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THE ITALIAN CONSTITUTIONAL COURT AND THE SURNAME OF CHILDREN

ABSTRACT. *The essay analyses Constitutional Court judgment No. 131 of 2022, which finally puts an end to discrimination between mother and father in the attribution of a child's surname. Although the decision is to be welcomed, it raises problems concerning the relationship between the Constitutional Court and the legislative power. The essay examines these issues in connection with the child's personal identity and the limits of the Constitutional Court's pronouncements.*

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1. Introduction

After waiting in vain for the legislature to intervene, the Court rewrote the rule on the child's surname. Judgment No. 131 of 2022 puts an end to discrimination between parents based on the fact that in Italy the child's surname is the paternal one.

The decision is of extreme interest both for its undoubted social repercussions and for its effects on the principle of the separation of powers. The essay will attempt to analyse both these aspects of the ruling, highlighting their close interrelation.

In Italy, the rule of the paternal surname applied to all children regardless of whether they were born within marriage, outside marriage or adopted. In the case of children born in wedlock, the rule was so deeply rooted in custom that the Italian legislature had not even felt the need to write it down expressly, because it was derived from certain provisions in the legal system, since it was presupposed by them. The articles that assume the attribution of the paternal surname to the child are Articles 237, 262 and 299 of the Civile Code, Article 72(1) of Royal Decree No. 1238 of 9 July 1939 (Rules Governing Marital Status), and Articles 33 and 34 of Presidential Decree No. 396 of 3 November 2000 (Provisions Reforming and Simplifying the Rules on Marital Status, Pursuant to Article 2(12) of Law No. 127 of 15 May 1997)[1]. This patent

[1] The rules governing surname have undergone several modifications over time. Article 237 of the Civil Code, as amended by Legislative Decree no. 154 of 2013, provides that «possession of status results from a series of facts that taken together serve to prove the filial and kinship relationship between a person and the family to which he claims to belong» and specifically from the concurrence of «the following facts: – that the parent has treated the person as a child and has provided for his maintenance, education and placement in that capacity; – that the person has been constantly regarded as such in social relations; - that he has been recognised in that capacity by the family». As regards the child born out of wedlock, Article 262 of the Civil Code, again as amended by Legislative Decree No 154 of 2013, before the Court's additive intervention in 2016, provided that «the child shall take the surname of the parent who first recognised him. If the recognition was made simultaneously by both parents, the child shall take the surname of the father. If the filiation towards the father was ascertained or recognised after the mother's recognition, the child may take the father's surname by adding it to, preceding or replacing it with that of the mother. If the filiation vis-à-vis the parent has been ascertained or acknowledged after the surname has been attributed by the civil registrar, the first and second paragraphs of this article shall apply'; the child may, however, 'retain the surname previously attributed to him, if this surname has become an autonomous sign of his personal identity, by adding it to, preceding it or substituting it for the surname of the parent who first recognised him or for the surname of the parents in the case of recognition by both». Finally, with regard to the adopted child, Article 299 of the Civil Code, before the Court's additive intervention in 2016, provided that «if the adoption is made by spouses, the adopted

violation of the equality between spouses, solemnly proclaimed by Article 29 of the Italian Constitution, was justified on the basis of the limitation of the guarantee of family unity, laid down in the same article. In the legislator's view, the father's surname served to preserve that unity. On the other hand, as far as children born out of wedlock were concerned, the disparity in treatment between parents was functional to guaranteeing the recognised child the same treatment as the legitimate child (i.e. the one born within marriage) and the adoption discipline, introduced by Law No 184 of 1983, was also inspired by the same uniformitarian logic. The Italian legislature has not felt the need to change the patronymic even recently when it intervened to bring about the important unification of the status of children with Law No. 219 of 2012 and the subsequent Legislative Decree No. 154 of 2013. Evidently, the reform would have been a suitable opportunity to set hand also to a revision of the regulation of the surname[2].

2. The course of the Constitutional Court facing the legislative inertia

This is the background to the recent decision of the Italian Constitutional Court.

