THE MARRIED WOMAN'S NAME

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by

NICOLA W PALMIERI

Doctor juris University of Bologna
Advocate of the Bar of Milan

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A B S T R A C T

The married woman's name is characteristic of the long tradition of her inferior rights: this is the object of this thesis.

After introducing the ideas of the author and after a brief information of the examined systems of law, a chapter dedicated to History reminds the reader that in the old systems of law there was generally no question about a wife having less rights than a man, this being the obvious result of men having declared themselves the rulers in the government of society, women, children, slaves and beasts necessarily being their unequal subjects and properties.

The main chapter which follows deals with the married woman's name in France, Italy and Argentina; in West Germany and Sweden; in England and the U.S.A. A sideglance is given to Socialist systems since their solutions are of special interest.

Practically in all jurisdictions (except some Socialist States) the wife assumes at marriage as a matter of law or of custom (or both) the man's name. This is true as a general rule also for those countries, like West Germany, Austria and Italy, where recent reforms where introduced in the law of names in order to implement the constitutional principles of equality. Conflicts of laws present great difficulties of characterization given the undefined nature of the right to a name.

The subtitle of the thesis could have been: The Married Woman's Name and the Constitutional Principle of Equality of Rights. Thus in the final chapter the various theories of the nature of the right (property, status familiae, personality etc.) are discussed, but no definitive conclusion is reached: the right to a name has different natures, according to the purposes which

it aims at.

The concept that wives should have less rights than men resisted all modern Constitutions. Actually it is easy to declare the great principles of liberty and equality, but it is extremely difficult to implement thoroughly those concepts especially if there is no honest intention to implement them and if social behavior and tradition strongly resist them, as it is well evident in matters of names.

Actually the most deaf person is the one who does not wish to listen.

R E S U M E

Le nom de la femme mariée est une preuve éloquente de la condition d'infériorité de la femme dans notre société; cette hypothèse a suscité la recherche décrite dans cette thèse.

Après une introduction qui exprime l'opinion de l'auteur au sujet, et après un court exposé sur les systèmes juridiques à être discutés, un premier chapitre donne les informations essentielles sur le nom de la femme mariée à travers l'histoire. En droit romain, de même que dans le droit coutumier germanique, il était hors de tout doute que la femme avait moins de droits que l'homme, ce qui était la conséquence évidente d'une tradition culturelle dans laquelle l'homme s'était lui-même nommé chef dans une société dans laquelle les femmes, les enfants, les esclaves et les animaux étaient ses sujets subordonnés et sa propriété.

Le chapitre suivant traite du nom de la femme mariée d'abord en France, en Italie et en Argentine, puis dans la République Fédérale d'Allemagne et en Suède, et finalement en Angleterre et aux Etats Unis. Un aperçu sommaire de la question est aussi donné pour les pays de l'Europe orientale étant donné que les solutions socialistes ont un intérêt spécial pour notre recherche.

En pratique, le résultat auquel on aboutit est que dans tous les pays étudiés, exception faite de quelques pays socialistes, la femme prend au moment du mariage, en droit ou par règle coutumière (ou les deux), le nom patronymique de son mari. Ceci est aussi vrai, règle générale, pour des pays comme l'Allemagne de l'ouest, l'Autriche et l'Italie où des réformes

récentes ont été introduites pour se conformer aux exigences découlant des principes constitutionnels d'égalité.

Le droit international privé présente des difficultés presque insolubles dans la qualification du droit au nom en raison de la nature très discutée et incertaine de ce droit.

Le sous-titre de notre thèse aurait pu être "Le nom de la femme mariée et le principe constitutionnel d'égalité des droits". Donc, dans la conclusion, on a passé à la loupe les diverses théories qui ont été proposées sur la nature du droit au nom (notamment une proprieté, l'expression d'un état familial, un droit de la personallité, etc.) sans toutefois aboutir à une conclusion definitive. En effet, une solution unique n'existe pas puisque le droit au nom participe à la fois à plusieurs "natures" selon le but que, dans les circumstances particulières, il veut atteindre.

