THE SURNAME OF THE CHILD AFTER THE DECISION OF THE ITALIAN CONSTITUTIONAL COURT

EL APELLIDO DEL MENOR TRAS LA SENTENCIA DEL TRIBUNAL CONSTITUCIONAL ITALIANO

Actualidad Jurídica Iberoamericana Nº 19, noviembre 2023, ISSN: 2386-4567, pp. 84-101

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ARTICLE RECEIVED: 30 de junio de 2023
ARTICLE APPROVED: 15 septiembre de 2023

ABSTRACT: In a context in which the plurality of family models is fully recognized and the possibility of creating families that overlap over time, the surname attribution rule should allow to define in the most precise, detailed and lasting way possible the identity of the family and the personal identity of each of its components by clearly and completely identifying the relationships of belonging to the parental lineages. In this perspective, the declaration of constitutional illegitimacy of the rules that impose the automatic attribution of the paternal surname and the identification of the rule of the attribution of the double surname which can only be derogated from by the parents' agreement on the one hand, completes the path aimed at achieving a full equality between father and mother, but, on the other hand, it opens up complex issues. In particular, the need to ensure effective protection of the child's personal identity suggests the opportunity to give the double surname rule a mandatory character, excluding the possibility of derogating from it on the basis of a mere parental agreement. The attribution of a single surname, in fact, would give rise to an only partial perception of the identity of the child, generating a vision of his belonging to the parental lineages which, especially in the perspective of stepfamilies, would generate inappropriate distortions in the perception of identity of the individuals and of the family as a whole.

KEY WORDS: Surname attribution; gender equality; personal identity; mutual agreement of the parents.

RESUMEN: *En un contexto en el que se reconoce plenamente la pluralidad de modelos familiares y la posibilidad de crear familias que se superponen en el tiempo, la regla de atribución del apellido debe permitir definir de la forma más precisa, detallada y duradera posible la identidad de la familia y la identidad personal de cada uno de sus componentes mediante la identificación clara y completa de las relaciones de pertenencia a los linajes parentales. En esta perspectiva, la declaración de ilegitimidad constitucional de las normas que imponen la atribución automática del apellido paterno y la identificación de la norma de la atribución del doble apellido que sólo puede ser derogada por el acuerdo de los padres, por una parte, completa el camino dirigido a lograr una plena igualdad entre padre y madre, pero, por otra, abre cuestiones com-plejas. En particular, la necesidad de garantizar una protección efectiva de la identidad per-sonal del niño sugiere la oportunidad de dar a la regla del doble apellido un carácter imperativo, excluyendo la posibilidad de derogarla sobre la base de un mero acuerdo de los padres. La atribución de un único apellido, en efecto, daría lugar a una percepción sólo parcial de la identidad del hijo, generando una visión de su pertenencia a los linajes parentales que, especialmente en la perspectiva de las familias ensambladas, generaría distorsiones inadecuadas en la percepción de la identidad de los indi-viduos y de la familia en su conjunto.*

PALABRAS CLAVE: *Atribución del apellido; igualdad de género; identidad personal; acuerdo mutuo de los padres.*

SUMMARY.- I. THE DECISION OF THE CONSTITUTIONAL COURT. - II. PERSONAL IDENTITY IN THE PRISM OF THE NEW FAMILY MODELS. - III. PARENTAL AUTONOMY AND THE CHILD'S PERSONAL IDENTITY.

