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The surname of married women and sons by Italian law

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THE SURNAME OF MARRIED WOMEN AND SONS BY ITALIAN LAW

I've chosen to deal with surname in the family because this is a matter debated in Italian jurisprudence and source of gender discrimination for the reason that its attribution is regulated in automatic manner at women's disadvantage.

The surname is an important personal identification element, but also an instrument of achievement in many fields.

Moreover its loss may become an economic drawback.

So the debate about this question and the law that regulates the surname attribution to married women and sons regards both points of view: the moral one, that is the right to maintain one's identity, and the economic one, that is the right to maintain a possible achievement instrument.

The Italian law, in the 22nd article of the Constitution, protects the name right as an automatic and unsuppressible person's right, moreover as a distinguishing mark of person's identity, also when new events may involve its change.

The New York 18th December 1979 Convention about Women's discriminations abolition, that Italy has ratified, obliges the signatory States to adopt all the adequate measures to remove discriminations against women in the questions deriving from marriage or family life.

In particular this Convention wants to assure the same personal rights to husband and to wife, including the surname choice.

Moreover, the Council of Europe with two Recommendations in 1995 and in 1998 asserted that the maintenance of gender discrimination about the surname choice is incompatible with the equality principle.

So the Council recommended to defaulting States to reach complete equality between parents in the choice of their common surname and in the surname attribution to their children, born both inside and outside marriage.

These are the juridical premises.

But how does Italian law regulate the matter?

Actually, the family surname is still the husband's surname. Before 1975 family law reform, the law obliged the wife to lose her maiden name and to use only the husband's one.

After 1975, the wife can add the husband surname to her maiden name, but she loses it in case of divorce.

So her identity sign changes during her life, according to the circumstances, while the husband always maintain his own identity by the name. This is a gender discrimination.

With respect to children the question is more discriminant.

Two are the “*modus operandi*” of surnames, depending on children juridical “*status*”: that is if they are legitimate or natural.

In the first case, there is’nt an express rule, but from the legal system it can be deduced the automatic attribution of father’s surname, without the possibility for parents to choose another surname.

The Civil Code (article 6th) states every person’s right to one’s name, which includes the “*nomen familiae*” (surname) and the “*praenomen*” (first name). This same article forbids to change, to add or to rectify the name unless expressly otherwise provided by law.

So, the mother’s surname cannot be added to the father’s one except in exceptional cases, by an administrative proceeding founded not on a full right, but on an legitimate interest.

This rule is an inheritance of an ancient juridical tradition that has its roots in roman family law, based on “*agnatio*”, that is to say on a system of personal, familiar and inheritance relations in which the center was the “*pater familias*”, according to a patriarchal women discrimination order.

It might be coherent with the former family law that acknowledged “*the patria potestas*” (the authority) on children only to the father and obliged the wife to accept all the husband’s decisions relating to the family (the choice of the place of residence, the possibility of working, the education of children, etc.).

But, after the 1975 Family Law Reform, that implemented the equality principle between husband and wife, founded on the 1948 Republican Constitution (how many years to get this result!) the automatic attribution of husband’s surname to the wife (even if in addition) and to the children is an incoherent rule, based on dicrimination.

Also the Supreme Court has expressed this judgement with an ordinance (pronounced in 2004) and sent the case to the Constitutional Court, that has the power to control the corrispondence of the ordinary laws to the Constitutional Charta principles.

The Constitutional Court, with the 16th February 2006 sentence, expressed the opinion that the automatic attribution of father's surname to the child is a discriminating rule, but its abrogation would have produced a normative void, due to the plurime possible solutions.

So The Court invited the "*conditor iuris*" , that is the Parliament, to adopt new rules in surname matter.

The consequence is that there are many bills waiting for the debate in Parliament, but at the moment no changes have occurred.

These Bills provide the parents the faculty of choosing the surname to attribute to their children and the possibility to ascribe both their surnames, with the limit that the choice will be the same for all the children of the couple.

In the case of natural child the surname depends on the parent who first recognizes the son.

If it is the mother who first recognizes the son, then the son gets her surname; if both parents recognize the son in the same moment, then he takes the father's surname. If the father recognizes the son after the mother, his surname may be added after the mother's one or may stand in for the former one.

But, in last years, the Supreme Court has affirmed the principle that the child has the right to maintain his personal identity.

So it is the judge to value, in according with this principle, if the change of the name respects the child's best interest.

Also in case of adoption, the adopted takes the husband's surname (by italian law the full adoption is possible only by married partners).

So in every situation, except for the recognition of a natural child, it is always the father's surname to identify the son.

It follows that the missed transmission of mother's surname cuts off this part of the child personal roots and this is wrong from a moral profile. But it has also negative economic effects if the mother's surname is known and important and if it has a tangible worth.

Therefore, this discrimination produces many forms of negative effects, without any present reason.

In the other European Countries there are different rules putting husband and wife on the same plane.

In Germany, they can choose a common surname (indifferently the husband's or the wife's surname) or they can maintain theirs one and in this second case the legitimate child will have the surname chosen by parents.

By the Spanish Codigo Civil (in the 109th article), the son takes both parents' surnames (even if in first position the father's one and after the mother's one) and he can transmit both of them or only the father's surname.

In France there is the principle that all the people can ask to add "*a titre d'usage*" to the father's surname the mother's surname (or that of a near relative's) to avoid its extinction.

These are some examples of the rules by which some italian bills are inspired, but in the matter of surname there are many opinions and many solutions.

Now, the parliamentary debate is stopped, even if the sentences of Supreme Court have brought up it again and we are waiting for a new regulation that should be more respectful of the women's right.

This is also the hope of ADAMI (ITALIAN WOMEN JUDGE ASSOCIATION) that fights against gender discrimination as one of its first aims. In fact, it promotes the gender equality culture in the jurisprudence by its members.

On this regard, I want to remember the important contribution of Mrs. Gabriella Luccioli, the first woman judge in Supreme Court and now the first woman Chief Justice of a section of the Supreme Court, who was also one judge promoter of ADAMI and of IAWJ.