

The Child's Surname in the Light of Italian Constitutional Legality

Loredana Tullio*

Abstract

The Italian Constitutional Court declared unconstitutional the legal rule that every child must be attributed the father's surname at birth or adoption or in case of recognition by both parents (joint recognition), and cannot also be attributed the mother's surname, even if requested by both parents.

This article examines the legal arguments raised by the Court, especially the finding that the provision for automatic and absolute priority to the father's surname sacrifices the child's right to identity and violates the principles of equality and equal dignity between parents, guaranteed by the Italian Constitution and the European legislation. The right to a name, within a family, can be fully guaranteed by allowing the mother to attribute her surname, or by securing the right of the child to the acquisition of identification marks from both parents.

The article emphasizes several themes: the analysis of previous Italian and European jurisprudence on the matter; the radical changes following the implementation of the Lisbon Treaty; the problems arising from the double surname attributed to a recognized child, or to a dual citizenship child; and the future scenarios arising from the important and historical pronouncement of unconstitutionality, given the dynamism of the legal system.

I. The Child's Right to Identity and Equal Dignity of Parents. Constitutional Court 21 December 2016 no 286: The Case

With a historic decision, the Italian Constitutional Court¹ declared

* Associate Professor of Private Law, University of Molise, Department of Law.

¹ Corte Costituzionale 21 December 2016 no 286, *Giurisprudenza costituzionale*, 2435-2437 (2017), with notes by: R. Favale, 'Il cognome dei figli e il lungo sonno del legislatore' *Giurisprudenza italiana*, 815-824 (2017); C. Favilli, 'Il cognome tra parità dei genitori e identità dei figli' *La nuova giurisprudenza civile commentata*, 823-830 (2017); 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); V. De Santis, 'Il cognome della moglie e della madre nella famiglia: condanne dei giudici e necessità di riforma. L'unità della famiglia e la parità tra i coniugi alla prova' *federalismi.it*, 13 March 2017, 1-37; C. Ingenito, 'L'epilogo dell'automatica attribuzione del cognome paterno del figlio (nota a Corte costituzionale no 286/2016)' *Rivista AIC*, 31 May 2017, 1-18; S. Scagliarini, 'Dubbie certezze e sicure incertezze in tema di cognome dei figli' *Rivista AIC*, 19 May 2017, 1-13; E. Malfatti, 'Illegittimità dell'automatismo nell'attribuzione del cognome paterno: la "cornice" (giurisprudenziale europea) non fa il quadro'

unconstitutional the 'rule' that provided for the automatic attribution of the father's surname to a child, even against the wishes of the parents.

This ruling is the result of a slow but unremitting transformation that has affected Italian family law in recent years.² Lawmakers and judges, operating in different roles, have begun to reconsider the relationship between parents and children, through a series of reforms and several pronouncements, in the light of changes in the system of the source of law. The doctrine itself has contributed to this evolutionary trend. Through multiple debates on the matter, it has critically and continuously sought to re-design a new family model,³ no longer necessarily based on a conjugal bond and refraining from re-propagating the archaic concept of the 'patriarchal family'. This new model can be described as a 'social formation'⁴ consistent with the constitutional principles and abiding by supranational legislation.

The case before the Court concerned the prohibition on a married couple attributing to their child, who has 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'⁵

Forum di Quaderni Costituzionali Rassegna, 5 January 2017, 1-4.

² In recent years, several innovations have been implemented in Italy: the law *Revisione delle disposizioni vigenti in materia di filiazione* (legge 10 December 2012 no 219; decreto legge 28 December 2013 no 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 10 November 2014 no 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 no 55), allowing the so-called 'express divorce'; finally, the law *Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze* (legge 20 May 2016 no 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.

³ M. Paradiso, 'Navigando nell'arcipelago familiare. Itaca non c'è', in A. Busacca ed, *La famiglia all'imperfetto? Corso di diritto civile 2015-16* (Napoli: Edizioni Scientifiche Italiane, 2016), 285-301; F. Romeo, 'Famiglia: sostantivo plurale?' *Diritto delle successioni e della famiglia*, 67-91 (2015); V. Scalisi, 'Le stagioni della famiglia nel diritto dell'unità d'Italia ad oggi. Parte seconda. "Pluralizzazione" e "riconoscimento" anche in prospettiva europea' *Rivista di diritto civile*, 1287-1317 (2013); F.D. Busnelli, 'La famiglia e l'arcipelago familiare' *Rivista di diritto civile*, I, 520 (2002); P. Rescigno, 'Le famiglie ricomposte: nuove prospettive giuridiche' *Famiglia*, 1-8 (2002).

⁴ P. Perlingieri, 'Sulla famiglia come formazione sociale' *Diritto e giurisprudenza*, 775-778 (1979) discusses 'the family as "social formation" in its constitutionally significant function and in the peculiar solidarity that characterizes its internal affairs, inspired by the equal moral and legal dignity of its members'; see also G.B. Ferri, 'Persona umana e formazioni sociali', in Id, *Saggi di diritto civile* (Rimini: Maggioli, 1993), 26.

⁵ Corte Costituzionale 24 June 2002 no 268, *Giurisprudenza costituzionale*, 1952 (2002); Corte Costituzionale 11 May 2001 no 120, *Giurisprudenza costituzionale*, 973-978 (2001). See also L. Lenti, 'Nome e cognome' *Digesto delle discipline privatistiche, Sezione civile* (Torino: Utet, 1995), XII, 136-143; F. De Scrilli, 'Il cognome dei figli', in P. Zatti ed, *Trattato di diritto di*

which benefits from autonomous constitutional protection as a distinctive sign of the person.⁶ It 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.⁷ 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’.⁸

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’.⁹ Moreover, the decision to attribute to the child only the father’s surname created an unreasonable disparity in treatment between parents,¹⁰ 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

famiglia (Milano: Giuffrè, 2002), II, 471-490 and Id, ‘Il cognome dei figli’, in P. Zatti ed, *Trattato di diritto di famiglia* (Milano: Giuffrè, 2006), Agg VII, 348-360.

⁶ P. Perlingieri, *La personalità umana nell’ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 1972); Id, *La persona umana e i suoi diritti. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2006).

⁷ About this, see A. De Cupis, ‘I diritti della personalità’, in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1961), IV.2, 11; C.M. Bianca, *Diritto civile, 1. La norma giuridica. I soggetti* (Milano: Giuffrè, 2nd ed, 2002), 189. The ‘emblematic symbol of personal identity (...) deserving protection’ is discussed in L. Bigliuzzi Geri et al, *Diritto civile* (Torino: Utet, 2007), 162.