I. THE DECISION OF THE CONSTITUTIONAL COURT.

Eight years after the decision Cusan and Fazzo against Italy – with which the European Court of Human Rights found a violation of art. 8 CEDU (Right to respect for private and family life), in conjunction with art. 14 CEDU (Prohibition of discrimination), due to the difference in treatment based on gender[1] – and six years after the declaration of illegitimacy of the rules governing the attribution of the surname to the child where they precluded the latter from the possibility «of being identified, since birth, also with the surname of the mother» –[2] the Constitutional Court intervenes in the matter of the family surname declaring the illegitimacy of art. 262, paragraph 1, of the Italian Civil Code «in the part in which it provides, with regard to the hypothesis of the recognition carried out simultaneously by both parents, that the child assumes the surname of the father, rather than providing that the child assumes the surnames of the parents, in order from the same agreed, subject to the agreement, at the time of recognition, to attribute the surname of only one of them». Upon the declaration of illegitimacy of art. 262, paragraph 1, of the Italian Civil Code – motivated on the basis of the contrary to the articles 2, 3 and 117 read in the light of articles 8 and 14 Conv. CEDU – it follows the illegitimacy of other rules governing the attribution of the surname in the context of marital filiation[3] and adoptive filiation, which, being inspired by the logic of the automatic prevalence of the paternal surname, present

1 European chr, 7th january 2014, application n. 77/07, *Fam. dir.*, 2014, pp. 205 ss., with notes of Carbone, V.: "La disciplina italiana del cognome dei figli nati dal matrimonio", and Stefanelli, S.: "Illegittimità dell'obbligo del cognome paterno e prospettive di riforma"; *Giur. it.*, 2014, pp. 2670 ss., with note of Corzani, V.: "L'attribuzione del cognome materno di fronte alla Corte europea dei diritti dell'uomo". See also Giardina, F.: "Il cognome del figlio e i volti dell'identità. Un'opinione in 'controluce'", in *Nuova giur. civ. comm.*, 2014, II, p. 139; Moretti, M.: "Il cognome del figlio", *Tratt. Bonilini*, VI, Utet, Torino, 2016, pp. 4078 ss., in part. 4083.

2 Corte cost., 21st december 2016, n. 286, *Fam. dir.*, 2017, pp. 213 ss, with note of Al Mureden, E.: "L'attribuzione del cognome tra parità dei genitori e identità personale del figlio".

3 In this regard the decision of the Corte costituzionale (Corte cost., 31st may 2022, n. 131, *Fam. dir.*, 2022, pp. 871 ss., with notes of Sesta, M.: "Le nuove regole di attribuzione del doppio cognome tra eguaglianza dei genitori e tutela dell'identità del figlio"; Al Mureden, E.: "Cognome e identità personale nella complessità dei rapporti familiari"; Calvigioni, R.: "La nuova disciplina del cognome: il ruolo dell'ufficiale dello stato civile"; *Familia*, 2022, pp. 375 ss., with note of Iannicelli, M.A.: "La scelta del cognome da attribuire al figlio deve poter essere condivisa dai genitori", states that the declaration of the illegitimacy of the provision contained in art. 262 c.c. determines, as a corollary, also the declaration of the constitutional illegitimacy of the rule governing the surname attribution to a child born in wedlock.

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the same profiles of illegitimacy with respect to the aforementioned principles of the Constitution and the Eur. Convention human rights.

The decision of the Constitutional Court – prompted by a question of legitimacy posed by the Bolzano Tribunal and further developed by the same Constitutional Court[4] – definitively completes the plan aimed at adapting the discipline of the surname to the principle of equality between parents (art. 3 of the Constitution)[5]: the automatic attribution to the child of a double surname resulting from the surname of each parent constitutes, in fact, the default rule which, placing the father and the mother on a level of parity, allows them to exercise their decision-making autonomy regarding the order of surnames or the opportunity to opt for the attribution of a single surname to the child[6]. At the same time, the decision of the Constitutional Court opens up a scenario in which an intervention by the legislator appears indispensable, called to regulate a multiplicity of issues. In this sense, the Constitutional Court evokes, first of all, the preparation of functional rules «to prevent the attribution of the surname of both parents from involving, in the succession of generations, a multiplier mechanism which would be detrimental to the identity function of the surname»[7]; moreover, the need arises to «evaluate the child's interest in not being given - with the sacrifice of a profile that also pertains to his family identity - a different surname than that of brothers and sisters»[8].

Furthermore, it must be considered that the identification of rules capable of governing these complex problems will involve profound transformations, the complete implementation of which will be preceded by a considerable transition period in which families identified with a single surname attributed according to traditional rules will progressively be replaced by families identified on the basis of a surname governed by the new regulatory framework.