La conception que la femme doit avoir moins de droits que l'homme a resisté à toutes les constitutions modernes. En effet, il est facile de concevoir et de déclarer les grands principes de liberté et d'égalité, mais beaucoup moins de les rendre effectifs, ce qui est fort difficile et pratiquement impossible lorsque manque une intention honnête de le faire.

Il n'y a en effet, comme le dit le proverbe, pire sourd que celui qui ne veut pas entendre.

P R E F A C E

My first confrontation with "names" occurred some ten years ago. The issue was: how could the parents of a child give the father's name to the baby whose mother (single woman) was not the (judicially separated) man's wife?

The case was at that time insoluble in Italy. But lawyers always find a way. Actually the child was born in one of the more liberal States of the U.S.A. and obtained not only the father's name but also, as a special gift, American citizenship. I probably would have forgotten about this rather "minor" problem area in the law (indeed, *what is a name?*) had not a curious development taken place in that very case.

Shortly after the baby's birth, divorce was introduced in Italy. The child's "natural" parents could marry and in their innocent belief (was it not also a sound belief?) they thought that now they could officially recognize their child. The reader can imagine their surprise and frustration when they learned that after introduction of the Divorce Act in Italy a married couple could not, in certain circumstances, recognize after marriage their common child, e.g. if the father had children from a previous dissolved marriage, unless the President of the Italian Republic gave his authorization and unless all his previous children after reaching majority had been heard on the matter (see Art. 252 CC as it was in the formulation before the amendments of 1975, in connection with Art.7 L. 1.12.1970 n.898).

The Divorce Bill was presented, of course, by left wing parties' Members of Parliament and was approved with their

determinant votes. Quite tame sheep, those Italian leftists, are not they? How could they permit such a distortion of their very concepts of "egalitarianism"? How could they uphold the "regal" prerogative of a recognition *per rescriptum principis?*

I thought at that time that this was an exceptional and rare case of manifest injustice in the law of names. Actually I was wrong.

The more I committed myself in researching this province of the law, the more I discovered that the name was a characteristic field of tensions created by ancestral rules of social behavior, by conflicting religious and political faiths, where law is always defeated and negated.

It has always fascinated me to understand the law not just as rules and regulations but as the very necessary aspect and product of men's life in society. Thus the right to the name provided an ideal material for this kind of research. With growing interest I canvassed huge piles of documentation, conceiving the ambitious plan of writing a treatise on the right of the name in the world. Soon I realized that this was the task of a team, not the work of one man. So I went over to develop progressively short parts of the whole: the "Married woman's name" shall be the first of the series.

* * *

It is customary to indicate in the preface to a thesis what elements of the research are considered to be contributions to original knowledge.

Well, after consideration of the opinions expressed by the most distinguished authors, from Pliner to Perreau, from Scialoja to Kohler, and by all the others, just a few of whom have been cited in the bibliography, I discovered that in the

Western civilization no authority attempted up to now, as I do here, to demonstrate, on a rigorous scientific basis, that the statutory provisions on the name are mostly useless, besides being oppressive of private people's freedom(and that the customary rules in this field are mostly the product of a traditional concept of fundamental inequality of rights).

What this thesis attempts to demonstrate is the incoherence of the unilateral and incomplete theories on the nature of the right to a name, the consequent impossibility in finding uncontradictory solutions,and the extreme difficulty of a correct characterization in conflicts of law. How can all these difficulties be avoided? The answer apparently may come from a more scientific understanding of what the name represents for the law, from the discovery of why and within what limits it is appropriate for the law to get involved in the names of persons.

The obvious conclusion seems to be that actually the identity of a person, not the name, should be the only concern of the law. Married women, in particular, should not only be entitled to keep always their maiden or ante-nuptial name, or to assume (as well as everybody else) whatever name they want during their life as single or married women, but also to give to their matrimonial and extramatrimonial children any name they like, and this without anyone's permission.

