Hard Cases

In the Name of Equality. The Italian Constitutional Court Rewrites the Rule on Surname Attribution

Giulia Terlizzi*

Abstract

With judgment no 131 of 27 April-31 May 2022, the Constitutional Court replied to the question of legitimacy raised by the Court itself in February 2021. The case concerned the rules to transmit the surname as in the Italian civil code. The Court declared such rules unconstitutional, insofar as these rules do not allow the child to take the mother's name in the event of parental consent. With this decision, the Court made not only a radical change with regards to the past discipline, but also affirmed the new rule governing family name that is based on a new fundament: the protection of gender equality as an essential element to guarantee the identity of the child. In a comparative perspective, it is interesting to consider the innovation adopted by the French law on name's attribution– Law no 301 of 2 March 2022 – pushing even further on the role of autonomy in family law. However, both in Italy and France, uncertainties remain once equality is established.

I. Introduction

With judgment no 131 of 27 April-31 May 2022, the Constitutional Court replied to the question of legitimacy raised by the Court itself in February 2021, concerning the rules on surname transmission established by the Italian civil code (Arts 143 bis and 262 of the Civil code). Following these provisions, in the absence of parental agreement, the discipline required the acquisition at birth of the paternal surname, instead of the surnames of both parents. Face to these rules, the constitutional court takes one more time into serious consideration the problem of harmonizing the subject matter with the principles of equality coming from the Constitution and supranational laws, reiterating the importance of assigning the surname of both parents as an expression of personal and family identity. This evolution, however, must be linked to the importance of maximally protecting the choice of parents regarding the right to assign a single surname or both, in the order of preference, and therefore according to a new criterion based on the consent and will of the parents, and no longer based on the authority of the disposition established by the law itself. In this light, with

*Assistant Professor of Comparative Law, University of Turin. All the quotes that are not in English in the original sources have been translated by the author of this Article.

the recent decision no 131 of 2022 held by the Constitutional Court, the Court replied to the question of constitutional legitimacy, declaring the rules of the Italian civil code unconstitutional, insofar as these rules do not allow the child to take the mother's name in the event of parental consent. With this decision, the Court made not only a radical change with regards to the past discipline, but also affirmed the new rule governing family name that is based on a new fundament: the protection of gender equality as an essential element to guarantee the identity of the child.

In a comparative perspective, it is interesting to consider the French experience and the recent law on name's attribution – Law 2 March 2022 no 301 – that codified the '*nom d'usage*' in the articles of civil code dedicated to the name's attribution rules, pushing even further on the role of autonomy of the parties in family law. However, both in Italy and France still uncertainties remain once equality established.

II. What's in a Name?

In the contemporary society, the name – composed by first name and surname – represents the major distinctive feature in a human being, and therefore it has been reasonably placed among the fundamental rights protected by the Italian Constitution, which guarantees and protects the right to personal identity. According to Art 2 of the Constitution, in fact, the Italian legislature 'acknowledges and protects the fundamental rights of the human being, both as an individual and as a member of social group'.

If, on one hand, it is undoubtedly true that – as Romeo and Juliet 's quote of Shakespeare taught to all of us –[1] what someone or something is called or labelled cannot completely describe their or its intrinsic qualities, on the other hand, however, it is also true that the name – and family name in particular – is part of the personal identity of the person, both in its individual and social dimension. In this perspective, the name reveals an identity: geographical, national or even professional, but, above all, it reveals the family origins. Beyond the personal value of the first name, the surname has a social value being also a feature that allows the individual to be distinguished by people that are not part of the family, covering a public function, which is strictly linked to the interest of the social community to identify its members.[2]This is also affirmed, although through a negative formulation of the disposition, in Art 22

[1] W. Shakespeare, *Romeo and Juliet*, in W.J. Craig ed, *The Complete Works of William Shakespeare* (London: Oxford University Press: 1914 Bartleby.com, 2000. www.bartleby.com/70/), Act II. Scene II: 'What's in a name? That which we call a rose/ By any other name would smell as sweet'.

[2] See 'Nome e cognome' *Digesto delle discipline privatistiche, Sezione civile* (Torino: UTET, 1995), XII, 136-143.

of the Italian Constitution, which establishes 'No person may be deprived for political reasons of legal capacity, citizenship or *name*'. In particular, the surname 'is a point of emergence of the individual's belonging to a family group and thus a defining profile of personal identity and social personality'.[3] Moreover, the name has a strong value in the psychological and individual sphere of the person, since if it is true that 'through a name the person is distinguished from other persons and individualized',[4] it is also true that 'a name has a special significance for human beings' as it is also well explained by child psychology when teaches that 'even a very young child identifies so strongly with its first name that there is an identity between the psychic existence and the first name'.[5]

III. The Old Discipline of Family Name in Italy

In Italy, the system of rules governing names and surnames remained for long time rooted in a historical heritage based on roman law. As recognized, the rules descended from

> 'the legacy of an ancient legal tradition rooted in Roman family law, based on *agnatio*, on a system of personal, family and inheritance relations at the centre of which is the *pater familias*, as the main subject of rights'.[6]

The Italian civil code of 1942 followed this patriarchal model.[7] For instance, according to the first version of Art 144 of the civil code on marital authority, the husband was considered 'the head of the family', while the wife had to follow his civil status, taking his surname.[8] Moreover, there was no specific rule on the surname of legitimate children in the Italian Civil Code, since it was considered an indisputable axiom that they should take their father's surname.

Beyond these considerations of the utmost importance, however, in the past, this rule was justified by 'the objective inscrutability' of the father's biological derivation relationship'[9] or as a 'form of compensation for the natural uncertainty

[3] Of this opinion F. Astone, 'Il cognome materno: un passo avanti, non un punto d'arrivo, tra certezze acquisite e modelli da selezionare' *Giurisprudenza costituzionale*, 493 (2017).

[4] W. Pintens and M.R. Will, in K. Zweigert and U. Drobnig eds, *International Encyclopedia of Comparative Law*, IV, 1995, 45.