The appropriate emphasis placed on the right to personal identity of the children and of each component of the family requires consideration, alongside the questions indicated by the Constitutional Court, that concerning the fate of

4 Corte cost., 11th february 2021, n. 18, *Fam. dir.*, 2021, pp. 464 ss., with note of Bugetti, M.N. and Pizzetti, F.G.: "(Quasi) al capolinea la regola della trasmissione automatica del patronimico ai figli".

5 Arceri, A.: "*Sub* art. 143-bis c.c.", in Sesta, M.: *Codice della famiglia*, 3ª ed., Giuffrè, Milano, 2015, p. 475; Arceri, A.: "*Sub* art. 156-bis c.c.", *ivi*, p. 609; De Cicco, M.C.: "Cognome della famiglia e uguaglianza tra coniugi", in Ferrando, G. - Fortino, M. and Ruscello, F.: *Famiglia e matrimonio*, 2ª ed., *Tratt.* Zatti, I, 1, Giuffrè, Milano, 2011, p. 1016; Paradiso, M.: "I rapporti personali tra coniugi", 2nd ed., in *Comm.* Schlesinger, Giuffrè, Milano, 2012, pp. 158 ss. Corte cost., 19th february 2006, n. 61, *Familia*, 2006, pp. 931 ss., with note of Bugetti, M.G.: "Il cognome della famiglia tra istanze individuali e principio di eguaglianza" and *Fam. pers. succ.*, 2006, p. 898, with note of Gavazzi, L.: "Sull'attribuzione del cognome materno ai figli legittimi"; Corte cost., 24th october 2007, nn. 348 and 349, which established the principle that the rules of domestic law must be interpreted in the light of those of the European Convention on Human Rights.

6 Corte cost., 2022/131, cit.

7 Corte cost., 2022/131, cit.

8 Corte cost., 2022/131, cit.

the rules governing the right of the wife to add to the surname that of her husband (art. 143 bis of the civil code) and to keep it after separation (art. 156 bis of the civil code) and divorce (art. 5, paragraph 2 and 3, div law).

Even the analysis of this particular profile further highlights the persistent uncertainties regarding the identification of rules capable of guaranteeing full implementation of the right to personal identity of children and parents and suggests observing the problem of the reform of the rules that govern the family surname in a perspective that, overcoming the polarization around the problem of parental equality, enhances the need to adapt the discipline of the surname to the complexity of current family models and their flexibility over time.

II. PERSONAL IDENTITY IN THE PRISM OF THE NEW FAMILY MODELS.

In the system prior to the 1975 Reform, the regulation of the family surname expressed the need to bear witness to the unity of an indissoluble family group, characterized by the preeminence of the husband and the father and in which the rights of the individual members were placed on a level subordinate with respect to the best interest of the group itself[9]. In that context, therefore, the provisions which required the wife to take the husband's surname[10] and determined the attribution to the children of the father's surname were certainly functional to the implementation of the principles governing family relations within a consortium whose cohesion was guaranteed by the indissolubility of marriage and whose identity was defined by the pre-eminence of the husband and father over his wife and children[11].

The profound reforms that affected family law in the early seventies created the conditions for making the discipline of the surname inadequate with respect to its function as a tool by which to identify the family and define the personal identity of the individuals who compose it. The advance of the family model outlined by the 1975 Reform in accordance with the constitutional principles of equality and non-discrimination made the attribution of the paternal surname no longer congruent with the principle of equality; even earlier, indeed, the introduction of divorce created the conditions for undermining the ability of the surname to faithfully

9 Cicu, A.: "La filiazione", in Cicu, A. and Tedeschi, G.: *La filiazione. Gli alimenti*, III, 2, 1, 3ª ed., in *Tratt. dir. civ.* Vassalli, Utet, Torino, 1969, p. 297; De Cupis, A.: "Nome e cognome", in *Noviss. dig. it.*, XI, Utet, Torino, 1965, p. 303.

