Hard Cases

In the Name of the Child: Remedies to Adultcentrism in Naming Law

Amalia Diurni*

Abstract

The Italian legal system undoubtedly belongs to the western legal tradition and yet, until only recently, automatic passing on of the patronymic affected a child's legal naming in Italy in the same way as it still does in countries of no affinity with it, whilst the rest of the world had already abandoned this archaic remnant of the patriarchal society by developing alternative models: unilateral (single surname), bilateral (double surname), and liberal (parents' free choice or multiple options) model. The Italian legal system belongs to the civil law tradition and yet it was the Constitutional Court, not the legislator, who steered the country out from the automatic patronymic mechanism to the gender egalitarian one. The Italian lawmaker has now been urged to intervene. The aim of this paper is to shed light on the adultcentrism found in many naming laws and to propose a more efficient and child-friendly solution.

I. The Long Road Towards Modernity

The Italian legal system undoubtedly belongs to the western legal tradition and yet, until only recently, automatic passing on of the patronymic affected a child's legal naming in Italy in the same way as it still does in countries of no affinity with it (Sharia law countries such as Iran, Iraq, Syria, Yemen, Jordan, Qatar, Saudi Arabia, Kuwait, Lebanon and Tunisia; the poorest of African countries such as Burkina-Faso, Burundi, Ivory Coast, Ghana, Nigeria, Senegal, Sudan and Tanzania; North and South Korea), whilst the rest of the world had already abandoned this archaic remnant of the patriarchal society.

The automatic passing on of the father's name has its roots in an ancient social identification practice (a patronym is, in the strict sense of the word, the name of the father).[1] This practice became a legal custom when patronyms, as well as other nicknames – some related to geographical origins (Leonardo Da Vinci), others to jobs (Sandro Botticelli) and others still to physical traits (Masaccio)[2]–

*Full Professor of Private Comparative Law, Tor Vergata University of Rome.

[1] In Russia, the name of a child is still composed by a first name and a surname (chosen by the parents from their own surnames) and, between such first name and surname, the first name of the father (Art 58 Russian civil code). In Scandinavian countries most surnames are composed of the father's name and the final ending -søn or -datter (eg § 7 *Navneloven*, Danish Name Act, no 524 of 2005, lately amended by Act no 1815 of 2021 and no 227 of 2022).

[2] Masaccio is the nickname of Tommaso di Ser Giovanni di Mòne di Andreuccio Cassài, a

crystallized in family surnames. The reason was connected with the assumption of man's superiority over women, with the ensuing structure of society in general and of legal orders in particular. Legal determination of paternity consequently played a protective role for the child (there can be certainty of a child's mother, but not of the father –*mater semper certa est, pater numquam*). This made patronyms popular, whilst mothers' surnames were reserved for the offspring of… loose morals. In short, at that time, automatic passing on of the patronymic was regarded, worldwide, as the best solution in the interest of all parties: mother, father, child and legal order.

In relation to children born in wedlock in Italy, the rule wasn't even explicitly laid out in writing,[3] but existed, rather, as a 'norma di sistema'[4] – a rule inferable from other rules,[5] such as Art 262 of the Italian civil code governing children born out of wedlock and according to which, if recognized concurrently by both parents, the child is automatically given the father's surname.[6]

The Italian legal system undoubtedly belongs to the civil law tradition and yet it was a judicial decision, not the legislator, who steered the country out from the automatic patronymic mechanism to the gender egalitarian one. The Italian Constitutional Court took more than a decade to replace the legislative formant and establish a new order. The process of drawing the country out from the family of traditional legal orders described above was long and gradual. The first time the constitutional illegitimacy of the rule was ever questioned goes back to 1988. Indeed, twice[7] that year did the Italian Constitutional Court dismiss any

humorous version of Maso (short for Tommaso), meaning 'messy Tom', according to G. Vasari, *Le vite de' più eccellenti pittori, scultori e architettori* (Firenze: Appresso i Giunti, 1568), II, 296,who wrote about the famous painting: 'E perché e' non volle pensar giammai in maniera alcuna alle cure o cose del mondo, e, non che altro, al vestire stesso, non costumando risquotere i danari da' suoi debitori, se non quando era in bisogno estremo, per Tommaso (che era il suo nome) fu da tutti detto Masaccio'.

[3] In France the rule has a customary character: see P. Hilt and F. Granet-Lambrechts, *Droit de la famille* (Grenoble: PUG, 6th ed, 2018), 187-188. In Italy, the customary character of the rule is maintained by a minority of legal scholars and courts (F. Giardina, 'Il cognome del figlio e i volti dell'identità personale. Un'opinione «controluce»' *Nuova giurisprudenza civile commentata*, 2014, 139; Tribunale di Milano 4 June 2002, *Famiglia e Diritto*, II, 173 (2003), with note of A. Figone, 'Sull'attribuzione del cognome del figlio legittimo'; Corte di Cassazione 29 May 2006, no 16093), the majority considering it to be an implicit rule of the civil code (M. Alcuri, 'L'attribuzione del cognome materno al figlio legittimo al vaglio delle sez. un. della S.C.: orientamenti della giurisprudenza interna e comunitaria' *Diritto di Famiglia e delle Persone*, 1076 (2009); G. Grisi, 'L'aporia della norma che impone il patronimico' *Europa e Diritto Privato*, 679 (2010); S. Troiano, 'Cognome del minore e identità personale' 3 *Jus Civile*, 565 n 13 (2020); Corte di Cassazione ordinanza no 13298 of 17 July 2004).

[4] Corte costituzionale sentenza 16 February 2006 no 61, *Foro italiano*, I, 1673 (2006); Corte di Cassazione 17 July 2004 no 13298.

[5] Arts 237, 262 and 299 Italian Civil Code and also Art 72 para 1 Regio decreto no 1238 of 1939, and Arts 33 and 34 Decreto del Presidente della Repubblica no 396 of 2000.

[6] Art 262 Italian Civil Code. For details see G. Terlizzi, 'In the Name of Equality. The Constitutional Court Rewrites the Rule on Surname Attribution' in this *issue*.