This is not just an opinion. It is the consequence of a methodic application and scientific understanding of the law, of its necessity and its limits. Thus the conclusions obtained in this thesis should be a contribution to new and better knowledge of the law, and they may lead, hopefully, to substantially more consistent approaches to this very debatable chapter of family and administrative law.

* * *

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Montreal,
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N.W.PALMIERI

TABLE OF CONTENTS

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page

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3. *ARGENTINA*

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CN Civ Sala C 11 6 1961	*60*	44
C Civ 2a. Capital 23 8 1946	*60*	44
C Civ 1a. Capital 27 9 1939	*60*	44
C 2a. CC La Plata sala III 28 8 1962	*60*	44
C 2a. CC La Plata sala I 26 3 1953	*60*	44

4. *GERMANY*

Bundesverfassungsgericht

4 5 1971	*207*	99
26 11 1963	*83*	53
25 7 1963	*80*	53

Bundesgerichtshof

12 5 1971	*205,206,249*	99,124
12 7 1965	*204*	98
13 7 1957	*67,80*	48,53
14 7 1956, note of BOSCH	*84*	53

Oberste Landesgerichte

BayObLG 31 7 1970	*64*	47
BayObLG 19 11 1954	*68*	48
KG 15 10 1962	*204*	98

Oberlandesgerichte

Celle 7 8 1970	*80*	52
Düsseldorf 9 8 1967	*203,248*	98,124
Frankfurt 17 11 1966	*34*	34
Hamburg 26 6 1972	*208*	100
Hamm 20 8 1970	*202*	98
Hamm 21 10 1966	*83*	53
Karlsruhe 3 7 1958	*83*	53

Landgerichte

Frankfurt 11 6 1963	*205*	99

Bundesverwaltungsgericht

27 11 1959, note of BOSCH	*83*	53

Oberverwaltungsgerichte

Hamburg 11 11 1955	*70,75*	49,51
Hessen 17 8 1956	*69,72*	49,50

ABBREVIATIONS

AC	Appeal Cases (England)
AmJur	American Jurisprudence
Anm	Anmerkung
ArmSSR	Armenian SSR
AV	Ausführungsverordnung (Austria)
AzeSSR	Azerbaijan SSR
BayObLG	Bayerisches Oberstes Landesgericht (Fed.Rep.Germany
BelSSR	Belorussian SSR
BGB-RGRK	Reichsgerichtsrätekommentar zum BGB
BGH	Bundesgerichtshof (Fed.Rep.Germany)
BR	Bundesrat (Fed.Rep.Germany)
BT	Bundestag (" " ")
BVerfG	Bundesverfassungsgericht (Fed.Rep.Germany)
BVerwG	Bundesverwaltungsgerich (Fed.Rep.Germany)
C	Codex Iustiniani
CCiv	Cámara Civil (Argentina)
C Cost	Corte Costituzionale (Italy)
Ch (Ch D)	Chancery (England)
CIEC	Commission International de l'Etat Civil
CJS	Corpus Juris Secundum (USA)
CN	Cámara Nacional (Argentina)
D	Digesta Iustiniani Augusti
DJT	Deutscher Juristentag
EheVO	Verordnung über Eheschliessung und Aufhebung (DDR)
EstSSR	Estonian SSR
EV	Einführungsverordnung
GeoSSR	Georgian SSR
hrsg	herausgegeben
I	Institutiones Iustiniani
KazSSR	Kazakh SSR
KG	Kammergericht (Fed.Rep.Germany)
KirSSR	Kirghiz SSR
LettSSR	Lettland SSR
LG	Landgericht (Fed.Rep.Germany)
LitSSR	Lithuanian SSR
MolSSR	Moldavian SSR
NamÄndG	Namensänderungsgesetz
OAG	Opinion Attorney General (USA)
OVG	Oberverwaltungsgericht (Fed.Rep.Germany)
P (PD, P&D)	Probate (England)
PstG	Personenstandsgesetz (Fed.Rep.Germany)
Rdn	Randnummer
SBZ	Sowjetische Besatzungszone
TadSSR	Tadzhik SSR
TurSSR	Turkmen SSR
UkrSSR	Ukrainian SSR