It comes after a long and complex journey that began almost 20 years ago with decision No. 61 of 2006 in which, though the Court had found that the child's surname regulation was in conflict with the Constitution, it had not declared the regulation

child shall take the surname of the husband». Article 72, paragraph 1, of Royal Decree No. 1238 of 9 July 1939 prohibited the imposition on the child of the name of the living father, while Articles 33 and 34 provide the limits on the attribution of a name and the provisions on the surname. In particular, for what we are interested in here, Article 33 (Provisions on the surname) provided that «The legitimised child shall have his father's surname, but if he is of age on the date of legitimation, he may choose, within a year from the day he becomes aware of it, to keep the surname he previously bore, if different, or to add to it or place before it, at his choice, that of the parent who legitimised him». Finally, Article 34, which sets limits on the attribution of a name, provides in its first paragraph that «It is forbidden to impose on the child the same name as the living father [...]».

[2] This point is emphasised by the Constitutional Court in Judgment No. 286 of 2016 and also by the scholars, see M. Trimarchi, *Il cognome dei figli: un'occasione perduta dalla riforma*, in «Famiglia e diritto», 2013, p. 243 and S. Troiano, *Cognome del minore e identità personale*, in «Jus civile», 2020, 3, p. 559 ff.

constitutionally unlawful[3]. In fact, the Court, while noting that the «system of attributing surnames is the legacy of a patriarchal conception of the family [...] no longer consistent with the principles of the legal system and with the constitutional value of equality between men and women», observed that, faced with several solutions compatible with the Constitution, it is within the legislature's discretion to choose among the various options[4]. For these reasons, the pronouncement closed with an invitation to the legislator to act as soon as possible.

Ten years later, in the absence of the hoped-for intervention of the Italian legislature, the issue of a child's surname came before the European Court of Human Rights. The European Court, in the Cusan Fazzo v. Italy judgment of 7 January 2014, condemned Italy for violation of Article 14 in conjunction with Article 8 of the ECHR[5]. According to the European Court, the provision of a paternal surname violates the equality of parents, who, by mutual agreement, cannot decide to give their child only the maternal surname.

At last in 2016, the protracted legislative inertia in remedying the discriminations noted by the Constitutional Court, and perhaps also the decision of condemnation of the European Court of Human Rights, led the Constitutional Court to go beyond its own jurisprudence and to declare the rule on the automatic attribution

[3] See G. Serges, *Famiglia e matrimonio*, in *La famiglia davanti ai suoi giudici*, a cura di F. Giuffrè, I. Nicotra, Editoriale Scientifica, Napoli, 2014, p. 587.

[4] On this decision, see E. Palici Di Suni, *Il nome di famiglia. la Corte si tira ancora una volta indietro, ma non convince*, in «Giurisprudenza costituzionale», 2006, p. 550 ff.; S. Niccolai, *Il cognome familiare tra marito e moglie. Come è difficile pensare le relazioni tra i sessi fuori dallo schema dell'uguaglianza*, in «Giurisprudenza costituzionale», 2006, p. 558 ff.; I. Nicotra, *L'attribuzione ai figli del cognome paterno è retaggio di una concezione patriarcale: le nuove Camere colgano il suggerimento della Corte per modificare la legge*, in «Consulta online», 16.2.2006.

[5] On the decision of the European Court of Human Rights, see E. Malfatti, *Dopo la sentenza europea sul cognome materno: quali possibili scenari?*, in «Consulta online», 9.3.2014; F. Buffa, *Nel nome della madre. Prime riflessioni sulla sentenza CEDU, II sez., 7 gennaio 2014, Cusan e Fazzo c. Italia*, in «Questione giustizia», 15.1.2014 and S. Niccolai, *Il diritto delle figlie a trasmettere il cognome del padre: il caso Cusan e Fazzo c. Italia*, in «Quaderni costituzionali»., 3/2014, p. 453 ff. On the decisive influence of this pronouncement on the Constitutional Court's decision, see E. Malfatti, *Illegittimità dell'automatismo, nell'attribuzione del cognome paterno: la "cornice" (giurisprudenziale europea) non fa il quadro*, in «Forum quaderni costituzionali», 5.1.2017, p. 1 ff. For a different perspective, see E. Frontoni, *Genitori e figli tra giudici e legislatore. La prospettiva relazionale*, Editoriale Scientifica, Napoli, 2019, p. 101 ff.