[7] Ordinanza no 176 of 11 February 1988, *Diritto della famiglia e delle persone*, I, 670 (1988),

violation of Arts 3 and 29 of the Italian Constitution in connection with a mother's impossibility of passing her surname on to her child: in the first decision the child had been born in wedlock, whilst in the second decision the child had been recognized by the father at the time of birth. Almost twenty years later the Supreme Court (Corte di Cassazione) resubmitted the question to the Constitutional Court, which court upheld its decision of inadmissibility.[8] The question had, nonetheless, raised relevant issues and proven useful to instigate urgent and necessary legislative intervention. The court declared the patronymic rule, as based on a patriarchal concept of family, to be no longer consistent with the constitutional values of gender equality and the fundamental principles of the Italian legal system.[9] This *obiter dictum* was supported by making reference to the New York Convention on the Elimination of All Forms of Discrimination against Women,[10] especially Art 16, para 1, point g),[11] and to the Recommendations of the Council of Europe's Parliamentary Assembly[12] on discrimination between men and women with regard to the choice of surnames and on the passing on of parents' surnames to children.

The persistent silence of the Italian Parliament eventually forced the Constitutional Court to mend the situation when it was asked to rule on a civil registry officer's refusal to add the maternal surname to a child's (paternal) birth-surname. By declaring the constitutional illegitimacy of the patronymic rule in the part of it that does not provide for exceptions where parents grant their mutual consent, the Court[13] introduced, for the first time ever in Italy, the

with notes of F. Dall'Ongaro, 'Il nome della famiglia e il principio di parità', and ordinanza no 586 of 19 May 1988, *Giurisprudenza costituzionale*, I, 2726 (1988).

[8] Corte costituzionale sentenza 16 February 2006 no 61, n 4 above, with notes of E. Palici Di Duni, 'Il nome di famiglia: la Corte costituzionale si tira ancora una volta indietro, ma non convince' *Giustizia costituzionale*, I, 543, 552 (2006); S. Niccolai, 'Il cognome familiare tra marito e moglie. Come è difficile pensare le relazioni fra i sessi fuori dallo schema dell'eguaglianza' *Giustizia costituzionale*, I, 543, 558 (2006); L. Gavazzi, 'Sull'attribuzione del cognome materno ai figli legittimi' *Famiglia, Persone e Successioni*, 898-908 (2006); V. Carfì, 'Il cognome del figlio legittimo al vaglio della Consulta' *La Nuova Giurisprudenza Civile Commentata*, 1, 35-47 (2007); 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*, 1, 316 (2007).

[9] ibid. See for translation and comment, G. Terlizzi, n 6 above.

[10] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted the 18 December 1979 by the United Nations General Assembly, signed by 196 countries so far (not the USA) and ratified in Italy by legge 14 March 1985 no 132.

[11] Art 16, para 1, point g, CEDAW: 'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: … (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.'

[12] Recommendations 1271 (1995) and 1362 (1998) made by the Parliamentary Assembly of the Council of Europe on the Discrimination between men and women in the choice of a surname and in the passing on of parents' surnames to children.

[13] Corte costituzionale sentenza 21 December 2016 no 286, *Giurisprudenza italiana*, 815-

possibility of a double surname. The solution was only partial and unsatisfactory: in order to see her surname added to the legally imposed patronymic the mother still depended on the father's assent. Aware of the inadequacy of its decision, the Court urged the legislator once again; organic regulation of the matter and determination of naming criteria consistent with the principle of gender equality could be deferred no longer.

The European Court of Human Right's (ECHR) decision against Italy in the 2014 Cusan and Fazzo case[14] further increased the urgency for new regulation in Italy. This decision fell within a framework of reiterated action, in European case law, to move towards gender equality and the elimination of all sexual discrimination in relation to surnames passed on to children as well as to those acquired by spouses.[15] In the Italian case, infringement of Art 14 (taken together with Art 8) of the European Convention on Human Rights was determined, by reason of the fact that the Italian rule required that the given surname invariably be – regardless of any different mutual wish of the spouses – that of the father. The European Court did however underline that – on account of its practical use – such a rule 'was not necessarily incompatible with the Convention'.[16] What the European Court ruled against, was the impossibility of deviating from the rule even when parents were in agreement to do so. This excessive rigidity subsequently became the target of the Italian Constitutional Court's decision of 2016.

824 (2017), with notes of R. Favale, 'Il cognome dei figli e il lungo sonno del legislatore'; E. Al Mureden, 'L'attribuzione del cognome tra parità dei genitori e identità personale del figlio' *Famiglia e Diritto*, 213-224 (2017); V. Carbone, 'Per la Corte costituzionale i figli possono avere anche il cognome materno, se i genitori sono d'accordo' *Corriere Giuridico*, 165-167 (2017); C. Favilli, 'Il cognome tra parità dei genitori ed identità dei figli' *La Nuova Giurisprudenza Civile Commentata*, 818-830 (2017); C. Ingenito, 'L'epilogo dell'automatica attribuzione del cognome paterno al figlio (Nota a Corte costituzionale n. 286/2016)' *Osservatorio costituzionale*, 2, 1-18 (2017).

[14] Eur. Court H.R., *Cusan and Fazzo* v *Italy*, Judgment of 7 January 2014. For a comment, see M. Calogero and L. Panella, 'L'attribuzione del cognome ai figli in una recente sentenza della Corte dei diritti dell'uomo: l'Affaire Cusan e Fazzo c. Italia' *Ordine internazionale e diritti umani*, 222-246, (2014).

[15] The Court had had the opportunity to examine somewhat similar issues in the Burghartz (Eur. Court H.R., *Burghartz* v *Switzerland*, Judgment of 22 February 1994), Ünal Tekeli (Eur. Court H.R., *Ünal Tekeli* v *Turkey*, Judgment of 16 November 2004) and Losonci Rose and Rose (Eur. Court H.R., *Losonci Rose and Rose* v *Switzerland*, Judgment of 9 November 2010) cases: The first case concerned the dismissal of a husband's request to have his wife's surname placed before his own; the second case dealt with a Turkish legal rule whereby a married woman could not use her maiden name on its own after marriage, although a married man retained his surname as it was prior to marriage; the third case addressed the Swiss rule according to which the husband's surname was automatically attributed to the couple as the new family name after marriage (*Familienname*) and consequently became the surname of their offspring. For a comment see G. Ferrando, 'Genitori e figli nella giurisprudenza della Corte europea dei diritti dell'uomo' *Famiglia e Diritto*, 1049-1053 (2009). In a critical sense, see A. M. Gross, 'Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names' 9 *Harvard Human Rights Journal* 269-284 (1996).