UzbSSR	Uzbek SSR
VG	Verwaltungsgericht (Fed.Rep.Germany)
VGH	Verwaltungsgerichtshof (Fed.Rep.Germany)
VO	Verordnung
Vorbem	Vorbemerkung

ABGB	Allgemeines Bürgerliches Gesetzbuch(Austria)
Ala Code	Alabama Code
Alaska Stats	Alaska Statutes
ALR	Allgemeines Landrecht(Preussen, 1794)
ARS	Arizona Revised Statutes Annotated
Ark Stat	Arkansas Statutes Annotated
BGB	Bürgerliches Gesetzbuch(Fed.Rep.of Germany)
Burn's Ann St	Indiana Annotated Statutes
BWB	Burgerlijk Wetboek (Netherlands)
Cal Civ Code	California Civil Code
CZ Code	Canal Zone Code
Conn Publ Act	Connecticut Public Act
DC Code	D.C. Code Annotated
Del Code	Delaware Code Annotated
EGBGB	Einführungsgesetz zum BGB (Fed.Rep.of Germany)
EheG	Ehegesetz (Kontrollratsgesetz 1946, Fed.Rep.Germ.)
1. EheRG	Erstes Familienrechtsreformgesetz(Fed.Rep.Germany)
FGB	Familiengesetzbuch der DDR (20.12.1965 - East Germ.)
FSA	Florida Statutes Annotated
Ga Code	Georgia Code Annotated
GG	Grundgesetz für die BRD (23.5.1949 - Fed.Rep.Germ.)
GleichberG	Gleichberechtigungsgesetz (18.6.1957 - Fed.Rep.Germ.
Hawaii Rev St	Hawaii Revised Statutes
ICA	Iowa Code Annotated
KRS	Kentucky Revised Statutes Annotated
KSA	Kansas General Statutes Annotated
La Code Civ Proc	Louisiana Code of Civil Procedure Annotated
LSA-RS	Louisiana Revised Statutes
Md Ann Code	Maryland Annotated Code
MeRS	Maine Revised Statutes Annotated
MGLA = GL	Massachusetts Annotated Laws
Mich Stats	Michigan Statutes Annotated
MSA	Minnesota Statutes Annotated
NCGS	North Carolina General Statutes
NHRS	New Hampshire Revised Statutes Annotated
NJSA	New Jersey Revised Statutes
NRS	Nevada Revised Statutes
NY Dom Rel Law	New York Domestic Relations Law
Ohio RC	Ohio Revised Code Annotated
Okla St	Oklahoma Statutes Annotated
ORS	Oregon Revised Statutes
PS	Pennsylvania Statutes Annotated
RCW	Washington Revised Code
RI Gen Laws	Rhode Island General Laws
RSMo	Missouri Revised Statutes

SC Code	South Carolina Code Annotated
SDCL	South Dakota Code
SHA	Illinois Revised Statutes
Va Code	Virginia Code
Vernon's Ann Civ St	Texas Revised Civil Statutes
VS	Vermont Statutes
WSA	Wiscounsin Statutes Annotated
WVa. Code	West Virginia Code
ZGB	Zivilgesetzbuch (Switzerland)