of the paternal surname unconstitutional. In detail, with judgment No. 286 of 2016, the Court declared unconstitutional the rule in the part where it does not provide that, by mutual agreement, parents may derogate from the paternal surname rule by adding the mother's surname to the paternal one[6].

However, in the event of failure to agree, the judgment leaves in place the automatism of the paternal surname, and thus the inequality between parents, not completely restoring constitutional legality. For this reason, it ends with a new invitation to the legislature to intervene to provide a regulation of the matter that eliminates the unconstitutionality at the root[7].

Also this new call for action went unanswered. Thus, the issue of the child's surname was once again before the Court, raised in the course of a case that a couple had been unable to give their son only his mother's surname[8].

It is in the course of this new judicial review that the constitutional judge is referring to itself the question of the legitimacy of the rules governing the automatic attribution of the father's surname to the child in the event of a lack of agreement between the parents[9].

The Court observes that «even if the right of the parents to choose, by mutual

[6] On this decision, see FRONTONI, *Illegittimità dell'automatismo, nell'attribuzione del cognome paterno: la "cornice" (giurisprudenziale europea) non fa il quadro*, cit., p. 1 ff.; S. SCAGLIARINI, *Dubbie certezze e sicure incertezze in tema di cognome dei figli*, in «Rivista AIC» 2/2017; A. FUSCO, «*Chi fuor li maggior tui?*»: *la nuova risposta del Giudice delle leggi alla questione sull'attribuzione automatica del cognome paterno. Riflessioni a margine di C. cost. sent. n. 286 del 2016*, in «Osservatorio AIC» 3/2017; C. INGENITO, *L'epilogo dell'automatica attribuzione del cognome paterno al figlio*, in «Osservatorio AIC», 2/2017.

[7] On this point of the decision, see FRONTONI, *Genitori e figli tra giudici e legislatore. La prospettiva relazionale*, cit., p. 98 ff. and p. 173 ff.

[8] With a referral order filed on 17 October 2019 and registered as No. 78 of the 2020 Register of Referral Orders, the Second Civil Division of the Ordinary Court of Bolzano raised questions as to the constitutionality of Article 262(1) of the Civil Code, in that it fails to allow parents, at the time of contemporaneously acknowledging their child, and in spite of their mutual agreement, to give the child the mother's surname only.

[9] See Constitutional Court, ord. n. 18 del 2021. On the various aspects of this ruling, see INGENITO, *Una nuova occasione per superare "l'anche" nell'attribuzione al figlio del cognome dei genitori. Riflessioni a margine dell'ordinanza n. 18/2021 della Corte costituzionale*, in «Federalismi.it», 11/2021; G. MONACO, *Una nuova ordinanza di "autorimessione" della Corte costituzionale*, «Federalismi.it», 11/2021; MALFATTI, *Ri-costruire la 'regola' del cognome: una long story a puntate (e anche un po' a sorpresa)*, in «Nomos», 1/2021 and see also FRONTONI, *Il cognome del figlio: una questione senza soluzione?,* in «Osservatorio AIC», 4/2020.

agreement, the transmission of their mother's surname alone were recognised (as the two parents requested), the rule requiring the acquisition of the paternal surname alone should be reaffirmed in all cases where such an agreement is lacking or has not been legitimately expressed; in these cases, which are likely to be more frequent, the prevalence of the paternal surname should therefore be reconfirmed, the incompatibility of which with the fundamental value of equality has long been recognised [...]»[10].

The Court also points out that «not even the consent, on which the limited possibility of derogation from the general rules of patronymic is based, could be considered an expression of real equality between the parties, since one of them does not need the agreement in order for its surname to prevail»[11].