⁸ Corte Costituzionale 21 December 2016 no 286 n 1 above, para 3.4.1.

⁹ N. Irti, *Norma e luoghi. Problemi di geo-diritto* (Roma-Bari: Laterza, 2001), 3-16.

¹⁰ F. Prospero, ‘L’eguaglianza morale e giuridica dei coniugi e la trasmissione del cognome ai figli’ *Rassegna di diritto civile*, 841-858 (1996); V. Carbone, ‘L’inarrestabile declino del patronimico’ *Famiglia*, 951 (2006); more recently, C. Cirillo, ‘Il cognome dei figli: tentativo di negare la parità dei coniugi?’ *Rivista giuridica del Molise e del Sannio*, 97-112 (2015).

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 Eur. Court H.R., *Ünal Tekeli v Turkey*, Judgment of 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. About this, 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’ *ejiltalk.org*, 10 February 2014. See also: P. Perlingieri, ‘Riflessioni sull’unità della famiglia’, in Id, *Rapporti personali nella famiglia* (Napoli: Edizioni Scientifiche Italiane, 1982), 38; G. Ferrando, ‘I rapporti personali tra coniugi: principio di eguaglianza e garanzia dell’unità della famiglia’, in P. Perlingieri and M. Sesta eds, *I rapporti civilistici nell’interpretazione della Corte costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2007), 317-332.

relations between spouses are governed by solidarity and equality'.¹²

In short, 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 Arts 3 and 29, with respect to the principles of equality and equal dignity of spouses; it was also in contravention of international law¹³ barring any form of discrimination against women¹⁴ and any inequality between spouses in choosing the family name,¹⁵ as well as treaties seeking to safeguard the rights of the child¹⁶ and, more generally, civil and political rights.¹⁷ Art 117, para 1 of the Constitution, which was drafted to accommodate 'European values',¹⁸ allows compliance with fundamental principles to be a connection between various normative sources and the foundation of the unity of the regulation system.¹⁹

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'²⁰ 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.²¹

To better understand the matter, this article will examine four issues: first, the absence of a specific 'rule' designed to provide for the automatic attribution

¹² Corte Costituzionale 13 July 1970 no 133, *Giurisprudenza costituzionale*, 1605-1611 (1970). S. Rodotà, *Solidarietà. Un'utopia necessaria* (Roma-Bari: Laterza, 2016), 52: he discusses 'family as a sanctuary (...) where it is possible to fully exercise the virtue of solidarity'.

¹³ Recognized by Italian law, ex Art 117, para 1, Constitution.

¹⁴ Art 16, para 1, letter g, Convention on the Elimination of all forms of Discrimination against Women (CEDAW), implemented on 18 December 1979 by the United Nations General Assembly (UNGA), ratified and into force with legge 14 March 1985 no 12.

¹⁵ See Council of Europe Recommendations 28 April 1995 no 1271, and 18 March 1998 no 1362, and also the Resolution of the Committee of Ministers of Council 27 September 1978 no 37. About the matter, see G. Rossolillo, 'La legge applicabile al nome alla luce delle convenzioni internazionali e dei principi comunitari', in C. Honorati ed, *Diritto al nome e all'identità personale nell'ordinamento europeo* (Milano: Giuffrè, 2010), 91-110.

¹⁶ Art 7, Convention on the Rights of the Child, approved in New York on 20 November 1989; ratified and into force with legge 27 May 1991 no 176.

¹⁷ Art 24, International Covenant on Civil and Political Rights, adopted by on 16 December 1966, entered into force 23 March 1976, ratified and into force in Italy with legge 25 October 1977 no 881.

¹⁸ G. Serges, 'Art. 117, 1 comma', in R. Bifulco et al eds, *Commentario alla Costituzione* (Torino: Utet, 2006), III, 2225.

¹⁹ P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 558-561.

²⁰ Corte costituzionale 21 December 2016 no 286 n 1 above, para 3.4.1.

²¹ Register 19 January 2017 no 97.

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 pronouncement of unconstitutionality in light of the dynamism of the legal system.

II. The ‘Rule’ About the Attribution of the Surname in Italian and European Jurisprudence

This was not the first time the Constitutional Court had addressed the matter of the prevalence of the paternal surname. On several occasions²² it had pointed out how the transmission of the father’s surname to descendants was the legacy of a patriarchal conception of family,²³ 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*,²⁴ on the basis of the legality of the bond of submission. The patronymic constraint later on, though not mentioned in the *Code civil des français*, nor in the Italian Civil Code of 1865, continued to find justification in the presence of the ‘marital authority’ and the ‘*patria potestas*’, raised under the veil of a ‘presumed’ *égalité*.²⁵

The judges stated that this way of attributing the surname is no longer consistent with the values expressed by modern regulations. However, in previous

²² Corte Costituzionale 11 February 1988 no 176, with a note by C. De Cicco, ‘Disciplina del cognome e principi costituzionali’ *Rassegna di diritto civile*, 190 (1991); Corte Costituzionale 19 May 1988 no 586, *Giurisprudenza costituzionale*, 2726-2729 (1988); 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); G. Dosi, ‘Doppio cognome, no alla via giudiziaria’ *Diritto e giustizia*, 10 (2006); L. Gavazzi, ‘Sull’attribuzione del cognome materno ai figli legittimi’ *Famiglia persone e successioni*, 902-906 (2006). In particular, on judgment no 61, the parents wanted to give the mother’s surname to their child: the Corte di Cassazione 17 July 2004 no 13298, *Famiglia e diritto*, 457-460 (2004), asked for Constitutional Court to declare unconstitutional the rule of automatic attribution of father’s surname (and not – as in the case discussed – to declare unconstitutional the legal rule that every child must be attributed the father’s surname at birth and cannot also be attributed the mother’s surname, even if requested by both parents). But the Constitutional Court abstained from ‘manipulative’ action, outside its powers, referring the matter to the ‘area reserved to the legislator’: only the law can give clarity (not creating confusion) and would not give up the unity of the family by overcoming an ancient legacy.

²³ R. Sacco discusses the ‘patrilineal system’.

²⁴ R. Bizzocchi, *Il cognome degli italiani* (Roma-Bari: Laterza, 2014); S. Bisi, ‘Il cognome: origini e senso’ *Legalità e giustizia*, 126-130 (2006); P. Bonfante, ‘La gens e la ‘*familia*’ ’ *Bollettino dell’Istituto di Diritto Romano*, 236 (1888), now in Id, *Scritti giuridici varii* (Roma: Aracne editrice, 2007), I, 23-38; M. Brutti, *Il diritto privato nell’antica Roma* (Torino: Giappichelli, 2011), 192.

