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THE ATTRIBUTION OF SURNAMES IN ITALIAN LAW AFTER THE CONSTITUTIONAL COURT'S JUDGMENT N. 131/2022: CURRENT SITUATION, NEW CHALLENGES AND SOME PROPOSALS FOR INTEGRATION FROM SPANISH LAW[**]

ABSTRACT. *The Judgment of the Italian Constitutional Court no. 131 of 2022, to the analysis of which a large part of this paper is dedicated, has declared the unconstitutionality of Art. 262(1) of the Italian Civil Code, introducing two important modifications in the system of attribution of surnames to children: on the one hand, it establishes that, in the absence of agreement, the child will receive the surname of both parents, making it the general rule and thus putting an end to the automatic attribution of the paternal surname. And, in the event that the parents decide to attribute the child exclusively the surname of one of them, this may be the paternal or maternal surname, putting an end to the impossibility of the child receiving only the maternal surname. But this raises new challenges, such as the determination of the order of surnames in cases of double surnames, the possible multiplier effect of surnames in successive generations or the way in which the principle of family unity is to be guaranteed. These questions will be addressed by bringing up the solutions offered by the Spanish system, where the double surname has traditionally been the general rule, and which may therefore be useful for integrating the new Italian system of attribution of surnames.*

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1. The system of attribution of surnames in Italian law prior to Constitutional Court's Judgment no. 131 of 2022

Article 262(1) of the Italian Civil Code, the subject of the pronouncement of the Constitutional Court in its Judgment no. 131 of 2022 (to whose analysis these lines are dedicated), regulates the attribution of the surname to children born out of wedlock, providing that the children adopt the surname of the parent who first recognised them, and, when the recognition is made simultaneously by both parents, the children take the surname of the father.

In the case of matrimonial children, there is no rule in positive law, which made sense for many years, but not today. In this respect, until the reform carried out by Law no. 151 of 19 May 1975, Article 144 of the Civil Code stipulated that the husband is the head of the family and the wife follows his civil status, adopting his surname. In this way, the husband's surname was imposed on the wife and became the family surname, so that it was not necessary to establish rules to determine the surname of the children born in the marriage, who in any case received this family surname.

Law no. 151 of 19 May 1975 modified Article 144 of the Civil Code and introduced a new Article 143-bis, providing for the addition and no longer the substitution of the wife's surname by the husband's, a provision which from the beginning was interpreted as an option and not an obligation for the wife. This blurred the image of the husband's surname as the family name.

The problem is that the reform did not introduce any reference to the regime of transmission of the spouses' surnames to the children, so that, in practice, the rule of attribution of the father's surname was maintained[1]. The Italian legal system seems to take it for granted if we look at the provisions contained in various rules, such as Article 262(1) of the Civil Code, which we have already seen that, although referring to children born out of wedlock, provides that when recognition is made simultaneously by both parents, the child takes the father's surname.

Also Art. 299(3) of the Civil Code, concerning adopted children, provides that

[1] See M. Sesta, *Manuale di diritto di famiglia*, Cedam, Padova 2007, p. 208.

the adopted child takes the surname of the husband. And, in similar terms, Art. 27(1) of Law no. 184 of 1983 establishes that the adopted child receives and transmits the surname of the adoptive parents. This surname, in accordance with the condition of child born in the marriage of the adopting spouses, refers unequivocally to that of the husband, to the point that paragraph 2 of the same precept establishes that, only in the case that the adoption is established in favour of the separated wife, the adoptee will receive her surname.

Finally, Article 34 of Presidential Decree no. 396 of 2000 also presupposes the attribution of the father's surname, as it prohibits giving the child the same name as the father or the living brother or sister, in order to avoid homonymity.

Therefore, a patriarchal vision of the family has traditionally prevailed in Italian law (as it did in most of the legal systems around us), which, especially in recent years, has been strongly criticised by the doctrine[2] (but there were also those in favour of such a system)[3].