As it has been the case on most occasions when the Court has decided to refer to itself a question of constitutionality, the issue has been declared well-founded and, as a result of the judgment, the children are having a double surname, maternal and paternal, in the order indicated by the parents. In this way the mother's name, which until now had been 'invisible', is finally recognised.

Moreover, both of them may also decide to give their children only the surname of one of them, thus derogating from the new rule introduced by the Court.

As mentioned at the beginning of this comment, the judgment is undoubtedly extremely important, because it puts an end to a now intolerable discrimination between parents, although the possibility for them to derogate from the double surname rule gives rise to some perplexity, also in the light of previous constitutional case law.

3. Parental equality and personal identity of the child

In order to clarify this aspect better, it is necessary to make some preliminary considerations. Starting from Judgment No 286 of 2016, to justify the unconstitutionality of the surname regulation, the Court relies on two profiles of violation of constitutional norms. The automatic attribution of the patronymic contrasts with both

[10] Constitutional Court, Ord. No. 18 of 2021.

[11] Constitutional Court, Ord. No. 18 of 2021.

the principle of equality (Article 3, first paragraph, of the Constitution), and the child's right to personal identity (Article 2 of the Constitution). Since Judgment No. 13 of 1994, the latter represents an essential personality trait and involves a number of aspects including the right to see represented the bond with both parental branches[12]. In the decision under comment, the Court once again refers to this profile, emphasising that «children's right to a personal identity and the equality between the parents intersect in the area of selecting surnames»[13] and observing that «a person's surname, together with their first name, forms the core of their legal and social identity: it is how they are identified for both public and private law purposes, and it becomes the abbreviated representation of the individual personality, the meaning of which grows and is enriched over time»[14].

After this premise, however, the Constitutional Court seems to 'forget' this profile that embodies the right to a child's personal identity. Letting parents choose their child's surname means disregarding the child's personal identity, which, as the Court has observed in its previous judgments, should be anchored in the recognition of both parental lines and not defined by a free choice of the parents.

Giving due weight to the right to personal identity as well, the Court should have stopped at the introduction of the new double surname rule, without also

[12] In Judgment No. 286 of 2016, the Court emphasised that «In order to achieve the full and effective realisation of the right to personal identity, which has its primary and most immediate expression in the name, along with the recognition of equal significance to both parents within the process of constructing that personal identity, the child's right to be identified from birth by the surname of both parents must be recognised. Conversely, the provision for absolute priority to the father's surname sacrifices the child's right to identity, denying him or her the ability to be identified from birth also by the mother's surname». See Constitutional Court, Judgment No. 286 of 2016, point 3.4.1 of Conclusions on Points of Law. On the right to personal identity see V. Zeno-Zencovich, *Identità personale*, in *Digesto delle Discipline Privatistiche*, UTET, Torino, vol. IX, 1993, p. 294 ff.; G. Pino, *The Right to Personal Identity in Italian Private Law: Constitutional Interpretation and Judge-Made Rights,* in *The Harmonization of Private Law in Europe,* edited by M. Van Hoecke and F. Ost, Hart Publishing, Oxford, 2000, p. 225 ff. On the relevance of the right to personal identity in contemporary family law, see D. Messinetti, *Diritti della famiglia e identità della persona*, in «Rivista di diritto civile», 2005, I, p. 137 ff.; M.R. Marella, G. Marini, *Di cosa parliamo quando parliamo di famiglia*, Laterza, Roma-Bari, 2014, p. 41 ff.; M. Di Masi, *L'interesse del minore. Il principio e la clausola generale*, Jovene, Napoli, 2020; F. Caggia, *Capire il diritto di famiglia attraverso le sue fasi*, in «Rivista di diritto di famiglia», 2017, p. 1572 ff.

[13] Constitutional Court, Judgment No.131 of 2022, point 9 of Conclusions on Points of Law.

[14] Constitutional Court, Judgment No. 131 of 2022 point 9 of Conclusions on Points of Law.

providing for the possibility of its derogation.