²⁵ J.-E.-M. Portalis, *Discorso preliminare al primo progetto di Codice civile* (Napoli: Edizioni Scientifiche Italiane, 2013), 50; C. Sangiorgio, ‘Il cognome nella giurisprudenza’ *Legalità e giustizia*, 131 (2006).

cases, the Court limited itself to ‘ascertaining’ the invalidity of the rule without ever ‘declaring’ the rule unconstitutional.²⁶ The established incompatibility of the rule with the constitutional values²⁷ was therefore limited, through ‘*sentenza monito*’²⁸ (‘warning judgments’), 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 surname²⁹ (discriminatory – in this case – against the husband). In other words, until 2016, the Constitutional Court had always abstained from ‘destructive’ or ‘manipulative’ action, outside its powers, referring the matter to the ‘area reserved to the legislator’.³⁰ 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.

However, despite widespread certainty regarding the patronymic rule, there was actually an absence of a clearly-defined provision regarding the matter: the

²⁶ Although the Court highlighted traits of unconstitutionality in the opinion, its ruling rejected the claim. For further details, see P. Perlingieri, *Funzione giurisdizionale e Costituzione italiana* (Napoli: Edizioni Scientifiche Italiane, 2010), 315; A. Rapposelli, ‘Illegittimità costituzionale dichiarata ma non rimossa: un “nuovo” tipo di sentenze additive?’ *Rivista AIC*, 21 January 2015, 1-12.

²⁷ C. De Cicco, ‘Cognome e principi costituzionali’, in P. Perlingieri and M. Sesta eds, *I rapporti civilistici nell’interpretazione della Corte costituzionale* n 11 above, 333-348.

²⁸ Amongst the possible pronouncements of the Italian Constitutional Court there is the so-called ‘*sentenza monito*’. It issues a warning to the legislator, urging it to intervene on a rule of dubious constitutionality: T. Martines, *Diritto costituzionale* (Milano: Giuffrè, 13th ed, 2013), 504; M.R. Morelli, ‘Sentenza monito, inerzia del legislatore e successiva declaratoria di incostituzionalità sopravvenuta: nuove tipologie di decisioni costituzionali di accoglimento al di là del dogma della efficacia retroattiva’ *Giustizia civile*, 509 (1989); M.C. Grisolia, ‘Alcune osservazioni sulle “sentenze comandamento” ovvero sul “potere monitorio” della Corte costituzionale’ *Giurisprudenza costituzionale*, 826-842 (1982).

²⁹ Arts 143-bis Civil Code and 5, paras 2-4, legge 1 December 1970 no 898. Italian jurisprudence has reduced for a long time the significance of the rule, pointing out that it is a mere *right*, and not an *obligation* (Corte di Cassazione 13 July 1961 no 1692, *Foro italiano*, I, 1065-1067 (1961) and Corte di Cassazione 14 April 1970 no 1020, *Repertorio Foro italiano*, ‘Matrimonio’, 92 (1970)). However, a reform on the rule, towards conformity with Constitutional and European principles, is hoped for: S. Niccolai, ‘Il cognome familiare tra marito e moglie. Com’è difficile pensare le relazioni tra i sessi fuori dallo schema dell’eguaglianza’ *Giurisprudenza costituzionale*, I, 558-575 (2006); E. Bellisario, ‘Sub Art. 143 bis’, in G. Perlingieri ed, *Codice civile annotato con la dottrina e la giurisprudenza. Delle persone e della famiglia* (Napoli: Edizioni Scientifiche Italiane, 2010), I, 639-641; E. Al Mureden, ‘Il persistente utilizzo del cognome maritale, tra tutela dell’identità personale della ex moglie e diritto dell’ex marito a formare una seconda famiglia’ *Famiglia e diritto*, 122-128 (2016); G. Rossolillo, ‘La Convenzione di Monaco del 1980 e la continuità del cognome’ *La nuova giurisprudenza civile commentata*, 533-541 (2016); an example about civil unions can be found in: M.N. Bugetti, ‘Il cognome comune delle coppie unite civilmente’ *Famiglia e diritto*, 911-918 (2016); A. Panichella, ‘Unioni civili e convivenze: aspetti positivi e dubbi interpretativi alla luce della nuova legge n. 76 del 2016’ *Rivista giuridica del Molise e del Sannio*, 205-207 (2017).

³⁰ Corte Costituzionale 16 February 2006 no 61 n 22 above.

rule appears to be taken for granted, but it is actually not clearly identifiable.³¹ In fact it is sometimes called a ‘customary norm’,³² sometimes it is deemed as an implied ‘rule inferable from the system’.³³ The European Court of Human Rights (ECtHR), in the well-known *Cusan Fazzo* case, warns of the necessity of a reform ‘*dans la législation et/ou la pratique italienne*’³⁴ (in Italian ‘legislation and/or practice’), using a wording that highlights the understandable uncertainty about the genesis of this rule. Such indecision also fueled debates about its eligibility for constitutional review.³⁵

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 child recognition; Art 299 of the Civil Code, on adoption; Art 72, para 1, of the regio decreto 9 July 1939 no 1238,

³¹ F. Giardina, ‘Il cognome del figlio e i volti dell’identità. Un’opinione «controluce»’ *La nuova giurisprudenza civile commentata*, II, 139-142 (2014); A. Giusti, ‘Parità tra coniugi e cognome del figlio’ *Giustizia civile*, 876 (1985).

³² Corte d’Appello di Milano 4 June 2002, *Famiglia e diritto*, 173-174 (2003), with a comment by A. Figone, ‘Sull’attribuzione del cognome del figlio legittimo’ *Famiglia e diritto*, 175-177 (2003); Corte d’Appello di Genova 26 November 2013, which raised the constitutional legitimacy check here discussed; Corte di Cassazione 17 July 2004 no 13298 n 22 above, 457-460, with a note by V. Carbone, ‘Quale futuro per il cognome?’ *Famiglia e diritto*, 460-466 (2004). F. Pacini discusses about custom *contra legem* ‘Una consuetudine secolare da rivedere’ *Giurisprudenza di merito*, 1243 (1985); G. Grisi, ‘L’aporia della norma che impone il patronimico’ *Europa e diritto privato*, 666-683 (2010).

