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Indice

Some Comparative Reflections On The Unsolved Question Of Double Surname

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Thinking of dystopian visions of the law arises the idea of legal transplants of rules which weren't born in their actual context and have been placed successfully in different legal systems as consequence of circulation. In this flow legal rules lose its original features and acquire those derived from the new context in which they move. In this case the dystopian view allow us to discover what the legal framework would have been without the legal models circulation. This phenomenon is very frequent and more often concerns greater areas of law, for instance anti-discrimination law, given that today circulation concern general principles rather than specific, operative rules as in the past. In this perspective Italian Constitutional Court in a recent judgment (131/2022) recognized the non-compliance of art. 262 paragraph 1 of Italian Civil Code with the child's right to identity and with the parents' right to equality, protected by art.2 and art. 3 of Italian Constitution, as for the automatism of paternal surname derived from it.

This decision will be the starting point to analyse the relevance of anti-discrimination law in Italy as effect of a presumed legal transplant as, for instance, Italian legal system until it didn't recognize the possibility to use a double-barrelled surname, especially with reference to children born by parents joined in civil partnerships or same-sex marriages.

The research will be conducted by comparative method, taking into account overall those elements (cryptotipes), hidden in the folds of legal systems, which explain the divergence between effects of the same rules in different places.

Pensando a visioni distopiche del diritto nasce l'idea di trapianti giuridici di norme che non sono nate nel loro contesto attuale e sono state collocate con successo in sistemi giuridici diversi come conseguenza della circolazione. In questo flusso le norme giuridiche perdono le loro caratteristiche originarie e acquisiscono quelle derivanti dal nuovo contesto in cui si muovono. In questo caso la visione distopica ci permette di scoprire come sarebbe stato il quadro giuridico senza la circolazione dei modelli giuridici. Questo fenomeno è molto frequente e riguarda più spesso grandi aree del diritto, ad esempio il diritto antidiscriminatorio, dato che oggi la circolazione riguarda principi generali piuttosto che norme specifiche e operative come in passato. In questa prospettiva la Corte Costituzionale italiana in una recente sentenza (131/2022) ha riconosciuto la non conformità dell'art. 262 comma 1 del Codice Civile italiano. 262 comma 1 del Codice civile italiano con il diritto del minore all'identità e con il diritto dei genitori all'uguaglianza, tutelati dagli artt. 2 e 3 della Costituzione italiana, per quanto riguarda il diritto all'infanzia. 3 della Costituzione italiana, per quanto riguarda l'automatismo del cognome paterno da esso derivato.

Questa decisione sarà il punto di partenza per analizzare la rilevanza del diritto antidiscriminatorio in Italia come effetto di un presunto trapianto giuridico in quanto, ad esempio, l'ordinamento giuridico italiano fino a quel momento non riconosceva la possibilità di utilizzare un cognome con doppia barra, soprattutto con riferimento ai figli nati da genitori uniti in unione civile o da matrimoni omosessuali.

La ricerca sarà condotta con metodo comparativo, tenendo conto complessivamente di quegli elementi (criptotipi), nascosti nelle pieghe dei sistemi giuridici, che spiegano la divergenza tra gli effetti delle stesse norme in luoghi diversi.

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1. INTRODUCTION. THE ITALIAN PATH TOWARDS THE "DOUBLE SURNAME" AND THE EUROPEAN COURT OF HUMAN RIGHTS CASELAW

By a sentence No. 131 of 31 May 2022[1] – a decision of extreme interest both for its undoubted social effects and for the comparative reflections on circulation of legal models - the Italian Constitutional Court declared the constitutional illegitimacy of the rules providing for the automatic attribution of the father's surname, with reference to children born in wedlock, out of wedlock and adopted children.

Finally, after waiting for the legislature to intervene, the Court rewrote the rule on the child's surname, putting end to discrimination between parents based on the fact that in Italy the child's surname must be the paternal one.

In Italy, the rule of the paternal surname is applied to all children regardless of whether they were born within marriage, outside marriage or adopted. In the case of children born in wedlock, the rule was so deeply rooted in custom that the Italian legislator had not even felt the need to write it down expressly, because it was derived from certain ancient provisions in the legal system, since it was presupposed by them. This patent violation of the equality between spouses, solemnly proclaimed by Article 29 of the Italian Constitution, was justified on the basis of the guarantee of family unity, laid down in the same article. In the legislator's view, the father's surname served to preserve that unity. On the other hand, as far as children born out of wedlock were concerned, the disparity in treatment between parents was functional to guaranteeing the recognised child the same treatment as the legitimate child (i.e. the one born within marriage) and the adoption discipline, introduced by Law No 184 of 1983, was also inspired by the same uniformitarian logic. The Italian legislature has not felt the need to change the patronymic even recently when it intervened to reform the status of children with Law No. 219 of 2012 and the subsequent Legislative Decree No. 154 of 2013. Evidently, the reform would have been a suitable opportunity to begin a deep revision of the regulation of the surname in Italian legal system.

The surname, together with the first name, represents the nucleus of a person's legal and social identity[2]: it confers identifiability, 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. Constant in the jurisprudence of the Constitutional Court is the affirmation that the name is ""an autonomous distinguishing mark of [...] personal identity", as well as an "essential trait of [...]

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[1] Constitutional Court, 31 May 2022, n. 131, on which see E. FRONTONI, *La Corte scrive la nuova disciplina del cognome dei figli*, in Osservatorio AIC, 2022, 5, pp. 162 ff.; M.C. AMOROSO, E. PIERAZZI, *Il cognome della madre*, in www.giustiziainsieme.it; L. BARTOLUCCI, *La disciplina del "doppio cognome" dopo la sentenza n.131 del 2022: la prolungata inerzia del legislatore e un nuovo capitolo dei suoi rapporti con la Corte*, in Studi dell'Osservatorio AIC 2022, III, pp. 941 ff.; M. PICCHI, *La pronuncia della Corte Costituzionale sul cognome dei figli: una nuova occasione di dialogo col legislatore*, in Osservatorio sulle fonti, 2022, 2, pp. 274 ff.; C. MASCIOTTA, *L'eguaglianza dei genitori nell'attribuzione del cognome: una nuova regola iuris dettata dal giudice costituzionale*, in Osservatorio sulle fonti, 2022, 2, pp. 252 ff.

[2] P. PERLINGIERI, *La personalità umana nell'ordinamento giuridico*, Napoli, 1972; P. PERLINGIERI, *La persona umana e i suoi diritti. Problemi del diritto civile,* Napoli, 2006. About this, see also A. DE CUPIS, *I diritti della personalità*, in A. CICU, F. MESSINEO (eds.), *Trattato di diritto civile e commerciale,* Milano, 1961, p. 11; C.M. BIANCA, *Diritto civile, 1. La norma giuridica. I* soggetti, Milano, 2002, p. 189. The 'emblematic symbol of personal identity (...) deserving protection' is discussed in L. BIGLIAZZI GERI (ed.), *Diritto civile*, Torino, 2007, p. 162.

personality"", "recognised as a "good that is the subject of an autonomous right under Article 2 of the Constitution". [and, therefore, as] 'a fundamental right of the human person'" (Constitutional Court, 24 June 2002, no. 268). 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 that receives him through the status filiationis. The surname, therefore, takes root in the family identity and, at the same time, reflects the function it plays, also in a future projection, with respect to the person as it must reflect and respect the equality and equal dignity of the parents. Selecting only the paternal line from among the data prior to the attribution of the surname unilaterally obscures the parental relationship with the mother. In the face of the simultaneous recognition of the child, the sign of the union between two parents results in the invisibility of the woman. The automatism imposed bears the seal of an inequality between the parents, which reverberates and imprints itself on the child's identity. It is an automatism that finds a limit either in Article 3 of the Constitution, on which the relationship between the parents, united in pursuing the child's interests, is based, or - as the Court has already noted with reference to the attribution of the surname to the child born in wedlock - in the coordination between the principle of equality and "the purpose of safeguarding family unity, referred to in Article 29, second paragraph, of the Constitution". It is, in fact, ""precisely equality that guarantees that unity and, conversely, it is inequality that jeopardises it"[3], since unity "is strengthened to the extent that the mutual relations between spouses are governed by solidarity and equality"[4].