The fact is that when the Constitutional Court has had the opportunity, it has highlighted the inconvenience of this regime, as well as the problems of constitutionality that it may present. Already in its Order no. 176 of 1988[4], it considered that it would be possible, and probably more in line with the evolution of social conscience, to replace the rule of attribution of the father's surname to children born in marriage with a different criterion, more respectful of the autonomy of the spouses and of Article 29 of the Italian Constitution, which provides that marriage is ordered on the moral and legal equality of the spouses.

It is more categorical in its Judgement no. 61 of 2006[5], in which it states that

[2] See V. Barba, *Apellido familiar, apellido de los hijos e igualdad de género en el Derecho italiano: hacia la superación del modelo familiar patriarcal*, in «Actualidad Jurídica Iberoamericana» n. 16 bis, 2022, pp. 886-919.

[3] As Sesta notes, Italian doctrine was divided between those who considered that it did not comply with the principle of equality and those who, on the other hand, justified the continuation of this legal framework by virtue of the provision in Article 19(2), which allows limits to be placed on equality between spouses to guarantee family unity. Sesta, *Manuale di diritto di famiglia*, cit., pp. 209-210.

[4] With a note by F. Dall'Ongaro, *Il nome della famiglia e il principio della parità*, in «Il diritto di famiglia e delle persone», 17, n. 1, 1988, pp. 1576-1586.

[5] With a note by L.Gavazzi, *Sull'attribuzione del cognome materno ai figli legittimi*, in «Nuova giur. civ. Comm»,

the current system of attribution of surnames is the legacy of a patriarchal conception of the family, which has its roots in Roman family law[6], and of an antiquated marital power, which is no longer coherent with the principles of the legal system and with the constitutional value of equality between men and women (an idea that it would reiterate in its Judgement no. 145 of 2007).

A few years later, in its Judgement no. 286 of 2016[7], it went further and declared the unconstitutionality of the rules for determining surnames as being contrary to the principle of equality, insofar as they do not allow spouses to transmit to their children, by mutual agreement, also the maternal surname; extending its effects to both Art. 262(1) and Art. 299(3) of the Civil Code. Therefore, after the aforementioned ruling, the attribution of a double surname to the child began to be admitted, provided that there is agreement between the parents.

However, and despite the progress made by the aforementioned pronouncement, the truth is that, in the absence of agreement, only the paternal surname continued to be transmitted[8], and, furthermore, the possibility of attributing only the mother's surname was forbidden, even if there was agreement in this respect between the parents.

This has led the Constitutional Court to intervene again, and it has done so in its Judgement no. 131 of 2022, which I will now analyse.

2. Background to the Constitutional Court's decision

Constitutional Court Judgment no. 131 of 2022 has its origin in the presentation of three questions of unconstitutionality in relation to the content of Art. 262(1) of the Civil Code, although, as we shall see below, it only entered into the

2007 1, p. 30 ff.

[6] See too V. Carbone, *Quale futuro per il cognome?*, in «Famiglia e diritto», 2004, fasc. 5, pp. 457 ff.

[7] With a note by E. Al Mureden, *L'attribuzione del cognome tra parità dei genitori e identità del figlio*, in «Corriere giuridico», 2017, 2, pp. 165 ff.

[8] See R. Favale, *Il cognome dei figli e il lungo sonno del legislatore*, in «Giurisprudenza italiana», 2017, 4, p. 824.

substance of two of them, as the other was not admitted.

The first question of unconstitutionality was presented by the Court of Bolzano (2nd section) through its order dated 17 October 2019 (registered as no. 78 in the 2020 register of orders). The proposing court considered that Art. 262(1) of the Civil Code, by impeding that, in the case of simultaneous recognition of a child born out of wedlock, the parents may, by mutual agreement, transmit only the maternal surname, could be contrary to Articles 2, 3, 11 and 117(1) of the Constitution, the latter in conjunction with Articles 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified by Italy and made enforceable by Law no. 848 of 4 August 1955; and with Articles 7 and 21 of the Charter of Fundamental Rights of the European Union (CFREU), proclaimed in Nice on 7 December 2000.