10 Arceri, A.: "*Sub* art. 143-bis c.c.", cit., p. 475; Conte, G.: "*Sub* art. 143-bis", in Ferrando, G.: *Matrimonio*, in De Nova, G.: *Commentario del Codice civile* Scialoja-Branca-Galgano, Zanichelli, Bologna, 2017, pp. 736 ss.

11 Cavina, M.: *Il padre spodestato: l'autorità paterna dall'antichità a oggi*, Laterza, Roma-Bari, 2007, pp. 251 ss.; De Cupis, A.: "Nome e cognome", cit., p. 307; Lenti, L.: "Nome e cognome", in *Dig. disc. priv.*, Sez. *civ.*, XII, Utet, Torino, 1995, pp. 135 ss.; Id., "Nome e cognome", in *Dig.*, *Aggiornamento*, II, Utet, Torino, 2003, pp. 928 ss.; Bianca, M.: "La decisione della Corte costituzionale sul cognome del figlio e il diritto di famiglia mobile. Riflessioni sulla funzione della Corte costituzionale nel sistema di effettività dei diritti", *giustiziainsieme.it*, 13 luglio 2022, p. 1.

represent the identity of the family and the condition of its individual members in contexts other than that of the united conjugal family.

More than fifty years after the introduction of divorce, statistical data testify that the scenarios that in the mid-seventies could only be intuited and highlighted have gradually taken on a rampant scope and have led to profound transformations of the law in force which have manifested first in the unification of the rules governing the relationship between parents and children[12], then in the modification of the rules on marriage crises[13], finally in the introduction of the organic discipline of cohabitation[14]. The emergence of a plurality of alternative family models with respect to the paradigm of the united conjugal family and the definitive acknowledgment of the uncertainty regarding the existence, stability and solidity of the union between the parents has led to the enhancement of a child-based perspective[15] and to establish the principle of two parents as an element of cohesion of the family nucleus.

Precisely co-parenthood as the fundamental and minimum nucleus of the family should constitute the unavoidable starting point with a view to outlining a discipline of the surname effectively capable of reconciling the need to guarantee equality between the parents, family unity and full protection of the right to personal identity of its components[16]. In such a perspective, the need to fully represent the identity of each family member «even in a future projection»[17] assumes a growing

12 Bianca, C.M.: "La riforma della filiazione: alcune note di lume", *Giust. civ.*, 2013, II, pp. 437 ss.; Id., "La legge italiana conosce solo i figli", *Riv. dir. civ.*, 2013, pp. 1 ss.; Sesta, M.: "Filiazione (diritto civile)", in *Enc. dir.*, *Annali*, VIII, Giuffrè, Milano, 2014, p. 448; Bianca, M.: "L'unicità dello stato di figlio", in Bianca, C.M.: *La riforma della filiazione*, Wolters Kluwer CEDAM, Padova, 2015, pp. 3 ss.; Sesta, M. and Arceri, A.: "La responsabilità genitoriale e l'affidamento dei figli, La crisi della famiglia", III, in Schlesinger, P.: *Tratt. dir. civ. comm.* Cicu, Messineo e Mengoni, Giuffrè, Milano, 2016, pp. 12 ss.; Al Mureden, E.: "*Sub* art. 316 c.c.", in Sesta, M.: *Codice dell'unione civile e delle convivenze*, Giuffrè, Milano, 2017, pp. 1664 ss.; La Rosa, E.: "*Sub* art. 316 c.c.", in Di Rosa, G.: *La famiglia*, 2nd ed., *Comm. c.c.* Gabrielli, Utet, Torino, 2018, pp. 613 ss.; Lenti, L.: "Responsabilità genitoriale", in Id. and Mantovani, M.: *Il nuovo diritto della filiazione*, *Le riforme*, 2, in *Tratt.* Zatti, Giuffrè, Milano, 2019, pp. 375 ss.; Lenti, L.: "Diritto della famiglia", in *Tratt.* Iudica-Zatti, Giuffrè, Milano, 2021, p. 277.