³³ Corte di Cassazione 22 September 2008 no 23934, *Corriere giuridico*, 489-495 (2009) with a note by G. Autorino Stanzone, ‘Autonomia familiare e attribuzione del cognome: i dubbi in Italia e le certezze in Europa’; Corte di Cassazione 14 July 2006 no 16093, *Famiglia e diritto*, 469-470 (2006); R. Villani, ‘L’attribuzione del cognome ai figli (legittimi e naturali) e la forza di alcune regole non scritte: è tempo per una nuova disciplina?’ *La nuova giurisprudenza civile commentata*, I, 316-329 (2007); T. Auletta, *Diritto di famiglia* (Torino: Giappichelli, 2016), 355.

³⁴ Eur. Court H.R., *Cusan and Fazzo v Italy*, Judgment of 7 January 2014, *Famiglia e diritto*, 212 (2014), with notes by: S. Winkler, ‘Sull’attribuzione del cognome paterno nella recente sentenza della Corte europea dei diritti dell’uomo’ *La nuova giurisprudenza civile commentata*, I, 520-528 (2014); M. Calogero and 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’ *Ordine internazionale e diritti umani*, 222-246 (2014); V. Corzani, ‘L’attribuzione del cognome materno di fronte alla Corte europea dei diritti dell’uomo’ *Giurisprudenza italiana*, 2670-2675 (2014); G. Dolso, ‘La questione del cognome familiare tra Corte costituzionale e Corte europea’ *Giurisprudenza costituzionale*, 738-758 (2014); M. Alcuri, ‘L’attribuzione del cognome paterno al vaglio della Corte di Strasburgo’ *Diritto delle persone e della famiglia*, 555-561 (2014).

³⁵ A. Pazè, ‘Verso un diritto all’attribuzione del cognome materno’ *Il diritto di famiglia e delle persone*, 324 (1998). About the significance of unwritten law in the constitutionality judgements, P. Perlingieri, *Funzione giurisdizionale e Costituzione italiana* n 26 above, 228; F. Astone, ‘Le fonti non scritte’, in N. Lipari ed, *Giurisprudenza costituzionale e fonti del diritto* (Napoli: Edizioni Scientifiche Italiane, 2006), 93-124.

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 decreto del Presidente della Repubblica 3 November 2000 no 396.³⁶

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,³⁷ 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.³⁸ The ECtHR, intervening in this 'framework',³⁹ 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 newborns in family status registries is excessively rigid and discriminatory against women'.⁴⁰ 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'⁴¹ constitutes an infringement of European laws and international obligations.

III. The Changed Italian-European System of Sources and Compliance with International Obligations

The possibility of giving a child the surname of the mother or a double

³⁶ The decreto del Presidente della Repubblica repealed the previous Regulation of Civil Status (regio decreto 9 July 1939 no 1238); see P. Stanzione, *Il nuovo ordinamento di stato civile* (Milano: Giuffrè, 2001).

³⁷ Corte di Cassazione 22 September 2008 no 23934 n 33 above; Corte di Cassazione 28 May 2009 no 12670, *Famiglia e diritto*, 235-237 (2010) with the comment of A. Vesto, 'Cognome del figlio naturale: declino del patronimico e ascesa dell'identità personale del minore' *Famiglia e diritto*, 237-240 (2010); Corte d'Appello di Catania 30 June 2010, *Famiglia e diritto*, 1135-1137 (2012).

³⁸ Several pronouncements by the Eur. Court H.R. stated the principle of gender equality in choosing the family name: Eur. Court H.R., *Burghartz v Switzerland*, Judgment of 22 February 1994, available at <http://tinyurl.com/y9wle8cv> (last visited 15 June 2017); Eur. Court H.R., *Stjerna v Finland*, Judgment of 25 November 1994, available at <http://tinyurl.com/yazb5xwj> (last visited 15 June 2017); Eur. Court H.R., *Ünal Tekeli v Turkey* n 11 above; Eur. Court H.R., *Losonci Rose e Rose v Switzerland*, Judgment of 9 November 2010, available at <http://tinyurl.com/y7octv9f> (last visited 15 June 2017). See also S. Rodotà et al, 'Il diritto privato nella giurisprudenza della Corte europea dei diritti dell'uomo' *La nuova giurisprudenza civile commentata*, 103-200 (2016); G. Chiappetta, *Gli status personae e familiae nella giurisprudenza delle Corti sovranazionali* (Napoli: Edizioni Scientifiche Italiane, 2012).

³⁹ Corte Costituzionale 21 December 2016 no 286 n 1 above, para 3.4.1; E. Malfatti, 'Illegittimità dell'automatismo nell'attribuzione del cognome paterno' n 1 above.

⁴⁰ Eur. Court H.R., *Cusan and Fazzo v Italy* n 34 above, paras 63 and 67.

⁴¹ Eur. Court H.R., *Cusan and Fazzo v Italy* n 34 above, para 39. Cf S. Stefanelli, 'Cognome paterno e diritti fondamentali', in L. Cassetti ed, *Diritti garanzie ed evoluzioni dei sistemi di protezione* (Perugia: Dipartimento di Giurisprudenza, 2016), 107-138.

surname, as is already the case in many European countries,⁴² clearly became an issue after Italy's ratification of the Treaty of Lisbon (resulting in the new text of Art 6 of the Treaty on European Union, TEU, coming into force). This ratification gave new force to the need to adopt solutions compatible with European dictates, including the jurisprudence of the ECtHR.⁴³

These circumstances require greater attention to compatibility with constitutional precepts.⁴⁴ The relevance of the ECHR is not limited to the adaptation of national laws. Rather, the ECHR contributes to the underlying unitary values of our legal system.⁴⁵ Consequently, the contravention 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.⁴⁶ The Constitutional Court states that the question is 'absorbed' in that article and emphasizes the centrality of the Cusan Fazzo judgement finding Italy to be in violation of the ECHR. Such a finding and the violation of ECHR rules render it