[5] ibid

[6] See, V. Carbone, 'Quale futuro per il cognome?' *Famiglia e diritto*, 457 (2004). See also, Corte Costituzionale 16 February 2006 no 61, *Foro Italiano*, I, 1673-1677 (2006).

[7] See, for an interesting overview in a comparative perspective of the rule in different countries, A. Diurni, 'In the Name of the Child: Remedies to Adultcentrism in Naming Law', in this issue.

[8] See the old version of Art 144 of the Italian civil code which (with a text identical to that of Art 131 of the Civil Code of the Kingdom of Italy of 1865) provided that: 'the husband is the head of the family; the wife follows his civil status, takes his surname and is obliged to accompany him wherever he sees fit to establish his residence'.

[9] See, L. Olivero, 'Ancora sul cognome: due luoghi comuni e due proposte per una riforma

of paternity before the dissemination of genetic evidence'.[10] In other opinions, a customary rule, or a traditional rule was recognized in the rule grounded on the patronymic transmission.[11] In any case, there is also a symbolic value beside the juridical value of the name. As observed by an attentive scholar, there is a symbolic value in the name, and 'this value plays a role in marking the differences of maternal and paternal roles in the process leading to the birth of a new life'.[12] Under this perspective, it has been pointed out that 'a child's bond with his mother is in her flesh, given that she has carried him for nine months, and given she has 'brought him into the world', and it will never be possible for them to erase what has been established in this alliance. A child's bond with his father will only be built, on the contrary, in any case mainly, through words. It is because he 'names' him as his child that a father assumes his paternity, and it is therefore another alliance that will be established (...) in this nomination'.[13]

The situation mentioned above was also reflected in the case law of the Constitutional Court. In fact, firstly, the Constitutional Court, in its orders no 176 and no 586 of 1988, had explicitly stated that there was no constitutional illegitimacy of the system regulating the attribution of the paternal surname to legitimate children, assuming that the constitutional principle of the legal and moral equality of spouses was to be interpreted within the scope of safeguarding family unity.[14]

It was clear, at the time, that the principle governing the whole system of family law was thus the preeminent value of the 'unity of the family', rather than the name as a fundamental component of 'personal identity'.[15]

IV. The Long March Towards Equality in Italian Family Law

An initial slight change arose with the Family law reform of 1975. In a period of social and cultural changes, the traditional vision of the family based on the principle of unity began to disintegrate.

annunciata' *Jus civile*, 1371-1400 (2021), who recalls the interesting opinions of J.-L. Renchon, *Le nom de famille, in Cour constitutionnelle et droit familial*, in N. Massager and J. Sosson eds, Anthemis, Limal, 2015, 20.

[10] On the origins of the paternal surname as a 'form of compensation for the natural uncertainty of paternity before the spread of genetic evidence', see C. Favilli, 'Il cognome tra parità dei genitori e identità dei figli' *Nuova giurisprudenza civile commentata*, 824, (2017).

[11] See the analysis of Pazé, 'Verso un diritto all'attribuzione del cognome materno' *Diritto di Famiglia e delle persone* 326, (1998); F. Giardina, 'Il cognome del figlio e i volti dell'identità' *Nuova giurisprudenza civile commentata* 2014, 139; G. Alpa and G. Resta, *Le persone fisiche e i diritti della personalità*, (Torino: UTET, 2006), 96.

[12] See, L. Olivero, note 9 above.

[13] J.-L. Renchon, n 9 above, 20.

[14] Ordinanza no 176 of 11 February 1988 *Diritto della famiglia e delle persone*, 1988, I, 670, with notes of F. Dall'Ongaro, Il nome della famiglia e il principio di parità, and ordinanza no 586 of 19 May 1988 *Giurisprudenza costituzionale*, 1988, I, 2726.

[15] L. Tullio, n 15 above.

It is worth noting that this shift was also achieved thanks to the contributions of some legal scholars who actively favoured this evolutionary trend and re-designed a new family model described as a 'social formation'[16] within its paramount constitutional function and characterized 'by equal, moral and legal dignity of its members'.[17]

Additional important changes marked a strong break in the traditional structure of family law, in the very last decade, as also documented by previous articles appeared in this journal.[18] Several innovations have been implemented in Italy, following an acceleration never seen before, that completely reshaped the rules governing family law.[19] Concerning name's attribution rules, the Decree no 54 of 13 March 2012 amended the text of Art 33 of the previous Decree 396/2000, allowing for the possibility that the child may also request to 'add another surname to his/her own'.[20]

However, even though times were changing fast and it appeared to be ripe for further innovations, no changes in the general family names discipline had been achieved and no reforms touched this specific issue until the final word held by the Constitutional Court in April 2022.

V. The Silence of the Legislator and the Role Played by the Courts

Until that decision, considering the silence of the legislator, the need for a new discipline governing family name was challenged in the court's rooms.

However, in contrast with two former decisions of the Constitutional Court – in which the Court had instead seen in the safeguarding of family unity pursuant to Art 29 of the Constitution the justification for the limitation of the principle of equality between spouses in terms of the transmission of the

[16] In particular, see P. Perlingieri, 'Sulla famiglia come formazione sociale' *Diritto e giurisprudenza*, 775-778 (1979).

[17] ibid

[18] See, among others, the recent contribution of L. Tullio, n 15 above.

[19] The law 10 December 2012 no 219; decreto legge 28 December 2013 no 154, implementing the uniqueness of the child status, that recognized the equality between children born of a married couple, born out of the wedlock and adopted children; the Law 10 November 2014 no 162, especially at Arts 6 and 12, that introduced measures of 'assisted negotiation' and 'agreements reached before the registrar' in order to allow the friendly and out-of-court settlement of marital separation; the law 6 May 2015 no 55, allowing the so-called 'express divorce'; finally, the law no 76 of 20 May 2016, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, that recognized for same-sex couples the same rights of married couples, allowing the registered same-sex couples to enter into same-sex union protected by the law. See, L. Tullio, n 15 above.