PERIODICALS

A	Atlantic Reporter (USA)
AcP	Archiv für die civilistische Praxis
ALR	American Law Reports, Annotated
All ER	The All England Law Reports, Annotated
ArchBürgR	Archiv für bürgerliches Recht
BayObLGZ	Sammlung von Entscheidungen des BayObLG, Zivilsachen
BGBl	Bundesgesetzblatt
BGHZ	Sammlung von Entscheidungen des BGH, Zivilsachen
BO	Boletin Oficial (Argentina), Buletinul Oficial (Rumania)
BT Drucks	Drucksache des Deutschen Bundestages
BVerwGE	Sammlung von Entscheidungen des BVerwG
Cal Rptr	California Reporter
Clunet	Journal du droit international privé et de la jurisprudence comparée; Journal du droit international
Col L Rev	Columbia Law Review
D	Recueil Dalloz Sirey; Recueil Dalloz
DA	Recueil analytique Dalloz
DC	Recueil critique Dalloz
D...Chron	Dalloz, Recueil hebdomadaire, section Chronique
DH	Recueil hebdomadaire Dalloz
DP	Recueil périodique et critique Dalloz
D...Somm	Recueil Dalloz, Sommaires
Dalloz Nouv Rép	Nouveau répertoire de droit Dalloz
Dalloz Rép civ	Répertoire de droit civil Dalloz
Dalloz Réep prat	Répertoire pratique Dalloz
Dir e Giur	Diritto e Giurisprudenza (Italy)
DÖV	Die Öffentliche Verwaltung (Fed.Rep.Germany)
DRiZ	Deutsche Richterzeitung
DV	Durzaven Vestnik (Bulgaria, Gazette of Laws)
DzU	Dzienik Ustaw (Poland, Gazette of Laws)
FamRZ	Ehe und Familie; Zeitschrift für das gesamte Familienrecht (Fed.Rep.Germany)
F It	Il Foro Italiano
F Pad	Il Foro Padano (Italy)
F Supp	Federal Supplement (USA)
G It	Giurisprudenza Italiana
Gaz Zyr	Gazeta Zyrtare (Albania, Gazette of Laws)
Gaz Pal	La Gazzette du Palais (France)
Giust Civ	La Giustizia Civile (Italy)
Hag Con	Haggard Consistory 1 & 2
J A	Revista de Jurisprudencia Argentina
J-Cl dr int	Juris-classeur de droit international (France)

J-Cl P	Juris-classeur périodique
J-Cl Rép prat	Juris-classeur - Répertoire pratique de droit privé
JO	Journal Officiel
JuS	Juristische Schulung (Fed.Rep.Germany)
JZ	Juristenzeitung (Fed.Rep.Germany)
L L	Revista Juridica Argentina *La Ley*
L M	Lindenmaier-Möhring Nachschlagwerk des BGH
MDR	Monatsschrift für Deutsches Recht
Mon Trib	Monitore dei Tribunali (Italy)
NE	Northeastern Reporter (USA)
NJ	Neue Justiz (DDR)
NJB	Nederlands Juristenblad
NJW	Neue Juristische Wochenschrift (Fed.Rep.Germany)
Nouv rev dr i p	Nouvelle revue de droit international privé(France)
NW	Northwestern Reporter (USA)
NYS	New York Supplement
P	Pacific Reporter (USA)
RabelsZ	Zeitschrift für ausländisches und internationales Privatrecht, begr.von Rabel
Rép Dalloz dr int	Répertoire Dalloz de droit international
Rép Lég	Répertoire de Législation de Doctrine et de Jurisprudence, Dalloz
Rép prat dr belge	Répertoire pratique du droit belge
Rev crit	Revue critique de droit international privé
Rev Trim	Revue trimestrielle de droit civil
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
Riv dir civ	Rivista di diritto civile
Riv dir matr	Rivista di diritto matrimoniale
RDMSP	Rivista del diritto matrimoniale e dello stato delle persone
Riv Trim	Rivista trimestrale di diritto e procedura civile
S	Recueil Sirey
SALJ	South African Law Journal
SbZ	Sbirka Zakonu (Gazette of Laws, Czechoslovakia)
SCLR	Southern California Law Review
Sem Jur	Semaine Juridique
Sl l	Sluzbeni list (Gazette of Laws, Yugoslavia)
So	Southern Reporter (USA)
StAZ	Zeitschrift für Standesamtswesen
St & R	Staat und Recht
ZSF	Zeitschrift für Sozialforschung

Speaking generally, the law of this country allows any person to assume and use any name, provided its use is not calculated to deceive and to inflict pecuniary loss.