⁴² 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 Bundesverfassungsgericht 5 March 1991, with a note by O. Kimminich (translated by B. Pozzo, 'Alcune novità in tema di cognome della famiglia nel diritto tedesco' *Quadrimestre*, II, 887-895 (1991)); U. Diederichsen, 'Die Neuordnung des Familiennamensrechts' *Neue juristische Wochenschrift*, 1089 (1994); R. Favale retraces the evolution of German legislation in 'Il cognome dei figli e il lungo sonno del legislatore' n 1 above, 819-823. In France, the *Loi* 4 March 2002 no 304, *relative au nom de famille* (and 18 June 2003 no 516), states that the child can be attributed the surname of the father or the mother's one, or both, separated by a hyphen, provided that the choice is agreed by both parents. (F. Bellivier, 'Dévolution du nom de famille' *Revue trimestrielle de droit civil*, 554 (2003); T. Garé, 'La réforme de la filiation – à propos de l'ordonnance du 4 juillet' *La Semaine juridique*, 1491 (2005); G. Raoul-Cormeil, 'Le nom de l'enfant mineur' *CRDF*, 45-58 (2006)). Austrian Civil Code provides for gender equality between men and women, within family, since 1811 (§ 139). In Spain, Art 109 of the *código civil* (formulated in 1999) provides for a 'double surname' of children; the order of the surnames is chosen by both parents. (J.J. Forner Delaygua, *Nombres y apellidos. Normativa interna e internacional* (Barcelona: Bosch Edición, 1994); M.P. Sánchez González, 'Régimen Jurídico de los apellidos en Derecho español y su incidencia sobre el principio de no discriminación por razón de sexo' *Revista General de Derecho*, 8855 (1998)). In the Netherlands, new regulations passed with the Law 19 November 1997, in force also for registered *partners*, provides for a joint choice by both parents, to be communicated at the time of the notification of birth or even before birth.

⁴³ A. Ruggeri, 'Famiglie, genitori e figli, attraverso il "dialogo" tra Corti europee e Corte costituzionale: quali insegnamenti per la teoria della Costituzione e delle relazioni internazionali' *Consultaonline.it*, 29 May 2014, 1-45.

⁴⁴ J. Long, 'Il diritto privato italiano della famiglia e minorile alla prova della Convenzione europea dei diritti dell'uomo' *Europa e diritto privato*, 1059-1100 (2016); F. Pesce, 'La tutela dei diritti fondamentali in materia familiare: recenti sviluppi' *Diritti umani e diritto internazionale*, 5-48 (2016); A. Viviani, *L'identità personale nel sistema della Convenzione europea dei diritti dell'uomo* (Napoli: Editoriale Scientifica, 2013).

⁴⁵ P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008), 63.

⁴⁶ Corte costituzionale 24 October 2007 no 348, *Rassegna di diritto civile*, 1119-1121 (2009), with a note by C. Pinelli, 'Sul trattamento giurisdizionale della CEDU e delle leggi con essa confliggenti' *Giurisprudenza costituzionale*, 3518-3525 (2007).

inevitable that the Constitutional Court would review the matter.⁴⁷ 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.

IV. The Double Surname of the Child

Concessions in the attribution of the father's and the mother's surname were previously granted only in two cases: 1. double (but not contemporary) recognition of the child; and 2. for European dual citizens.

1. The recognition of a child born outside of wedlock was subject to a particular discipline. The child received the surname of the parent who had first recognized him (Art 262, para 1, Civil Code): the surname of the mother, if she was the only one to be judicially recognized (Art 269 Civil Code), or of the father if he had declared his paternity together with the female parent (Art 262, para 1, Civil Code). Only if the father joined the family after the mother had already recognized the child, the child could adopt the father's surname by adding it, putting it before the mother's surname or completely replacing the latter (Art 262, para 2).⁴⁸

Such a change, although intended to ensure equal treatment of children born out of wedlock and children born of a married couple, could, in some cases, be detrimental both to the woman, who could face discrimination if her surname was replaced by the paternal one, and to the children, deprived suddenly of the 'right to be themselves'.⁴⁹ In fact, the child could suffer an injury to personal identity, in a certain social context, due someone else's decision. The Constitutional Court granted the child the right to refuse to change its surname, instead of the automatic assumption of the paternal one, if the existing surname had become an autonomous sign of the child's personality.⁵⁰ This way, a key

⁴⁷ S. Filippi, 'Il cognome della madre al figlio legittimo: siamo alla svolta?' *Famiglia, persone e successioni*, 432-436 (2009).

⁴⁸ Without prejudices to the need to refer the decision to a judge, if the child is under age; under those circumstances, it is possible to schedule hearings of the child (Art 262, para 4, Civil Code). Cf G. Arieta, 'Attribuzione del cognome al figlio naturale e giudicato *rebus sic stantibus*' *Famiglia e diritto*, 1137-1141 (2012); R. Villani, 'L'attribuzione del doppio cognome ai figli (naturali, nel caso di specie, ma, in realtà, anche legittimi), quale strumento per salvaguardare la relazione tra i nati ed i rami familiari di ciascun genitore?' *La nuova giurisprudenza civile commentata*, I, 680-686 (2011).

⁴⁹ Corte Costituzionale 3 February 1994 no 13, *Foro italiano*, I, 1668-1671 (1994), para 5.1: the 'right to be oneself, understood as respect for the image of a person participating to associate life, acquiring ideas and experiences, ideological, religious, moral and social opinions and beliefs that differentiate and at the same time qualify the individual'. About this matter, see M. Dogliotti, 'Persone fisiche. Capacità, status, diritti', in M. Bessone ed, *Trattato di diritto privato* (Torino: Giappichelli, 2014), II, 407.

⁵⁰ Corte Costituzionale 27 July 1996 no 297, *Giurisprudenza costituzionale*, 2475-2478

priority is assigned to the name as a ‘symbol of the child’s identity’, rather than the concept of a name as a ‘sign of belonging to a family or to a parent’s lineage’. This is especially clear in the event of conflict between parents, who might be motivated not by providing the child with the best education or assistance needed, but to reach (thanks to a favorable ruling for one parent) a ‘summit’ to place the flag of his, or her, own last name.⁵¹

It should be noted that sometimes unmarried parents choose to assign the surname through manipulation of late recognition: the mother recognizes her child immediately after the birth, while the father deliberately delays recognition.⁵² This way, the child is given a ‘double surname’ is secured, escaping from the automatic preference for the father’s last name.

2. The intention to maintain a relationship between the child and the lineage of both parents is patent in the case of a minor already registered with a double surname⁵³ in another country. In Europe, the issue has been addressed and resolved for more than a decade. The European Court of Justice (EUCJ) handed down several rulings⁵⁴ ensuring respect for personal identity, requiring each

(1996), with notes by V. Carbone, ‘La conservazione del vecchio cognome come diritto all’identità personale’ *Famiglia e diritto*, 413-418 (1996); G. Ferrando, ‘Diritto all’identità personale e cognome del figlio’ *Giurisprudenza costituzionale*, 2479-2482 (1996); G. Cassano, ‘Status familiare e conservazione del “proprio” cognome (la Consulta legittima nuovamente il diritto all’identità personale)’ *Il diritto di famiglia e delle persone*, I, 476-484 (1996). Cf also Corte Costituzionale 3 February 1994 no 13 n 49 above, 1668-1671, stating the constitutional illegitimacy of parts of Art 165 Civil Status Regulations, namely those barring the individual whose Civil Status registration has been rectified from asking the court the recognition of the right to keep the former surname, if it is deemed as a distinctive sign of personal identity. The same goes for disclaimer of paternity of a child of age: D. Berloco, ‘Il cognome del figlio disconosciuto’ *Lo Stato civile italiano*, 14 (2010).