[20] Decreto del Presidente della Repubblica 13 March 2012 no 54, Regolamento recante modifica delle disposizioni in materia di stato civile relativamente alla disciplina del nome e del cognome prevista dal titolo X del decreto del Presidente della Repubblica 3 novembre 2000, n 396 (12G0076).

surname to descendants[21]– in 2006 a famous decision of the Constitutional Court (12 February 2006 no 61) expressly marked a radical conceptual overturning. In this judgment the Court expressly stated that

> 'the current system of attributing children's surnames is the legacy of a patriarchal conception of the family, which has its roots in Roman family law, and of an outdated marital power, which is no longer consistent with the principles of the legal system and the constitutional value of equality between men and women'.[22]

At the same time, however, the Constitutional Court declared that the choice among the various options available to overcome discrimination was beyond the Court's powers. Such a choice was left to the discretion of the legislature, but it remained silent on this topic.[23]

VI. The Case Cusan Fazzo and the Condemnation of Italian Rules by the ECtHR

On 31 March 2011, Mr Fazzo and Mrs Cusan applied to the Minister of the Internal Affairs for permission to add the name 'Cusan' to the names of their 'legitimate children'. They explained that they wanted this to enable them to identify themselves with the moral heritage of their maternal grandfather - who had died in 2011 and who, according to them, had been a philanthropist. As the applicant's brother had no descendants, the name 'Cusan' could only be perpetuated, they said, by passing to the children of Ms Alessandra Cusan.

By a decree of 14 December 2012, the Prefect of Milan authorised the applicants to change the name of their children to 'Fazzo Cusan'.

The applicants stated that, despite this authorisation, they wish to maintain their application before the Court. In this respect, they pointed out that the Prefect's decree had been issued following an administrative, not a judicial, procedure and that they had not been authorised to give their child only their mother's surname, as they had requested to the Court of Milan. Without finding

[21] See, G. Passarelli, 'Note sulla attribuzione del cognome materno. Una questione (ancora) de iure condendo' *Famiglia e Diritto*, 551-559 (2021).

[22] Corte Costituzionale 16 February 2006 no 61, *Foro Italiano*, I, 1673-1677 (2006), with notes by: E. Palici di Suni, 'Il nome di famiglia: la Corte Costituzionale si tira ancora una volta indietro, ma non convince' *Giurisprudenza costituzionale*, I, 552-558 (2006)

[23] Some bills and legislative proposals were made, but they did not appear adequate for the social changes and the new model of family. It has been noted that in this context, the decreto legge 28 February 2019 no 1025 entitled *Disposizioni in materia di attribuzione del cognome ai figli* had marked the end of this immovability by the legislature. See on this issue, among the legal scholars, G. Passarelli, n 21 above, and R. Peleggi, 'Parità tra genitori e cognome dei figli: il Belgio abolisce le discriminazioni, mentre l'Italia resta in attesa di una riforma' *Rivista di Diritti Comparati*, 94, 79-98 (2018).

justice in the Italian system, Mrs Cusan and Mr Fazzo[24] decided to appeal to the Strasbourg Court.[25] The European Court of Human Rights, in upholding the appellants' arguments, started from an analysis of Art 14 of the European Convention on Human Rights (prohibition of discrimination) in conjunction with Art 8 (right to respect for private and family life). In particular, the European Court reiterated that the right to a name must be brought within the scope of Art 8 of the Convention insofar as it constitutes the indispensable identifying and distinctive sign of personal identity.

In light of these considerations, in January 2014, the European Court of Human Rights invited the Italian legislature to fill this legislative gap, ie, the right of both spouses to transmit their surnames to children born both within and outside marriage.

In its reasonings, the court stressed that the rule denounced by the applicants was symptomatic of a patriarchal conception of the family and was difficult to reconcile with the relevant international law. Nonetheless, the Court considered that it was up to the legislator to establish a legal regime in this area that was compatible with the Constitution.

Following the decision against Italy by the ECtHR, the Italian debate started to focus firmly on the need of the legislature to protect and guarantee gender equality between men and women, the 'moral and legal equality' of the parents, harmonising the new discipline to the changed needs of the family in the contemporary society, thus overcoming the link with a patriarchal model.

After this recall made by the Court of Strasbourg, a long series of bills were proposed by the Parliament, but none of them was finally approved.[26]

VII. Another Crack in the System: The Constitutional Court's Judgement no 286 of 2016

According to these principles, another crack in the system has been made by the Italian Constitutional Court with the judgement no 286 of 2016,[27] which declared the constitutional illegitimacy of Art 262, para 1, of the Civil Code in the part where it does not allow spouses to attribute by mutual agreement also the maternal surname in compliance with 'the changed situation of constitutional case law and the likely change occurring in the European rules'.[28]

[24] European Court H.R., *Cusan and Fazzo* v *Italy*, Judgment of 7 January.

[25] ibid

[26] ibid

[27] Corte Costituzionale 21 December 2016 no 286, *Giurisprudenza costituzionale*, 2435-2437 (2017), with notes of E. Al Mureden, 'L'attribuzione del cognome tra parità dei genitori e identità personale del figlio' *Famiglia e diritto*, 218-224 (2017); V. Carbone, 'Per la Corte costituzionale i figli possono avere anche il cognome materno, se i genitori sono d'accordo' *Corriere giuridico*, 167-174 (2017).

[28] Decision no 286 declared unconstitutional the following provisions, insofar as they did

The underlying case concerned the name of a child with dual nationality. In fact, it dealt with a minor born in Brazil who held dual Italian-Brazilian citizenship and who requested to be registered in Italy with the last names of both of his parents, as he had been registered in Brazil. The respective civil authorities rejected the request based on existing legislation, and the case was eventually brought before the Italian Constitutional Court. The merit of the Constitutional Court's 2016 ruling was to allow not only, in the case of parental consent, for the child to take on the surnames of both, but above all, for all cases of dual nationality couples residing in Italy, for the children to be identified on Italian territory in the same way as they are identified in the other state.

The Court's reasoning strengthened 'the double dimension of the surname' – personal and social – to justify, especially for the dual citizens in this case, 'a fortified protection not only within the country, but in the wider 'legal space'.[29] Moreover,

> 'the decision to attribute to the child only the father's surname would create an unreasonable disparity in treatment between parents, a disparity that could not be justified in the name of safeguarding family unity'.