13 D.L. 12ve september 2014, n. 132, converted with amendments into L. 10 novembre 2014, n. 162; on this subject, compare Rimini, C.: "Il nuovo divorzio, La crisi della famiglia", II, in Schlesinger, P.: *Tratt. dir. civ. comm.* Cicu, Messineo e Mengoni, Giuffrè, Milano, 2015, pp. 22 ss.

14 Art. 1, parr. 36-65, L. 20th may 2016, n. 76. Compare AA.VV., "*Sub* art. 1, parr. 36-35, L. n. 76/2016", in Sesta, M.: *Codice dell'unione civile e delle convivenze*, Giuffrè, Milano, 2017; Ruscello, F.: "Note introduttive", in Ferrando, G. - Fortino, M. and Ruscello, F.: *Legami di coppia e modelli familiari*, *Le riforme*, 1, *Tratt.* Zatti, Giuffrè, Milano, 2019, pp. 125 ss.; Lenti, L.: "Diritto della famiglia", cit., pp. 515 ss.

15 Sesta, M.: "La prospettiva paidocentrica quale *fil rouge* dell'attuale disciplina giuridica della famiglia", *Fam. dir.*, 2021, p. 763.

16 Sesta, M.: "Mezzo secolo di riforme (1970-2020)", *Fam. dir.*, 2021, p. 17; Sesta, M. and Arceri, A.: "La responsabilità genitoriale", cit., pp. 33 ss.; Sesta, M.: "Stato unico di filiazione e diritto ereditario", *Riv. dir. civ.*, 2014, p. 5; Id., "Stato unico di filiazione e diritto ereditario", in Boni, G. - Camassa, E. - Cavana, P. - Lillo, P. and Turchi V., Recte sapere*: Studi in onore di Giuseppe Dalla Torre*, III, Utet, Torino, 2014, p. 1647; Sesta, M.: "Filiazione (diritto civile)", cit., p. 445; Bianca, M.: "L'unicità dello stato di figlio", cit., pp. 3 ss.; Al Mureden, E.: "La separazione personale dei coniugi, La crisi della famiglia", I, in Schlesinger, P.: *Tratt. dir. civ. comm.* Cicu, Messineo and Mengoni, Giuffrè, Milano, 2015, pp. 12 ss.

17 Corte cost., 2016/286, cit.

prevalence, i.e. in the perspective of any transformations that the family structure may undergo following the crisis of union of parents and their existential choices.

Thus, for example, in the case in which the son lives permanently only with the mother who uses only her own surname following the breakdown of the marriage or the dissolution of the cohabitation with the father, the rule of the necessary attribution to the son of the paternal surname represents in partially the condition of the latter. The profiles of inconsistency between the structure of the family nucleus in which the child lives and that which can be perceived through the surname of the people with whom he enters into relations become even more evident when the parents form new families after the breakup of their union[18]. In this case the rule of the attribution of the paternal surname would highlight the kinship relationships between the son and the members of the second family formed by the father to an excessive extent; at the same time, the kinship relationships arising from the mother's formation of a second family would be unjustifiably concealed. In other words, consanguineous siblings born from the father's second marriage or second union would bear an identical surname to the child born from the first marriage or first union, while uterine brothers born from the mother's second marriage or second union would bear a completely other than the child born from the first marriage or first partnership.

The considerations made regarding the personal identity of the child can also be repeated by adopting a broader field of observation which includes the personal identity of the father, mother and other relatives. The attribution of a single surname, in fact, involves alterations and undue compressions of personal identity also from the perspective of the parents.

From this point of view, case law has brought out the interest of the ex-husband and father who, having given life to a second family, advances an application aimed at inhibiting the ex-wife from persistently using her surname in order to avoid undue overlapping between the family dissolved with the divorce and the one created by him later[19].

In specular terms, the right to personal identity of the ex-wife and mother of the common children who, following the divorce, loses her husband's surname and therefore the possibility of being identified through it as the mother of the common children, assumes significant importance, as well as of common grandchildren.