⁵¹ In this respect, Corte di Cassazione 15 December 2011 no 27069, with notes by V. Carbone, ‘Conflitto sul cognome del minore che vive con la madre tra il patronimico e il doppio cognome’ *Famiglia e diritto*, 134-142 (2012); F.R. Fantetti, ‘Nessuna automaticità o privilegio al patronimico’ *Famiglia persone e successioni*, 181 (2012).

⁵² G. Berloco, ‘I figli legittimi continueranno ad avere il cognome del papà; i figli naturali, invece, potranno avere il cognome della mamma se il padre tarda nel riconoscimento’ *Lo Stato civile italiano*, 660 (2006).

⁵³ A. Ciervo, ‘Dal cognome patriarcale al cognome «pariarcale»? Evoluzioni giurisprudenziali in tema di doppio cognome del minore’ *Rivista critica del diritto privato*, 153-168 (2009).

⁵⁴ Case 148/02 *Carlos Garcia Avello v Belgium*, [2003] ECR I-11613, with notes by: E. Castorina, ‘Il caso Garcia Avello innanzi alla Corte di Giustizia: conferme e caute aperture in materia di cittadinanza europea’ *Giurisprudenza italiana*, III, 2011-2015 (2004); G. Palmieri, ‘Doppia cittadinanza e diritto al nome’ *Europa e diritto privato*, 217-230 (2004); A. Iliopoulou, ‘What is name? Citoyenneté, égalité et droit au nome à propos de l’arrêt Garcia Avello’ *Revue trimestrielle de droit européen*, 565 (2004); J. Hauser, ‘Nom: il ne manquait quel es juridictions de l’Union européenne!’ *Revue trimestrielle de droit civil*, 62 (2004). These rulings follow the ‘prohibition of discrimination’ based on nationality; later, the principle inspiring the rulings will be the ‘freedom of movement’: Case 353/06 *Grunkin Paul* [2008] *Famiglia e diritto*, 193-194 (2009), with comments by R. Conti, ‘Il diritto comunitario e il doppio cognome: un primato in espansione?’ *Corriere giuridico*, 508-514 (2009); G. Rossolillo, ‘Personal Identity at a crossroad between PIL, Human Rights and EU Law’, in P. Sarcevic et al eds, *Yearbook of Private International Law* (Lausanne: Sellier, 2009), XI, 151.

member State to include in the civil status registries a child, who is a citizen of that State, with the surname which the child was identified and registered with in the member State of birth, and where the parents resided – even though the surname could be attributed according to criteria other than those provided by the laws of the State of which the child has citizenship. The EUCJ does not express the rule to be preferred for the attribution of the surname; its concern is that the different national systems of surname attribution shall not discriminate, depending on nationality, against dual citizens, and that States shall not impose their ‘internal’ legislation against conflicting legislation of another nation against the will of the person concerned.

The person concerned, therefore, has the right to be registered in the second country with the surname given in the first one; otherwise the freedom of movement and residence in the territories of the EU member States would be limited.⁵⁵ Therefore, the registrar who receives the birth certificate for a citizen born abroad must register the correct surname at the time of registration, in order to safeguard the fundamental right to personal identity.⁵⁶ The EU jurisprudence in the matter of surnames is thus that European citizens, thanks to their status, are entitled to encounter no discrimination on the grounds of nationality in two different member states, one of whom intends to impose its internal legislation over the rules of the other one.⁵⁷

This ruling has been extended, in some cases, to persons possessing the citizenship of a non-EU country,⁵⁸ besides an EU member State citizenship. However, in the instant case, the Constitutional Court did not reference discrimination based on nationality or limitations to freedom of movement and residence (already guaranteed all over Europe in accordance with current Arts 18 and 20, Treaty on the Functioning of the European Union, TFEU). Rather,

⁵⁵ G. Pino, ‘Il diritto all’identità personale ieri e oggi. Informazione, mercato, dati personali’, in R. Panetta ed, *Libera circolazione e protezione dei dati personali* (Milano: Giuffrè, 2006), I, 264-267.

⁵⁶ Several pronouncements put into practice the decision of the European Court of Justice: Tribunale di Bologna 9 June 2004, with a note by M.N. Bugetti, ‘L’attribuzione del cognome tra normativa interna e principi comunitari’ *Famiglia e diritto*, 442-450 (2004); Tribunale di Roma 15 October 2004, with a note by A. Barone and E. Calò, ‘Il cognome dei soggetti bipoliti nell’ordinamento comunitario’ *Corriere giuridico*, 680-686 (2005). Corte di Cassazione 17 July 2013 no 17462, with note by A. Palmieri, ‘Sul diritto al doppio cognome per la persona provvista di doppia cittadinanza’ *Foro italiano*, 2810-2812 (2013).

⁵⁷ S.M. Carbone and I. Queirolo, ‘Unione europea e diritto di famiglia: la progressiva “invasione” degli spazi riservati alla sovranità statale’, in S.M. Carbone and I. Queirolo eds, *Diritto di famiglia e Unione europea* (Torino: Giappichelli, 2007), 27.

⁵⁸ Tribunale di Lamezia Terme, 25 January 2010, with a note by R.M. Bova, ‘Il cognome del figlio legittimo con doppia cittadinanza: confronto tra l’ordinamento interno, il diritto sovranazionale e le legislazioni degli Stati europei’ *Famiglia e diritto*, 1044-1052 (2010); P. Mengozzi, ‘Il diritto alla continuità di cognome di minori provvisti della cittadinanza di uno Stato non membro della Comunità e della cittadinanza italiana’ *Rivista di diritto internazionale privato e processuale*, 69-84 (2009); G. Chiappetta, *Famiglia e minori nella leale collaborazione tra le Corti* (Napoli: Edizioni Scientifiche Italiane, 2011), 403-454.

the Court focused on the infringement of the fundamental right to the identification of the person and the principles of equality and equal dignity of the parents. It is important to note that the choice of the Italian system of attributing the father's surname as family surname does not constitute discrimination itself; but it could turn into discrimination, as the ECtHR noted several times, if the attribution is drawn rigidly and absolutely⁵⁹ (as it actually was), in other words, if it does not accept any derogation, not even with the consent of both parents.