As previously declared by the Constitutional Court, family unity 'is strengthened when mutual relations between spouses are governed by solidarity and equality'.[30]

With this decision, the Court made not only a radical change with regards to the past discipline, but also affirmed the new rule governing family name on a new fundament: the protection of gender equality. In the words of the Supreme Court, 'in order to achieve the full and effective realisation of the right to personal identity, which has its primary and most immediate expression in the name, along with the recognition of equal significance to both parents within the process of constructing that personal identity, the child's right to be identified from birth by the surname of both parents must be recognised. Conversely, the provision for absolute priority to the father's surname sacrifices

not allow the parents, by mutual consent, to attribute to their children at the moment of birth the maternal as well as the paternal last name:Arts 237, 262 and 299 of the Italian Civil Code; Art 72, first paragraph, of Royal Decree no 1238 of 1939; and Arts 33 and 34 of Presidential Decree no 396 of 2000. The Civil Code provisions in question refer to the permissible evidentiary means for the establishment of a person's civil status (Art 237), the attribution of a last name to a child born outside of marriage (Art 262), and the attribution of a last name to an adoptive child (Art 299). Prior to the Constitutional Court's decision, these provisions only allowed the paternal last name to be attributed to the child when both parents recognized the child at the moment of birth or adoption. Additionally, Art 72, para 1, of Royal Decree no 1238 of 1939, as amended, on the digital and archival registration of the civil status of a person, and articles 33 and 34 of Presidential Decree no 396, on the change of last name of a person as a result of the change in his or her parents' last name, which would have contradicted the Court decision, were also voided. For the facts and details of the case see, in this review, the clear analysis of L. Tullio, n 15 above.

[29] N. Irti, *Norma e luoghi. Problemi di geo-diritto* (Roma-Bari: Laterza, 2001), 3-16 cited in L. Tullio, n 15 above, 223.

[30] L. Tullio, n 15 above, 224.

the child's right to identity, denying him or her the ability to be identified from birth also by the mother's surname'.[31] In fact, according to the judges' decision

> 'the automatic attribution of only the paternal surname results in the invisibility of the mother and is the sign of an inequality between the parents, which reverberates and imprints itself on the identity of the child'.[32]

This entails the simultaneous violation of Arts 2, 3 and 117 of the Constitution, since the right to personal identity was compromised, and also with respect to the principles of equality and equal dignity of spouses, but also of Arts 8 and 14 of the European Convention on Human Rights'.

According to these new perspectives, the family name must be matter of choice to be solved by both the parents on consensual basis.

VIII. The Preliminary Constitutional Question Before the Italian Constitutional Court no 18 of 2021

By order 78/2020, the Court of Bolzano raised with the Constitutional Court a question of the legitimacy of the rule concerning the surname of children born out of wedlock, in so far as it provides that if the recognition was made simultaneously by both parents, the father's surname is assigned.[33]

On 13 January 2021 the Court, in joint divisions, examined the case and decided to go further, raising before itself a question of the constitutionality of the aforementioned rule, Art 262, para 1, of the Civil Code, deeming the question to be preliminary to that raised by the judge a quo.

On the merits, the question raised by the Court of Bolzano concerns the possibility for unmarried parents to attribute to their daughter, recognised at birth by both, only her mother's surname.

This case is different from the former judgment no 286/2016, which confirms the right to give the child the mother's surname in addition to the father's if the parents agree. The case concerned the question whether it is

[31] Corte Costituzionale 21 December 2016 no 286, *Giurisprudenza costituzionale*, 2435-2437 (2017), available at https://tinyurl.com/48a462yw (last visited 31 December 2022).

[32] ibid

[33] According to Art 262 c.c.: Il figlio assume il cognome del genitore che per primo lo ha riconosciuto. Se il riconoscimento è stato effettuato contemporaneamente da entrambi i genitori il figlio assume il cognome del padre. In the case, parents had insisted on giving only the mother's surname for essentially 'aesthetic' reasons such as the difficulty of understanding the paternal surname and the circumstance that the short name given to the child would better match the mother's short surname; moreover, the mother's surname would be well known to Germans and Italians alike. See, C. Masciotta, 'L'eguaglianza dei genitori nell'attribuzione del cognome: una nuova regola iuris dettata dal giudice costituzionale' 15 Osservatorio sulle Fonti, 262, 251-271 (2022).

possible for two unmarried parents to attribute to their daughter only the surname of her mother in the event of simultaneous recognition of the child. This possibility is precluded by the provision of Art 262 of the civil code.

In October 2019 the Court of Bolzano thus asked the Constitutional Court to declare Art 262 of the Civil Code unconstitutional in that it does not allow for the possibility, in the event of an agreement between the parents, of giving the child the maternal name instead of the paternal name.

Thus, with Order no 18 of 2021, the Constitutional Court raised the question of the constitutional legitimacy of Art 262 of the Civil Code, with reference to Arts 2, 3 and 117, first paragraph, of the Italian Constitution, the latter in relation to Arts 8 and 14 ECHR, in the part where, in the absence of agreement between the parents, it provides for the acquisition at birth of the paternal surname, instead of that of both parents. The order, and therefore the answer to this doubt of constitutionality, was therefore an essential prerequisite for the Court to address the question of legitimacy raised by the Court of Bolzano.

In the aforementioned order, the Court pointed out that, even if 'the right of the parents to choose, by mutual agreement, to transmit only their mother's surname was recognised, the rule requiring the acquisition of only the father's surname should be reiterated in all cases where such an agreement is lacking or, in any case, has not been legitimately expressed. On the other hand, not even the consent, on which the limited possibility of derogation from the general rule providing for the attribution of the father's surname is based, 'could not be considered an expression of real equality between the parties, given that one of them does not need the agreement to have its own surname prevail'.

In addressing to itself the preliminary question of constitutional legitimacy, it is worth noting that the Court enlarges the scope of the question addressed by the Court of Bolzano.