18 Al Mureden, E.: "Le famiglie ricomposte tra matrimonio, unione civile e convivenze", *Fam. dir.*, 2016, p. 966.

19 Cass., 26th october 2015, n. 21706, *Fam. dir.*, 2016, pp. 122 ss., with note of Al Mureden, E.: "Il persistente utilizzo del cognome maritale tra tutela dell'identità personale della ex moglie e diritto dell'ex marito a formare una seconda famiglia".

Precisely the observation of the questions concerning the parents leads us to further reiterate that, in a context in which the plurality of family models is fully recognized and the possibility of giving life to families that overlap over time, a rule of attribution of the surname that allows the identity of the family and the personal identity of each of its members to be defined in the most precise, detailed and lasting way possible, clearly and completely identifying the relationships of belonging to the parental lineages.

From this point of view, an emblematic demonstration of the need to overcome current paradigms can be found in the analysis of the rules that govern the wife's right to add that of her husband to her surname. The art. 143 bis of the Civil Code, according to which «the wife adds that of her husband to her surname and keeps it during her widowhood, until she remarries»[20], falls within those «areas of unequal law»[21], «legacy of a patriarchal conception of the family», which appears «no longer consistent with the principles of the legal system and with the constitutional value of equality between men and women»[22].The asymmetry that characterizes the discipline of the surname in the physiological phase of the relationship is also reflected in the rules governing the use of the marital surname during separation (art. 156 bis of the civil code)[23] and after divorce (art. 5, paragraph 2 ° and 3rd, l. div.)[24]. In particular the art. 156 bis of the civil code provides that the judge can prohibit the separated wife from using the husband's surname if this causes a detriment to the latter[25]. In the context of divorce, the art. 5, paragraph 2, law div. the loss of the marital surname is linked to the dissolution of the marriage, without prejudice to the possibility of obtaining an authorization to keep it in the presence of an interest worthy of protection of the ex-spouse or children (art. 5, paragraph 3, div. law).

20 Paradiso, M.: "I rapporti personali tra coniugi", cit., pp. 153 ss.; Finocchiaro, F.: "Del matrimonio", in Galgano, F.: *Commentario del Codice civile* Scialoja-Branca, Zanichelli, Bologna-Roma, 1993, p. 270; Rossi Carleo, L. and Caricato, C.: "La separazione e il divorzio", in Auletta, T.: *La crisi familiare*, 2nd ed., IV, 2, in *Tratt.* Bessone, Giappichelli, Torino, 2013, p. 141; Tommasini, R.: "Sub art. 143-bis c.c.", in Balestra, L.: *Della famiglia*, I, 1, in *Comm. c.c.* Gabrielli, Utet, Torino, 2010, pp. 152 ss., especially 447 ss.

21 Ferrando, G.: "I rapporti personali tra coniugi: principio di uguaglianza e garanzia dell'unità della famiglia", in Perlingieri, P. and Sesta, M.: *I rapporti civilistici nell'interpretazione della Corte costituzionale*, I, ESI, Napoli, 2007, pp. 317 ss. especially 328. On this topic De Cicco, M.C.: "Cognome e principi costituzionali", *ivi*, p. 333; Sesta, M., "*Sub* art. 29 Cost.", in Id.: *Codice della famiglia*, 3rd ed., Giuffrè, Milano, 2015, p. 96.

22 Corte cost., 2006/61, cit.

23 Querci, A.: "*Sub* art. 156-bis", in Ferrando, G.: *Matrimonio*, in De Nova, G.: *Comm.* Scialoja-Branca-Galgano, Zanichelli, Bologna, 2017, pp. 1014 ss.

24 Bonilini, G.: "Gli effetti della pronunzia di divorzio sul cognome coniugale"; Bonilini, G. and Tommaseo, F.: *Lo scioglimento del matrimonio*, 3rd ed., in *Comm.* Schlesinger, Giuffrè, Milano, 2010, p. 513; Finocchiaro, A. and M.: *Diritto di famiglia*, I, Giuffrè, Milano, 1984, p. 675.

25 A similar provision is to be found in French law, where the art. 300 *code civil* (as amended by *loi* 26th may 2004, n. 439), provides that «Chacun des époux séparés conserve l'usage du nom de l'autre. Toutefois, le jugement de séparation de corps ou un jugement postérieur peut, compte tenu des intérêts respectifs des époux, le leur interdire».

