of the civil status of a son, he will have the surnames of the progenitor, they have the normal relationship of father and son, and it is publicly known that they are father and son. The possession of status according to these parameters is evident in repeated acts, carried out continually and in public, and it is not necessary that the acts showing such possession be very numerous nor carried out at all times with full publicity. It must last for a certain time, even when its actual existence at the time it is invoked is not required, and it is sufficient that it be recorded in the recent past (rulings of the Supreme Courts of February 16, 1989; of May 20, 1991, and of November 14, 1992,⁵⁹ among others).

It is not a matter of *acquiring* civil status by continued possession (a type of *usucapio* of civil status) but of *demonstrating* a civil status which exists when there is no registration, it is not known where the registration is (it is not known where the birth or marriage is registered), or its exactness is arguable.

In connection with what has been seen regarding the character of privileged proof of the registration, it is understood that it is only possible to resort to the possession of status as a means of proof in its absence, serving as a basis for completing its omission or to obtain a declaration with the simple value of presumption.

58. S.T.S., Nov. 5, 1987 (Roj. 6988/1987) and S.T.S., Feb. 2, 1999 (Roj. 578/1999).

59. S.T.S., Feb. 16, 1989 (Roj. 1063/1989), S.T.S., May 20, 1991 (Roj. 2554/1991), and S.T.S. Nov. 14, 1992 (Roj. 8458/1992).

In turn, it may also serve as a basis for obtaining the rectification of the Civil Registry if there is a problem of the exactness of the registration.

It is frequently used together with other factors in judicial proceedings in order to obtain a ruling which declares civil status—for example, a declaration of paternity.

Although it is fundamentally used in cases of filiation and marriage, there are also examples of possession of status in legal residence and nationality (Resolutions of the Department of Registries and Notaries of July 3, 1967 and of October 28, 1986⁶⁰).

VII. DOUBTFUL CIVIL STATUS

Having seen the characteristics and judicial regime of civil status, we must now approach the classification as a civil status of some situations which are put forward as doubtful, and which we will deal with under this heading, and the crisis and continuance of the category, which will be dealt with under the final heading.

A. *Sex as Civil Status*

We have seen that one of the registrations mentioned is sex, with its possible change (article 4.4 of the LCR 2011). It must be remembered that, besides its aspect of identity, the condition of male or female has been considered as civil status for a long time precisely because the woman had her capacity to act in some areas conditioned or limited due to being a woman.

The principle of constitutional equality in article 14 *Constitución Española* (CE), focused on the negative and unjustified discrimination due to sex, has been included in several laws which have eliminated such discrimination: in the civil area, the laws of May 13, 1981 and July 7, 1981 and expressly, the Law

60. B.O.E. n. 172, Jul. 20, 1967 and B.O.E. n. 273, Nov. 14, 1986.

of October 15, 1990,⁶¹ in application of the principle of non-discrimination due to sex; with general scope, outstanding is Organic Law 3/2007, of March 22,⁶² for the effective equality of women and men.

Essential legislative differentiations are maintained, for example, in the determination and actions concerning paternity and maternity, due to the different roles of the man and the woman in the conception, gestation and birth. Furthermore, precisely because it is the woman who gestates and gives birth, attending to this circumstance, the Constitution does not stipulate in vain the integral protection of mothers (article 39 CE), with no reference to fathers. In order to adapt reality to the principles of equality, the legislator introduced some affirmative action in favour of the woman, tending to compensate this circumstance in order to achieve real equality. Measures which are the result of the ratification by Spain (in 1983) of the *Convention on the Elimination of all Forms of Discrimination against Women*⁶³ of 1979, which encourages the States to take “special measures of a temporary nature aimed at speeding up de facto equality between men and women,” which has caused our Constitutional Court to consider as constitutional some measures which, apparently, would be discriminatory toward men (rulings of the Constitutional Court of July 16, 1987, of January 24, 1995, and May 14, 2008,⁶⁴ this last one is in relation to Organic Law 1/2004, of December 28,⁶⁵ on the integral protection against gender violence, which considers that the physical, psychical and moral integrity of the woman as member of a couple is insufficiently protected).