[16] Eur. Court H.R., *Cusan and Fazzo* v *Italy* n 14 above.

II. The Principle of Family Unity and the Unilateral Model

The European and Italian decisions both focused on two principles: gender equality and family unity. The latter is prominent in legal systems that belong to the unilateral model (single surname). This model is based on the idea that a family is the fusion of two persons,[17] where each person should therefore be recognized, within the social context, as a member of his or her family. This outcome can be secured by a family name - the same one for all its members, parents and children. The unilateral model was theorized and transposed into the German civil code[18] (*Bürgerliches Gesetzbuch, BGB*) in 1900: the *Familienname* was the husband's surname, acquired by his wife upon marriage[19] and then passed on to their offspring.[20] This model was common to most countries in continental Europe that shared the German language or tradition,[21] such as

[17] The existence of two different concepts of the couple in Europe is theorized by V. Feschet, 'The surname in Western Europe. Liberty, Equality and Paternity in Legal Systems in the Twenty-First Century' *L'Homme Z.F.G.*, 20.1, 65, 63-73 (2009): 'In an equation, in Europe the couple is sometimes thought as the fusion between two persons (father + mother = 1), sometimes as an association of two individuals (father + mother = 1 + 1)'. She compared, in the same ethnological research, names and religious practices, concluding that 'in the countries with a Protestant tendency (Sweden, Finland, Denmark, Germany, Netherlands, Iceland), the lawmakers chose alternative naming procedures which massively reject the double name, pleading the Public Records Office overweight. In predominantly Roman Catholic or Catholic Orthodox countries (Portugal, Spain, France, Italy, Belgium, Switzerland, Greece), the tradition is clearly patrilineal or bilateral and the double name has the status of an ideal formula, or the preferable to the mother's name (though it is never explicit)'. Whilst the first assumption about the couple's equation is inspiring, the latter one raises a complaint because Sweden (§ 4 no 3 and § 20 *Lag (2016:1013) om personnamn*), Finland (Secions 5 and 6 *Etu- ja sukunimilaki*), Denmark (§ 8 *Navneloven*), and Norway (§ 1 and 7 *Navneloven*) already grant the choice of a double name.

[18] In Germany, naming law has gone through several phases, starting from *Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiete des bürgerlichen Rechts* of 1957. At that time § 1355 BGB was modified in order to allow the wife to add her husband's surname to her maiden name. Until 1976 the husband's surname was both *Ehename* and *Familienname* and, consequently, was also name of every child born in wedlock. With the first family law reform (*Erstes Gesetz zur Reform des Ehe- und Familienrechts*: 1. EheRG) the new § 1355 BGB gave spouses the possibility of choosing the *Ehename* from their surnames, which then, under § 1616 BGB, automatically became the surname of their offspring. In the case of disagreement, the father's surname prevailed (§ 1355, para 2, 1, BGB). The German Federal Constitutional Court, Bundesverfassungsgericht 5 March 1991, 44 *Neue Juristische Wochenschrift*, 1602-1606(1991), declared the latter rule unconstitutional and introduced the possibility of a double surname consisting of the spouses' surnames. In the case of disagreement, the order of the surnames wasdecided by lot. The option of the double surname was eliminated by the *Familiennamensrechtsgesetz* of 1993, which confirmed the unilateral model also in 2005 for cohabiting couples, *Lebenspartnerschaft* (*Gesetz zur Änderung des Ehe- und Lebenspartnerschaftsnamensrechts*), and in 2018 for same-sex couples. For an historical reconstruction, see D. Schwab, 'Personenname und Recht' *Namenkundliche Informationen*, 110-134 (2015).

[19] § 1355 BGB was reformed by the Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiete des bürgerlichen Rechts in 1957.

[20] § 1616 BGB : 'Das Kind erhält den Familiennamen des Vaters' (The child receives the father's family name).

[21] Like Austria, Holland, Lichtenstein, Switzerland, Turkey, Greece and Japan. Actually, the *Ehename* is compulsory in Turkey (Art 321 Turkish Civil Code, *Medeni Kanun*) and Japan

Scandinavian countries. Conversely, in France, couples are thought of as a '*communauté de vie*' (Art 215, para 1, French civil code), an association of two individuals, where each retain their birth surname in accordance with Art 1 of the Loi du 6 Fructidor an II.[22]

With its first family law reform of 1976,[23] Germany established gender equality by leaving it to the spouses to decide which of their birth names was to become the family name; where no agreement was reached, the husband's name would prevail.[24] Nowadays, in the case of disagreement, under § 1617 BGB the Family Court entrusts one the parents with the decision, thereby safeguarding both gender equality and family unity.

The idea of a *Familienname* is still widespread across continental Europe: Scandinavian countries deem family names, once chosen by the couple, to be the first choice for the child's naming.[25] However, globally, the German unilateral model – which bans the use of double surnames – is only shared by

(Art 790 Japanese Civil Code, 民法): see G. Koziol, 'Befristetes Wiederverheiratungsverbot für Frauen und Verbot der Führung getrennter Nachnamen für Ehepartner. Zu zwei neuen verfassungsrechtlichen Entscheidungen des Obersten Gerichtshofes in Japan' *Zeitschrift für Japanisches Recht*, 51, 63 (2017). In 1983 Greece abolished the *Familienname* and allowed double surnames (Art 1505 Greek Civil Code, Αστικὸς Κώδικας), and likewise Austria (§ 155, par. 1, Austrian Civil Code, ABGB), where, however (just like in Lichtenstein, Switzerland and Holland), the *Familienname* has been maintained only as an option for the spouses. The unilateral model applies in Holland (Art 1:5 Dutch Civil Code, BW), Lichtenstein (Art 139 Lichtenstein Civil Code) and Switzerland (Art 270 Swiss Civil Code, ZGB), as well as Turkey and Japan.