Sharply, the Court observed that, if one were to accept the Court's view, the rule requiring the child to acquire only the father's surname would have to be upheld in all cases where there is no agreement. Since these are probably the most frequent cases, the prevalence of patronymic would thus be reconfirmed, the incompatibility of which with the fundamental value of equality has long been recognised by the Court itself, which has repeatedly urged the legislature to intervene.

In other words, a system that allows derogation from the surname rule only if both parents agree confirms and aggravates gender inequality, since in the event of a conflict between the father and mother, over the decision of the child's surname, it automatically favours the father's will and decision, leaving the mother's will completely unsuccessful.

IX. The Court's Reply. Judgement no 131 of 27 April – 31 May 2022

After more than thirty years, with Judgement no 131 of 27 April - 31 May 2022, the Court strengthens – one more time - its role as guarantor of the Constitutional rights established in the Constitution that, as in the case under comment, have been threatened and jeopardized by the rules contained in the civil code for a long time.

Essentially the Court's judgement declares unconstitutional the articles of the Italian Civil code on three grounds: first, the violation of the personal identity of the children; second, the violation of the right of equality between parents, third the violation of international obligations which condemned in this last thirty years Italy for its discriminatory discipline in the attribution of Family name.

In developing these key issues, the Courts starts declaring in fact that

> 'the surname, together with the first name, represents the core of the person's legal and social identity: it confers identifiability on him, in relations under public law, as under private law, and embodies the synthetic representation of the individual personality, which over time is progressively enriched with meanings'.

This was a constant in the case law of the Court, that always recognized the name as a 'fundamental right of the human person',[34] stressing that it is 'an autonomous distinguishing mark of (...) personal identity',[35] as well as an 'essential trait of (...) personality'.[36]

In the famous judgment no 286 of 2016, the Court recognised the name as an 'asset that is the subject of an autonomous right under Art 2 of the Constitution', and consequently as 'an essential feature of (...) personality'.[37]

It follows that 'the surname, as the fulcrum – together with the first name – of legal and social identity, links the individual to the social formation through the *status filiationis*'.[38] The surname 'must, therefore, be rooted in the family identity and, at the same time, reflect the function it plays, also in a future projection, with respect to the person'.[39]

It is, therefore,

> 'precisely the manner in which the surname testifies to the child's family identity that must reflect and respect the equality and equal dignity

[34] Judgments no 13 of 1994, *Giurisprudenza Costituzionale*, 95 (1994) no 297 of 1996 *Giurisprudenza Costituzionale*, 2475 (1996), and, most recently, Judgment no 120 of 2001 *Il Foro Italiano*, 645/646-657/658 (2002)

[35] Judgment no 297 of 1996 *Giurisprudenza Costituzionale*, 2745 (1996)

[36] Judgment no 268 of 2002; in the same sense, judgment no 120 of 2001 *Il Foro Italiano*, 645/646-657/658(2002).

[37] Judgment no 286 of 2016, *Giurisprudenza costituzionale*, 2435- 2437 (2017).

[38] Judgment no 131 of 27 April -31 May 2022 *Il Foro Italiano* I, 2233 (2022).

[39] Judgment no 286 of 2016 n 37 above.

of the parents'.[40]

The sharp reasoning of the court, and in a way the very interest of the Court in replying to this preliminary question was focused precisely on this knot.

Starting from the logical assumption that 'there is not even a possible agreement without equality', because in the absence of an equality of the parties, the logical basis of an agreement would be threatened. The Court affirmed that if, in the absence of an agreement the rule to be applied would remain the rule of the father's name, equality should not be guaranteed in any case, and the problem would be unsolved, every time there is no agreement between the parties, since one of them shall always prevail on the other. The answer, therefore, it is not only in admitting for the future an agreement for the parties in the choice of the family name, but rather to change the existing rule of the automatic attribution of father's name in the case of disagreement.

Bearing in mind these guiding principles the Courts declared unconstitutional Art 262(1) of the Civil Code in so far as it allows, with regard to the case of recognition made simultaneously by both parents that the child takes the father's surname, instead of establishing that the child takes the surnames of the parents in the order agreed by them, at the time of recognition, or to attribute the surname of only one of them. Consequently, it declares the unconstitutionality of the rule inferable from Arts 262, first para, and 299, third para, of the Civil Code, insofar as it allows that a child born in wedlock takes the father's surname, instead of allowing that the child takes the surnames of the parents, in the order agreed by them, at birth, to attribute the surname of one of them alone; and it declares also the unlawfulness of Art 299, third para, of the Civil Code in so far as it provides that 'the adopted child shall take the surname of the husband's surname', instead of allowing that the adoptee shall take the surnames of the adoptive parents, in the order agreed upon by them, without prejudice to an agreement, reached in the adoption proceedings, to attribute the surname of only one of them. Ultimately, the Court of Laws has declared the illegitimacy of any form of automatic attribution of the paternal surname, with repercussions, therefore, also on Arts 237 and 299 of the Civil Code.[41]

In fact, according to the judges' decision

> 'the automatic attribution of only the paternal surname results in the invisibility of the mother and is the sign of an inequality between the parents, which reverberates and imprints itself on the identity of the

[40] Judgment no 131 of 27 April-31 May 2022.

[41] Art 237 of the Civil Code indicated among the constitutive elements of the possession of the status of legitimate child the fact 'that the person has always borne the surname of the father he claims to have'. That paragraph was repealed by Legislative Decree No 154 of 28 December 2013.

child'.[42]

The Court found discriminatory and detrimental to the child's identity the rule that automatically attributes the father's surname. The constitutional illegitimacy was also extended to the rules on the attribution of the surname to the child born in wedlock and to the adopted child.

In accordance with the principle of equality and in the child's interest, both parents must be able to share the choice on his or her surname, which constitutes a fundamental element of personal identity.

Therefore, the rule becomes that the child takes the surname of both parents in the order agreed by them, unless they decide, by mutual agreement, to give only the surname of one of them.