61. Law 11/1981, of May 13, B.O.E. n. 119, May 19, 1981; Law 30/1981 of June 7, B.O.E. n. 172, Jul. 20, 1981; and Law 11/1990, of October 15, B.O.E. n. 250, Oct. 18, 1990.

62. B.O.E. n. 71, Mar. 23, 2007.

63. UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, A/RES/34/180 (18 Dec 1979).

64. S.T.C. 126/1987, B.O.E. n. 191, Aug. 11, 1987; S.T.C. 16/1995, B.O.E. n. 50 sup., Feb. 28, 1995; and S.T.C. 59/2008, B.O.E. n. 135 sup., Jun. 4, 2008.

65. B.O.E. n. 313, Dec. 29, 2004.

However, in general terms, it can be said that once the limitation to the capacity of the woman to act due to her sexual condition has disappeared, this condition, or that of the male are not civil statuses as such, but indications of identity.

As such, mentions of identity have traditionally been possible to alter through governmental rectification proceedings in the Civil Registry, in the cases of material error on consigning the sex, and in the cases of physical intersexuality (anatomical conformation which does not correspond to the chromosome conformation), defined subsequently differently from what is consigned in the entry (article 93.2 LCR 1957).

The problem has arisen, not in these cases which we can call *errors*, but in cases of *sex change*, in the cases of trans-sexuality, and, specifically, in regard to the possibility, manner and effects of consigning these sex changes in the Civil Registry. Precisely because it was a transformation with regard to the previous situation, and partly because sex continued to be considered as civil status, in order to consign this change in the Registry, the application of the regime of actions of status was required so that only through a judicial ruling (and not simple registration proceedings) was it possible to obtain this change in the registered identification of sex. Besides this, sex thus transformed was considered to be fictitious, and as such it prevented the application of all the consequences which would result from the new sexual condition. Thus, a female transsexual who at chromosome level is male could not marry a male: in this regard, among others, the Resolutions of the Department of Registries and Notaries, of January 21, 1988, of October 2, 1991, of December 29, 1994, of June 18 and 21, 2001,⁶⁶ and the Rulings of the Supreme Court of July 2, 1987, of July 15, 1988, of March 3, 1989, and of April 19,

66. Resolution of Jan. 21, 1988 (RJ 1988/215); Resolution of Oct. 2, 1991 (RJ 1991/8611); Resolution of Dec. 29, 1994 (RJ 1995/1574); and Resolution of Jun. 18, 2001 (BIMJ 1889-1900) and June 21, 2001 (BIMJ 1901).

1991,⁶⁷ which considered the marriage contracted by a transsexual with a person of the same original sex as null.

However, in two resolutions of 2001 (January 8 and 31),⁶⁸ the Department of Registries and Notaries admitted this possibility on condition that the transsexual had obtained a registration rectification through a judicial ruling, based, among other arguments, on the fact that the pronouncements against the rulings of the Supreme Court which had been *obiter dicta* and did not constitute case law.

The admission by Law 13/2005, of July 1,⁶⁹ of the marriage between persons of the same sex, from the point of view of positive law, eliminates the debate on the question of transsexual marriage.

However, in order to solve the problem of marriage, Law 3/2007, of March 15,⁷⁰ goes much further as it permits registration rectification of the mention of sex in the cases of trans-sexuality with no need for a judicial ruling, once the applicant accredits the following, among other points:

- a) that a gender identity disorder has been diagnosed, with discordance between the morphological sex or physiological gender initially registered and the gender identity felt by the applicant or psychosocial sex, as well as the stability and persistence of this discordance, . . . and b) that the person has been medically treated for, at least, two years in order to accommodate his physical characteristics to the corresponding sex claimed. It is not necessary that the medical treatment included sexual reassignment surgery (article 4.1).