[22] Art 1 Loi du 6 Fructidor an II (23 August 1794): 'Aucun citoyen ne pourra porter de nom ou de prénom autres que ceux exprimés dans son acte de naissance : ceux qui les auraient quittés seront tenus de les reprendre'. Replacement of the maiden name with the husband's surname was common in France (but increasingly less so nowadays), but this was just a custom, referred to by a 1974 ministerial act as follows: 'Le mariage est sans effet sur le nom des époux, qui continuent d'avoir pour seul patronyme officiel celui qui résulte de leur acte de naissance. Toutefois, chacun des époux peut utiliser dans la vie courante, s'il le désire, le nom de son conjoint, en l'ajoutant à son propre nom ou même, pour la femme, en le substituant au sien': *Arrêté* 16 May 1974 *fixant les modèles de livret de famille*.

It is significant that Spain and Portugal both view the couple as an association. As a result of this, the spouses both keep their double surname (as per the bilateral model).

[23] Erstes Gesetz zur Reform des Ehe- und Familienrechts: 1. EheRG.

[24] In 1991 this rule (stated in § 1355, para 2, sentence 1, BGB) was declared unconstitutional by the German Federal Constitutional Court (see n 18 above), giving parents the possibility of creating a double surname composed of each of their birth names. In the case of disagreement, the lot decided. The possibility of having a double surname was eliminated through legislative intervention following the judicial decision. Today, if parents cannot reach an agreement, the Family Court empowers one of parents to decide, and his or her surname is passed on to the children if he or she does not decide. See D. Schwab, n 18 above, 125.

[25] In Finland, Denmark, Sweden and Norway the couple has a very vast choice: mother's or father's surname, both as a double surname or a as a newly invented surname: E. Brylla, 'The Swedish Personal Names Act 1982 and the impact of its interpretation on the surname stock' *Studia anthroponymica Scandinavica*, 23, 71-77 (2005); K. Leibring, 'The new Personal Names Act in Sweden - some possible consequences for the name usage' *Namenkundliche Informationen*, 109/110, 408-419 (2017).

the Netherlands, Switzerland, Lichtenstein, Turkey and Japan.[26]

Family unity is not an issue in the bilateral model, which enhances the child's ties with both parents, giving him or her a double surname. Traditionally, double surnames consist of the father's surname followed by the mother's, as in Spain,[27] but also come the other way around, as in Portugal.[28] Double surnames were not initially aimed at preventing discrimination between men and women since both legal systems provide for the passing on of the father's surname alone, thereby securing prevalence of a patrilinear genealogy, just as in the rest of the continent. Nowadays, however, parents can decide on the order of their names in the composition of their children's surnames, thereby determining which of their surnames gets passed on to the future generation, and the principle of gender equality is fully respected. Family unity is fulfilled with regard to the couple's children, who must all have the same surname.

In actual fact, the concept of family is something that changed over time. In the past, complex societies consisted of a broad family structure, such as the Roman paterfamilias group, the Chinese upper-class family, the Samurai family in Japan or the Indian *Kul* (a joint family usually composed of three generations).[29] In more modern times, especially in the western legal tradition, the concept of family was confined to the nuclear family unit, consisting of a man, a woman and their socially – and consequently legally – recognized children. Stability was ensured by the indissolubility of marriage and formalized by a common shared surname. The introduction of divorce law, the increased likelihood of marital breakdowns and out-of-wedlock births, the proliferation of assisted reproductive technologies, and the gradual social acceptance of new family structures, all brought about changes in typical partnership and childbearing models.[30] The deconstruction of the traditional concept of family brought about by a variety of family patterns other than the nuclear family (stepfamily, single parent family, extended family, blended family, same-sex family, etc), triggered the need for policy changes and for a re-visitation of the legal framework.

III. Individual Freedom and Identity Value: The Liberal Model

[26] n 21 above.

[27] Art 109 Spanish Civil Code. For details, see A. Lamarca Marquès, 'The changing concept of 'family' and challenges for family law in Spain and Catalonia', in J. M. Scherpe ed, *European family law: the changing concept of 'family' and challenges for domestic family law* (Cheltenham: Edward Elgar Publishing, 2016), II, 289-307.

[28] Art 1875 Portuguese Civil Code and Art 103, para 2, point e, *Código do Registo civil*, reformed in 1997 by Decreto-Lei no 36/97.

[29] I.F.G. Baxter, 'Family Groups' *Encyclopedia Britannica*, 24 August 2022, available athttps://tinyurl.com/3sbpmz9c (last visited 31 December 2022).

[30] Highlights of trends and structures together with statistical data can be found in the research of P. Lunn, T. Fahey and C. Hannan, *Family figures: family dynamics and family types in Ireland (1986-2006)* (Dublin: The Economic and Social Research Institute, 2009), 25-38.

Family unity as a main principle is in recession, whilst individual freedom and identity value are becoming dominant in the legal discourse. In this sense, it is the common law approach to the matter that is prevailing, even though its legal transplant in countries of civil law tradition is happening in the most varied of ways. As is well known, the common law model is based on a liberal attitude towards private matters and does not grant public law an overriding power. Conversely, across continental Europe, public law prevails in matters of personal status. In the UK and US[31] individuals have great freedom in naming themselves and their children. In regard to their children, parents may choose between one of their surnames, both their surnames (hyphenated or not, or even originally combined – Dawn Porter, the television presenter, and her husband, Chris O'Dowd, changed their surname upon marriage to O'Porter)[32] or a surname created especially for the newborn,[33] provided it is neither injurious nor misleading.[34] Parents are free to choose a different surname for each of their children and to change it, by mutual agreement or unilaterally by the custodial parent, until such time as the child's coming of age, even for the purpose of adjusting it to the name of a new partner or half-brothers and sisters. This all takes place without the child's consent,[35] but the child has the right to change his or her surname, easily and at will, on coming of age.[36]

Therefore, in the UK and US,[37] '*name is a matter of fact rather than a*

[31] In US the *common law name change* is considered constitutionally granted by the 1st Amendment and the Secion 1 of the 14th Amendment: see E. J. Bander, *Change of Name and Law of Names* (New York: Dobbs Ferry, 1973); J. S. Kushner, 'The Right to Control One's Name' 57 *UCLA L.R.*, 313, 319-321 (2009), with further details on case law; C. Alonso-Yoder, 'Making a Name for Themselves' 74 *Rutgers Law Review*, 3, 911, 934-936, 969-970 (2022).