The facts date back to an appeal brought by the Public Prosecutor's Office to the Court of Bolzano requesting the rectification of the birth certificate of a child, to which the parents had attributed only the maternal surname at the time of the declaration of birth, carried out with the simultaneous recognition of both parents in front of the medical director. It was not, therefore, a question of attributing both surnames, which in the case of agreement between the parents was already possible following the Constitutional Court Judgment no. 286 of 2016, but only the maternal surname, an option that was not provided for in the current legislation. It should be noted that, in the course of the proceedings before the Court of Bolzano, the parents confirmed that they wished to attribute to their daughter only the mother's surname.

Some time later, the Constitutional Court itself, after analysing the order of the Bolzano Court, decided to raise a broader question of unconstitutionality on the content of Art. 262(1), by order of 11 February 2021 (registered as no. 25 in the 2021 register of orders). Like the Tribunale di Bolzano, the Constitutional Court considered that the aforementioned Article could be contrary to Articles 2, 3 and 117(1) of the Constitution, the latter in relation to Articles 8 and 14 of the ECHR, but for an additional reason: because, in the absence of agreement between the parents, it attributes the paternal surname to the children, instead of the surnames of both parents.

The third question of unconstitutionality brought against Art. 262(1) of the Civil Code has its origin in the application filed by two spouses with the aim of being

allowed to impose on their child only the surname of the mother. In this way, they sought to guarantee the child's right to identity, as well as the principle of family unity, by assigning the couple's third child the surname that, prior to their marriage, they had already had two other daughters (previously recognised only by their mother and who therefore bore only her surname). However, this request was rejected both by the officer of the Civil Status Office and by the Lagonegro Court (before which the parties appealed), which, in its Decree of 4 November 2020, considered that the alleged protection of the integrity of the family unit could well be safeguarded by attributing the surname of both parents to all the children. The aforementioned Decree was appealed before the Court of Appeal of Potenza, which decided to raise a question of unconstitutionality through its order of 12 November 2021 (registered under no. 222 in the 2021 register of orders). However, as anticipated, this last question of unconstitutionality was not admitted by the Constitutional Court, on the grounds that it lacked an adequate and independent illustration of the reasons why the censured rule would constitute a violation of constitutional norms. In any case, its subject matter was similar to that of the question of unconstitutionality submitted by the Court of Bolzano, so that, in practice, its inadmissibility has not impeded the Constitutional Court from ruling on the substance of the case.

For the rest, the Constitutional Court decided to cumulate and resolve jointly the first two questions of unconstitutionality to which I have referred, given the close connection between them. And it did so in the following manner.

3. The Constitutional Court's decision

The Constitutional Court had to judge the constitutionality of Art. 262(1) of the Civil Code from a dual perspective:

On the one hand, the Court of Bolzano, in the question of unconstitutionality raised through the order dated 17 October 2019 (registered under no. 78 in the 2020 register of orders), points out that the precept in question may suffer from a defect of unconstitutionality by not allowing the parents, by mutual agreement, to attribute to the child only the surname of the mother. It therefore calls for an additional intervention

repealing the general rule on the automatic transmission of the paternal surname and allowing the parents to attribute to their child only the maternal surname.

For its part, the Constitutional Court, by order of 11 February 2021 (registered under no. 25 in the 2021 register of orders) proposes, as a preliminary ruling, an intervention that replaces the content of Art. 262(1) of the Civil Code, eliminating the provision that, in the absence of a different agreement between the parents, the paternal surname is attributed to the child, instead of the surnames of both parents.

We have already seen in the previous section that the constitutional precepts invoked by the proposing courts coincide: Article 2, in relation to the protection of the identity of the child, and Article 3, in relation to the principle of equality in relations between parents. Reference is also made to a possible conflict with the international obligations assumed by Italy, under Article 117(1) of the Constitution, in relation to the protection of the personal identity of the child, provided for by Article 8 of the ECHR, and to the prohibition of discrimination, a matter covered by Article 14 of the ECHR.