Therefore, governmental proceedings are sufficient if the resolution is effectively positive and it agrees to the rectification of

67. S.T.S., Jul. 2, 1987 (RJ 1987/5045); S.T.S., Jul. 15, 1988 (RJ 1988/5722); S.T.S., Mar. 3, 1989 (RJ 1989/1993); and S.T.S., Apr. 19, 1991 (RJ 1991/2725).

68. Resolution of Jan. 8, 2001 (RJ 2001/2568) and Resolution of Jan. 31, 2001 (RJ 2001/5095).

69. B.O.E. n. 157, Jul. 2, 2005.

70. B.O.E. n. 65, Mar. 16, 2007.

the registration mention of the sex, it will have constitutive effects from the time of its registration in the Civil Registry:

2. The registration rectification will permit the person to exercise all the rights inherent to his new condition. 3. The change of sex and the name agreed will not alter the holding of the rights and legal obligations which might have corresponded to the person previous to the registration of the registration change.⁷¹

Thus, the change of sex differs from other questions such as disability, which, although it is partial and limited to the minimum aspects, requires a judicial ruling; which also: a) if it is upheld, is of a constitutive nature according to the majority of doctrine, and b) it must be registered in the Civil Registry, which is an act of improper execution.

Law 3/2007 is applicable to the cases which were pending resolution such as the Ruling of the Supreme Court of September 17, 2007,⁷² on the fact that a surgical operation is not required; from this ruling, the more than doubtful character of the civil status of the sexual condition can be deduced, in the light of the loss of importance of the condition of man and woman as a judicial situation, and the inapplicability of the of the regime of actions of status in the sense that it is not unavailable, but may undergo registration rectification at the discretion of the person concerned.⁷³

B. Prodigality, the Declaration of Insolvency and Disability

1. Prodigality

The declaration of prodigality limits the capacity of the person to act, and, for this reason, he is subjected to a limited guard system: guardianship (article 286 C.C. and 760.3 LCP). The

71. Articles 5.2 and 5.3, Law 3/2007 of March 15, *supra* note 70.

72. S.T.S., Sep. 17, 2007 (Roj. 5818/2007).

73. See also the ruling of the Supreme Court of July 18, 2008 (Roj. 3962/2008).

prodigal does not suffer limitations in the personal area, and the limitations he suffers in the area of estate are only *inter vivos*. For this reason, insofar as it is a judicial modification of the capacity of the persons, it is possible to consider it to be civil status. However, it is curious that it is not mentioned in the list of either of the two Laws of the Civil Registry (1957 and 2011). At least at the present time, this may be due to the fact that some legislation, in particular, Aragonese legislation which explicitly states that “prodigality will have no other effect than to be the reason for incapacitation when the requisites of the previous section are present” (article 38.3 Code of Local Jurisdiction Law of Aragon⁷⁴), that is to say, when wasting and squandering assets is the result of “persistent illnesses or deficiencies of a physical or psychical nature which prevent the person from governing by himself” (article 38.2 Code of Local Jurisdiction Law of Aragon). If this presupposition does not exist, the capacity to act in the estate area cannot be limited as a measure to protect the interests of others although it can permit the adoption of measures for insurance and obligatory enforcement of family duties: assistance in the marriage, bringing up the children, food among relatives, etc. In fact, according to the third transitory provision of Aragonese Law 13/2006, of December 27, on the Law of the person:

1. From the entry into force of this law, nobody can be declared to be a prodigal.
2. The persons declared to be prodigals on the entry into force of this Law will continue to be regulated by the norms of the previous legislation, but they can judicially apply for the reintegration of their capacity.⁷⁵

74. D.L. 1/2001 of March 11, on the Código del Derecho Foral de Aragón, B.O.E. n. 63, Mar. 29, 2011.

75. Third Transitory Disposition, Law 13/2006 of December 27, B.O.E. n. 23, Jan. 26, 2007.

2. *The Declaration of Insolvency*

Once insolvency is declared in accordance with Law 22/2003, of July 9,⁷⁶ the debtor will have his economic powers modified, in the sense that these are: a) intervened by the insolvency receivers if the insolvency is voluntary, or b) possibly suspended if it is a necessary insolvency, and in this case he will be substituted by the insolvency administration.