The 1975 reform of family law itself, which did not intervene on the discipline of attributing surnames to children, had, however, helped to focus on the meaning of the relationship between equality and family unity. The unity of the family founded on marriage is based on 'the same rights and duties' of the spouses (Article 143 of the Civil Code), on mutual solidarity and the sharing of choices[5]. Similarly, the assumption of responsibility by the parents, inside and outside marriage, is rooted in equality between them and agreement on decisions concerning the child. This was always emphasised by the 1975 family law Reform and the 2012-2013 filiation reform, which was also silent with respect to the censured rule, but which was in favour of removing another historical residue of the disparity between parents[6], still present in the original fourth paragraph of Article 316 of the Civil Code, under which only the father could adopt 'urgent and irrevocable measures' to remedy 'an impending danger of serious harm to the child'. Unity and equality cannot coexist if one denies the other, if unity operates as a limit that offers a veil of apparent legitimacy to sacrifices imposed in a direction that is only one-sided. In the face of the evolution of the legal system, the legacy of a discriminatory vision, which through the surname reverberates on the identity of each individual, is no longer tolerable. In the face of regulations that guarantee the attribution of the father's surname, the mother is placed in a situation of asymmetry, antithetical to equality, which, a priori, invalidates the possibility of an agreement, all the more improbable insofar as its object is the attribution of the mother's surname alone, i.e. the

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[3] Constitutional Court, 13 July 1970, n. 133.

[4] Constitutional Court, 8 November 2016, n. 286.

[5] Among the provisions, see the new article 144 of the Civil Code.

[6] See F. PROSPERI, *L'eguaglianza morale e giuridica dei coniugi e la trasmissione del cognome ai figli*, in Rassegna di diritto civile, 1996, pp. 841-858; V. CARBONE, *L'inarrestabile declino del patronimico*, in Familia,2006, p. 951; C. CIRILLO, *Il cognome dei figli: tentativo di negare la parità dei coniugi?,* in Rivista giuridica del Molise e del Sannio,2015, pp. 97-112.

radical sacrifice of what is rightfully the father's. Without equality, the logical and axiological conditions for an agreement are lacking.

Really, more than 15 years before the decision no. 131/2022, by decision no. 61 of 2006 the Constitutional Court had found that the child's surname regulation was in conflict with the Constitution, but it had not declared constitutionally unlawful the legal rule yet. In that occasion, the Court, while noting that *the system of attributing surnames is the legacy of a patriarchal conception of the family [...] no longer consistent with the principles of the legal system and with the constitutional value of equality between men and women*», observed that, faced with several solutions compatible with the Constitution, it is within the legislature's discretion to choose among the various options. For these reasons, the judgment closed with an invitation to the legislator to act as soon as possible.

Ten years after, in the absence of the hoped-for intervention of the Italian Legislator, the issue of a child's surname came before the European Court of human Rights. The European Court, in the *Cusan Fazzo v. Italy* judgment of 7 January 2014[7], condemned Italy for violation of Article 14 in conjunction with Article 8 of the EChR. According to the European Court, the provision of a paternal surname violates the equality of parents, who, by mutual agreement, cannot decide to give their child only the maternal surname.

So thanks to the family law reform of 1975 and then to the filiation reform of 2012-2013, several inequalities between spouses and between parents, which could no longer be tolerated because violating constitutional norms protecting women and the family, namely Articles 3, 29, 30 and 31 of the Constitution, have been ironed out. At the same time, these differences did not take into account the European and international law. On the one hand because they were not in line with the international obligations assumed by our legal system, in particular with respect to the ratification of the 1979 UN Convention for the the Elimination of Discrimination against Women[8]. On the other hand, discrimination between parents with respect to surname also violated Articles 8 and 14 of the European Convention of Human Rights, as the European Court of Human Rights has counted the name among the aspects of private and family life, as a means of personal identification and of connection to a lineage, thus drawing the right to choose the name to be given to children into the parents' private sphere and not only to public needs. In this regard, by the judgment *Cusan and Fazzo v. Italy* the European Court in 2014 found a violation of Article 14 (prohibition of discrimination) combined with Article 8 of the Convention (right to respect for private and family life)40 and it condemned Italy as it does not provide in surname

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[7] *Cusan Fazzo v. Italy*, ECtHR 7 January 2014, n. 77/07, in *Famiglia e diritto,* 2014, p. 212. See S. WINKLER, *Sull'attribuzione del cognome paterno nella recente sentenza della Corte europea dei diritti* dell'uomo, in La nuova giurisprudenza civile commentata*,* 2014, I, pp. 520-528; M. CALOGERO, L. PANELLA, *L'attribuzione del cognome ai figli in una recente sentenza della Corte europea dei diritti dell'uomo: l'affaire Cusan e Fazzo c. Italia*, in Ordine internazionale e diritti umani, 2014, pp. 222-246; V. CORZANI, *L'attribuzione del cognome materno di fronte alla Corte europea dei diritti* dell'uomo, in Giurisprudenza italiana,2014, pp. 2670-2675; G. DOLSO, *La questione del cognome familiare tra Corte costituzionale e Corte europea*, in *Giurisprudenza costituzionale,* 2014, pp. 738-758; M. ALCURI, *L'attribuzione del cognome paterno al vaglio della Corte di Strasburgo*, in Diritto delle persone e della famiglia*,* 2014, pp. 555-561; E. MALFATTI, *Dopo la sentenza europea sul cognome materno: quali possibili scenari?*, in Consulta online, 9.3.2014; F. BUFFA, *Nel nome della madre. Prime riflessioni sulla sentenza CEDU, II sez., 7 gennaio 2014, Cusan e Fazzo c. Italia*, in Questione giustizia, 15.1.2014 and S. NICCOLAI, *Il diritto delle figlie a trasmettere il cognome del padre: il caso Cusan e Fazzo c. Italia*, in Quaderni costituzionali., 2014, 3, pp. 453 ff. On the decisive influence of this pronouncement on the Constitutional Court's decision, see E. MALFATTI, *Illegittimità dell'automatismo, nell'attribuzione del cognome paterno: la "cornice" (giurisprudenziale europea) non fa il quadro*, in Forum quaderni costituzionali, 5.1.2017, pp. 1 ff. For a different perspective, see E. FRONTONI, *Genitori e figli tra giudici e legislatore. La prospettiva relazionale*, Napoli, 2019, pp. 101 ff.

[8] *Convention on the Elimination of All Forms of Discrimination against Women* . New York, adopted by United Nations General Assembly on 18 December 1979, entered into force on 3 September 1981 after the twentieth country had ratified it.

attribution for the possibility of assigning the maternal surname to the child (by agreement of the parents) under the principle of equality, inviting the Italian State to adopt the appropriate measures to comply with the aforementioned judgment and, thus thereby fulfilling its obligations under Article 46 of the Convention.

Later, by a historical decision no 286 of 21 December 2016[9], the Italian Constitutional Court' had declared unconstitutional the 'rule' that provided for the automatic attribution of the father's surname to a child, even against the wishes of the parents: the Court declared unconstitutional the rule in the part where it does not provide that, by mutual agreement, parents may derogate from the paternal surname rule by adding the mother's surname to the paternal one. However, in the event of failure to agree, the judgment leaves in place the automatism of the paternal surname, and thus the inequality between parents, not completely restoring constitutional legality. For this reason, the Court invited again the legislator to intervene to provide a regulation of the matter for eliminating the unconstitutionality at the root.