Therefore, the proposing courts understand, in the first place, that the rules relating to the attribution of the surname may not be in conformity with Article 2 of the Constitution, from the point of view of the protection of the personal identity of the minor. In this respect, the Constitutional Court, in the Judgment, which is the subject of this commentary, shows how the surname has decisive profiles in the configuration of the personal identity of the minor. Together with the name, it represents the core of the legal and social identity of a person, conferring identifiability, both in public law relations and in private law relations. In this regard, it brings up the doctrine it has established in other previous rulings, in which it considered that the name is an autonomous distinctive sign of personal identity (Judgement no. 297 of 1996), an essential feature of personality (Judgements no. 120 of 2001, no. 268 of 2002 and no. 286 of 2016) and a fundamental right of the human person (Judgements no. 13 of 1994, no. 297 of 1966, no. 120 of 2001 and no. 268 of 2002).

The Constitutional Court also understands that, from a family point of view, the identity of the child can be broken down into three elements: (i) the parental link with the father, identified by a surname, representative of his family branch; (ii) the parental link with the mother, also identified by a surname, also representative of her

family branch; (iii) and the choice of the parents to recognise the child at the same time, welcoming him or her into a family unit. In this way, the automatic and exclusive attribution of the surname of the paternal parental line not only unilaterally obscures the parental relationship with the mother, but also sacrifices the child's right to identity, denying him or her the possibility of being identified, from birth, also with the mother's surname.

The second constitutional precept invoked by the proposing courts is Article 3 of the Constitution, which enshrines the principle of equality. In this regard, the Bolzano Court refers to the grounds of the judgment of the European Court of Human Rights of 7 January 2014 (Cusan and Fazzo v. Italy), which held that the impossibility for parents to attribute to their child, at birth, the mother's surname instead of the father's surname constituted a violation of Article 14 of the ECHR (prohibition of discrimination), in conjunction with Article 8 of the ECHR (right to respect for private and family life)[9]. In paragraph 66 of the above-mentioned decision, the European High Court stressed the importance of a development in the direction of ensuring equality of the sexes and the elimination of any discrimination in the choice of surname, pointing out that the tradition of expressing the unity of the family by attributing to all its members the surname of the husband cannot justify discrimination against women.

The Italian Constitutional Court, in the judgement we are analysing, adheres to these arguments and considers that, in the face of the rules that guarantee the attribution of the father's surname, the mother finds herself in a situation of asymmetry, antithetical to equality, which ends up causing an effect of invisibility of the woman. In fact, already in the question of unconstitutionality presented through the order of 11 February 2021, it highlighted this situation, alleging that not even consent, on which the limited possibility of non-application of the general rules providing for the attribution of the father's surname is based, could be considered an expression of real equality between the parties, given that one of them does not need the agreement to make their own surname prevail. Without equality, the logical and axiological conditions

[9] See further C. Pitea, *Trasmissione del cognome e parità di genere: sulla sentenza Cusan e Fazzo c. Italia e sulle prospettive della sua esecuzione nell'ordinamento interno*, in «Diritti umani e diritto internazionale», 2014, fasc. 1, pp. 231 ff.

for an agreement are lacking. In its Judgement no. 131 of 2022, the Constitutional Court insists on this idea and considers that the rule of automatic attribution of the paternal surname, *a priori*, invalidates the possibility of an agreement, all the more improbable insofar as its object is the attribution of the mother's surname exclusively, that is, the radical sacrifice of what corresponds to the father.

Based on the above, the Constitutional Court declares the unconstitutionality of Art. 262(1) of the Civil Code, as being contrary to arts. 2, 3 and 117(1) of the Italian Constitution, the latter in relation to Articles 8 and 14 of the ECHR, insofar as it provides, in relation to the hypothesis of recognition carried out simultaneously by both parents, that the child adopts the surname of the father, instead of providing that the child adopts the surnames of the parents, in the order agreed by them, without prejudice to the agreement, at the time of recognition, to attribute the surname of only one of them, which could be either the paternal or maternal surname.

Consequently, it also declares the unconstitutionality of other rules of the Italian legal system that regulate the attribution of surnames in the same sense as Article 262(1) of the Civil Code. In this regard, it considers that Article 299(3) of the Civil Code and Article 27(1) of Law no. 184 of 1983 are unconstitutional in so far as they provide that the adopted child shall receive the surname of the husband instead of providing that the adopted child shall receive the surnames of the adoptive parents, in the order agreed by them, without prejudice to the agreement, reached during the adoption procedure, to attribute the surname of only one of them, which may be either the paternal or the maternal surname.