Despite the fact that this limitation is registered in the Civil Registry on the sheet or register of the debtor (No. 10: “The judicial modification of the capacity of the persons. . . which derives from the declaration of insolvency of natural persons⁷⁷), the fact that, on the one hand, it is not a stable situation as it may terminate at any time by an agreement between the debtor and his creditors, and, on the other hand, it is intended fundamentally for the benefit of the creditors (which makes it possible to understand that there are no reasons of public order), makes the Supreme Court consider that insolvency is not a civil status (rulings of the Supreme Court of June 30, 1987 and October 14, 2005,⁷⁸ referred to bankruptcy, whose regime is now unified with that of guardianship).

3. *Incapacitation and the Measures for Safeguarding the Person with Disability*

One of the traditionally classified *civil statuses* constituted differently from other civil statuses by judicial ruling is that of the *incapacitated person*. Nevertheless, some authors do not include the judicial modifications of the capacity to act among civil statuses; as we have seen, these are circumscribed to those derived from the permanent social links of citizenship or regionality and those derived from family situations.

76. B.O.E. n. 164, Jul. 10, 2003.

77. Article 4.10 LCR 2011, *supra* note 1.

78. S.T.S., Jun. 30, 1987 (Roj. 4548/1987) and S.T.S., Oct. 14, 2005 (Roj. 6181/2005).

Apart from the fact that the *Convention of the Rights of Persons with Disability*⁷⁹ does not at any time refer to incapacitation, but to the “adequate and effective safeguard measures” (article 12), even less so, it conceives these as configuring its own *civil status*. It must also be taken into account that, as will be seen in the corresponding theme, there is a doctrinal and professional sector which considers that the Convention of the Rights of Persons with Disability proscribes, as contrary to judicial equality, the difference between judicial capacity and the capacity to act, and judicial incapacitation, and, therefore: a) in the case of the capacity to act, this should be mentioned simply, as stated by the *Convention of the Rights of Persons with Disability* as “the exercise of judicial capacity” (article 12), with regard to which measures may be taken which provide the aforementioned adequate and effective safeguards for this exercise, but without limiting the same, and b) regarding the process of incapacitation, this current of thought proposes its substitution by a system of supports for the free taking of decisions, in the case of persons with disability who require this.

In the European environment, the Green Paper of the European Commission⁸⁰ in order to promote the recognition of the effects of civil status certificates, only lists as civil statuses: birth, marriage and death, with no reference to incapacitation or the modification of the capacity to act.

In recent years, legislative interest is focused on *incapacitation*, which tends to be reduced to a minimum in the cases strictly necessary and which continue to be effectively considered to be civil status, but in the regulation of measures for the support of persons with disability. Measures which are the subject of publicity in the Civil Registry,⁸¹ through different types of entries are:

79. UN General Assembly, *Convention on the Rights of Persons with Disability*, A/RES/61/611 (13 Dec. 2006).

80. *Supra* note 4.

81. SOFÍA DE SALAS MURILLO, LA PUBLICIDAD DE LA DISCAPACIDAD EN EL REGISTRO CIVIL (Thomson-Reuters-Aranzadi 2012).

register of judicial modifications of the capacity of persons to act, with the corresponding assignment of the regime of legal guardianship (articles 72 and 73 LRC 2011); annotation—without probative value—of the situations of natural disability which are accompanied by *de facto* guardianship (article 40.3.9th LRC 2011); register of the *protected estates of persons of persons with disability*, who do not necessarily have to be disabled (article 76 LRC 2011); register of the *preventive powers of attorney* (article 77 LRC 2011), and, finally and more recently, register of the *assistance*, incorporated to the Civil Code of Catalonia (article 226-7 of Law enacting Book II of Catalan Civil Code, Llei 25/2010, de 29 de juliol).⁸²

The new conceptions of disability involve:

[A] new judicial approach to these and this leads to the security and permanence sought with the configuration of