In order to justify the possibility of derogating from the rule of double surname, the constitutional judge introduces the new concept of 'family identity' to which the child is linked, at the moment when, through his surname, he acquires the *status filiationis*. Consequently, «the way in which a surname professes a child's family identity must reflect and show respect for the parity and equal dignity of the parents»[15]. In this changed perspective, it is not so much relevant the surname itself, but rather the manner in which this attribution arrives at, which must be equal. That is why, after having placed the parents in a position of effective equality, it can be given value to the agreement between them to derogate from the general rule.

The Court's argument does not appear convincing, because it conflicts with previous case law and because it appears to be an expression of the Court's choice in favour of a conception of the family as a social formation characterised by a wide sphere of autonomy from which the State must withdraw as far as possible. This option, however, appears to be reserved to the legislature's discretion and not to a judgment of the Constitutional Court[16].

[15] Constitutional Court, Judgment No. 131 del 2022, point 9 of Conclusions on Points of Law.

[16] The various bills presented in the previous legislature tended to give parents the choice of surname (four in the Chamber of Deputies, see Bill Nos. 106, 230, 1265 and 2129, and three in the Senate of the Republic, see Bill Nos. 170, 286 and 1025). These are very similar drafts that seek to resolve the different issues that arise when abandoning the criterion of the automatic paternal surname. Bill No. 106 (which reproduces, with some amendments and additions, the content of the bill AS No. 1628 approved by the Chamber of Deputies in the 17th legislature on 24 September 2014, the examination of which was then halted in committee at the Senate) provides, for example, for the introduction of a new Article 143-quater in the Civil Code, pursuant to which «Married parents, when declaring the birth of their child, may attribute to the child, according to their will, either the father's surname or the mother's surname or those of both in the agreed order. If there is no agreement between the parents, the child is given the surnames of both parents in alphabetical order. The children of the same married parents, born subsequently, bear the same surname attributed to the first child. A child who has been attributed the surnames of both parents may transmit to his/her child only one of them, at his/her choice».

4. The Constitutional Court's judgment and the relationship with the legislature

Whit regard to the relationship with the legislature, the decision presents further critical profiles[17]. Actually, it is part of a new trend in constitutional jurisprudence to overcome the limit of the legislature's discretion in the face of its continuous inaction to guarantee constitutional rights[18].

According to an authoritative doctrine, when the Court does not declare constitutional illegitimacy so as not to invade the legislature's sphere of discretion, on the one hand it risks offering the latter, and its inertia, a kind of over-protection and, on the other, it fails in its role as guarantor of constitutional rights[19]. In line with this position, many authors believe that the Court's new attitude is justifiable in the light of the protracted legislative inertia[20]. This type of intervention is more radical than the Court's traditional one, which, following the Crisafullian doctrine of obligatory rhymes, merely made explicit what was implicit in the legal system[21].

According to these authors, overcoming the so-called obligatory rhymes allows

[17] Two famous essays by Modugno and Zagrebelsky from the 1980s examine the complex relationship between the Constitutional Court and the legislature. Recently, the two scholars have taken up the topic. See, F. Modugno, *Corte costituzionale e potere legislativo,* in *Corte costituzionale e sviluppo della forma di governo italiana*, Bologna 1982, p.19 ff. and G. Zagrebelsky, *La Corte costituzionale e il legislatore*, *ivi*, p. 103 ff.; Modugno, *Vecchie e nuove questioni in tema di giustizia costituzionale. Il superamento dell'insensato dualismo tra (semplice) legalità e costituzionalità*, in «Diritto e Società», 4/2019, p. 791 ff. and Zagrebelsky, *Sofferenze e insofferenze della giustizia costituzionale. Un'introduzione*, in «Diritto e Società», 4/2019, p. 545 ff.

[18] On this new trend, see G. Lattanzi (President of the Constitutional Court), *Summary of the report on the work of the Constitutional Court in 2018*, M. Cartabia (President of the Constitutional Court), *Summary of the report on the work of the Constitutional Court in 2019;* G. Coraggio (President of the Constitutional Court), *Report by president on the Constitutional Court's activity in the year 2020,* on <www.cortecostituzionale.it>.