This ruling is the result of a slow transformation which inevitably has affected Italian family law[10]. Lawmakers and judges, operating in different formats, have begun to reconsider the relationship between parents and children, through a series of reforms and several judgments, in the light of changes in the system of the source of law. The doctrine itself has contributed to this evolutionary trend. By multiple debates on the matter, it has critically and continuously sought to re-design a new family model, no longer necessarily based on a conjugal bond far from the archaic concept of the 'patriarchal family'. This new model can be described as a 'social formation' consistent with the constitutional principles and abiding by supranational legislation.

The case before the Constitutional Court in 2016 concerned the prohibition on a married couple attributing to their child, who had dual citizenship (Italian and Brazilian), the maternal surname in addition to the paternal one. The minor was thus registered with different surnames in the two countries: this choice sacrificed the right to identity and constituted an obvious injury to that 'essential trait of personality' which benefits from autonomous constitutional protection as a distinctive sign of the person. It

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[9] Corte Costituzionale 21 December 2016, n. 286, in Giurisprudenza costituzionale, 2017, pp. 2435- 2437, with notes by R. FAVALE, *ll cognome dei figli e il lungo sonno del legislatore*, in Giurisprudenza italiana, 2017, pp. 815-824. See also L. TULLIO, *The Child's Surname in the Light of Italian Constitutional Legality*, in Italian Law Journal, 2017, 3, pp. 221 ff.; C. FAVILLI, *ll cognome tra parità dei genitori e identità dei figli,* in La nuova giurisprudenza civile commentata,2017, pp. 823-830; E. AL MUREDEN, *L'attribuzione del cognome tra parità dei genitori e identità personale del figlio,* in Famiglia e diritto, 2017, pp. 218-224; V. CARBONE, *Per la Corte costituzionale i figli possono avere anche il cognome materno, se i genitori sono d'accordo,* in Corriere giuridico, 2017, pp. 167-174; V. DE SANTIS, *ll cognome della moglie e della madre nella famiglia: condanne dei giudici e necessitA di riforma. L'unità della famiglia e la parità tra i coniugi alla prova*, in federalismi.it, Focus Human Rights, 2017, pp. 1-37; C. INGENITO, *L'epilogo dell'automatica attribuzione del cognome paterno del figlio (nota a Corte costituzionale no 286/2016)*, in Rivista AIC, 2017, 31 May, pp. 1-18; S. SCAGLIARINI, *Dubbie certezze e sicure incertezze in tema di cognome dei figli,* in Rivista AIC, 2017, 19 May, pp. 1-13; E. MALFATTI, *Illegittimità dell'automatismo nell'attribuzione del cognome paterno: la "cornice" (giurisprudenziale europea) non fa il quadro*, in Forum di Quaderni Costituzionali Rassegna, 2017, 5 January, pp. 1-4.

[10] In recent years, a lot of innovations have been implemented by Italian Legislator: the law Revisione delle disposizioni vigenti in materia di filiazione (legge 1 December 2012, n. 219; decreto legge 28 December 2013, n. 154), implementing the uniqueness of the child status, recognizing the equality between children born of a married couple, born out of the wedlock and adopted children; the Law Disciplina sui modelli alternativi di risoluzione delle controversie (legge l November 2014, n. 162, especially Arts 6 and 12) that, through 'assisted negotiation' and 'agreements reached before the registrar' allowed the friendly and out-of-court settlement of marital separation; the law Disposizioni in materia di scioglimento o di cessazione degli effetti civili del matrimonio (legge 6 May 2015, n. 55), allowing the so-called 'express divorce'; finally, the law *Regolamentazione delle unionicivili trapersone dello stesso sesso e disciplinadelle convivenze* (legge 20 May 2016, n. 76), that recognized for same-sex couples the same rights of married couples, allowing the registered same-sex couples to enter into common-law marriage agreements.

should be noted that this 'verbal sign' is suitable not only as a 'concise individual emblem', but also 'to summarize with great simplicity the personality of the individual', projecting it into the social context. The Constitutional Court recalls that 'the value of the identity of the person, in the fullness and complexity of its expression, and the awareness of the public and private value of the right to the name as an emergence of the belonging of the individual to a family group, identify the criteria for the attribution of the surname of the minor as profiles determining his personal identity, which is projected into his social personality'.

This double dimension of the surname (personal and social) strengthens its importance and justifies, especially for dual citizens, a fortified protection not only within the country, but in the wider 'legal place'. Moreover, the decision to attribute to the child only the father's surname created an unreasonable disparity in treatment between parents, a disparity that could not be justified in the name of safeguarding family unity.[11] On the contrary, as previously mentioned by the Constitutional Court itself, family unity 'is strengthened when mutual relations between spouses are governed by solidarity and equality'.

The impossibility of enrolling the child in public registries with the surname of both parents (the double surname, which had already been attributed in Brazil) was contrary both to Art 2 of the Constitution, since the right to personal identity was compromised, and also to Art. 3 and Art. 29 of the Constitution, with respect to the principles of equality and equal dignity of spouses; it was also in contravention of international law barring any form of discrimination against women' and any inequality between spouses in choosing the family name, as well as treaties seeking to safeguard the rights of the child and, more generally, civil and political rights.

The Constitutional Court therefore recognized with this interpretative ruling the 'full and effective implementation of the right to personal identity, which finds its first and immediate confirmation in the name', affirming the 'equal importance of both parental figures in the process of building the personal identity' of the child. As an immediate consequence of the unconstitutionality ruling, the Ministry of the Interior implemented the Circular 19 January 2017 no 1, which obliged registrars to accept the requests of parents who, by mutual agreement, intend to assign to a child a double surname, paternal and maternal, at the time of birth, adoption or in the case of joint recognition.

To better understand this topic, in Court's opinion, four issues must be examined: first, the absence of a specific 'rule' designed to provide for the automatic attribution of the paternal surname and the solutions adopted by Italian and European case-law; second, the obvious urgency of a constitutional intervention following the profound changes in regulations; third, the pre-existing presence of a double surname for recognized children and for dual citizenship children; and finally, the issues arising from the judgment of unconstitutionality in light of the dynamism of the legal system. This was not the first time the Constitutional Court had addressed the matter

[11] The paradigm stating that the unity of the name is functional to the unity of the family is overcome by the ruling of the European Court of Human Rights, *UnalTekeli v Turkey,* 16 September 2005, available at http://tinyurl.com/y8tsr38o (last visited 15 June 2017). It should be noted that, following this decision, the Turkish Constitutional Court declared unconstitutional Art 187 of the Turkish Civil Code obliging the woman to change her surname after the marriage. See B. ÇALI, *Third Time Lucky? The Dynamics of the Internationalization of Domestic Courts, the Turkish Constitutional Court and Women's Right to Identity in International Law,* in ejiltalk.org, 10 February 2014. See also: P. PERLINGIERI, *Riflessioni sull'unità della famiglia*, in P. PERLINGIERI (ed.), *Rapporti personali nella famiglia*, Napoli, 1982, p. 38; G. FERRANDO, *I rapporti personali tra coniugi: principio di eguaglianza e garanzia dell'unità della famiglia,* in P. PERLINGIERI, M. SESTA (eds.), *I rapporti civilistici nell'interpretazione della Corte costituzionale,* Napoli, 2007, pp. 317-332.

of the prevalence of the paternal surname. As already seen, on several occasions it had pointed out how the transmission of the father's surname to descendants was the legacy of a patriarchal conception of family, whose roots were firmly tied to Roman law: at that time, it seemed logical, building the *gens* system, to choose the progenitor's *nomen* to designate the *familia* on the basis of the legality of the bond of submission. The patronymic constraint later on, though not mentioned in the *Code civil ,*nor in the Italian Civil Code of 1865, continued to find justification in the presence of the *'marital authority*' and of *the 'patria potestas',* aised under the veil of a 'presumed' *egalité.*

The constitutional judges stated that this way of attributing the surname is no longer consistent with the values expressed by modem regulations. However, in previous cases, the Court limited itself to 'ascertaining' the invalidity of the rule without ever 'declaring' the rule unconstitutional. The established incompatibility of the rule with the constitutional values was therefore limited by the need to wait for a direct intervention that could address, in a coherent and careful manner, all the possible consequences arising from the 'fall' of the ancient and automatic attribution of the father's surname. Moreover, there was also the related issue of the husband's surname (discriminatory - in this case - against the husband). In other words, until 2016, the Constitutional Court had always abstained from a 'destructive' action, outside its powers, referring the matter to the 'area reserved to the legislator'. The Court awaited the opportunity to regulate the matter *ex novo,* replacing the 'rule' in force with regard to the imposition of the so-called *nomen familiae* with a different criterion, more respectful of the autonomy of spouses and of the principles of equal dignity and equality.