As to the rules necessary to settle any disagreement, in the absence of different criteria established by the legislator, the Court cannot but point to the instrument that the legal system already provides for resolving disagreements between parents on choices of particular relevance concerning the children. This is the recourse to the intervention of the court, provided for, in simplified forms, by Art 316, second and third paras, of the Civil Code, as well as – with reference to situations of crisis of the couple - by Arts 337-ter, third para, 337-quater, third para, and 337-octies of the Civil Code.[43]

Moreover, the aforementioned provisions are the same ones that, according to the orientations of case law and legal scholarship, settle disagreements between parents also with regard to the attribution of the first name.[44]

In any case, it is up to the legislature to regulate all aspects related to this decision.

It is worth highlight that the Court is clearly aware of the fact that its role is checking norms, and not making norms. The role to legislate, instead, is the task of the legislature. In the judgement rendered by the Court, this is an important issue because the Court, faced to the prolonged silence of the Parliament on the innumerable invitations to legislate, not only declares the unconstitutionality of any norms that establish an automatically attribution of the name but also tries to imagine how the norms should be imagined, offering some useful criteria to the legislator, hopefully waiting for its prompt intervention.

X. More '*Liberté*' Than '*Égalité*': The Insertion of '*Nom d'Usage*' in the French 'Law no 2022 -301 of 2 March 2022 on the Choice of a Name Derived from Filiation'

The comparison with the French legal system appears extremely interesting

[42] Judgment no 131 of 27 April-31 May 2022.
[43] ibid
[44] ibid

as far as the events and vicissitudes around the discipline of name's attribution recall – with some peculiarities – the same path of the Italian experience.

In this view, if, on one side, the French legislator recognised the equality between parents and tried to abandon the rule of patronymic, on the basis of the principle of equality and non-discrimination, the result is only partially achieved and it seems less complete compared to the efforts achieved by the Italian Constitutional Court. On the other side, with the recent Law 2022-301, this new law gives the power of autonomy a role even broader.

The parliamentary debates reveal that the legislator intended to reconcile the objective of equality, which was the primary objective of the initial bill, with greater freedom in choosing one's name.[45]

This is evident at very first sight if one pays attention to the title given to the act: 'Law no. 2022-301: on the choice of a name derived from filiation'. The legislative text was adopted by the National Assembly and published in the *Journal officiel* of 3 March 2022, it came into force on 1 July 2022.[46]

Before briefly illustrating the innovations of the law 2022-301, it seems important to give a synthetic picture of the rules governing name's attribution in France until this recent change.

In France, in the past, the patronymic rule applied together with the admissibility of the so-called *nom d'usage* provided for by the Law n° 85-1372 of 1985. The *nom d'usage* is a peculiarity of the French system. This rule, which is not mandatory and not transmissible- allows the name of the other parent to be added to one's own in social life. The *nom d'usage*, however, did not enter in the civil status registers and it was not transmitted to descendants. It is therefore not a 'real' name. It is not a pseudonym either, since it can, at the request of the person concerned, be registered on identity documents under the heading '*nom d'usage*'. It is therefore a social name.[47] This is why this technique has been opened up more widely for adults and minors.

In the brief excursus concerning family name, the most important changes then resulted from the Acts of 4 March 2002 and 18 June 2003, two essential texts which, once again, tackled the injustice, in the event of the parents marrying, of the paternal preference in the attribution of the name and created the fourfold option of Art 311-21 of the Civil Code.[48]

[45] Débats Parlamentaires (procedure accélérée), LOI n° 2022-301 du 2 mars 2022 relative au choix du nom issu de la filiation, available at https://tinyurl.com/bdzbrkr2 (last visited 31 December 2022).

[46] LOI n° 2022-301 du 2 mars 2022 relative au choix du nom issu de la filiation, JORF n°0052 du 3 mars 2022.

[47] F. Laroche-Gisserot, 'Les apports de la loi du 2 mars 2022 relative au choix du nom issu de la filiation' *AJ Famille*, 360 (2022).

[48] See, for a reconstruction of the evolution of the discipline in French Legal System, C. Petit, 'Difficultés d'application de la législation relative au nom de famille : appel au législateur ?' *RLDC*, 39 (2011); Id, 'Modification des règles relatives au nom de famille des enfants : égalité, liberté et complexité (suite)' *RLDC*, 5162 (2013).

According to Art 311-21 of the French Civil Code (carnal filiation and adoptive filiation) – depending on whether the child has one or two links of filiation at the time of the birth declaration – a child who has two links of filiation may be given the mother's name or the father's name or both in any order they wish, provided they complete a name choice form. Otherwise, the suppletive rules will provide that if there is not perfect simultaneity in the establishment of the two links of filiation, the one who first established the link of filiation transmits his name, while in the case of simultaneity, it is the father's name that is transmitted automatically (reminiscence of the old system: patronymic).

Finally, if there is a disagreement between the parents and it is notified to the *Office de l'État Civil* (OEC), then the two names are transmitted in alphabetical order.

These Acts guaranteed the principle of freedom of choice of family name and the equality between the sexes in the transmission, but with two limits: the first was represented by the choice of no more than two names transmitted and the second by the respect of the principle of unity of name in siblings.

In the absence of marriage, various solutions were available, adapted to the state of parental relation.

In the case of one parent-child relationship, the rule was established by Art 311-23 of the Civil Code: a child who has only one parent-child relationship at the time of the declaration of birth is given the name of his or her only parent. If a second parent-child relationship is subsequently established, and with the agreement of the first parent, the possibility of choosing a name returns with the same limitations as before. If the first parent does not agree, there is no possibility of changing the name.