[19] V. Marcenò, G. Zagrebelsky, *Giustizia costituzionale*, il Mulino, Bologna, 2012, p. 400.

[20] See M. Ruotolo, *L'evoluzione delle tecniche decisorie della Corte costituzionale nel giudizio in via incidentale. Per un inquadramento dell'ord. n. 207 del 2018 in un nuovo contesto giurisprudenziale,* in «Rivista AIC», 2/2019. Ruotolo, *Corte e legislatore,* in «Diritto e società», 1/2020, p. 53 ff. Ruotolo, *Oltre le rime obbligate?,* in «Federalismi.it», 3/2021; D. Tega, *La Corte nel contesto. Percorsi di ri-accentramento della giustizia costituzionale in Italia,* Bup, Bologna, 2020*,* p. 101 ff.

[21] See V. Crisafulli, *La Costituzione ha vent'anni*, in «Giurisprudenza costituzionale», 1976, 1707 ff. On this type of decisions, the so called additive judgments, see *Introduction to Italian Public Law*, edited by G.F. Ferrari, Giuffrè, Milano, 2008, p. 204 ff.

the Court to perform fully its task of guaranteeing the supremacy of the Constitution. This function appears even more important when, as in this case, the violation of rights, «due to the inertia of the legislature rather than to its own autonomous decision and thus protracted over time, is perceived as an 'injustice'...»[22].

On the contrary, according to other authors, when the Court chooses among several possible solutions, all compatible with the Constitution, it is exercising a function that does not belong to it, by invading the field of the legislature, even when the latter has remained inert[23].

Moreover, the Court replaces the legislature in the role of interpreter of the social conscience, without having the legitimacy and adequate tools to do so (the Court is not a representative body and does not have a complete vision of the issue). According to these authors, the search for increasing legitimacy has prompted the Court to accompany its activism with a growing and critical dialogue with society, through a new website and by visiting schools and prisons[24]. Thus, the Court no longer seems to act only with its judgments, as it should[25].

This debate on the role of the Constitutional Court takes place in the framework of a more comprehensive issue concerning the interpretative powers of the Constitutional Court. In order to simplify as much as possible, two lines of interpretation are opposed: those who believe that the Court could not go beyond the text (according to a position that can be ascribed to so-called originalism) and those who instead believe that the Constitution should be understood as a living document[26].

[22] See G. Repetto, *Recenti orientamenti della Corte costituzionale in tema di sentenze di accoglimento manipolative*, in Liber amicorum *per Pasquale Costanzo*, in «Consulta online», 3.2.2020.

[23] N. Zanon, *Corte costituzionale, evoluzione della "coscienza sociale" interpretazione della Costituzione e diritti fondamentali: questioni e interrogativi a partire da un caso paradigmatico"*, in «Rivista AIC», 4/2017.

[24] On the importance for constitutional Courts to open up to civil society, see A. Bogdandy, *Strukturwandel des öffentlichen Rechts Entstehung und Demokratisierung der europäischen Gesellschaft*, Suhrkamp, 2022.

[25] On the new activism of the Constitutional Court, see the remarks of A. Morrone, *Suprematismo giudiziario Su sconfinamenti e legittimazione politica della Corte costituzionale*, in «Quaderni costituzionali», 2/2019, p. 251 ff. For a different perspective, see R. Bin, S*ul ruolo della Corte costituzionale. Riflessioni in margine ad un recente scritto di Andrea Morrone*, in «Quaderni costituzionali», 4/2019, p. 757 ff. E. Cheli, *Corte costituzionale e potere politico. Riflessioni in margine ad un recente scritto di Andrea Morrone*, in «Quaderni costituzionali», 4/2019, p. 780 ff.

