JUDGMENT NO. 286 YEAR 2016

In this case the Court heard a reference concerning the legal rule that every child must be attributed it's father's surname only at birth, and cannot be attributed also the mother's surname, even if so requested by both parents. Referring to the case law of the European Court of Human Rights, the Court struck down the legislation with particular reference to the right to personal identity. "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." The Court also found the rule unconstitutional on the grounds that it violated the principle of equality between husband and wife.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of the rule which may be inferred from Articles 237, 262 and 299 of the Civil Code, Article 72(1) of Royal Decree no. 1238 of 9 July 1939 (Law on Civil Status) and Articles 33 and 34 of Presidential Decree no. 396 of 3 November 2000 (Regulations on the review and simplification of the Law on Civil Status, adopted pursuant to Article 2(12) of Law no. 127 of 15 May 1997), initiated by the Genoa Court of Appeal in the proceedings brought by M.M. and M.G. by the referral order of 28 November 2013, registered as no. 31 in the Register of Referral Orders 2014 and published in the Official Journal of the Republic no. 13, first special series, 2014.

Considering the entries of appearance by M.M. and M.G., both in their own right and in their capacity as the persons with parental authority over the minor V., and the intervention by the Association *Rete per la Parità* [Network for Equality];

having heard the judge rapporteur Giuliano Amato at the public hearing of 8 November 2016;

having heard Counsel Antonella Anselmo for the Association *Rete per la Parità* and Counsel Susanna Schivo for M.M. and M.G., both in their own right and in their capacity as the persons with parental authority over the minor V.

[omitted]

Conclusions on points of law

1.– By the referral order issued on 28 November 2013, the Genoa Court of Appeal raised − with reference to Articles 2, 3, 29(2) and 117(1) of the Constitution – a question concerning the constitutionality of the rule which may be inferred from Articles 237, 262 and 299 of the Civil Code, Article 72(1) of Royal Decree no. 1238 of 9 July 1939 (Law on Civil Status) and Articles 33 and 34 of Presidential Decree no. 396 of 3 November 2000 (Regulations on the review and simplification of the Law on Civil Status, adopted pursuant to Article 2(12) of Law no. 127 of 15 May 1997), insofar as it provides for "the automatic attribution of the father's surname to a legitimate child, [even] if desired otherwise by the parents".

The objection alleges in the first place that Article 2 of the Constitution has been violated as a result of the encroachment on the right to personal identity, which entails the right of each individual to recognition of identifiers of each parent's branch of the family.
It is also argued that Articles 3 and 29(2) of the Constitution have been breached due to the violation of the right of equality and the equal dignity of parents both in relation to children and between husband and wife.
Finally, it is asserted that Article 117(1) of the Constitution has been violated with reference to Article 16(1)(g) of the Convention on the Elimination of All Forms of Discrimination against Women, to the Council of Europe Recommendations no. 1271 of 28 April 1995 and no. 1362 of 18 March 1998 and to Resolution no. 37 of 27 September 1978 on the creation of full equality between parents in the attribution of the surname to children.
2.– As a preliminary matter, it is necessary to confirm the order adopted during the oral proceedings, which is annexed to this Judgment, ruling inadmissible the intervention by the association *Rete per la Parità*.
3.– The question raised with reference to Articles 2, 3 and 29 of the Constitution is well founded.
3.1.– It is objected that the rule − which may be inferred from Articles 237, 262 and 299 of the Civil Code and Articles 33 and 34 of Presidential Decree no. 396 of 2000 – providing for the automatic attribution of the father's surname to a legitimate child, even if desired otherwise by the parents, is unconstitutional.
It must be pointed out, as a preliminary matter, that the provisions identified by the referring court also include Article 72(1) of Royal Decree no. 1238 of 1939, which was however repealed by Article 110 of Presidential Decree no. 396 of 2000. However, it is apparent from the overall tone of the arguments set forth in the referral order that this provision is targeted by the objections made by the referring court for the sole purpose of rendering explicit the rule − which is presupposed by it – providing for the automatic attribution of the father's surname only.
The existence of the contested provision and its prevailing validity within the system, which may be inferred from the provisions that are implicitly premised upon it, has already been recognised within the case law of the Constitutional Court on the previous occasions on which its constitutionality has been disputed (see Judgments no. 61 of 2006 and no. 176 of 1988; Orders no. 145 of 2007 and no. 586 of 1988). In these rulings, the Court acknowledged the existence of that rule, as a premise of the same provisions – albeit applicable to different factual situations – as those identified by the referring court in these proceedings (Articles 237, 262 and 299 of the Civil Code Articles 33 and 34 of Presidential Decree no. 396 of 2000).
Although it has not been incorporated into an express provision, once again there is no reason to doubt the current validity and imperative force of the rule that the father's surname is attributed *ipso iure* to his children.
A similar position has also been stated within the case law of the Court of Cassation, both prior to and after the cited rulings of this Court. Indeed, the case law of the Court of Cassation has recognised that it is possible to infer – from these albeit heterogeneous provisions – the existence of a rule which, whilst not being specifically stipulated by any provision, is nonetheless part of the system and "without doubt constitutes the manifestation, as a legal rule established by the state, of a custom that has become