Lord Lindley, *Cowley v. Cowley*, [1901] AC 450 at 460.

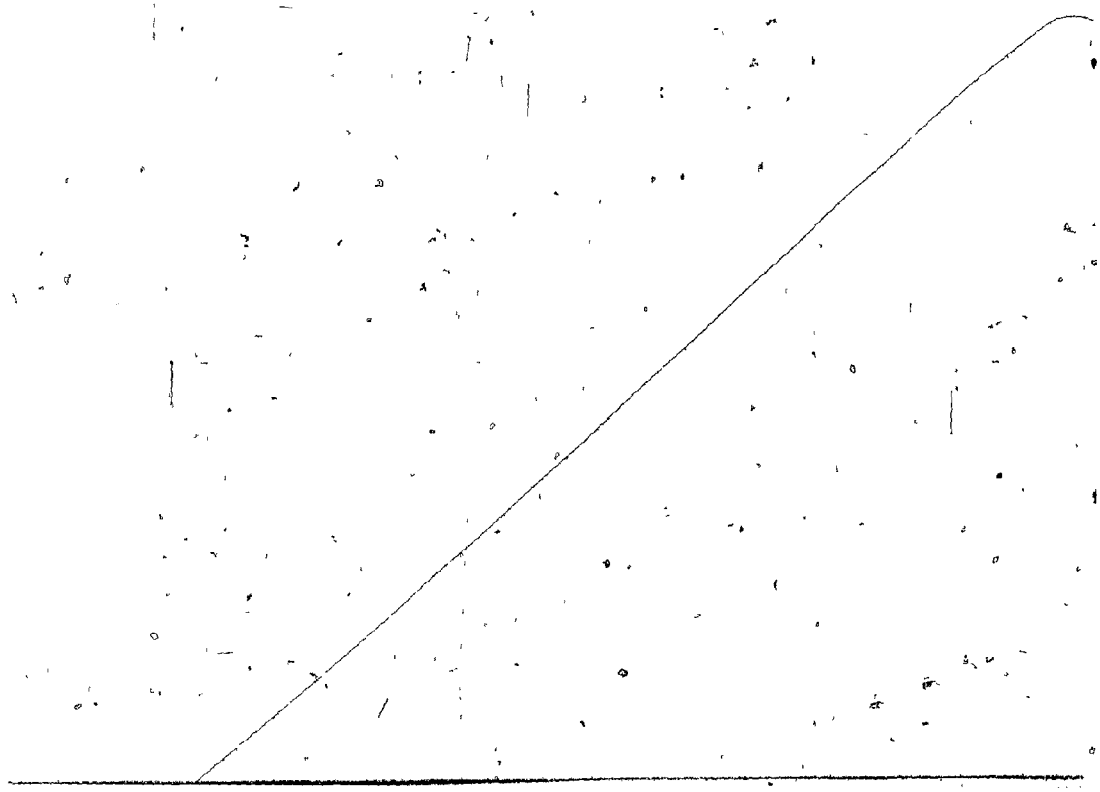
The mere assumption of a name, which is the patronymic of a family, by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress.

Lord Chelmsford, *Du Boulay v. Du Boulay*, (1869) L R 2 P.C. 430

In America there will always be men ready to exploit religious and ancestral differences but such men will constantly lose stature as time passes and will eventually disappear through their own smallness.

McGeehan J, *Appl of Ferris et al*, 34 NYS 2d 909 at 910 (1942)

INTRODUCTION



INTRODUCTION

A. THE CONCEPTION OF WORK

The essential and predominant function of the *name* is to establish a relation between a word and a person, who is represented by that word.