V. Between 'Missed Opportunities' and 'Forced Occasions': The Opening of New Scenarios

After years of conflict between tradition and innovation,⁶⁰ and a growing mass of decisions by the Supreme Court of Cassation, the Constitutional Court, the Court of Justice, and finally the ECtHR, the affirmation of the 'right to the maternal surname' seems to be implemented in Italy by means of a historical ruling by Constitutional judges.

Changing the rules on a front which has been exclusively masculine for thousands of years was a difficult task, especially considering that rapid social change often finds harsh hurdles in overcoming the many preconceptions still intertwined in the legacy of past generations. This is demonstrated by the legislature's 'missed opportunity'⁶¹ to act on this issue: the recent reform of 2012, which strengthened the kinship ties of both parental branches while underlining the unique status of the child and celebrating the possibility of different affectivities⁶² within a couple, together with the decline of the protections offered to a child for the mere fact of being born within wedlock.

The ruling analyzed in this article, therefore, represents a forced occasion to bridge a gap or, better, to urge timely legislative action to revise the law in a manner consistent with legislative values, granting the father and the mother full freedom of choice of the surname to be attributed to the child, fully respecting gender equality. However, the issue can only be considered partially solved. This

⁵⁹ Eur. Court H.R., *Cusan and Fazzo v Italy* n 34 above, para 67; Eur. Court H.R., *Losonci Rose e Rose v Switzerland* n 38 above, para 49.

⁶⁰ R. Catalano, 'Il diritto dei figli al cognome familiare: evoluzione normativa e giurisprudenziale' *Foro napoletano*, 485-492 (2016); J. Fortin, *Children's Rights and the Developing Law* (Cambridge: Cambridge University Press, 3rd ed, 2009), 489-494.

⁶¹ M. Trimarchi, 'Il cognome dei figli: un'occasione perduta dalla riforma' *Famiglia e diritto*, 243 (2013); M. Fini, 'Il cognome dei figli: il silenzio della legge n. 219 del 2012', in R. Pane ed, *Nuove frontiere della famiglia. La riforma della filiazione* (Napoli: Edizioni Scientifiche Italiane, 2014), 75-80; A. Figone, 'Sulla mancata integrale equiparazione della posizione dei figli pur dopo la riforma' *Rivista dell'Associazione Italiana degli Avvocati per la Famiglia e per i Minori*, 39-45 (2015).

⁶² P. Femia, 'Dichiarazione d'amore. Fattispecie e convivenza tra matrimonio e unioni civili', in A. Busacca ed, *La famiglia all'imperfetto?* n 3 above, 253-281.

is because to the Court did not explicitly declare the unconstitutionality of automatic attribution of the paternal surname,⁶³ but more specifically required the registrar to add the maternal surname, provided that both parents agree.

This decision, therefore, reduces, without eliminating, the elements in contravention of fundamental principles and rights,⁶⁴ since the old patronymic rule remains in force in the absence of agreement between parents, either because they do not express an opinion or because they disagree. It is therefore up to the legislature to intervene quickly to clarify a number of issues.⁶⁵

It will be necessary to regulate cases where the parents do not indicate a preference or where they disagree, and to evaluate also the priority of the surnames, stating which one comes first (the paternal, the maternal, or in alphabetical order). It will be necessary to ask what the limits may be in case of an agreement: whether it is possible to assign a single surname (so-called common), chosen without a hierarchical relationship between man and woman, but in fact tending to undermine the equal dignity of the parents; or assert that the motive pointing to the need for gender equality⁶⁶ shall not turn into an imposition on the child, passive recipient of a decision taken by someone else. In other words, it will be necessary to ask whether the need to transmit a surname should not be balanced with the best interests of the child,⁶⁷ offered as a carrier of an alleged family heritage,⁶⁸ leaving the child, once having come of age, to choose on the matter of social identification.⁶⁹ Moreover, the legislature should develop exact regulations, especially for cases where a social or biological parent appears at a different time (for example, in the case of adoption or non-contemporaneous recognition of the child).

⁶³ Cf Corte Costituzionale 16 February 2006 no 61 n 22 above.

⁶⁴ C. Favilli, 'Il cognome tra parità dei genitori e identità dei figli' n 1 above, 823.

⁶⁵ A bill (disegno di legge no 1628) about surname is stuck in the Senate for more than two years, after having been passed by the lower chamber (Camera dei Deputati) on 24 September 2014. For a summary on the various proposals see A.O. Cozzi, 'I D.D.L. sul cognome del coniuge e dei figli tra eguaglianza e unità familiare' *La nuova giurisprudenza civile commentata*, II, 449-466 (2010).

⁶⁶ C. De Cicco, 'La normativa sul cognome e l'eguaglianza dei genitori' *Rassegna di diritto civile*, 960-989 (1985).

⁶⁷ This happened, for example, on the matter of non-contextual recognition of the child: Corte Costituzionale 27 July 1996 no 297 n 50 above. About the matter, see E. Lamarque, *Prima i bambini. Il principio del best interests of the child nella prospettiva costituzionale* (Milano: Giuffrè, 2016); about the necessary balance between opposite interests, see B. Randazzo, 'Diritto ad avere un genitore v. diritto a divenire un genitore alla luce della giurisprudenza della Corte Edu: le trasformazioni degli istituti dell'adozione e della filiazione "sorrette" da un'ambigua invocazione del preminente interesse del minore' *Rivista AIC*, 5 March 2017, 9.

⁶⁸ F. Giardina notes that the desire to accomplish a 'form of ownership' of the child and a 'landlord attitude and projection of oneself on the future generations' could be concealed under the 'noble' pretension of achieving an equal treatment in 'Interesse del minore: gli aspetti identitari' *La nuova giurisprudenza civile commentata*, 160 (2016).

⁶⁹ This happens in Spain, where the child, after coming of age, can submit a petition to change the order of its surnames. About this, V. Carbone, 'Per la Corte costituzionale i figli possono avere anche il cognome materno, se i genitori sono d'accordo' n 1 above, 169.

The choice of the double surname will then involve the need to address the issue of proliferation or multiplication of surnames through generations: the surname of the family could be composed of the first surname of each of the parents or of one of the two. The new law will then have to address the issue of the retroactivity of the rule with respect to parents/adult children who in the past have been denied the attribution of their maternal surname.