consolidated over time" (see Court of Cassation, 1st Division, judgments no. 13298 of 17 July 2004 and no. 23934 of 22 September 2008).
In the case under examination, the rule on the automatic attribution of the father's surname has been challenged solely on the grounds that it does not allow the parents – who may so jointly request at the time of birth – to give the child also the mother's surname.
3.2.– Having described the present question in these terms, it must be pointed out that this Court has already on previous occasions examined the provisions concerning the priority status of the father's surname at the time it is attributed to the child, although it ruled the relative questions unconstitutional on the grounds that they would fall under the discretion of the legislator when enacting any new legislation.
However, it was expressly recognised in Order no. 176 of 1988 that "it would be possible, and probably in keeping with the evolution of the social conscience, to replace the current rule on the determination of the distinctive surname of members of a family established by marriage with a different criterion that affords greater respect to the autonomy of the married couple and that can reconcile the two principles enshrined in Article 29 of the Constitution, rather than to make use of the authority to limit one in favour of the other" (see also Order no. 586 of 1988).
Eighteen years later, in view of the fact that the legislative framework had not changed, in Judgment no. 61 of 2006, this Court expressly ruled with even greater resoluteness that the rule under examination was not compatible with the constitutional values of moral and legal quality between man and wife. This system for attributing the surname was in fact defined as the "legacy of a patriarchal conception of the family rooted in the Roman tradition of family law and of a power within marriage that is now a thing of the past, and is no longer consistent with the principles underlying the legal system and the constitutional value of equality between men and women".
3.3.– Even though many years have passed since these rulings, a "different criterion that affords greater respect to the autonomy of the married couple" has not yet been introduced.
Nor was the provision contested in these proceedings affected even by Legislative Decree no. 154 of 28 December 2013 (Review of the provisions applicable to filiation, adopted pursuant to Article 2 of Law no. 219 of 10 December 2012), by which the legislator laid the basis for the full harmonisation of the legislation governing the status of legitimate children, biological children and adopted children, recognising one single status of son or daughter.
Although the provisions governing changes of surname were amended – through the repeal of Articles 84, 85, 86, 87 and 88 of Presidential Decree no. 396 of 2000 and the introduction of a new Article 89 by Presidential Decree no. 54 of 13 March 2012, (Regulations on the review and simplification of the Law on Civil Status, adopted pursuant to Article 2(12) of Law no. 127 of 15 May 1997) – the amendments did not affect the rules governing the "original" attribution of the surname at birth.
On the other hand, it is important to note the intensive efforts which are being made to prepare legislative changes that will regulate the attribution of surnames to children according to new criteria. However, at present these efforts are still ongoing.
Thus, within the family founded on marriage it is still not possible for the mother to pass her own surname onto her children at birth or for the child to be identified from birth also by the mother's surname.

3.4.– The Court considers that this exclusion is detrimental to the child's right to personal identity, and at the same time entails an unreasonable difference in treatment between the married couple, which is not justified by the aim of safeguarding the unity of the family.