There is no a specific rule requiring the automatic attribution of the father's surname. It is inferred from an indirect interpretation of several articles of the Civil Code and from other specific laws. An example of a more explicit rule is Art. 237 of the Civil Code, which supports the use of the father's surname by including among the constituent elements of status ownership the circumstance that 'the person carries the surname of the father whom he/she claims to have'. The following articles similarly support the automatic attribution of the father's surname: Art. 262 of the Civil Code, about children recognition; Art. 299 of the Civil Code, on adoption; Art 72, para 1, of the royal decree 9 July 1939 no 1238, which provides for the prohibition of imposing on the child the same first name of the living father, as they have the same surname; and Arts 33 and 34 of the decree of President of Republic 3 November 2000 no 396. It is on the basis of these provisions that the Constitutional Court found grounds to rule on the constitutionality of the practice. Such a ruling had been repeatedly called for not only by the judges, but also by numerous appeals presented over the last thirty years, and by the ECtHR, which was the main driving force of this reforming effort. The ECtHR, intervening in this framework, pointed out that in Italy, in determining the surname to be attributed to the child, the father and the mother were 'in similar situations', yet 'treated in a different way'. Therefore, 'the registration of children in family status registries is excessively rigid and discriminatory against women'. The right to the 'name' is found under the protection provided by Arts 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR). As a result, 'the impossibility for a married couple to attribute to their children, at birth, the mother's surname' constitutes an infringement of European laws and international obligations.

In this sense the importance of a development in the direction of gender equality[12] was emphasised by the ECHR, which calls for the "elimination of all discrimination in the choice of surname, on the assumption that the tradition of manifesting the unity of the family by giving all its members the husband's surname cannot justify discrimination against women" (ECHR, judgment of 7 January 2014, *Cusan and Fazzo v. Italy*, paragraph 66).

These circumstances require greater attention to compatibility with constitutional precepts. The relevance of the ECHR is not limited to the adaptation of national laws. Rather, the ECHR

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[12] Y. TIROSH, *A Name of One's Own: Gender and Symbolic Legal Personhood in the European Court of Human Rights*, in Harvard Journal of Law and Gender, 2010, 33, p. 247.

contributes to the underlying unitary values of our legal system. Consequently, the violation of Arts 8 and 14 of the ECHR by national legislation does not raise a problem of 'hierarchical placement of conflicting rules, but rather issues of constitutional legitimacy', given the breach of Art 117, para 1 of the Constitution. The Constitutional Court states that the question is 'absorbed' in that article and emphasizes the centrality of the *Cusan Fazzo* judgment finding Italy to be in violation of the ECHR. Such a finding and the violation of ECHR rules implies that the Constitutional Court would review the matter. The Constitutional Court intervened to review its previous stance, showing itself to be fully aware of the fact that the proper protection of the 'right to name' requires a fair balancing of the interests involved in the light of the complex and changed regulation framework.

2. A LOOK AT SOME NATIONAL EXPERIENCES: THE REGULATION OF SURNAME IN UNITED KINGDOM, FRANCE, BELGIUM AND GERMANY

In a comparative perspective it can be useful looking at other legal systems to develop some comparative reflections also for finding the best solutions to unresolved issues in our legal system.

The common denominator of the foreign experiences that will be examined here is, on the one hand, the abandonment, albeit at different times and in different ways, of the model of patrilineal transmission of the surname, often allowing the attribution of a double surname, and on the other hand, having faced the adjustments that were necessary to fully implement both the principle of equality and non-discrimination between men and women and the principle of protecting the identity of the child.

At the outcome of the research, although the recognition of a beneficial circulatory effect between the legal models examined in the sense of the now shared use of both parents' surnames by the legal systems is undeniable, the influence of hidden elements in certain legal systems - which explain the divergence between effects of the same rules in different places - reveals a series of problems in the application of the new rules in some legal systems, such as the Italian one for which there are still many uncertainties as to how the new model of surname attribution can efficiently work.

In United Kingdom, the attribution of a surname to children, although left to the persons with parental responsibility, as in most legal systems is not, however, regulated by specific and inderogable provisions, but rather left to their decisional autonomy[13]. In fact, when registering the birth (which must be done within 42 days), the child can be given the name of the father, the mother or both parents (double-barreled). In the latter case, it is usually the patronymic that is placed in the first position, but it is not uncommon that the order of the surnames may follow the best 'sound'; it is also possible, although not frequent in practice, to assign a surname other than that of the parents.

In essence, there is a wide latitude in indicating the surname through which «at the date of the regis- tration of the birth it is intended that the child shall be known»[14].

[13] In accordance with section 9(3) of the Registration of Births and Deaths Regulations 1987 (Statutory Instrument 1987, n. 2088) as amended by the Registration of Births and Deaths (Amendment) Regulations 1994 (Statutory Instrument, n.1948).

[14] In the United Kingdom, the extreme valorisation of individual freedom and autonomy is also expressed in the fact that name and surname can be changed very easily by means of the *deed poll,* that is «a solemn declaration of your intent to assume a new change of name, and thus it's evidence that you've changed your

The situation just described seems, however, to be the result of a relatively recent change: in fact, still in the late 1990s, the House of Lords, in the leading case *Dawson v. Wearmouth*[15], had stated on the one hand that «A surname which is given to a child at birth is not simply a name plucked out of the air» ; on the other hand, it had recalled that <Where the parents are married the child will normally be given the surname or patronymic of the father thereby demonstrating its relationship to him. The surna-me is therefore a biological label which tells the world at large that the blood of the name flows in its veins.>.

In the same year, the guidelines drawn up by the Court of Appeal[16] for the case of changing a child's surname indicated that, if the parents were married, the surname should be changed, there should be «strong reasons to change the name from the father's surname if the child was so registered»; similarly, the judge should have taken into account that the initial registration could represent «the biological link with the child's father».

Indeed, among all the criteria that must inform the judges' decisions, the best interests of the child stand out as paramount, allowing the appreciation of the different circumstances of the case. Thus, for example, in *Dawson* case , judges considered to be in the child's best interests that he or she continue to bear the surname *Wearmouth* attributed to him or her at birth, despite the fact that it was the mother's surname from a previous marriage that had been dissolved and therefore did not represent the child's biological ancestry. The Court did not see any 'strong and countervailing' reasons to consent to the change of the surname, which was duly registered and was also the mother and siblings' surname with whom the child lived.

As far as double surnames are concerned, the examination of the most recent case-law, which is admittedly not copious, does not reveal any particular attention and use of this instrument. The words of Lady Hale in a case decided in 2001[17] are revealing: <Parents and courts should be much more prepared to contemplate the use of both names in an appropriate case, because that is to recognise the importance of both parents>. A double surname is also a useful vehicle for representing the child's different ties, as in the case, for example, in adoption cases[18].