In this evolutionary trend, another important change occurred with the Law on bioethics 2021-1017 of 2 August 2021, that established new rules for the transmission of specific names to child born through assisted reproductive technology (ART).[49] The new Art 342-12 Civil Code provides for couples of women who have recourse to ART the possibility of transmitting the name of the mother who gives birth, of the mother who does not give birth or of both in the order they wish (via a declaration form to be submitted at the time of the declaration of birth at the latest) within the limit of one name for each (para 1) and respect for the principle of unity of the name in the siblings (para 3). If there is no double recognition because the mother who did not give birth prevents it, the possibility of returning to the rules of Art 311-23 of the Civil Code (transmission of the name of the only parent who established the link) is allowed. In the absence of a choice, the legislator provides for the automatic transmission of both names in alphabetical order. On this particular criterion, shades and uncertainties persist, because of the risk of threatening equality

[49] LOI n° 2021-1017 du 2 août 2021 relative à la bioéthique, JORF n° 0178 du 3 août 2021 ELI: https://tinyurl.com/374huu5y (last visited 31 December 2022).

once more, since the alphabetical order inevitably leads to the survival of only one surname in transfer process involving the next generations. Equality, in this perspective, is one more time attacked by the inevitably abandonment, generation by generation, of all those surnames from the Z backwards. The alphabetical order – as we will point out in the next pages – remains a debated issue also in Italy, since no reference to a criterion in case of no choice of the parents has been evocated in the Constitutional Court's judgement, except for the suggestion to leave the issue on judges. As far as equality is concerned, it is undoubtful that in France, in contrast with the Italian approach, many of the latest reforms concerning name's attribution rules have been made, all guided by the ambition to strengthen equality.

With the new Act of 3 March 2022, French law combines *liberte* and *egalité*, overcoming the problem arose with former provisions of civil codes, according to which, in case of disagreement, the patronymic rule prevailed.[50]

In fact, this reform facilitates the use of the other parent's name, particularly for minors. It also gives any adult not only the right to add but even to substitute the name of their other parent or, if they bear the names of both parents, to reverse the order of their names. This can be done once in a lifetime, by a simple declaration at the town hall, without having to justify a legitimate reason.

As documented in the preparatory work the two major principles taken into consideration by the legislator in the reform were equality between parents and individual freedom.

It is with specific regard to the *nom d'usage* that the Act of 2 March 2022 further strengthens equality between parents, particularly for minors.

In fact, one of the innovations made by Law 2022-301 is the enshrinement in the Civil Code of the *nom d'usage* in Art 311-24-2, among the rules disciplining the name's attribution.[51]

As reported in the explanatory memorandum to the Act

> 'the aim was to respond to the concern of many women who are raising a child alone or who have primary responsibility for it (and for whom) the fact that the child most often bears the father's name can be a source of complication in carrying out administrative procedures'.[52]

The law first allows, as '*nom d'usage*', to add to one's name the name of the parent who did not transmit one's own, in the name of the principle of freedom.

The law then gives every adult the right, once in his or her life, to change his

[50] P. Calendal Fabre, 'La loi relative au choix du nom issu de la filiation : liberté, égalité... simplicité !' *AJ Famille,* 358 (2022).

[51] See, French Civil Code, Section 3 : Des règles de dévolution du nom de famille et du nom d'usage (Arts 311-21 à 311-24-2), https://tinyurl.com/56fknckj (last visited 31 December 2022).

[52] See Assemblee Nationale, Proposition de loi n°4853 pour garantir l'égalité et la liberté dans l'attribution et le choix du nom, Legifrance, https://tinyurl.com/2p94k85k (last visited 31 December 2022).

or her surname, adding or substituting the name of the parent who did not pass on his or her own.

The principle of equality was even more directly invoked by inserting the possibility for the parent who has not transmitted his or her name to the child to decide alone to add it to the child's name, as *nom d'usage*. In so doing, the authors of these amendments intended to 'restore parental equality in the choice of the name used in everyday life'.

In its substance, while the main thrust of Act no 2022-301 of 2 March 2022 is to give the adult child the fourfold choice that his or her parents have not exercised or have, in his or her opinion, exercised incorrectly, the Act has also used and extended the technique of the *nom d'usage*, a name used in everyday life, again to facilitate adaptations that would be desired but had not been implemented for various reasons.[53]

As affirmed, this is a twofold revolution: substantive and procedural.[54] A revolution in substance because this change of name is a right and is therefore not conditional on the demonstration of a legitimate reason that an authority would be responsible for controlling. A revolution in procedure because the change is made by declaration before the civil registrar and no longer by decree prepared by the chancellery after the publicity formalities have been completed.[55]

In any case, as declared by most of the commentators, such discipline does not simplify but confuses the entire system, mixing rules pertaining to different grades and orders in the same provision, without a real equality standard guaranteed.

As observed, if 'the Act of 2 March 2022 thus responds to an egalitarian aspiration' it did not follow 'an egalitarian logic', as it refused 'to impose automaticity of the double name at birth', precisely on the ground of freedom.[56] In contrast with the solution given by the Italian Constitutional Court it did not want to impose the automaticity of the double name at birth.

It is clear that the French rule of *nom d'usage*' is not referrable to our legal system. However, this new rule together with the amended rules of double names – including criteria and limits to regulate the choice of family name – adopted by the French legislator, as they reveal the conceptual basis that guided this insertion in the code: the freedom of choice of both parents, the freedom of choice of the minor once in adult age, aiming essentially to allow the freedom of choice in its greatest expression and in the most different conditions.[57]

[53] F. Laroche-Gisserot, n 47 above, 360.

[54] ibid

[55] ibid

[56] P. Calendal Fabre, n 49 above, 358.

[57] See, for interesting critical thoughts around the so called 'adulcentrism' derived from the guiding principle of the new rules, A. Diurni, n 7 above.

XI. Once Equality Established, Some Uncertainties Remain

The final word given by the Italian Constitutional Court on the issue, together with the above-mentioned case law, confirm the idea that abandoning the principle of automatic attribution of the paternal surname is part of the broader effort of the constant adaptation of family law to the constitutional and community values. On this point, the judgement of the Court no 131 of 31 May 2022 reveals in a clear-cut way the role of the constitutional court as defensor and guarantor of constitutional values and fundamental rights towards the acts and rules enacted by the Parliament or by the Government.

In this context, it should be added that the question of the family name has as its objective the 'egalitarian aspiration' since the aim is to level out the differences between parents. The delicate issue of the protection of minors is also concerned.[58]

In this scenario that is completely reshaped, the power of autonomy earns a privileged role, becoming the parameter through which the regulation of private life: private autonomy has become the dominant approach to the problem of surnames in the different European legal systems as the previous analysis of the Italian and French legal system testifies.