3.4.1.– As regards the first grounds for unconstitutionality, it must be pointed out that the discrepancy between this provision and the guarantee of the full realisation of the right to personal identity, which is afforded absolute protection under Article 2 of the Constitution, is reinforced within the current legislative framework.

Due to the value of the identity of the individual, within its fullest and most complex manifestation, and mindful of the significance under both public and private law of the right to one's name as an expression of membership of a family group, it may be concluded that the criteria for attributing the surname to a minor constitute decisive aspects of his or her personal identity, which projects itself onto his or her social personality pursuant to Article 2 of the Constitution.

It is precisely from this perspective that the Court has for some time recognised the child's right to maintain his or her original surname, even in the event of changes in his or her status as a result of subsequent recognition or adoption. The original surname is in fact classified as a self-standing distinctive marker of his or her personal identity (see Judgment no. 297 of 1996), and an "essential feature of his or her personality" (see Judgment no. 268 of 2002; see also Judgment no. 120 of 2001).

The increasing appreciation of the value of the right to personal identity culminated in the recent assertion by this Court of the child's right to know his or her origins and to receive information concerning his or her parents, as a "significant element within the constitutional system ensuring protection for the individual" (see Judgment no. 278 of 2013).

The relevant framework also incorporates the case law of the European Court of Human Rights, which has classified the right to one's name under the protection offered by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950 and implemented by Law no. 848 of 4 August 1955.

In particular, in the judgment in *Cusan Fazzo v. Italy* of 7 January 2014, which was issued after the referral order under examination, the Strasbourg Court asserted that the inability of parents to attribute the mother's surname to a child rather than the father's constituted a breach of Article 14 (Prohibition of discrimination), in conjunction with Article 8 (Right to respect for private and family life) of the ECHR, resulting from a gap within Italian law, which could only be filled by adopting "reforms to the legislation and/or practice in Italy". The ECtHR also held that this impossibility could not be offset by the subsequent administrative authorisation to change the name of underage children by adding the mother's surname to the father's.

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.

3.4.2.– As regards the parallel ground for unconstitutionality consisting in the violation of the principle of equality between husband and wife, it should be pointed out that the principle that the father's surname takes priority, and the resulting difference in treatment for the married couple, is not justified either by Article 3 of the Constitution or by the aim of safeguarding the unity of the family pursuant to Article 29(2) of the Constitution.

As has long since been observed by this Court, "it is precisely equality that guarantees such unity, and conversely it is inequality that jeopardises it", as unity "is enhanced where the reciprocal relations between husband and wife are governed by solidarity and equality" (see Judgment no. 133 of 1970).

The enduring violation of the principle of "moral and legal" equality between husband and wife caused by the disregard for the mother's right for the child to take also her surname, is at odds – today as in the past – with the aim of guaranteeing the unity of the family, which has been identified as a general rationale justifying exceptions to equality between husband and wife, and in particular the rule establishing priority for the father's surname.

This difference in treatment between husband and wife in the attribution of the surname to children, as an expression of a now superseded patriarchal conception of the family and of relations between husband and wife, is also incompatible with the principle of equality and with the principle of equal moral and legal dignity for the married couple.

4.– By this decision, this Court has however been called upon to resolve the question formulated by the referring court concerning the rule governing the attribution of the father's surname solely insofar as it requires that children automatically acquire the father's surname even if desired otherwise by both parents. The ruling that it is unconstitutional is thus limited solely to the extent to which it does not permit the married couple by mutual agreement to transmit to the children at birth also the mother's surname.

4.1– The objection relating to Article 117(1) of the Constitution is moot.

5.– Pursuant to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), the declaration of unconstitutionality must in consequence be extended to Article 262(1) of the Civil Code, which still contains – with reference to the recognition of a biological child at the same time by both parents – a rule identical to that ruled unconstitutional by this Judgment.

Also this provision must therefore be ruled unconstitutional to the extent that it does not permit the parents, by mutual agreement, to transmit to the child at birth also the mother's surname.