Conversely in most civil law systems, the regulation of the surname has always been characterised by the transmission of the patronymic to the children: this fulfilled a public function of identifying the subject and at the same time signalled the unitary recognition of the family. This was the general rule, with the exception of Spain and Portugal[19], where the bilateral surname attribution had prevailed. The automatic transmission of the paternal surname alone has been abandoned by most legal systems: some now allow the choice between paternal or maternal surnames (e.g. Germany), while others, as the French experience shows, provide for both the choice of the maternal surname as an alternative to the patronymic and the solution of a double surname. And this seems to be the current trend toward the openness towards the possibility of transmitting both surnames, in line with the principle of equality between spouses and the principle of protecting the identity of the child.

As far as the French experience is concerned, there have been several interventions by the Legislator aimed at removing from the legal system all those provisions that maintained discrimination against women in the transmission of surnames to children.

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name in good faith». Cfr. UK DEED POLL OFFICE, *Choosing a double barrel surname*, 27 aprile 2020, https:// www.ukdeedpolloffice.org/double-barrel-surname.

[15] *Dawson v. Wearmouth* [1999] 2 WLR 960, [1999] 1 FLR 1167.

[16] *Re W, Re A, Re B* (Change of Name) [1999] EWCA Civ 2030.

[17] *Re R* (a Child) (Surname: Using Both Parents) [2001] EWCA Civ 1344.

[18] *Re Y* (a minor) (N. 2) (*Brussel II revised: Jurisdiction after Article 15 Transfer: Welfare*), [2022] EWFC 69.

[19] Although, in Portugal since 1997 there has also been the possibility of a single surname.

In 1985[20], an initial intervention had introduced the possibility of adding the mother's surname to the father's surname, but only as a usage, thus excluding transmissibility to future generations. This change was considered clearly inadequate with regard to the demands of equality, and therefore the provisions of the Civil Code were subject to a series of amendments, in particular from the early 2000s , through which parents were given a fourfold possibility with regard to the choice of surname to transmit to their children[21]. Given that in France, too, the attribution of the surname follows parental authority, it is therefore possible to choose between: father's surname, mother's surname, double surname in the order chosen by the parents, subject to a limit of two.

In order to do so, a joint declaration must be made before the civil registrar, in the absence of which, however (as well as in the event of non-agreement), the patronymic is revived and the child automatically acquires the father's surname. This solution isn't more feasible since 2013[22] as the automaticity of using the patronymic was replaced by the alphabetical criterion, as the former was not feasible in same sex couples. In fact, however, the modification was limited to cases of disagreement on the order of surnames , leaving the rule of automatic recourse to patronymic in the case of no choice. This raises some doubts, however, especially in the light of the European Court of Human Rights's case-law, which aims to sanction the automaticity of these mechanisms[23]. The child must be heard if he (or she) is over thirteen and the parents' choice of surname, made for the first-born child, is irrevocable and extends to all the children of the couple.

However, the numerous interventions did not have the hoped effects as most children were given only their father's surname[24]. The French legislator has again intervened on this issue by the law no 301 of 2 March 2022[25] which is intended to <*facilitate the faculté, pour toute personne, de porter le nom de celui de ses parents qui ne lui a pas été transmis à la naissance, qu'il s'agisse de le faire par le nom d'usage ou par le nom de famille*>. On the one hand, testifying to its importance in the French legal system, the rule on *nom d'usage*[26] is codified in the new Article 311-24-2 Civil Code. As far as we are concerned, the parents (or the parent exercising parental authority) may decide that the child bears, by way of use, one of the names provided for in the first paragraph of Article 311-21 Code civil: i.e. the father's or the mother's surname, or both. In addition, the parent whose surname has not been passed on to the child may add his or her own surname, also against the wishes of the other parent; the only condition is that the

[20] Loi 23 décembre 1985, n. 85-1372 du relative à l'égalité des époux dans les régimes matrimoniaux et des parents dans la gestion des biens des enfants mineurs

[21] Loi du 4 mars 2002, n. 2002-304 relative au nom de famille, JORF du 5 mars 2002; Loi du 18 juin 2003, n. 2003-516, JORF 19 juin 2003; Ordonnance du 4 juillet 2005, n. 2005-759, JORF 6 juillet 2005.

[22] Loi du 17 mai 2013, n. 2013-404 ouvrant le mariage aux couples de personnes de même sexe, JORF n. 0114 du 18 mai 2013.

[23] See ECtHR, *León Madrid c. Spagna*, 26 ottobre 2021, ricorso n. 30306/13, by which the Spanish legal system, which has espoused the double surname system since at least the end of the 19th century, was condemned by the European Court of Human Rights precisely with regard to the regulation of the order of surnames: according to the judges, the rule that automatically privileges the middle surname is to be considered discriminatory..

[24] M. LAMARCHE, *Égalité ou liberté: le double nom de famille doit-il être prioritaire?*, in Droit de la famille, 2021, 7-8, 62, p. 3.

[25] Loi du 2 mars 2022, n. 2022-301 relative au choix du nom issu de la filiation, JORF n. 0052 du 3 mars 2022, about which cfr. A. PHILIPPOT, *La Chancellerie éclaire les nouvelles dispositions relatives au nom d'usage et au changement de nom*, in La Semaine Juridique Notariale et Immobilière, 2022, 25, act. 690.

[26] A. BLANQUET, *Le nom d'usage au regard de l'identité de la personne*, in *Revue trimestrielle de droit civil*, 2022, 59, sees in *nome d'usage* which sees as a constitutive element of a person's personal identity and, while emphasising its differences from legal identity, considers it to be a figure that fits in well with the trend of liberalisation that characterises the choice of name.

latter must have been informed and that the child has been heard if over thirteen: <*et sous réserve de la décision du juge aux affaires familiales en cas de désaccord*>.

On the other hand the new French law provides for a new simplified procedure for changing one's name (Article 61-3-1 Civil Code), thanks to which all citizens, having reached the age of majority, can ask the civil registrar to keep the surname they have been using up to that moment or to adopt another one, that of their mother, father or both. The change can only be made once and it can be registered after the person concerned has informed the registrar, no earlier than one month after receiving the request. The change of name automatically extends to the applicant's or the applicant's children if they are under the age of 13; above that age their consent is required.

Already Law 2002-304 of March 4, 2002, which entered into force in 2005 and reformed in France the family name, allows parents to choose, when declaring the birth, to transmit to their children either the father's name or that of the mother, or again a "double name", that is to say a name made up of the names of each of the parents "attached in the order chosen by them within the limit, however, of one surname for each". These provisions modified the system of continuity of the name of women. Previously, their name could only be transmitted outside of marriage and only in the configuration in which they recognized alone or before the father an unborn child. Within the framework of marriage, the devolution of the family name placed women in a complex situation: to keep the use of their birth name different from that of their children, or to use the name of their spouse – a customary practice often perceived at erroneously as included in the matrimonial regime - and thereby "abandon" the use of their name. It was certainly possible under the law of December 23, 1985 children bearing the names of their two conjoined parents. This device, little known, only concerned the name of use and no transmission of the mother's name was possible. The patronymic order put in opposition the name of the women and the family name. In fact, it was the option of bearing the surname of the spouse which prevailed massively. This practice today has diminished under the influence of social transformations. By law of March 4, 2002 not only women can transmit children their own name, but as a result, they can keep their name and share it with their children. Thus, the "patronymic subordination of women" which was in force is undermined by this new system which remains however little used: a tenth of children are assigned a double name.