[32] T. Walker, 'Dawn Porter compromises on a married name with Chris O'Dowd' *The Telegraph*, 31 October 2012. For a critical perspective see H. MacClintock, 'Sexism, surnames and social progress: The conflict of individual autonomy and government preferences in laws regarding name changes at marriage' 24 *Tem, Int'l & com L.J.* 277 (2010).

[33] Evidence of this practice can be found in name generation websites such as Generatorfun: https://generatorfun.com/surname-generator.

[34] See the instructions for the *deed pool*, a form of legal contract needed for official recognition of a name change in the UK: https://tinyurl.com/4754rhem (last visited 31 December 2022). Well known are series of judicial proceedings that took place in New Mexico, when 'Snaphappy Fishsuit Mokiligon' (probably the result of a previous name change), after having granted a name change into 'Variable' by the Court of Appeal, *In re Mokiligon*, 137 N.M. 22 (N.M. Ct. App. 2004), later applied to change his name into 'Fuck Censorship!'. The Court denied the request stating that the 'proposed name change would be obscene, offensive and not comply with common decency': *In re Variable*, 2008-NMCA-105.

[35] See *Re C (Change of Surname)* [1997] EWCA Civ 2783. In Scotland and North Ireland the change is admitted up to the age of 16: https://tinyurl.com/42szfvsd (last visited 31 December 2022).

[36] To change name by Deed Poll in the United Kingdom a person must be at least 16 years of age. To change the name of a child who is under 16 years of age, someone with parental responsibility can apply so long as everyone with parental responsibility for the child consents to the name change: https://tinyurl.com/mwm5tur7 (last visited 31 December 2022).

[37] In the first half of the 20th century some US state laws imposed the husband's name for the wife and the father's name for the children. The rise of feminist movements in the sixties

matter of law'.[38] Elsewhere, however, with the exception of Scandinavia,[39] the translation of this extremely liberal approach into civil law countries, generally limits the naming options to either the mother's surname, the father's surname or a double surname.[40] Differences across countries are revealed by diverse settlement norms that are applied in instances when parents disagree: some countries let the mother's surname prevail,[41] others let the father's surname prevail,[42] and others still the former or the latter depending on whether the children are born in or out of wedlock;[43] some countries solve the matter with a double surname (in which case some resort to alphabetical order[44] and others to the lot[45] to decide on the order of the two surnames. With the exception of Scandinavian countries,[46] which have adopted the extremist version of the model, civil law countries' conservative approach to the liberal model is exemplified by their interdiction of different surnames for siblings.

IV. Adultcentricism in Naming Law: A Story of Competition

set off the legal debate, which ended with the US Supreme Court's decision, *Reed* v *Reed*, 404 U.S. 71 (1971). The decision inverted the trend and applied the Equal Protection Clause under the 14th Amendment.

[38] See E. C. Smith, *The Story of Our Names* (Detroit: Gale Research Co., 1970, but 1st ed New York, 1950), 197. In *Loser* v *Plainfield Sav Bank*, 149 Iowa 672, 677 (1910) is to be found the well-known statement that 'contrary to the apparent thought suggested in argument in this case, there is no such thing as a 'legal name'.

[39] n 25 above.

[40] This is so in France, Belgium, Austria, Switzerland, Greece, Ireland, Croatia, Latvia and Lithuania, Luxembourg, Malta, Poland, Romania, Slovenia, Hungary and Cyprus.

[41] So in Austria (Art 155 Austrian Civil Code, ABGB), Norway, Sweden and Denmark. In Switzerland, has the guardian to choose the surname, than is the mother's (Art 270a Swiss Civil Code, ZGB).

[42] This is so in Greece (Art 1505 Greek Civil Code, Αστικός Κώδικας) and in the Principality of Monaco (Arts 77-2, 2-1 and 2-2 Monegasque Civil Code, modified by the Loi no 1.440 of 5 December 2016). The same rule applied in Belgium until the 2016 decision of the Constitutional Court declaring the illegitimacy of Art 335, para 1, Belgian Civil Code and the subsequent Loi du 25 décembre 2016 modifiant les articles 335 et 335ter du Code civil relatifs au mode de transmission du nome à l'enfant: 'En cas de désaccord, l'enfant porte les noms du père et de la mère accolés par ordre alphabétique dans la limite d'un nom pour chacun d'eux. Lorsque le père et la mère, ou l'un d'entre eux, portent un double nom, la partie du nom transmise à l'enfant est choisie par l'intéressé. En l'absence de choix, la partie du double nom transmise est déterminée selon l'ordre alphabétique'. For a comment, see R. Peleggi, 'Parità tra genitori e cognome dei figli: il Belgio abolisce le discriminazioni, mentre l'Italia resta in attesa di riforma' *Rivista di Diritti Comparati*, 3, 1, 7-8 (2018).

[43] Registered partnership is deemed equivalent to wedlock in Netherlands (Art 1.5, para 13, Dutch Civil Code, BW).

[44] France (Art 311-21 French Civil Code) and Belgium (Art 335, para 1, Belgian Civil Code).

[45] Luxembourg (Art 53, para 5, Luxembourg Civil Code).

[46] As an expression of extreme egocentrism, a John Smith and Jane Doe would, by way of example, have the possibility of naming their first baby-boy John Doe, their first baby-girl Jane Smith, their second baby-boy Jonnie Doesmith and their second baby-girl Janie Smithoe.

When compared with the rigidity and inequality of the patronymic, new models of naming law are clearly welcome. That said, the increasing freedom of choice that arises when moving from the limited unilateral model to the more extensive liberal one goes far beyond mere competition between different traditions and legal systems: it paves the way for competition among individuals, thus far prevented by the prevailing public interest for a standard naming system that disclosed family kinship through generations of males. The competition involves public institutions and private people, once again raising age-old conflicts between progressives and conservatives, men and women, mothers and fathers and their families. The choice becomes the arena where parents fight out their 'child ownership title'.