Therefore, with the judgement of the Constitutional Court, two important modifications are introduced in the system of attribution of surnames to children: on the one hand, it is established that, in the absence of agreement, the child will receive the surname of both parents, making this the general rule and thus putting an end to the automatic attribution of the paternal surname. And, in the event that the parents reach an agreement different from this general rule, that is, when they decide to attribute the child exclusively the surname of one of the parents, this may be the paternal or maternal surname, putting an end to the impossibility for the child to receive only the maternal surname.

4. Unresolved issues and proposals for integration from Spanish law

a) Order of surnames

Once the double surname (paternal and maternal) has become the general rule in Italian law, the next question that arises is the order in which the newborn (or adopted) child will receive the surnames of his or her parents.

If there is agreement between the parents, it seems clear that this must always take precedence. In fact, this is also the solution adopted in other European countries that provide for the attribution of a double surname, including Spain (Art. 49(2) of Law no. 20 of 21 July 2011, on the Civil Status Register).

But in the absence of an agreement, it is necessary to determine the criteria to be followed to establish the order of surnames. And, in this regard, the Italian Constitutional Court has ruled out that the mechanical preference of the paternal or maternal surname can be used as a criterion, as it would imply reproducing the same discriminatory logic that underlies the rule that was declared unconstitutional through Judgment no. 131 of 2022[10]. In fact, the European Court of Human Rights has also expressly ruled on this issue in its Judgement of 7 January 2014 (León Madrid v. Spain), referring to a provision of Spanish law (Article 194 of the Regulation of the Civil Status Registry Law, in correlation with Article 109 of the Spanish Civil Code), which required giving the father's surname before the mother's in case of disagreement over the order.

As an alternative, in its pronouncement, the Constitutional Court proposes that, when there is no agreement on the order of attribution of the parents' surnames, in the absence of specific criteria that may be introduced by the legislator, the conflict should be resolved by judicial intervention, which is the instrument provided for in Italian law to resolve disagreements between parents on decisions of particular importance concerning their children (Art. 316, second and third paragraphs, of the Civil Code). In fact, this is the rule to which case law and doctrine have been resorting when disagreements between the parents on the attribution of the child's name are to be resolved.

[10] See Barba, *Apellido familiar, apellido de los hijos e igualdad de género en el Derecho italiano*, cit., p. 910.

However, I have doubts as to whether it is appropriate to leave this decision to the judge. It cannot be ruled out that, especially during the first years of the new system, disagreements between parents about the order of their children's surnames will be frequent, with the risk of a high number of lawsuits reaching the courts with the aim of determining the order of the surnames of the born (or adopted) child, with the consequent risk of increasing the levels of saturation they are already experiencing. Furthermore, leaving this decision in the hands of the judge would mean that during the time the legal proceedings are in progress the order of the child's surnames would not be defined, which I believe could even end up affecting the child's right to identity.

That is why it seems to me that, on this point, the solution provided by the Spanish legislator may be more appropriate. In this regard, Art. 49(2) of Law no. 20 of 21 July 2011 on the Civil Status Register provides that in the event of disagreement between the parents about the order of the surnames or when this is not stated, the Civil Registrar shall require them to communicate the order of the surnames within a period of 3 days. After this period has expired, the Civil Registrar shall decide on the order of the surnames. Obviously, the decision of the Civil Registrar is subject to appeal in the courts.

As to the criteria to be followed in determining the order of the child's surnames in the absence of agreement between the parents, Italian law remains silent. And, in the case of Spanish law, Art. 49(2) of Law no. 20 of 21 July 2011, on the Civil Status Register, limits itself to stating that, when the Civil Registrar has to decide the order of surnames, the best interests of the child must be taken into account[11]. As it can be seen, this is a very vague criterion, which does little or nothing to help the Civil Registrar when making his or her decision, which will inevitably contain large doses of discretion[12]. On most occasions, it will not serve to determine the most appropriate

[11] The best interests of the child is an indeterminate legal concept that will have to be specified in each case. See F. Rivero, *El interés del menor* (2nd ed.), Dykinson, Madrid 2007, pp. 84-85.