As a word, the name has no particular or special meaning in respect of all other words. It receives however that meaning when it identifies and individualizes a particular person in an immediate and synthetic manner, thus distinguishing that person from the others, with whom he or she actually or virtually enters into some kind of relation. At that moment, the morphological entity *word* loses its intrinsic original meaning and its elementary significance (if it happens to have one), and transforms itself into a more complex entity. It evolves into a sign or code capable of recalling to memory the physiognomy, the social relations, the fine and bad qualities, the past and history of a human being, frequently known to the others just by means of that very word. It becomes a sort of a key-code which visualizes and evokes with immediacy the identity-personality of a human being in all his entirety.

This function of mediation might be obtained also by recourse to other means (symbols, figures or signs). However, it seems comprehensible that amongst all peoples it has been realized with an element of the language, the *word*, because in the same way as a word, the name is used primarily to make possible and facilitate communication between mankind.

As with the names of things, the names of men were frequently originated with an intrinsic meaning (Whitehead, Greenfield, Braunstein, Goodman, etc.). There is of course no use to try to discover the social, geographical and environmental relations, the references to arts and professions, the physical and psychological characteristics, the events and circumstances, which have led to the formation and attribution of those names, since the original meaning has no relevance anymore. The (personal) *name* has become a neutral etiquette, something like a number, with no meaning at all as a *word*, unless it refers to a *person*, who is the only unit of mesure of this particular name.

One might think that a person is free to choose *ad libitum* the etiquette which he or she likes, as an identification-sign of his person; that this etiquette may be changed at will; and that nobody should be subject to outside interference in the administration of this very private and absolute

personal element of designation of his individuality.

Indeed a person who changes his name, a wife who takes or does not take the name of her husband, a son who takes his mother's instead of the father's name: do they not remain as far as their person is concerned identical to themselves?

The identity of a person does not change if his family relations or the features of his face become modified, if his physio-somatic characteristics, his socio-economic condition, his education and position are constantly changing in a slow or sudden evolution.

We are experiencing day by day innumerable times the fact that things do not change, only because we change their name. Why should it be different with names of persons?

The reality of the names of persons is actually quite different.

If we look to Statutes and Codes we will discover that they are full of arbitrary rules limitating the liberty of private people regarding their names:

- women at marriage may be compelled to lose their maiden name. As if in the very day of the celebration of marriage their whole personality and identity had changed;

- divorced wives who had been compelled to assume at marriage their husband's name may be obliged to take back their maiden or previous name after divorce;
- illegitimate children may find themselves confronted with a change of their name by authority of court, just because somebody shows up who discovers that the "recognition" by the natural father was null and void by reason of some prohibition of the law ("adulterous" children), even if they enjoyed the use of that name for many years;
- "twilight" children may be barred from assuming their parent's name even after the parents have married, as it could still be the case, as we have seen, until recently in Italy after introduction of the *Divorce Act*.

The law imposes in a very irrational way attribution and change of names. The person "receives" a new name without of course any actual modification of his personal identity. Thus, in those circumstances the person is left for some time without any etiquette of identification since the new name does not yet individualize the person, being just a "word" incapable of realizing the relation between the person to whom it is given and the society in which that person lives. During this time of transition, and until it reaches some significance for the personality of the "bearer", it is a "non-name", a sign without the meaning of a name.

How are those deplorable interferences justified?

i. Public administration, it is said, rules the family relations of the "subjects" in a State by using the name of persons as the enunciation of the *status familiae*.

ii. Moreover, the public administration needs to use the name of persons for filing purposes.

The explanations are not convincing.

There is no rational explanation for obliging a wife to take the name of her husband in order to demonstrate her new status of married woman or to "strenghten" the family unity; without giving any reason why this publicity of the new marital status is necessary just only for the wife. Why should the same parameter not apply to the man as well?

Is family unity really strenghtened by way of the unity of name of the spouses? Could it not be equally achieved if each of the spouses retains his or her name in the new created family?

What is the reason why only the man's name and not as well the woman's name can be the "family" name, why the rule that all "legitimate" children have to assume exclusively their father's name?