Just as significant changes to family structures can be challenging and frequently turn into sources of conflict between people of different generations (corroborated by the long time needed[47] new family forms to be recognized by the law),[48] child naming is also addressed from an adult's perspective, without any concern for the individual whose name – consequently identity – is at stake. Notwithstanding the precedence that the western legal system grants to the protection of human rights and to the individual identity associated with such rights over traditional issues of public concern[49] (control, identification and family genealogy of the ruled by the rulers – nowadays achievable through means other than surnames, such as DNA profiling, fingerprinting, voice or face analysis), adultcentrism continues to affect the legal process of child naming.

There is, admittedly, a widely accepted international source of law (the aforementioned New York Convention), which recognizes the right of children to have a name, to know who their parents are (Art 7 UNCRC), to have their

[47] In the long process to free the family from the patriarchal character, both in terms of the internal relationship between spouses as well as the external and social ones by means of multiple forms of union, the Italian legislator invariably lags behind other European countries (eg in eliminating the patronymic rule, in regulating civil unions, in considering filiation without distinctions between in and out of wedlock, in recognizing same-sex parenting) see, among others, R. Torino, *La tutela della vita familiare delle coppie omosessuali nel diritto comparato, europeo e italiano* (Torino: Giappichelli, 2012); G. Ferrando, M. Fortino and F. Ruscello eds, *Legami di coppia e modelli familiari*, in P. Zattied, *Trattato di diritto di famiglia: le riforme 2012-2018* (Milano: Giuffrè Francis Lefebvre, 2019), I; L. Lenti and M. Mantovani eds, *Il nuovo diritto della filiazione*, in P. Zattied, *Trattato di diritto di famiglia: le riforme 2012-2018* (Milano: Giuffrè Francis Lefebvre, 2019), II. As in the name matter also in the same-sex parenting the jurisprudential formant is playing a relevant role in following the social evolution: see Corte di Cassazione 30 September 2016 no 19599, *Giurisprudenza Italiana*, 2365 (2017); Corte d'Appello di Trento 23 February 2017, *Giurisprudenza Italiana*, 2367 (2017), both decisions with notes of A. Diurni, 'Omogenitorialità: la giurisprudenza italiana si apre all'Europa e al mondo' *Giurisprudenza Italiana*, 2368-2379 (2017); Id, 'Il nuovo paradigma della plurigenitorialità nel diritto interno e internazionale' *Rivista di Diritto Privato*, I, 23-50 (2018).

[48] J. M. Scherpe ed, n 27 above.

[49] Interesting, albeit not recent, is the ethnologic research of Yale University's J. C. Scott, J. Tehranian and J. Mathias, 'The production of legal identities proper to states: The case of the permanent family surname' *Comparative studies in society and history*, 44, no 1 (2002), 4-44.

identity – including name and family relations – preserved (Art 8 UNCRC) and to have their own views expressed and heard (Art 12 UNCRC). Moreover, in order to supervise proper application of children's rights, the – howbeit vague[50] – concept of the 'best interest of the child' was developed. Widely adopted in judicial practice and statutory laws, the child's best interest argument is often instrumentalized to legitimize conflicting political and cultural positions: *libertarians* v *authoritarians*, *secularists* v *believers*, *women* v *men*, *courts* v *parents*, *parents* v *each other*. An analysis of US case law demonstrates the misuse of this criterion in a number of opinions[51] – some believe it worthy of being addressed against a welfare checklist[52] – whilst some UK courts apply 'The Welfare Test'[53] to justify measures that are taken against the will of the parents or of the child.[54]

It may therefore be assumed that a libertarian approach is no panacea. What is really needed is an assessment of which solution strikes a balance between the interests of the parents, who wish to see their surnames – as well as their genes – passed on to their offspring, and the interests of their children, who wish to see their identity respected by adults. It would, of course, not be in the interest of a child to be given a name that is the outcome of a family conflict. Likewise, it would not be in the interest of the child to be raised with one of his or her parental bonds severed by the automatic passing on of the patronymic. Greater choice means a higher risk of conflict. No choice means discrimination. The balancing point, as always, lies in the middle.

[50] S. Parker, 'The best interest of the child - Principles and problems' *International Journal of Law, Policy and the Family*, 8.1 (1994), 26-41. About the Italian, European, and international debate on that matter, see Mi. Bianca ed, *The Best Interest of the Child* (Roma: Sapienza Università Editrice, 2020), specifically on the vagueness of this concept see the contribution of U. C. Basset, 'L'interesse del minore: le nuove sfide d'un concetto vago e magari antipatico', 3-11.

[51] See J. S. Kushner, 'The Right to Control One's Name' 57 *UCLA L.R.*, 313, 332 (2009); L. M. Kohm, 'Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence' 10 *JL & Fam Stud* 337, 374 (2008); H. Reece, 'The paramountcy principle: consensus or construct?' 49 *Current Legal Problems* 267, 291 (1996).

[52] Critical on this point E. Sutherland, 'The Welfare Test: Determining the Indeterminate' *EdinLR* 22, 94, 97 (2018).

[53] The leading case for 'The Welfare Test' in UK is the decision of the House of Lords *Dawson* v *Wearmouth* (1999) *UKHL* 18. For a comment, M. Hayes, 'Dawson v Wearmouth 'What's in a name? A child by any other name is surely just as sweet?' *Child and Family L.Q.*, 11, 423 (1999).

[54] In this respect it is not surprising that the United States of America is one of the few countries that didn't sign the UNCRC and the United Kingdom was reprimanded from the UN Committee on the Rights of the Child for its tolerance of parental corporal punishment of children (Section 58 Children Act 2008). In its reply, the British government assumed that, 'within the boundaries set by law, the use of physical punishment is a matter for individual parents to decide. It is an insult to ordinary, decent parents to suggest that they cannot distinguish between smacking and criminal violence, or that one usually leads to the other': Joint Committee on Human Rights, 'Government Responses to Reports from the Committee in the last Parliament' *8th Report of Session 2005-06*, HL Paper 104, HC 850, 82, available at https://tinyurl.com/fc68n26s (last visited 31 December 2022).