[12] In fact, it has been criticised by the Spanish doctrine: R. Barber, *Apellidos y Registro Civil*, in «Actualidad Jurídica Aranzadi», 2010, 809, p. 4 ff.; and M. Ordas, *Imposición al menor del apellido paterno: igualdad, derecho a la propia imagen, interés del menor*, in «Derecho Privado y Constitución», 2014, 28, p. 88. Although other authors have argued in favour of such a system: see M. Linacero de la Fuente, Tratado del Registro Civil: adaptado a la Ley 20/2011, de 21 de julio, del Registro Civil, Valencia 2013: Tirant lo blanch, pp. 203-204.

order (for example, it is not clear how it can be more beneficial for a child to have the surname López García than García López).

For this reason, it seems that it would be more appropriate to introduce objective criteria. In this respect, in the case of Spain, during the parliamentary processing of the current Civil Status Law (which abolished the preference of the paternal surname), the political parties made some proposals aimed at providing some criteria that would allow the Civil Registrar to decide the order of surnames in the absence of agreement between the parents. For example, the Socialist Party defended the use of an alphabetical criterion, so that the surname beginning with a previous letter in the alphabet would be given first[13]. The Basque Nationalist Party, for its part, proposed that the least frequent surname should be chosen first, and therefore the one most likely to disappear, consulting the Bases of the National Institute of Statistics.

In other cases, the criteria proposed had a subjective nuance, but without leaving the decision on the order of surnames in the hands of the Civil Registrar. This is the case of the proposal made by the United Left, which suggested leaving it to the democratic choice of the family, allowing for the opinion and vote of family members other than the parents (e.g. grandparents, uncles, aunts, etc.).

In my view, objective criteria are preferable, as they would avoid giving space for the discretion of the decision-maker, as well as for appeals against the decision taken. And, among the possible objective criteria, the one that is probably best suited to the principle of equality is the drawing of lots. A solution that I believe would also be useful in the case of Italian law.

b) Multiplier effect of surnames

A risk that the Italian system presents by establishing as a general rule the double surname (paternal and maternal), and which has been highlighted by the Constitutional Court in its Judgment no. 131 of 2022, is the multiplying effect of surnames in the succession of generations.

[13] This solution has been proposed by Barba for the Italian regulation: Barba, *Apellido familiar, apellido de los hijos e igualdad de género en el Derecho italiano*, cit., p. 911.

The Constitutional Court therefore calls on the Italian legislator to adopt a criterion to avoid this multiplier effect of surnames. In this respect, it proposes that each of the parents with a double surname should choose the surname they want their descendants to receive.

However, this would mean placing the burden on parents to choose which of their two surnames (one paternal and one maternal) to pass on to their children, which in many cases could lead to a conflict of loyalties.

Therefore, I believe that it would be preferable to adopt the solution provided for in Spanish law (in which the double surname has traditionally been the general rule), which consists of the transmission to the children of the first surname of each of their parents (Art. 49.2 of Law no. 20 of 21 July 2011, on the Civil Status Register). And if one of the parents had a special interest in passing on their second surname to their children, he or she could always change the order of his or her own surnames prior to birth and so pass on the surname that was initially in second place.

c) Guarantee of the principle of family unity

Finally, the Constitutional Court, in its Judgement no. 131 of 2022, makes another appeal to the legislator to protect the child's interest in not having a surname different from that of his or her siblings, with the consequent sacrifice of a profile that is also part of his or her family identity. In this respect, it proposes reserving the options relating to the attribution of the surname to the moment of simultaneous recognition of the couple's first child (or at the moment of his or her birth in marriage or adoption), in order to make them binding with regard to subsequent children recognised at the same time by the same parents (or born in marriage or adopted by the same couple)[14].

In fact, this is the provision that is included in Spanish law through Art. 109(3) of the Civil Code, which provides that children born later will have the same order of surnames as the eldest; and probably the one that best guarantees the principle of family unity.

[14] See too *Ivi*.