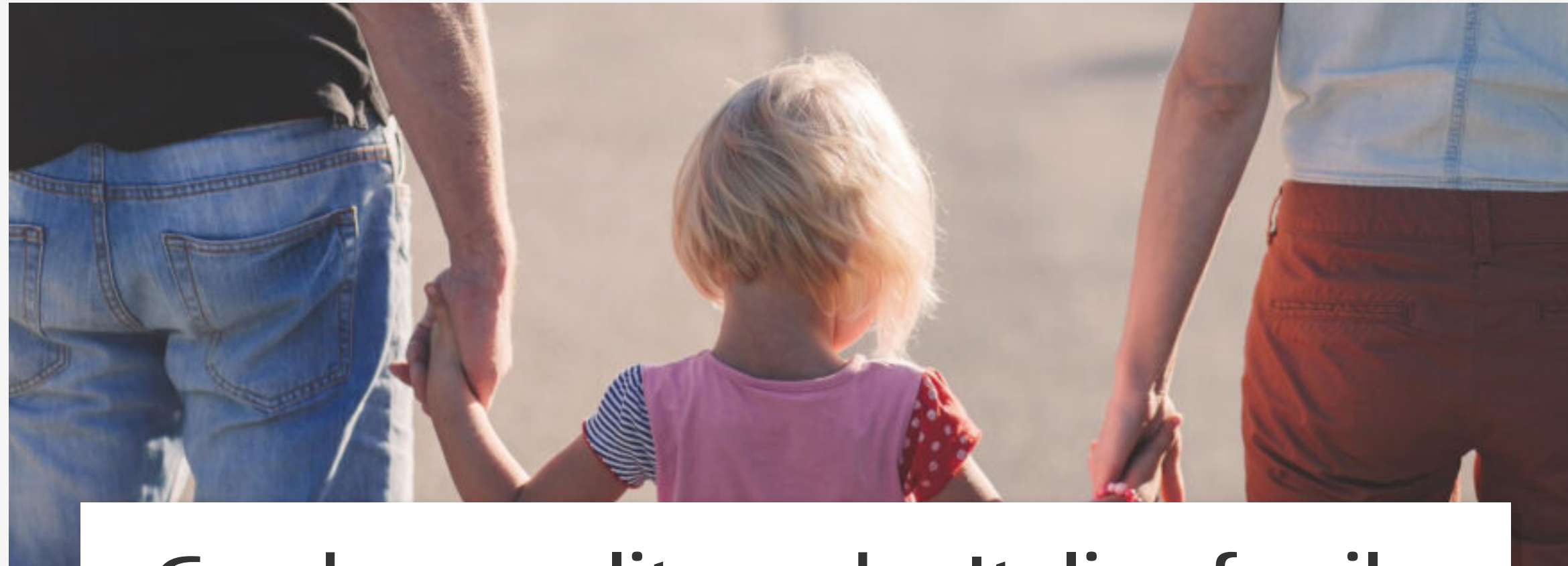


Matteo Greco
PhD Student in Law

Gender equality under Italian family law: different approaches of the Italian Constitutional Court

📅 July 01, 2022 • 📄 Private Law • ⌚ 4 min read

After 30 years of waiting for a legislative intervention, the Italian Constitutional Court is ‘rewriting’ the rule of surname attribution to children, the legacy of an outdated marital power that is contrary to the constitutional principles of equality.

In Italy, the system of surname attribution to children has always been based on the general rule of automatic transmission of the paternal family name, with only a marginal and limited number of exceptions. Despite the absence of a general legal provision, this criterion can be inferred from a systemic interpretation of several specific dispositions, regulating different cases. The rule was aimed at protecting the unity of the family and its roots lie in a patriarchal conception of family, which influenced the pre-Republican legislation.

It is hardly surprising that this rule remained in force even after the approval of the 1947 Constitution, since any constitutional transition process requires, first of all, a process of social transformation, which needs time to be completed. In fact, Italian family law has gradually evolved according to social consciousness, with the purpose of rebalancing the position of parents in family relationships. However, despite several reforms, the original criterion for the surname attribution had never changed.

The boundary of political discretion

For this reason, at the end of the 1980s, the issue reached the Italian Constitutional Court. On these occasions, the Court rejected the questions concerning constitutionality, as it was solely up to Parliament to replace the existing criterion with another more in tune with the evolution of social consciousness. Nevertheless, the Court stressed that the existing rule did not conflict with the constitutional principles, since its presence in the Italian legal system was justified by the fact that it was strongly rooted in social customs (Decisions No. [176](#) and [586](#) of 1988).

Subsequently, about eighteen years following the first judgments, with Decision [No. 61/2006](#), the Constitutional Court expressly recognised the unconstitutionality of the existing rule, while continuing to practise strict self-restraint. This is no insignificant issue, since it is not possible to eliminate a given criterion without simultaneously setting out a new one, in order to avoid the risk of unsustainable regulatory vacuums. Such a responsibility necessarily belongs to Parliament, as a representative, democratically-elected body.

The issue of a child’s surname eventually came before the European Court of Human Rights (ECtHR). In its ruling in the case [Cusan/Fazzo v. Italy](#) of 2014, the European Court condemned Italy for violating Article 14 (prohibition of discrimination) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights, since the lack of legal relevance of an agreement between parents about the choice of the child’s surname constitutes an unjustifiable discriminatory situation. In accordance with this position, the ECtHR stated that each parent shall have the right to participate in that choice on an absolutely equal position. As a consequence, the surname attributable to a child may be either the paternal or maternal one. This implies – according to the Court – the urgency of ‘adopting reforms in Italian legislation and/or praxis’.

Crossing the boundary: The *revirement* of the Constitutional Court

The ECtHR judgment was a pivotal moment, as in 2016, in the persistent absence of legislative initiatives, the orientation of the Constitutional judges started to partially change. Thus, with decision [No. 286/2016](#), the Constitutional Court upheld the questions of constitutional legitimacy, opening, however, only the possibility that parents, by mutual agreement, may transmit to their children, in addition to the paternal surname, also the maternal one. However, this conclusion did not actually overcome the relevant underlying problem; on the contrary, in some ways, it contributed to pointing it out even more. In fact, the rule of automatic attribution of the paternal surname, in the absence of an agreement between the parents, remained unaffected – the choice relating to the addition of the maternal surname was left entirely to the will of the father.

Therefore, a few years later, with decision [No. 131/2022](#), the Constitutional Court intervened again, declaring in this case the constitutional illegitimacy of all provisions from which such a rule can be inferred, while completely replacing it. Thus, in the absence of an agreement between the parents, the child’s surname must be composed by the juxtaposition of the surnames of both of them, since, according to the Italian judges, the automatic attribution of only the father’s surname ‘turns into the invisibility of the mother’ and is a sign of inequality between parents, which ‘reverberates and imprints itself on the child’s identity’.

To conclude, this case law is an example of the recent vocation of the Italian Constitutional Court to act as a driver of societal change, to the extent that its pronouncements seem to increasingly assume the features of a legislative act. Consequently, it is necessary to investigate the reasons for such a radical *revirement* and its systemic effects, bearing in mind that this trend is perceived mainly in the field of individual rights and fundamental freedoms. These aspects will be tackled during the Conference ‘Courts as an Arena for Societal Change’, in the panel ‘The multifaceted response of the Italian Constitutional Court to societal challenges’.

More than 120 scholars from all over the world will share their findings and views on 8 and 9 July 2022 at Leiden Law School during the conference [Courts as an Arena for Societal Change](#). Several blogs will be published on the [Leiden Law Blog](#) on the themes of the conference.

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