In Belgian legal system, similarly to what happened in Italian legal system, on the 14th January 2016 the Constitutional Court declared invalid article 335, § 1, second par. of Civil Code[27] on the basis of its contrariness to the constitutional principles of equality and non-discrimination (ex art. 10 and art. 11 of Constitution) and to the principle that the law must guarantee women and men the equal exercise of their rights and freedoms (art 1lbis of Constitution). The differential treatment was based on the criterion of the sex of the parents. Only very strong considerations can justify differential treatment based solely on sex. Neither tradition, nor the desire to ensure gradual progression, are, according to the Constitutional Court, strong enough considerations to justify a difference between fathers and mothers lacking a choice, being a priority ensuring gender equality. The Constitutional Court mitigated the consequences of the declaration of invalidity, but at the same time it obliged government or parliament to take action and thereby giving an *ultimatum*: <In order to avoid legal uncertainty, in particular having regard to the necessity of determining the child's surname from birth, and to allow Legislator to adopt a new regulation, the effects of the invalid provision shall be maintained until 31 December

[27] Before Constitutional Court's intervention article 335 of the Civil Code provided for the possibility of transmitting the surnames of both parents to the child, with the parents having full autonomy in determining the order of precedence. However, in the event of a conflict or in the event that the parents had not formalised any choice, it established the prevalence of the father's surname.

2016>. The subsequent intervention of the French Legislator in December 2016, by the *Loi modifiant les articles 335 et 335ter du Code civil relatifs au mode de transmission du nomination à l'enfant*, now established that, in the event of disagreement, as well as in the event of non-choice, the alphabetical criterion must be used. The decision also applies to subsequent children.

So the surname determined corresponding to art 335, §§ 1 and 3 of Civil Code now applies to other children whose lineage in respect of the same father and mother is established (art 335 bis CC). This rule aims avoiding children born by the same parents having different surnames[28].

Parents who did not make a choice of name with their first child can no longer exercise their right of choice at the birth of further children. The civil status registrar will request that the parents make a solemn declaration that the child in respect of whom they exercise the option of name of choice is their first child together.

In Germany[29] the attribution of surnames to children follows parental authority, since the 1998[30] juvenile law Reform eliminated the distinction between children born in or out of wedlock.

The rules differ depending on whether the parental authority is shared or shared by only one parent: in the latter case, the child receives the custody of the parent who recognised him/her (§ 1617 a BGB), usually therefore that of the mother. If, on the other hand, the parental authority is divided but the couple is not married, a decision must be made as to whether the newborn child is to be given the surname of the father or the mother, who are then placed on an equal footing with each other. If the parents do not make a decision within a month of the child's birth, the family court intervenes, putting the onus on one of the parents to choose the child's surname, possibly also setting a time limit. If, at the expiry of the time limit, the parent to whom the right of choice had been attributed does not express his or her opinion, or if no agreement has been reached, the child receives his or her surname ex lege, i.e. the surname of the parent to whom the right of decision had been transferred (§ 1617 BGB). In fact, it is considered that the judge, in making the choice, has already assessed that this is the party that will best take into account and realise the best interest of the child, that is a criterion often used in decisions concerning children according to further provisions of BGB[31]. The decision also applies to the couple's subsequent children.

The question is different, and more complicated, when parental authority is vested in both parents as married persons. The rule of the transmission of the surname to the children can be deduced, in this case, from § 1616 BGB, which states that the family surname adopted by the parents is transmitted to the children born in wedlock; one cannot therefore disregard the complex evolution that the *Familienname* (§ 1355 BGB) has undergone over time. At the time of the

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[28] However nothing prevents half-brothers and half-sisters (with only one common parent) from having different surnames since their lineage on the mother's side or father's side differs.

[29] German courts ruled that the spouses choose the common family name, carrying the surname they have chosen. (§§ 1616 and 1618 BGB). This reform arose from the unconstitutionality judgement B*undesverfassungsgericht* 5 March 1991, with a note by O. KIMMINICH (translated by B. POZZO, *Alcune novità in tema di cognome della famiglia nel diritto tedesco*, in Quadrimestre, 1991, 11, pp. 887-895); U. DIEDERICHSEN, *Die Neuordnung des Familiennamensrechts' Neuejuristische Wochenschrift,* 1994, 1089; R. FAVALE retraces the evolution of German legislation in *ll cognome dei figli e il lungo sonno del legislatore*, *op. cit.*, pp. 819-823.

[30] *Gesetz zur Reform des Kindschaftsrechts*, *Kindschaftsrechtsreformgesetz*, in BGBl, 1997, 2942, su cui A. DUTTA, *Reform des Namensrechts*?, in Zeitschrift für Rechtspolitik, 2017, p. 49.

[31] S. LIERMANN, *Der "Namensrichter" des Familiennamensrechtsgesetzes vom 16-12-1993*, in Zeitschrift für das gesamte Familienrecht, 1995, p. 199; L. MICHALSKI, *Kindes- namensrecht. Das Namensrecht des ehelichen Kindes nach den §§ 1616, 1616a BGB unter Berücksichtigung des Regierungsentwurfs eines Kindschaftsrechtsreformgesetzes*, in Zeitschrift für das gesamte Familienrecht, 1997, 977.

entry into force of the BGB, the provision stipulated that the woman, upon marriage, would take her husband's surname and lose her own . The family surname, i.e. the man's surname, would then also become the surname of the legitimate children, a privilege that was not granted to children born out of wedlock.

Through a long series of interventions in case-law and legislation to implement the principle of equality between men and women[32] , the current version has been arrived at, whereby, on the one hand, spouses are free to adopt a family surname or not (otherwise, each will continue to bear the surname they used before the marriage), and on the other, *Familienname* may be either the husband's or the wife's surname. The only concession for the spouse whose surname has not been chosen as the 'surname of the spouses' is that he or she may put his or her own surname first or add his or her own25. Consequently, if the spouses have chosen a family surname, this will be attributed to the children born during the marriage; failing this, the procedure described above for children born out of wedlock, i.e. the intervention of the family court, will be applied.

No room is left for a double surname, despite the fact that this solution had already found support in doctrine since the 1980s and despite the difficulties in abandoning *patronymische Namenskonventionen*. In 2002, the German Constitutional Court had recognised the value of the double surname, which better signals both the family affiliation of the child and its connection (*Verbundenheit*) with both parents than the single surname. It did not, however, go so far as to declare the non-provision of double surnames contrary to constitutional principles: there would have been too many practical difficulties, including the formation of surname chains.

A complete reform of the matter has been discussed since 2020 and, in the wake of a government study[33], a new bill has also been proposed to introduce double surnames for both spouses and children.

The proposal is in fact rather meagre: the aforementioned § 1355 BGB would be amended by allowing the choice, as *Familienname*, of a double surname composed of the spouses' two surnames. In case of no choice and, probably, also of disagreement on the order of the two surnames, the judge would have to intervene according to the mechanism already mentioned. The path thus seems to be set in the direction of more and more liberalisation, especially if one is to give credence to the statements by Minister of Justice Buschmann to this effect. The fact that the provision of a *Familienname* can be well coordinated with the double surname is shown by the Austrian legal system, which intervened in this matter with the 2013 reform[34] . The declared aim is to make the right to a first name more dynamic and flexible and also to allow the adoption and transmission of a double surname, thus meeting a widespread desire in society on the one hand, and the need to certify the equal position of parents on the other.

Recently on 11 April 2023, the German Ministry of Justice made public a draft law that provides for the possibility for spouses to choose their second surname as *Ehename* (whether or not using the hyphen), and to give their offspring, whether born in or out of wedlock, a double surname, consisting of the surnames of both parents. A simplified way of changing the surname is also envisaged; finally, it is also possible to use a gender-adapted form of the surname, in accordance with those traditions that provide for it[35]. As it stands, one partner in a married couple - but not both - can add the other partner's name to his or her surname but their children cannot carry both surnames. The legislative reform will allow both partners to take on a double sur-

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[32] According to art. 3 of the Grundgesetz: <Men and women are equal in their rights. The state promotes the effective implementation of the equality of women and men and acts for the elimination of existing disadvantages>.