Finally, it is also necessary to consider the ‘obligation’ to attribute the same surname to all the children of the couple, or the ‘right’ to allow the choice of different surnames for siblings born by the same parents. The ECtHR preferred to avoid taking a stand on the latter issue, deciding to ignore a situation in which, in a family of siblings born to the same parents, some of them carried one surname and others had a different one.⁷⁰ It should be emphasized, in this respect, that for children born after the re-establishment of a new family⁷¹ (the so-called ‘step family’), including the so-called ‘uterine siblings’, ie having the same mother but different fathers and ‘consanguineous siblings’, ie having the same father but different mothers, the effect of the double surname would allow men and women to be placed on an equal footing, since it would be possible to reveal the kinship relationships arising from the establishment of a new family by the mother.⁷² This way, highlighting the shared parent for ‘uterine siblings’ thanks to the same distinctive ‘sign’, the ‘visibility’ and ‘predictability’ of possible incestuous relationship would be enhanced.⁷³

VI. Conclusions

Hopefully legislative reforms will quickly be enacted to dissolve the many

⁷⁰ Eur. Court H.R., *von Rehlingen v Germany*, Judgment of 6 May 2008, available at <http://tinyurl.com/ydayvvg8> (last visited 15 June 2017).

⁷¹ D. Buzzelli, *La famiglia «composita». Un'indagine sistematica sulla famiglia ricomposta: i neo coniugi o conviventi, i figli nati da precedenti relazioni e i loro rapporti* (Napoli: Jovene, 2012); E. Al Mureden, ‘Le famiglie ricomposte tra matrimonio, unioni civili e convivenze’ *Famiglia e diritto*, 966-979 (2016).

⁷² It should be noted that, under the current practice, consanguineous siblings carry the same surname, while uterine siblings have different surnames: E. Al Mureden, ‘L’attribuzione del cognome tra parità dei genitori e identità personale del figlio’ n 1 above, 222; C. Ingenito, ‘L’epilogo dell’automatica attribuzione del cognome paterno del figlio (nota a Corte costituzionale n. 286/2016)’ n 1 above, 12.

⁷³ The recent reform of 2012-13 (n 2 above) removed the prohibition of recognition of children born of an incestuous relationship. About the matter, see G. Lisella, ‘Riconoscimento del figlio nato da relazione incestuosa e autorizzazione del giudice’, in R. Pane ed, *Nuove frontiere della famiglia* n 61 above, 57-71; M. Porcelli, *Accertamento della filiazione e interesse del minore* (Napoli: Edizioni Scientifiche Italiane, 2016), 64-67. Several pronouncements abide by the principle of overcoming any discrimination against incestuous children: Corte costituzionale 28 November 2002 no 494, *Giurisprudenza costituzionale*, 4058-4066 (2002), with a note by C.M. Bianca, ‘La Corte costituzionale ha rimosso il divieto di indagini sulla paternità e maternità di cui all’art. 278, comma 1, c.c. (ma i figli irricognoscibili rimangono)’ *Giurisprudenza costituzionale*, 4068-4074 (2002); Corte costituzionale 20 July 1990 no 341, *Vita notarile*, 436 (1990).

doubts discussed here, assuaging the fierce criticisms of the nostalgic supporters of a 'more rational and more convenient criterion, merely practical, for reconstructing family lineages' (that is, the attribution of paternal surname) who keep wondering how is it possible to be stuck discussing discrimination in the courtrooms, taking 'very harsh doctrinal stands concerning a matter (...) which is a mere formal question'.⁷⁴

In 'this age of many transformations the appeal to fundamental rights comes back, spreading through the world in unprecedented forms'⁷⁵ bringing not the need for (what is simplistically described as) 'a bureaucratic and standardized approach to equality',⁷⁶ but rather the need to enliven the human dimension through the implementation of the principle of equal social dignity.⁷⁷

The path traced by the Constitutional Court marks the fate of the automatic attribution of the paternal surname, momentarily 'attenuated' by this partial decision of unconstitutionality, which reasonably balances on the one hand the mother's right to transmit, with her own surname, part of her origins to her child, and, on the other hand, the child's right to witness the continuity of the family history also with reference to the maternal line.

This is just the beginning of a direct change which will allow such 'fundamental rights to be not only granted, but also (fully) implemented'.⁷⁸ 'Sometimes even a partial invalidity leads to actual innovations (...), and this is a fatal consequence of any judgment of unconstitutionality':⁷⁹ this does happen when the equal dignity of the parents is revealed in the dual attribution of the matronymic.⁸⁰

⁷⁴ S. Scagliarini, 'Dubbie certezze e sicure incertezze in tema di cognome dei figli' n 1 above, 5 and 12.

⁷⁵ S. Rodotà, *Il diritto di avere diritti* (Roma-Bari: Laterza, 2012), 7.

⁷⁶ S. Niccolai, 'Il diritto delle figlie a trasmettere il cognome del padre: il caso *Cusan e Fazzo c. Italia*' *Quaderni costituzionali*, 456 (2014); M. Finocchiaro, 'Se il figlio prende anche il nome della madre situazione ingovernabile in poche generazioni' *Guida al diritto*, 32 (2004).

⁷⁷ S. Rodotà, *Il diritto di avere diritti* n 75 above, 179-199.

⁷⁸ *ibid* 310.

⁷⁹ G. Branca, 'L'illegittimità parziale nelle sentenze della Corte costituzionale', in G. Maranini ed, *La giustizia costituzionale* (Firenze: Vallecchi, 1966), 63.

⁸⁰ About identity (and surname) of the child born by two mothers (one who gave birth, the other who transmitted her genetic pool), Corte di Cassazione 30 September 2016 no 19599, with notes by G. Ferrando, 'Ordine pubblico e interesse del minore nella circolazione degli *status filiationis*' *Corriere giuridico*, 190-198 (2017) and G. Palmeri, 'Le ragioni della trascrivibilità del certificato di nascita redatto all'estero a favore di una coppia *same-sex*' *La nuova giurisprudenza civile commentata*, 362-377 (2017). About the matter, see also L. Franco, 'Il nome del bambino nato da due madri: tra diritto al nome e diritto sul nome' *La nuova legge civile commentata*, 448-454 (2015); A. Bellelli, 'La filiazione nella coppia omosessuale' *Giurisprudenza italiana*, 1819-1823 (2016). Recently, see: Corte di Cassazione 15 June 2017 no 14878, *federalismi.it*, 28 June 2017.