82. The Preamble of this Catalan Law gives an interesting account of the policy underlying these alternative measures for the support of persons with disabilities:

Along with the provision which allows not to establish guardianship if a power of attorney was granted in anticipation of a loss of capacity, changes regarding *de facto* custody are a reflection of the new model of personal protection established by the second book. This model is guided by the idea that incapacity is too drastic a remedy and that it sometimes shows little respect for the natural capacity of the protected person. It is for this very reason that Chapter VI includes a new instrument of protection, assistance, aimed at the adult who needs to care for his person or property because of a non-disabling decrease in his physical or mental faculties. Personal protection is thus not necessarily linked to cases of lack of capacity: it also includes instruments, based on the free development of the personality, which serve to protect persons in situations such as aging, mental illness or disability. This instrument can also be very useful for certain vulnerable groups for whom incapacity and the implementation of a regime of guardianship or curatorship seem disproportionate, such as persons affected by mild mental retardation or other persons for whom, due to the kind of impairment they suffer, traditional instruments are not appropriate to meet their needs. In line with the guidelines of Recommendation R (99) 4, of the Committee of Ministers of the Council of Europe, of 28 February 1999, and with the existing precedents in various neighbouring legal systems, it was considered that this model of protection, parallel to guardianship or curatorship, could be more appropriate. Moreover, this trend also inspires the Convention on the Rights of Persons with Disabilities.

incapacitation as a civil status of the person terminating and being transformed into ballast which prevents the flexibility which the persons with disability require for the protection that integrates them into society. Thus, conserving the conception of civil status for the most extreme cases, we understand that agile mechanisms must be sought which permit carrying out the protection and assistance of persons with deficiencies in their participation in the judicial world, which, one way or another, affect their self-governance without affecting their civil status.⁸³

4. The Declaration of Absence

The judicial nature of absence, as is seen in the corresponding theme, is arguable: before the reform Civil Code of 1939, the majority opinion was that declared absence was a modifying reason for the capacity of the person. This opinion cannot currently be maintained as, according to the current drafting of article 188.2 C.C., purchases made by a third party from the person absent show that he conserves his capacity to act.

Regardless of the effect on the capacity to act, its character of civil status has been defended in the light of the wide range of judicial consequences which occur at the personal and estate level of the person absent. There are authors who recognize the importance of the effects of the declaration of absence, and they understand that this is not a question of civil status but of a disconnection between the person and the assets administered by a representative, which has a reflexive effect on the capacity of the person to act. Counter to the usual character of civil status, the possibility is added of removing the effect of the declaration at any time, based on presumptions and uncertainties so that the matter can be re-examined whenever it is necessary.

83. Cristóbal Francisco Fábrega Ruiz, *Realidad y nuevos horizontes de la guarda de hecho de las personas con autogobierno limitado* in HACIA UNA VISIÓN GLOBAL DE LOS MECANISMOS JURÍDICO-PRIVADOS DE PROTECCIÓN EN MATERIA DE DISCAPACIDAD 335, note 232. (S. de Salas Murillo, coord., El Justicia de Aragón 2010).

VIII. CURRENT SITUATION OF THE CATEGORY AND THE CONCEPT OF CIVIL STATUS: CRISIS OR SURVIVAL?

For some decades, doctrine has shown the ambiguity of the scope and meaning of civil status in our legislation due to the reasons already explained and others we shall see below.

A. *Vagueness of the Concept*

On the one hand, civil status *as a category* no longer affects the capacity to act, although there are cases in which this capacity is affected by some of the civil statuses, such as the status of minor or disabled person, it is not affected by others, such as marriage. As this common denominator does not exist, gathering such diverse situations as nationality, family status, age or disability in the same category inevitably leads to a vague and imprecise concept, whose unity lies solely, as was stated above, in its value for defining the basic judicial situation of the person in society. This is why some authors have abandoned the concept,⁸⁴ and others recognize that the law continues to use it with this meaning. This must continue to be taken into account, but conceptually it is a dispensable concept, to the extent that it adds little to the specific regulation of each of the situations of the human being.