Regardless of the contextual circumstances of their procreation and birth, all children develop their identity through their relationships with both parents. Scientific proof of the importance that children be informed of the circumstances of their birth, and have the possibility of getting to know their biological origins, underlines the paramount role played by naming in an individual's identity-building process. Today, the law in western countries falls short of protecting the full spectrum of human dignity; it only protects the dignity of existing beings, the dignity of the adults. In theory, the action of public authorities, whether legislative or judicial, is to satisfy human needs. In practice, however, what is being satisfied are individual wishes whose only limits are set by their feasibility.[55] Medically-assisted procreation is a shining example of this distortion: it has opened new possibilities for parenthood (from genetic, gestational and social mothers to genetic and social fathers, from single parents to same-sex parents)[56]but has required creative regulation to safeguard the welfare of the children born in these new ways. On the one hand, by refusing to legitimize new practices, the conservative stance encourages so-called 'procreative tourism' and creates uncertainty about the destiny of such newborns. On the other hand, by equating the new forms of parenthood with traditional ones (thereby accepting anonymization and registering only two parents among the many who contributed to the child's birth), the progressive stance erases the bonds of such children with their genetic and/or biological parents. Both stances invariably lead to a significant privation of children's rights; the adherents of both positions neglect children's rights in public debate or, even worse, use them as an argument to support their opinions as adults. Today's child is tomorrow's adult. He or she has expectations, which, on coming of age, become rights. The right to be informed of his or her origins (procreation and birth circumstances), the right to know who all his or her parents are (every individual directly involved in his or her existence, whether biological or genetic) and the right to get in touch with all such parents.

So, even with respect to naming, the dominance of an adultcentric approach is still persistent in authorities' statements, whether legislative or judicial – the issue of child identity wasn't even mentioned by the European Court of Human Rights in the Cusan and Fazzo case! – and requires an in-depth reflection or, better still, thorough reconsideration.

The pivotal point is to question the basis of naming as a legal act: should it be considered as an expression of parental rights (*Elternrecht*), and thereby legitimately focus on parents' interests and its 'ownership' perspective, or

[55] M. Paradiso, 'Navigando nell'arcipelago familiare: Itaca non c'è' *Rivista di diritto civile*, 1310, 1314 (2016). In the same sense, C. Castronovo, *Eclissi del diritto civile* (Milano: Giuffrè, 2015), 67.

[56] For a more detailed overview on the same-sex relationship and parenting in Europe see K. Boele-Woelki and A. Fuchs eds, S*ame-sex relationships and beyond. Gender matters in the EU* (Cambridge: Intersentia, 3rd ed, 2017).

should it be considered as an expression of parental responsibility towards its offspring (*Sorgerecht*), and thereby seek to protect the interests of the child[57], his or best welfare and the conditions for him or her to express a real choice in the future? Whilst the transition from paternal authority to parental authority has promoted equality between men and women in relation to their offspring, the gradual acknowledgment of modern concepts of parental responsibility triggers a Copernican revolution of perspective, with a relinquishing of the adultcentric approach also in matters of naming law.

V. The Balance Between Gender Equality and Child Identity: The Bilateral Model

The recent, culminating, decision of the Italian Constitutional Court[58] to declare the constitutional illegitimacy of the patronymic rule in all cases (ie for children born in and out of wedlock or adopted), gives us food for thought along these lines. In its reasoning the court did not shed light on whether naming is or isn't a matter of public interest but focused, rather, on the parties involved. The court even went as far as dismissing the question of family unity altogether, viewing the solution to this matter in a restored equality between mother and father[59] and leaving it to the parents to reach a consensual agreement on which of their surnames to pass on to their child. The court's attention was clearly drawn towards child identity – maintaining that this should prevail and that the gender equality principle should therefore be applied in accordance with it – and ruled for a double surname in instances of indecision or dispute between parents. As a matter of fact, the double surname model, which sees the full parental kinship set into the child's own legal and social identity, is the model that best takes the child's interest into consideration. That said, the Italian lawmaker has been urged – as made once again explicitly clear by the Constitutional Court – to intervene to regulate the generational transition of double surnames and to assess whether parents have a right to choose different surnames for each of their children.

A comparison of the many naming patterns developed by countries of

[57] That was the finding of the German Federal Constitutional Court, Bundesverfassungsgericht 30 January 2002, 1 *BvL* 23/96, *FamRZ*, 306 (2002). The distinction is made also by G. Autorino Stanzione, 'Attribuzione e trasmissione del cognome. Profili comparatistici' *Comparazione Diritto Civile*, 1, 16 (2010).

[58] Corte costituzionale sentenza 27 April-31 May 2022 no 131 available at https://tinyurl.com/3m2m95f6 (last visited 31 December 2022).

[59] The Court quotes its famous saying (Corte costituzionale sentenza 13 July 1970 no 133, § 4) 'it is indeed equality that safeguards that unity and, vice versa, disparity that puts it at risk', to draw the conclusion that, 'unity and equality cannot coexist if one negates the other, if unity works as a limit providing a veil of apparent legitimacy to sacrifices imposed only in a unilateral direction': Corte costituzionale sentenza 27 April-31 May 2022 no 131 n 58 above.

western legal tradition shows, on the one hand, the difficulties faced by the unilateral model[60] (domestically criticized for its rigidity and incoherence)[61] and, on the other hand, a liberal model that works well in its common law countries of origin but which is plagued by issues of diverse nature in civil law countries. Indeed, in countries that are based on civil law, the liberal model requires continuous adjustments (eg, the introduction and subsequent removal of the *mellannamn* in Sweden)[62] or is cause of administrative confusion to the extent of proving impracticable. A perfect example of the latter is France, where parents are not only granted a choice between one of their surnames or a hyphenated or non-hyphenated double surname, but also the right to add – *à titre d'usage* – a new partner's surname or the surname of the parent whose surname was not chosen[63] to their own name or to that of their children.

Conversely, as proven by the Spanish, Portuguese and Latin American examples, the bilateral model does not give rise to fierce competition between parents. The mandatory nature of the double surname means that parents are required to make only two choices: an individual, nonmandatory, choice between which of their double surnames is to be passed on to the child, and a common choice concerning the order of the two chosen (or legally determined) surnames – this latter decision affects generational transition: in Spain it is the first of the two surnames that is passed on to the second generation (unless the latter does not decide otherwise), in Portugal it is the second. The first (nonmandatory)

[60] The unsuitability of the unilateral model for the Italian legal system is clearly explained by S. Troiano, n 3 above.