The observation of this complex of provisions in the particular perspective of personal identity and the need to protect it in the context of unstructured or recomposed families brings out first of all the inadequacy of the rule contained in art. 143 bis of the civil code respect in order to make the belonging of the children to the maternal lineage perceptible. In fact, recognizing the wife's right to add that of her husband to her own surname does not allow her to highlight the belonging of her children to her own lineage, but only allows her to indicate that the mother belongs to the lineage of her husband's children, which she continues to assume a dominant position. Membership which, however, is concealed when, following the divorce, the ex-spouse's right to keep the husband's surname ceases (art. 5, paragraphs 2 and 3, div. law). Observing this rule from the perspective of the personal identity of the mother and that of the children, one could conclude that with divorce a part of the personal identity that was chosen to be highlighted at the time of the option to add the surname is canceled of the other to his own and which had characterized the entire married life[26].

On the basis of these considerations, it is possible to favorably observe the path which first led to the recognition of the right of parents in agreement to add the maternal surname to the paternal surname[27], then the current result which identifies in the automatic attribution of the double surname the default rule[28]. Nonetheless, precisely the angle of observation of the recomposed family allows us to highlight that even the overcoming of the rule of the necessary attribution to the child of the paternal surname - implemented by introducing provisions that respect the principle of non-discrimination between the father and the mother – could lead to unsatisfactory results if parents were allowed to choose only one of their surnames as their child's surname. The implementation of the principle of non-discrimination between parents by granting them the right to choose the surname of the child, in fact, would not allow adequate protection of the right to personal identity of the latter, i.e. his interest in the attribution of a surname capable of representing in the most complete, faithful and lasting way possible the kinship ties with the families of both parents[29]. Precisely this particular angle of observation allows us to underline the need to integrate the approach that tends to polarize attention on the problem of non-discrimination between spouses (art. 29 of the Constitution) and between parents (art. 3 of the Constitution)[30] highlighting the issue, not yet fully developed, of the protection of personal identity.

26 Cass. 2015/21706, cit.

27 Corte cost. 2016/286, cit.

28 Corte cost., 2022/131, cit.

29 Stefanelli, S.: "Illegittimità dell'obbligo del cognome paterno", cit., pp. 221 ss.

30 Corte cost., 11th february 1988, n. 176, in *Dir. fam. pers.*, 1988, pp. 670 ss.; Corte cost., 16th february 2006, n. 61, in *Familia*, 2006, pp. 931 ss.

III. PARENTAL AUTONOMY AND THE CHILD'S PERSONAL IDENTITY.

In a context characterized by the achieved equality between parents in terms of the transmission of their surname to their children, a significant area opens up in which the autonomy of the couple assumes fundamental importance. It can take place under different profiles. The comparative analysis leads to identifying systems in which the parents' autonomy is left with the choice of adopting a double surname, made up of each other's surname, or that of adopting a single surname choosing between the maternal and paternal surname. A similar solution - adopted in the French[31], German[32] and English[33] systems - gives parents a very broad autonomy as it allows them to «elect» by mutual agreement even a single surname and entrust it with the function of identifying the family and its members.

The different approach adopted in the Spanish legal system - where the rule of the mandatory attribution of the double surname[34] applies - however limits the autonomy of the spouses who, as a rule, are precluded from deciding by mutual agreement to identify the new family and its members using only one of their surnames. In such a context, parents - although subject to a rule which requires each of them to give at least one of their surnames to their child - are nonetheless called to exercise significant autonomy in two respects: in a system characterized by the obligatory presence of the double surname, each parent first of all, he must autonomously decide which of his surnames he intends to give to his son; the problem also arises of deciding by mutual agreement the order of attribution of the two surnames.

The comparison between the systems that allow parents to choose a single surname and those that impose the attribution of a double surname allows us to appreciate the latter from the point of view of greater protection of the child's personal identity.