These doubts are evident from the fact that the LCP:⁸⁵ a) does not take into account a specific regime for the actions of status, but for determined processes which affect situations traditionally framed in civil status (the special processes of Part I of Book IV on capacity, filiation, marriage and minors), and b) when it speaks of the impossibility to submit the lawsuits on these matters to transaction (articles 748 to 781 LCP), nor does it mention the term civil status.

84. CARLOS LASARTE ÁLVAREZ, *I PRINCIPIOS DE DERECHO CIVIL. PARTE GENERAL Y DERECHO DE LA PERSONA* (10th ed., Marcial Pons 2004).

85. *Supra* note 2.

It is true that it maintains the term when it takes into account two specific specialties related to the scope of the *res iudicata* (article 222.3) and of the execution of judgments (article 525.1.1), as was seen above. However, we have also seen that what is relative to the scope of the *res iudicata* is not clear, recalling what is relative to the confusing regime of article 222 LCP.

Despite everything (the LCP in those two articles), and the LCR 2011 (and the Bill for the Integral Reform of the Registries) continue to use the concept of *civil status* and, due to this, the interpreter cannot dispense with this, although must acknowledge the “elasticity of the concept” and its “historically variable content,”⁸⁶ or its instrumental nature.⁸⁷

B. Disassociation of Civil Status and the Civil Registry

In the processing of the LCR 2011, it was put forward that the concept be discarded, and probably this would have been the appropriate time to do so considering the conceptual proximity of civil status and Civil Registry. The General Council of Judicial Power understood this to be so in the report on the Bill, for this law: “Perhaps the legislator must make an effort in this regard and dare to define the legal concept of civil status once and for all or dispense completely with the use of this term.”⁸⁸

Nevertheless, the law (LCR 2011) decided to conserve the express reference to *civil status*, but it must be recognized that the broadness of the mention “other conditions of the person”⁸⁹ could give the sensation—at least from the standpoint of the positive law—that it is practically unnecessary to continue using this concept.

In this law, the concepts of Civil Registry and civil status are disassociated, perhaps even more strongly: the function of the

86. LACRUZ BERDEJO ET AL., *supra* note 8, at 393-94.

87. Roca Guillamón, *supra* note 25, at 97.

88. Consejo General del Poder Judicial, *supra* note 44, at 54.

89. Article 11.b LCR 2011, *supra* note 1.

Registry continues to be that of official confirmation, with the appropriate effects and the finalities of the facts and acts which refer to civil status of persons in each case, but also “to those others which are determined by the Law”.⁹⁰

This disassociation of civil status and the Civil Registry had already begun previously—although it is true that, until a short time ago, the Civil Code continued to talk of the “Registry of civil status”⁹¹ since, for some time, this Registry has admitted much data and many personal circumstances independent of the concept of *civil status*. If the last two Laws of the Civil Registry (of 1957 and of 2011) are examined, the Civil Registry is not nor has been solely a Registry of *civil status*, as the Civil Code seemed to say, but has admitted other facts, which is why it is called simply the Civil Registry.

What refers to disability is a proof of this; thus, the Civil Registry wished to admit entry to concepts or institutions which function apart from disability, and, therefore, a possible change in civil status.⁹² The design of the new Civil Registry stipulates an area of application even wider than the area stipulated by the LCR 1957 with regard to facts and acts which can be registered. This circumstance distances it from the strict limits of traditional civil status.

If the Bill for the Integral Reform of the Registries is approved, the difference will be even more marked as the registry would admit questions as distant from the category of civil status as life or accident insurance or pension schemes.

C. Civil Status is Compatible with the Maintenance of Groups or Social Categories

It is true that the notion of civil status has, on occasions, been identified with the idea of social stratification or classification.

90. Article 39, LCR 2011, *supra* note 1.

91. *Cf.* arts. 325 to 332 C.C., repealed by the LCR 2011.

92. *Cf. infra* Part VII.B.3.