[33] This study was commissioned by the German Ministry of Interior and by the Ministry of Justice : *Eckpunkte zur Reform des Namensrechts* consultabile in *Zeitschrift für Standesamtswesen, Familienrecht, Staatsangehörigkeitsrecht, Personenstandsrecht, internationales Privatrecht des In- und Aus- lands*, 2020, p. 136.

[34] *KindNamRÄG* 2013, in *BGBI,* 2013/15, 1 su cui S. Ferrari, A. RICHTER, *Das österreichische Kindschafts- und Namensrechts-Änderungsgesetz*, in Zeitschrift für das gesamte Familienrecht, 2013, pp. 1457 ff.

[35] The current system <*is about as up-to-date as a coal stove and as flexible as concrete*>, minister Marco Buschmann said in a statement as he published the draft legislation on this matter.

name, with or without a hyphen, and for their children to take that name too. Even if the parents both keep their original names, they will be able to give their children a double-barrelled surname, regardless of whether they are married. The new system will not allow names that are more than double- barrelled[36]. The Minister foresees making easier for stepchildren or children born by divorced parents to change their family names.

3. THE COMPULSORY DOUBLE SURNAME IN SPAIN

The double surname is the only solution in Spain and, until recently, also in Portuguese law.

In the Spanish legal system, the use of double surnames dates back to the 16th century and, although it is not easy to specify when this custom became established, the provision became law in 1889[37] at the latest with the entry into force of the Codigo Civil.

The first surname of the parents was passed on to the children of the couple: in order, that of the father, followed by the mother's one . Within a generation, therefore, the matronymic name was lost. In 1981, the legislator intervened by providing the possibility for children of full age to reverse the order of surnames, thus also allowing the transmission of the mother's surname to subsequent generations[38]. However, the amendment was not sufficient to fully realise the equality between spouses: Law No. 40 of 5 November 1999 'Sobre nombre y apellidos y orden de los mi smos' amended Article 109 of the Civil Code, making it possible for spouses to independently determine the order of surnames to be given to their children)[39].

If, however, they did not make use of their right to choose, as well as in the event of disagreement, the combination of this provision with the Civil Registry Regulation automatically put the paternal surname back in first place[40] The European Court of Human Rights, called upon to deal with the matter last year in the León Madrid case[41] , stated that, although the rule favouring the paternal surname in the event of disagreement may be necessary for practical purposes and therefore does not necessarily contravene the Convention, the same cannot be said for the automatism of the rule itself, which does not provide for the possibility of exceptions, thereby discriminating against mothers.It was only with Ley 20/2011 (which came into force in 2017) that the provision of the Civil Registry was amended, which currently provides that in the event of disagreement or when the surnames are not indicated in the application for registration, the civil registrar shall ask the parents, or the person legally representing the child, to notify the order within a maximum of three days. After that period has elapsed without express notification, it is still the registrar who decides on the order of surnames in the best interests of the child[42]. The reference to the best interests is nothing new, but certainly assigning such a delicate task to

[36] See *Referentenentwurf des Bundesministeriums der Justiz* at the page *BMJ, Bundesministerium der Justiz.*

[37] Cfr. art. 114, Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil (with reference to legitimate children only).

[38] Ley 13 may 1981, n. 11/1981. Since 2011, the choice can be made upon reaching the age of 16.

[39] Art. 109, as modified by the art.1 of the Ley 5 novembre 1999, n. 40/1999, , in «BOE», 6 novembre 1999: «Si la filiaciòn està determinada por ambas lìneas, el padre y la madre de comùn acuerdo podràn decidir el orden de transmisiòn de su respectivo apellido [...] exigiendo mantener el mismo orden respecto de todos los hijos que posteriormente tuviera la pa- reja».

[40] The art. 194 of the Real Decreto de 11 de febrero, n. 193/2000, , de modificación de determinados artículos del Reglamento del Registro Civil en materia relativa al nombre y apellidos y orden de los mismos, «BOE» n. 49, de 26 de febrero de 2000, 8484-8485, stated that if filiation was established with reference to both parents, the first surname would be the father's surname followed by the mother's one.

[41] *León Madrid c. Spagna*, 26 ottobre 2021, ricorso n. 30306/13.

[42] Art. 49 Ley de 21 de julio, n. 20/2011 del Registro Civil: «*En caso de desacuerdo o cuando no se hayan hecho constar los apellidos en la solicitud de inscripción, el Encargado del Registro Civil requerirá a los progenitores, o a quienes ostenten la representación legal del menor, para que en el plazo máximo de tres días comuniquen el orden de apellidos. Transcur- rido dicho plazo sin comunicación expresa, el Encargado acordará el orden de los apellidos atendiendo al interés superior del menor*».

a civil registrar is not without problems[43]. Suggestions from the doctrine have gone in the direction of giving pre-valence to surnames with greater social roots, for example, or to those that facilitate the identification of the child, increasing however a more specific regulation by e.g. the *Dirección General del Registro y del Notariado.*

Portugal differs from the Spanish archetype for two reasons: on the one hand because it allows children to be given up to four surnames, and on the other hand because the rule, at least before the reformation at the end of the 1990s, was that the order of surnames was maternal/paternal. The liberalisation at the end of the 1990s meant that in Portugal either the father's surname or the mother's surname could be transmitted (Art. 1875 CC) as well as a double surname. The order is the one indicated by the parents at the time of birth (and normally the father's surname still appears in the second position): in the absence of agreement, the decision is left to the court, which will take the best interests of the child into account. The choice does not apply to all the children of the couple, so much so that the principle of the unity of the surname in the family seems to have been definitively abandoned in this order.

4. CONCLUSIVE REMARKS

The circulation of the double surname model in Italy, as it frequently happens also in civil law systems, occurred thanks to the initiative of the judiciary and, in particular, of the Constitutional Court, while representing a fundamental stage in the course of any democratic system from the point of view of the equality of spouses, leaves more than a few application problems of the new regulation unsolved, revealing those implicit elements of various kinds - hidden in the folds of the legal systems - that determine the different effectiveness of the same legal rule in this or that legal system, the so called cryptotipes[44].

Several bills have already been tabled in the current Italian legislature, and in particular DDL S. 2, S. 21 and S. 131 as well as proposals C. 256 and C. 425. While DDL S. 2 seems to be inspired by the German solution, providing that the spouses can adopt a common surname, choosing one or pairing them, which will be passed on to their children, the other bills do not provide for a family surname, providing (e.g. DDL S. 21) that each spouse retains his or her own surname with the possibility of adding the other spouse's surname to his or her own. On the other hand, all provide for the transmissibility of the double surname, albeit with some different nuances. The solution that seems to be more in line with the Constitutional Court's decision no 131/2022 seems to be that of DDL S. 131, according to which 'the surname of both parents shall be attributed to the child of married parents [...] without prejudice to the agreement to attribute the surname of only one of the parents'.

As for the criteria for settling any disputes, both DDL S. 21 and proposals C. 256 and C. 425, suggest the use of the alphabetical criterion (as it already happens in France, for example); DDL S. 131, on the other hand, hypothesises the intervention of the judge, who, if the disagreement persists despite attempts at mediation and conciliation, should draw lots; this solution would, however, most probably lengthen the time taken to reach a decision, with detriment of the child's rights. All the drafts provide that the surname chosen for the first child shall also be valid for the couple's subsequent children; in order to avoid the multiplier mechanism, as advocated by the constitutional judges, it is

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[43] S. TROIANO, *Cognome del minore ed identità personale,* in Jus Civile, 2020, p. 593.

[44] R.SACCO, *Introduzione al diritto comparato*, 1992, pp. 125 ff.

stipulated that the son or daughter, in turn, shall transmit to their offspring only one surname each, of their choice.

No proposal opts for the Spanish criterion of the automatic 'passing' of the first surname, a solution that would relieve the children of a decision that might not be easy. An adult, who has been given only the paternal surname or only the maternal surname on the basis of the law in force at the time of birth, can add the other surname by means of a simplified procedure.