[61] S. Lettmaier, 'Notwendigkeit einer Reform des (Familien-)Namensrechts?' *FamRZ*, 1, 7-9 (2020), with further references to and additional clarifications of the criticism in German literature.

[62] It may be considered as some sort of a *middle name*, though different from the English, Danish or Norwegian versions of it. It is a name positioned between the first names and the surname (eg the husband's surname, if the spouses choose to take the wife's surname at marriage, or the mother's name if the parents choose to give the father's name to their children). However, according to the names Act of 1982, the Swedish *mellannamn* was not hereditary and the bearer was not to come under it in alphabetical lists to avoid bypassing of the unilateral model (only one person in a marriage could have a *mellannamn*). The 2016 reform abolished this option, ie no more *mellannamn* can be taken, but the existing one remains: K. Leibring, n 25 above, 410-411.

[63] The surname à titre d'usage was first introduced in Art 43 of the French Civil Code by the Loi no 85-1372 of 23 December 1985 relative à l'égalité des époux dans les régimes matrimoniaux et des parents dans la gestion des biens des enfants mineurs (now repealed). Later, once the option for the parents to choose a double surname for their children had been introduced (Art 311-21 French Civil Code in the version introduced by Loi no 2002-304 of 4 March 2002 relative au nom de famille), the surname à titre d'usage remained as a further option for the left-out parent's surname (ie when only one surname had been chosen). The new Loi no 2022-301 of 2 March 2022 relative au choix du nom issu de la filiation, introducing Art 311-24-2, inserted the nome d'usage in the French Civil Code, as regulated in favor of the spouses and parents. This also gave the adult child a right to change his or her surname in several possible ways, such as by using the parental surname not passed on to him or her as a nome d'usage. For further details, see G. Terlizzi, n 6 above, X.

choice gives an adult the chance – with regard to his or her own individual history and formed identity – to reverse the decision taken by his or her parents in the past. The second (common) choice involves both parents; it may become a matter of contention, but is easy to settle through legal recourse based on impartial methods, such as the lot[64] or alphabetical order,[65] or more customized mechanisms, such as the one that assigns the first place to the mother's or the father's surname depending on the sex of the child.[66] The latter is a viable, efficient and nondiscriminatory solution, consistent with the interests of the child.

Furthermore, in order to limit the scope of parental discretion and, therefore, opportunities for parental competition and conflict at the expense of their children, it would be advisable to require that all the couple's children be given the same surname. Such a solution would, at once, satisfy the public interest requirement of ensuring family unity and identification of same family members and the child's interest to have his or her own identity respected vis-à-vis both parents (through the union of their partial surnames in a new double surname), vis-à-vis any siblings (through the same surname) and vis-à-vis half-siblings (through part of their surname as a sign of mutual belonging).

VI. Conclusions

Thus designed, naming law would take into account the diverging interests at stake. Firstly, public interests: ensuring legal order through management of personal status, as traditionally the case in civil law countries; identifying each person in relation to his or her other family members; implementing gender equality and family unity; and protecting the rights of minors. Secondly, the mother's and father's interests: ensuring equal treatment, recognition of their common bond with the child and the right to decide which of their surnames is to be passed on to the child. Thirdly, the child's interests: ensuring the child is given the opportunity of building his or her own identity through a legally and socially identifying name proving full parental (mother and father) and familial (sibling) kinship, and seeing that his or her rights to personally make decisions regarding such name in the future (on coming of age)[67] are respected and protected.

[64] The problem might be the organization of such a lottery by the civil registry office.

[65] Literature underlines the discriminatory nature of this solution towards surnames falling among the lower part of the alphabet: S. Troiano, n 3 above, 591.

[66] In fact, medieval Sardinian documents reveal the existence of this sort of ancient practices on the island, eg in the Nuoro district between the 16th and 17th centuries: see E. Besta, 'L'attribuzione del cognome nella Sardegna medioevale', in *Studi di storia e diritto in onore di Carlo Calisse* (Milano: Giuffrè, 1940), I, 477-484; G. Murru Corriga, 'Di madre in figlia, di padre in figlio. Un caso di 'discendenza parallela' in Sardegna' *La ricerca folkrorica* 27, 53-73 (1993). L. Olivero, 'Ancora sul cognome: due luoghi comuni e due proposte per una riforma annunciata' *Jus Civile* 5, 1371, 1399-1400 (2021) proposes the adoption of a similar mechanism in Italy.

[67] In Spain, this right was recognized to the adult child as early as 1981 by the Ley 11/1981 of 13 May 1981 *de modificación del Código Civil en materia de filiación, patria potestad y*

After years of inactivity, the Italian legislator now has the chance to catch up with – and even surpass –other countries, introducing law by design[68] that does away with old-fashioned adultcentrism and provides for a more efficient, child-friendly and readily-available version of the bilateral model.

régimen económico del matrimonio. Some Italian scholars have criticized the rule, arguing against a decision left to a third party (the child!) and deeming it useless to solve gender inequality: G. Cattaneo, 'Il cognome della moglie e dei figli' *Rivista di Diritto Civile*, I, 702 (1997); M.C. De Cicco, 'Cognome e principi costituzionali', in M. Sesta and V. Cuffaro eds, *Persona, famiglia e successioni nella giurisprudenza costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 244. In fact, name change law has served as a vehicle for liberation as demonstrated by C. Alonso-Yoder, n 31 above, 930-961.

[68] The concept of a 'law by design' was introduced by Margaret Hagan, director of the Legal Design Lab at the Stanford Law School & Institute of Design. She argued for a design-driven approach to legal innovation focused on the solving of concrete human problems - starting with those submitted by the very clients of legal services - by lawyers, judges and legal experts. I'm using this expression to underline the need to re-think the law in general, and re-style naming law in particular, starting, in the latter case, from the child, who is ultimately the final recipient of it. This is a completely different idea from that of achieving legal objectives through technology 'by design', as experimented with the blockchain system or China's Social Credit System and presented by M. Zalnieriute, L. Bennett Moses and G. Williams, 'The Rule of Law 'By Design'?' *Tulane Law Review*, 95 (5), 1063-1101 (2021).