This is scarcely in accordance with the current configuration of a democratic society, and this would be a new incentive to abandon the category.⁹³ Nevertheless, this is not an impediment to its survival for several reasons:

a) The equality of all persons before the Law, with no distinctions, determines the fact that, today, civil status only refers to certain specific qualities such as marriage, age, disability, nationality, and not others such as race, social class and sex, which, from a constitutional point of view, would be inadmissible as they go against the dignity of persons and the principle of equality (articles 10 and 14 of the European Constitution).⁹⁴ In this regard, the LCR 2011 starts from the:

[U]nequivocal acknowledgement of dignity and equality has supposed the progressive abandonment of judicial constructions from past epochs which configured civil status based on social status, religion, sex, filiation or marriage. A Civil Registry coherent with the Constitution must assume that persons, equal in dignity and rights, are its only reason for existence, not only from an individual and subjective point of view but also in their objective dimension, as members of a politically organized community.⁹⁵

The fact is that, although the grouping of persons who are in the same *personal situation* subjected to the same *legal regime* may suggest the idea of social classification by *status*, currently, the judicial consequences of civil status, as well as its judicial treatment must be controlled by the principle of constitutional equality (article 14 of the CE); a principle, which, as is known, does not prohibit any inequality, but rather the differences of unjustified or discriminatory treatment, and even permits positive discrimination (in the case of women, for example, intended to obtain real equality).

93. ENCARNA ROCA TRÍAS, *Comentario al artículo 29* in I COMENTARIOS DEL CÓDIGO CIVIL 228 (Ministerio de Justicia ed., 1991).

94. Roca Guillamón, *supra* note 25, at 97.

95. Preamble LCR 2011, *supra* note 1.

b) It is not correct to limit status to those involved in belonging to a determined social community in our current legal system even though historically this was so. This means that they are not limited to those related to *status familiae* and *civitatis*, nor are they identified as a category with any social compartmentalization.

c) The recent tendencies regarding human rights mark out groups and collectives requiring special protection, such children and persons with disabilities, for whom international conventions and several norms have approved specific protection regulations. Some have observed here “new civil statuses”.⁹⁶ There are doubtful aspects, such as the fact that the recognition of the “degree of disability”, for the purposes of Legislative Decree 1/2013, of 29 November, approving the revised text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion,⁹⁷ and the qualification of the “dependence”, for the ones of the *Law on the Promotion of Personal Autonomy and Care for Dependent Persons*,⁹⁸ are administrative declarations, in principle without civil effects, which do not have access to the Civil Registry⁹⁹—besides the fact that, as such administrative resolutions, at least in principle, the regime LCP would not apply to these. However, for the purposes which we are now analysing, it is an irrefutable fact that there is no opposition in current law to introducing legislative differences, designing their own regime tending to facilitate the real equality of these collectives. In fact, the Preamble of the LCR 2011 expressly refers to the fact that “in this Law both the Convention of the Rights of the Child of November 20, 1989, ratified by Spain on November 30, 1990, and the Convention on the rights of persons with disabilities of

96. LACRUZ BERDEJO ET AL., *supra* note 8, at 28-29.

97. B.O.E. n. 289. Dec. 3, 2013.

98. Law 39/2006 of December 14, B.O.E. n. 299, Dec. 15, 2006.

99. In fact, some people have obtained the administrative declaration of a certain “degree of disability” (expressed in percent), whose ability to act, however, has not been modified, and vice versa. The same applies to the classification of the “dependence”. In this sense, we must remember that none of these procedures, even the judicial modification of capacity are compulsory.

December 13, 2006, ratified by Spain on November 23, 2007 is incorporated.”

D. Civil Status and de facto Relations

Another factor which blurs the limits of civil status, which has been shown by Parra Lucán, is the fact that, in the social reality, purely *de facto* situations occur, parallel to judicial relationships but apart from its legal regulation: *de facto* unions, *de facto* separation, *de facto* emancipation, naturally disabled persons and their *de facto* guardianship, etc.¹⁰⁰

It seems clear that, although there are determined legal consequences (for example, article 319 C.C. for *de facto* emancipation, or the varied Autonomous Community Laws on unmarried stable couples) these situations are not civil status, nor does the regime of civil status apply to them.