For this purpose, a declaration, made in person or by means of an autographed deed, to the civil registrar, who could then make an entry in the birth certificate, would be sufficient (e.g. DDL S. 131 and DDL S. 2), in accordance with a requirement that mirrors recent French legislation.

With regard to the criteria to be followed to settle disputes on the order of the two surnames, the Constitutional Court found in the system and consequently indicated to the legislator as a possibility the resorting to the courts[45]. Wanting to find an alternative, the overview of solutions is broad: from the application of criteria such as the 'French' alphabetical order, to the drawing of lots, as in Luxembourg, to the attribution of the power of choice to third parties, as in Spanish law. The identification of an 'automatic' criterion, obviously linked to criteria other than the prevalence of patronimic over matronymic or conversely, resolves the issue once and for all, but fails to take into account the specificities of the case. The opposite course of action, i.e. not indicating a criterion that is always applicable, but entrusting the decision to a third party, is not without its problems: the reference to the principle of best interest may be too general; so much so that even the House of Lords, while indicating the criterion cited as the first yardstick, has long since drawn up analytical guidelines as a guide for judges in resolving disputes concerning requests to change the surname of minors.

German law, on which our legislator has already drawn prominently in the field of naming rights within the framework of the regulation of civil unions[46] , provides a solution, which, although conceived in a different context from that of the choice of surname order, could be a valid starting point. On the one hand because the intervention of the judge, who thus performs an indispensable function of guarantee for the child, is foreseen and on the other hand because the concrete choice is then ultimately made within the family, because the parent who is deemed best able to realise the child's best interest will be able to decide. A time limit on the right to choose would also allow for a rapid resolution of the matter, which is certainly in the best interest of the child involved. The question remains as to whether this course of action is feasible, especially in cases of strong conflict between the spouses, where the sole competence of the court could perhaps be revived.

Each legal system responds to society's demands in the time and manner it sees fit; any solution should be sufficiently 'elastic' to adapt itself to a constantly evolving society.

With reference to the ECtHR case law three factors make the ECtHR case law particularly interesting for our comparative analysis.

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[45] A similar solution was adopted also in Australia: see Z. GOODAL, C. SPARK, *Naming Rights? Analysing Child Surname Disputes in Australian Courts Through a Gendered Lens*, in Feminist Legal Studies, 2020, 237.

[46] As it is known, the Italian regulation of civil unions (L. 20 May 2016, n. 76) was inspired by the German *Lebensgemeinschaft*, and, in particular, as it is underlined by C. FAVILLI, F. AZZARRI, *Il cognome dei figli dopo la sentenza 131/2022 della Corte costituzionale e nella prospettiva del diritto europeo*, in Diritti Comparati, 2022, 7, it was taken as a model for the regulation of th e partner's surname.

First, all of the cases addressed by the Court are originated in civil law countries.

Unlike the common law, civil law systems have a strict and highly regulated approach to name-giving and name-changing, a fact that results in litigation that is absent in contemporary common law countries. Secondly, the countries in question have different naming systems: for example, in some systems the wife takes the husband's name, while in others, each partner takes a different surname, composed of his or her paternal grandparents' names. This diversity allows recognizing consistent principles that appear in domestic legal systems, despite the variety of naming practices. Third, as the ECtHR operates within the framework of human rights, its authority and substantive law are based on the European Convention on Human Rights and Fundamental Freedoms. The universal characteristics of human rights principles allow for an analysis that goes beyond the single jurisdiction and specific doctrines and that relies on a more general protection of basic rights such as equality and privacy.

Even after this important Italian Constitutional Court judgment, the long history of the child's surname cannot be said to be over. The Italian legislator must still intervene to provide a surname regulation that will resolve the various problematic profiles on which the Court's judgment could not intervene. In order to be effective, the constitutional justice needs the cooperation of the legislator.

First of all, the Court makes it clear that the declaration of constitutional illegitimacy affects the rules attributing the surname and will therefore take effect from the day after its publication in all those cases where such attribution has not yet taken place, including those in which legal proceedings for that purpose are pending. All the others will keep the paternal surname given at birth. This surname can only be changed through a special administrative procedure. In addition, the judgment provides guidance for couples who already have other children. In these cases, the Court seems to suggest the way of adopting the original surname, which after the decision would take on the value no longer of an imposed surname, but of the one freely chosen by the parents for their family. The Constitutional Court, however, states that in the event of disagreement between the parents, the choice cannot be replaced by a court decision. In that case, the general rule of double surnames will apply.

On this issue, the Court once again invites the legislator to intervene to lay down rules that, applying to all children of the same parents, do not undermine the identifying function of the surname. Moreover, the Court called for a legislative intervention to resolve the issue of the surname that will be passed on to the child in the generational transition. It is up to Parliament to provide for rules to avoid the effect of a «mechanism that multiplies the number of surnames with the passage of generations» which could be prejudicial to the identity function of the surname. Even with regard to this delicate issue, however, the judgment indicates to the legislature a possible solution, namely that it is the parent holding the double surname who chooses the one that he/she wants to be representative of the parental relationship, «unless of course the parents choose to give their child one of their double surnames».

These indications suggest that the Italian Constitutional Court, fearing that the legislator will continue to remain silent, is laying the basis for a new and definitive intervention to complete the process begun in 2006. Judgment No. 131 of 2022 is undoubtedly a revolutionary judgment that nevertheless has some grey areas. While the merit of the ruling is to have firmly and without hesitation cancelled the patronymic (considered as "heritage of a patriarchal conception of the family") and ordered, in the name of constitutional legality, the attribution of the double surname as a rule, there are

nevertheless problematic aspects of the ruling that in part can be resolved and overcome by the choices of the legislator and that in part will remain unsolved without diminishing or weakening the disruptive and revolutionary scope of the Judge of Laws's decision. For example, it will have to be the legislator, according to the Court's invitation, to regulate the attribution of surnames in successive generations in order to avoid the multiplier effect, just as it will be appropriate to regulate the imposition of the same surname on all brothers and sisters. However, in order to avoid the multiplier effect, whether the choice of the surname to be attributed is laid down by law (e.g. the first surname) or whether it is left to the parent (as the Court suggests) is in any case an unsatisfactory option since the first favours an automatic system sacrificing any peculiarities worthy of derogation and the second leaves it to the mere, and unquestionable, power of the parent which of the two surnames to transmit. Similarly, whatever solution is hypothesised for the surnames of siblings is questionable: if all siblings must have the same surname or a double surname chosen for the eldest son, it favours, also for reasons of publicity, an appreciable need for family homogeneity that nevertheless prevents the consideration of circumstances, arrangements and relational dynamics that have arisen. On the other hand, leaving parents free to determine for each child the surname, whether maternal or paternal, or the order of surnames would mean shattering a family identity that should tend to be unique for all siblings.

In the face of such discipline, it is necessary to preserve the surname's identity and identification function, both at a legal and social level, in public and private law relations, which is not compatible with a mechanism that multiplies surnames in the succession of generations. The need, therefore, to guarantee the function of the surname, and consequently the pre-eminent interest of the child, points to the appropriateness of a choice by the parent - holder of the double surname that bears the memory of two family branches - of the one that he wishes to be representative of the parental relationship, provided that the parents do not opt for the attribution of the double surname of only one of them.

Secondly, it is for the legislator to assess the child's interest in not being given - at the sacrifice of a profile that also relates to his or her family identity - a different surname from his or her brothers and sisters' one. This could well be achieved by reserving the choice regarding the attribution of the surname to the moment of simultaneous recognition of the couple's first child (or at the moment of his or her birth in wedlock or adoption), so as to make them binding with respect to subsequent children recognised at the same time by the same parents (or born in wedlock or adopted by the same couple).