[26] On this debate, see R. Guastini, *Legalità*, in *Rule of law. L'ideale della legalità*, a cura di G. Pino, V. Villa, Il Mulino,

Reading judgment No. 131 of 2022 in the perspective of the separation of powers, while the introduction of the new rule of double surnames seems to be the choice that is most respectful of the Constitution, because it guarantees both equality between parents and the personal identity of the child, the possibility for parents to choose only one of their surnames appears to be a choice that has been made by the Court. From this point of view, the elimination of the automatism of the paternal surname in favour of the new rule of double surnames appears to be a way for the Court to affirm the supremacy of the Constitution by adopting the choice most in conformity with it, in the face of continuing legislative inertia. On the contrary, the possibility of choice granted to parents appears to be an undue invasion of the legislature's field, which lends itself to criticism as an example of excessive activism on the part of the Constitutional Court.

Furthermore, from the perspective of social effects, the choice given to parents could considerably reduce the impact of the pronouncement on relations between them. A German study shows that in Germany, where it is possible to choose the family name, only «6 per cent of couples choose the wife's name as the family name, while 75 per cent choose the husband's, which is therefore the one that is normally passed on to the children»[27].

The doctrine has long pointed out that judgments of the Constitutional Courts can have the effect of shutting down and sterilising public debate on an issue. These decisions can be perceived as something that 'falls from above' on a society that is not yet fully ripe for change.

Bologna, 2016, p. 142 ff.; ZANON, *I rapporti tra la Corte costituzionale e il legislatore alla luce di alcune recenti tendenze giurisprudenziali*, in «Federalismi.it», 3/2021. On the first interpretation of the Constitution, see, M. DOGLIANI, *Interpretazione*, in *Dizionario di diritto pubblico*, IV, a cura di S. Cassese, Milano, 2006 p. 3179 ff., on the second, see A. BARBERA, *Art. 2*, in *Commentario alla Costituzione*, a cura di G. Branca, Zanichelli, Bologna, 1975, p. 50 ff. For an intermediate position, see MODUGNO, *I "nuovi diritti" nella giurisprudenza costituzionale*, Giappichelli, Torino, 1995. The debate resembles the one following the judgment Dobbs v. Jackson Women's Health Organization. See A. PALMIERI, R. PARDOLESI, *Diritti costituzionali effimeri? L'*overruling *di «Roe v. Wade»,* in «Foro italiano», IV, 2022, p. 432 ff.; M.R. MARELLA, *«Dobbs» e la geopolitica dei diritti, ivi,* p. 442 ff.

[27] See TROIANO, *Cognome del minore e identità personale*, cit., p. 585 ff. and Nur sechs Prozent aller Paare entscheiden sich für den Namen der Frau in Suddeutsche Zeitung of 19 December 2018, on <www.suddeutsche.de>.

5. Concluding remarks

Even after this important Court judgment, the long history of the child's surname cannot be said to be over. The legislature must still intervene to provide a surname regulation that resolves the various problematic profiles on which the Court's judgment could not intervene. In order to be effective, the constitutional justice needs the cooperation of the legislature. The Court addresses the legislature on these further profiles as well.

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

The Constitutional Court, however, states that in the event of disagreement between the parents, the choice cannot be replaced by a court decision. In that case, the general rule of double surnames will apply.

On this issue, the Court once again invites the legislature to intervene to lay down rules that, applying to all children of the same parents, do not undermine the identifying function of the surname.

In addition, the Court called for legislative intervention to resolve the issue of the surname that will be passed on to the child in the generational transition. It is up to Parliament to provide for rules to avoid the effect of a «mechanism that multiplies the number of surnames with the passage of generations»[28] which could be prejudicial to the identity function of the surname. Even with regard to this delicate issue, however,

[28] Constitutional Court, judgment No. 131 del 2022, point 15.1 of Conclusions on Points of Law.

the judgment indicates to the legislature a possible solution, namely that it is the parent holding the double surname who chooses the one of the two that he/she wants to be representative of the parental relationship, «unless of course the parents choose to give their child one of their double surnames»[29].

These indications suggest that the Constitutional Court, fearing that the legislature will continue to remain silent, is laying the basis for a new and definitive intervention to complete the process begun in 2006.

[29] *Ibid.*