However, the process of *transforming judicially what is intended to be de facto*, which, in principle, is a contradiction, and even reaches the Civil Registry. Thus, the reform carried out by Law 1/2009, of March 25,¹⁰¹ to article 38 LCR 1957, introduced the possibility to annotate: “At the request of the Prosecutor’s office or any person concerned, . . . with simply informative value and with the statement of their circumstances: . . . 6. The existence of a *de facto* guardian and the judicial means of control and surveillance adopted as regards the minor or presumed disabled person.”¹⁰² In the same regard, article 40 LCR 2011 admits (“These may be annotated . . .”) the registration annotation of the *de facto* guardianship.

This is one of the most blurred points in our legislation and on which gives rise to more interpretational problems.

The first of these derives from the initial perplexity arising from giving registration publication, even if this is informative, to

100. PARRA LUCÁN, *supra* note 27, at 394-96.

101. B.O.E. n. 73, Mar. 26, 2009.

102. Article 1, Law 1/2009, *supra* note 101.

what is considered to be a *de facto* situation, whose publication seems to derive from the public notoriety of this. The conflict has already arisen regarding the administrative registration of unmarried stable couples: not in vain, the registration in these Registries is an essential requisite in the majority of Autonomous Community legislations in order to obtain the “judicial nature” of these non-marriage unions for the purposes of the application of the corresponding legal (administrative and civil) measures. In this regard, article 304 of the Code of Civil Law of Aragon¹⁰³ imposes the obligation to register the stable couple “in a Registry of the Government of Aragon so that the administrative measures regulated in this Law be applicable to it, as well as being annotated or mentioned in the competent State legislation if the State legislation stipulates this.” In contrast, Chapter IV of Part III of the new Second Book C.C., dedicated to “the stable cohabitation of the couple” does not require, at least in the legal text, registration in any administrative Registry.

However, besides the administrative registers, it is certain that neither in the LCR 1957 nor in the new LCR 2011, its annotation or mention in the Civil Registry is stipulated despite the fact that there was a Bill in 2003 on the reform of the LCR in order to permit the access of a stable union of couples or a common law marriage in the Civil Registry¹⁰⁴ and that, in the processing of the current law (LCR 2011), an amendment in this regard was proposed.¹⁰⁵ In the Bill of 2003, it was considered that this access was the most adequate means to make the constitutional principle judicial of security effective in the area of stable unions or common law couples, and, among other measures, it was proposed that the Second Section of the Civil Registry be called “Marriage,

103. *Supra* note 74.

104. Congreso de los diputados, Draft Law proposed by Parliament 122/000306 [BOCG, *Congreso de los Diputados*, Serie B, n.º. 351-1, Jul. 15, 2003].

105. Senado, Amendment n.º. 2 GPMX [BOCG, *Senado*, Jul. 7, 2011, n.º. 74, and Jul. 21, 2011, n.º. 81].

Stable Union or Common Law Couple.” This initiative did not prosper and, as was noted, the new LCR does not stipulate the registration mentioned.

The panorama is clearly different in the case of *de facto* guardianship, whose access to the Civil Registry is open from Law 1/2009 and endorsed in the LCR 2011, with no need to have administrative registers for this purpose.

Once the Civil Registry is legislatively open to *de facto* custody, the second problem lies in the way to prove the existence of this, which is closely linked to another problem—a basic problem—which is the concept of *de facto* custody and the extension which must be given to this. This is not the right scenario for an in-depth analysis of these questions, but it does serve, at least, to show the intricate and diffuse relationships between all these institutions.

As it stands, we are witnessing the opening of the Civil Registry to these factual situations, although it is true that the essential role of the official verification of these is not complied with, but rather only an informative role, which, for the purposes we have seen in this regard, reaffirms the separation of the Civil Registry and civil status.