In France, autonomy is even more evident. By facilitating the use of the name of the other parent, particularly for minors, and by giving any adult the right, via a Cerfa form (CERFA stands for centre d'enregistrement et de révision des formulaires administratifs), to add or substitute the name of the other parent or to reverse the order of their names, Act No 2022-301 of 2 March 2022 simplifies matters. This reform, which came into force on 1 July 2022, opens a new breach in the principles of the immutability and unavailability of names.

In Italy, the double name has become an essential step for the recognition of the child's identity. As observed by a legal scholar,

> 'in a context where the emergence of family ties is determined by the generation of a common child, the personal identity of each member and his or her belonging to the family group are effectively guaranteed precisely by the attribution to children of a surname that contains elements identifying both parents, underlining that "common kinship" which today constitutes the essential core and unifying element around which the family unit is cemented'.

In order to give effectiveness to this need,

> 'only the attribution of a double surname would therefore make it possible to highlight the belonging to the "lineages" of the father and mother, as well as the heritage of traditions, culture and family history that

[58] See, for interesting critical thoughts around the so called 'adulcentrism' derived from the guiding principle of the new rules, A. Diurni, n 7 above.

each surname can evoke'.[59]

Once the double name system is adopted and implemented, the next generation of children will have two surnames, and the question will arise as to which surname should be passed on to their children.

In this view, the path built by the Constitutional Court has not yet been accomplished and the legislative power has still an important role in order to give answers to these uncertainties.

As stated by the Court:

> 'as a corollary to the declarations of constitutional illegitimacy, this Court cannot fail to issue a twofold invitation to the legislature. Firstly, it is necessary to act to prevent the attribution of the surname of both parents from leading, in the succession of generations, to a multiplier mechanism, which would undermine the identity function of the surname'.

The other necessary legislative intervention concerns the protection of the child's interest in family identity, ie in not being given a surname different from that of his or her brothers or sisters, and here too the Court indicates a path 'constitutionally viable' even if not a compulsory one: reserving the choice of surname at the time of the recognition, birth or adoption of the first child, binding the parents for subsequent children.

Lastly, the petitum meritoriously allows the Court to limit the effects of this disruptive decision to the sole hypothesis of the original attribution of the surname, excluding applications to change the surname already acquired.

Some perplexities, however, have been brought by the legal scholars about the nearly accessory character of the violation of the child identity, compared to the preponderant claim of equality between parents. If the projection on the child's surname of the dual parental relationship, as the Court maintains, identifies the *status filiationis*, as a pivotal element of personal identity, it is difficult to doubt the fundamental nature of the right at stake and its prevalence in the balance with the consensual principle.[60] The right to be identified by both surnames seems therefore the logical prerequisite for the affirmation of the *regola iuris* of the double surname, whereas it seems ill-suited to the derogatory hypothesis based on consent.[61] As observed, such a judgment clearly leaves unsolved the problem of the order of surnames with respect to which, according to the Court, the parents' agreement must prevail and, failing that, recourse to the court to settle the dispute over choices inherent in the child. It must, however, be

[59] See the contribution of E. Al Mureden, 'L'attribuzione del cognome tra parità dei genitori e identità del figlio' *Famiglia e diritto*, 223, 213-224 (2017)

[60] C. Masciotta, 'L'eguaglianza dei genitori nell'attribuzione del cognome: una nuova regola iuris dettata dal giudice costituzionale' *Osservatorio sulle Fonti*, 268-271, 251-271 (2022).

[61] ibid

observed that the question of the order of surnames undoubtedly falls within the wide sphere of legislative discretion, the legislature being entitled to opt for a different solution such as alphabetical order: even in the absence of obligatory rhymes, the Court adds a *regula iuris* that is not constitutionally imposed but constitutionally compatible.[62]

Ultimately, in the light of this undoubtedly culturally significant judgment, it is doubtful that the general rule introduced by the Court was the only one that was constitutionally viable, thinking for example of the risk of the multiplication of surnames over the generations, with consequent prejudice to the identity of the children, which could have led to a different solution, falling within the legislative discretion, such as the parents' agreement on only one of the surnames, which could be subrogated judicially.[63]

As critically highlighted, 'it is possible to detect essentially four problems'.[64] The first is that the autonomy alone is not enough to guarantee equality; secondly, equality, entrusted to the free play of autonomy, requires in any case a criterion of legal closure which shall be equally egalitarian. A third problem concerns this last element, allowing a choice between the surname of one or both parents, naturally leads to the double name, as the most 'ecumenical' option among those allowed.[65] Finally, once the double name has been chosen, a criterion is needed to combine it, faced with this problem, an instinctive reflex invariably leads to the alphabet, since any other system – and in particular that which consists of putting the paternal surname before the maternal surname, or vice versa – appears discriminatory on gender grounds.[66]

As critically observed, in the case where the alphabetical order is adopted, the cultural and historical heritage of Italian family names will be threatened, because all names from Z backwards will be in second position[67]. This means that, in the case of the successive choice of the son one generation later with the same criterion of transmitting only one name with the alphabetical criterion, sooner or later some names will be erased (no matter if from the mother or the father). In this light, historical family names may be included as 'intangible heritage' by the Convention for the Safeguarding of the Intangible Heritage.[68]

Considering the French solution, it has been observed that a new dispute is likely to arise in matters of parental authority concerning the choice of the child's name. For where freedom of choice increases, the risk of disagreement

[62] ibid
[63] ibid
[64] L. Olivero, n 9 above 1390-91 and 1394-1395.
[65] ibid
[66] ibid
[67] ibid
[68] See L. Olivero, n 9 above 1390-91 and 1394-1395. See also the Basic Texts of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage 2020 Edition, https://tinyurl.com/4p3f73sw (last visited 31 December 2022).

between the two holders of the choice also increases.[69]

At this point, extremely grateful for the huge effort of the Court for an equality at last established, a question still arises: are we sure that the rule of the autonomy alone may solve the complex system of the discipline of Family name, considered in its broad implications and values, without threatening or censoring the values which in one way or another constitute the fabric of a social relationship?

The last word at the legislature.

[69] See Dossier: Réforme du nom (1re partie) *AJ Famille,* 357 (2022)