On the basis of the observations made previously, in fact, it is possible to state that giving parents the possibility of choosing to pass on a single surname to their child on the one hand makes it possible to overcome the discrimination profiles

31 According to the French legal system, where the regulation of surname attribution was reformed by *loi* no. 304/2002, the rule is that the choice of the surname is left to the parents who may attribute to the child either the paternal or maternal surname or both. It is only in the event of no option or no agreement that the rule of attributing the paternal surname prevails.

32 In the German legal system, following the declaration of unconstitutionality of the rule that determined the automatic attribution of the paternal surname, a reform was implemented whereby the choice of a child's surname is left to parental autonomy (Carbone, V.: "La disciplina italiana del cognome dei figli", cit., p. 218).

33 Harris-Short, S. and Miles, J.: *Family Law*, 4th ed., Oxford University Press, Oxford, 2019, pp. 582 ss.; Bugetti, M.N.: "L'incostituzionalità dell'automatica attribuzione ai figli del cognome paterno", in *giustiziacivile.com*, p. 2017.

34 In Spanish law there is a «double surname» rule whereby the child is given the first surname of each of the parents, in the order decided by the latter by mutual agreement (art. 109 c.c., amended by *ley* n. 40/1999).

that characterize the rule of the compulsory and automatic attribution of the surname paternal, but on the other hand it does not guarantee full implementation of the child's right to personal identity, which is compromised by the obscuring of a kinship line. Only the attribution of the double surname, in fact, allows to highlight the belongings to the «lines»[35] of the father and the mother and also the heritage of traditions, culture and family history that each surname can evoke.

Moreover, in a context in which the origin of kinship ties is determined by the generation of a common child, the personal identity of each member and his or her belonging to the family group appears to be effectively guaranteed only through the attribution to the children of a surname that contains identifying elements of both parents, emphasizing that «common parenting» which today constitutes the essential nucleus and the unifying element around which the family unit is cemented[36].

The prospect of an organic reform of the rules on the family surname also requires us to underline that it is entrusted with the function of identifying a family that can change its structure over time to the point of coexisting with parallel families recomposed by the parents. Therefore, it seems appropriate that the legislator, when he will be called to confirm and implement the principle expressed by the Constitutional Court, give the rule of the attribution of the double surname a mandatory character, excluding the possibility of derogating from it on the basis of a mere agreement of the parents and limiting the attribution of a single surname to cases in which an objective interest of the minor is evident, contrary to the attribution of the surname completely representative of both parents[37]. Otherwise, in fact, there would be the risk of entrusting the full implementation of the child's personal identity right to a choice by the parents who, while respecting the principle of equality, would end up recreating by mutual agreement and on an equal basis that obscuring of a part of the identity of the child (and of one of the parents) which characterized the regulatory context dominated by the traditional rule of the exclusive attribution of the paternal surname[38].

In other words, the compression of the right to personal identity implemented by the automatic attribution of the paternal surname which resulted in the impossibility for the child to «be identified, from birth, even with the maternal surname»[39], should not find space in the future discipline not even where the

35 Stefanelli, S.: "Illegittimità dell'obbligo del cognome paterno", cit., p. 221.

36 Sesta, M. and Arceri, A.: "La responsabilità genitoriale", cit., pp. 1 ss. especially 12 ss.; Sesta, M.: "Stato unico di filiazione", cit., p. 5.

37 Sesta, M.: "La cedevole tutela dell'identità del figlio nelle nuove regole di attribuzione del cognome", in *giustiziainsieme.it,* 13 luglio 2022, p. 1.

38 M. Sesta, "La cedevole tutela", cit., p. 1.

39 Corte cost., 21st december 2016, n. 286.

parents agree on the attribution of a single surname. Otherwise, leaving the parents arbiters of the choice of a single surname, one would end up compromising the full implementation of the child's right to personal identity[40] by reproducing in a casual way - albeit respectful of gender equality - those same dynamics generated from the automatic attribution of the paternal surname which have been the object of acceptable censorship by the Constitutional Court.

40 Sesta, M.: "La cedevole tutela", cit., p. 1.

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