5.1.– For the same reasons, the declaration of unconstitutionality must be extended, pursuant to Article 27 of Law no. 87 of 1953, finally to Article 299(3) of the Civil Code insofar as it does not permit the married couple to attribute also the mother's name by mutual agreement at the time of adoption in the event that a child is adopted by both.

6.– Lastly, it must be noted that, in the absence of agreement between the parents, the general rule that the father's surname applies will remain applicable pending the enactment of urgent legislation to regulate the area of law comprehensively according to criteria that are finally consistent with the principle of equality.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) *declares* unconstitutional the rule which may be inferred from Articles 237, 262 and 299 of the Civil Code, Article 72(1) of Royal Decree no. 1238 of 9 July 1939 (Law on Civil Status) and Articles 33 and 34 of Presidential Decree no. 396 of 3 November 2000 (Regulations on the review and simplification of the Law on Civil Status, adopted pursuant to Article 2(12) of Law no. 127 of 15 May 1997) insofar as it does not permit the married couple to attribute also the mother's name to the child by mutual agreement at the time of birth;
2) *declares* in consequence, pursuant to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), that Article 262(1) of the Civil Code is unconstitutional insofar as it does not permit the married couple to attribute also the mother's name to the child by mutual agreement at the time of birth;
3) *declares* in consequence, pursuant to Article 27 of Law no. 87 of 1953 that Article 299(3) of the Civil Code is unconstitutional insofar as it does not permit the married couple to attribute also the mother's name by mutual agreement at the time of adoption in the event that a child is adopted by both.
Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 8 November 2016.

ANNEX:
ORDER READ OUT AT THE HEARING OF 8 NOVEMBER 2016
ORDER

Having found that, in the proceedings initiated by the Genoa Court of Appeal by the referral order of 28 November 2013 (register of referral orders no. 31 of 2014), the association *Rete per la Parità*, represented by its *pro tempore* legal representative, filed an intervention on 7 April 2014.
Whereas the Association *Rete per la Parità* is not a party to the main proceedings;
according to the settled case law of this Court (see *inter alia* the referral orders annexed to Judgment no. 134 of 2013 and Order no. 318 of 2013), participation in interlocutory proceedings before the Constitutional Court is reserved, as a rule, to the parties to the proceedings before the lower court, along with the President of the Council of Ministers and, in cases involving regional legislation, the President of the Regional Executive (Articles 3 and 4 of the Supplementary rules on proceedings before the Constitutional Court);
exceptions may be made to these provisions – without thereby undermining the interlocutory nature of proceedings before the Constitutional Court – only for third parties vested with a qualified interest that is directly related to the substantive right averred in the proceedings, and not simply governed, in the same manner as any other, by the contested provision or provisions (see *inter alia* Judgments no. 76 of 2016; no. 221 of 2015 and the relative order read out at the hearing of 20 October 2015; no. 162 of 2014 and the relative order read out at the hearing of 8 April 2014; no. 293 and no. 118 of 2011; no. 138 of 2010 and the relative order read out at the hearing of 23 March 2010; Order no. 240 of 2014; no. 156 of 2013; no. 150 of 2012 and the relative order read out at the hearing of 22 May 2012);
accordingly, any declaration that the law is unconstitutional must have the same effect on the individual interest of the intervener as it has on the relationship at issue in the proceedings before the referring court;

these proceedings – concerning the rule which may be inferred from Articles 237, 262 and 299 of the Civil Code, Article 72(1) of Royal Decree no. 1238 of 9 July 1939 (Law on Civil Status) and Articles 33 and 34 of Presidential Decree no. 396 of 3 November 2000 (Regulations on the review and simplification of the Law on Civil Status, adopted pursuant to Article 2(12) of Law no. 127 of 15 May 1997), insofar as it provides for "the automatic attribution of the father's surname to a legitimate child, [even] if desired otherwise by the parents" – will not give rise to any direct or even indirect effects on the intervener Association;
accordingly, it does not have the status of a third party entitled to participate in the proceedings before this Court.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

rules inadmissible the intervention by the Association *Rete per la Parità*.