The explanations are contradictory.

Family status can never be correctly enunciated by way of names, since the exceptions are probably more numerous than the rule: let us think about legitimate children who do not bear the name of their mother, illegitimate children who do not bear the name of their real father although they may happen to live with him in his family, divorced wives who continue bearing their husband's name although there is no more *consortium vitae* etc.

Registration of the population cannot be efficiently achieved by using the name of the persons by reason of the inconvenience of too numerous homonyms.

Since a very long time, military, fiscal and electoral files register people with code numbers. Somewhere also vital statistics are organized by way of codes. Names are not needed any more. They are just dangerous means of confusion.

The name came into use for a typical personal and individual function. Unfortunately it has been "usurped" - this happened in the last few centuries - by the public administration, which has added to the typical private function of the name a second "public" function. And the name became more and more an *institution de police*.

This artificial second function is in open contra-

diction with the first original one.

The person should be free to acquire notoriety and to be individualized with any etiquette-name, free to change it at will as long as no purposes of fraud or damage to others are the reasons of the change (*mutare itaque nomen...sine aliqua fraude licito iure*, C. 9.25.1).

The attitude of the public administration is against this freedom. It imposes the inalienability and the immutability of the name, because any change of the name is deemed to make identification of persons extremely difficult.

It is nevertheless clear enough that this proclaimed immutability is an absolutely unrealistic hypothesis, as it is apparent if we think about the frequent changes of names which are prescribed by the very law.

The rules of public law easily prevailed of course over the private interests.

But even if there was in past centuries a justification for the "invasion" of the public administration into the private sphere of personal names, certainly such justification does not exist any more. Nobody would even dream today to use the name John Smith for the official file of the taxpayer Mr. Smith: computers do not like names.

Thus the "inspiration" of this research becomes manifest: A person's name is his private matter; everybody may keep his name as long as he wishes and, if he wants to change it, he should be able to do so; all provisions purporting to change one's name by automatic operation of law should be abolished; children should be able to take whatever name their parents wish to give them.

In more detail:

- Every person should have the right to identify himself in social relations with an etiquette, which can be a word, a figure or some other sign of his free choice.
- The name of a person should never become the exclusive property of the user.
- Heraldic privileges of every kind regarding the use of famous or particularly seldom names should be abolished.
- Every person who wants to change his etiquette-name should be allowed to do so freely unless he intends to do so for a fraudulent purpose.
- The public administration should organize its files by way of code-numbers or equivalent signs without interfering in people's freedom of choice and use of names.
- Husband and wife should have equal rights.
  Everyone should therefore be entitled to assume, when becoming married or later, the name of the other, or to choose and use a name composed of the names of both

of them, or to choose any other name. There is no necessity that spouses bear the same name.

- After divorce, separation, annulment or dissolution of a marriage, everyone of the former spouses should be entitled to continue using the name which he bore during marriage, not withstanding any consideration of the fault in the matrimonial breakdown. The other spouse or the court should never be allowed to interfere in matters relating to the name of the previous spouses.
- Children should bear the name which is attributed to them by their parents, but it should not be necessary that this name be the same as the name of the parents. Other children of same parents might have different names. Rules may be developed for the case of dispute between the parents regarding the name to be given to their children.
- A man should not be entitled to prevent a woman who is not his wife to attribute to her child any name she wishes. And any child, when reaching the appropriate age, should be entitled to decide by himself what shall be his name for the future.
- No protection of names *qua* name should be granted: the person, not the name, should be protected.
- There could be no distinction in law between family and given name. Any word or other suitable symbol may be

used either as family name or as given name , and every-body may create *ex-novo* his own name.

This is our *hypothèse de travail*, or using ZWEIGERT's words, *l'inspiration, sans laquelle rien dans le monde de l'esprit ne peut progresser.*[1]

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1. ZWEIGERT, *Méthodologie du droit comparé*, in Mélanges offerts à Jacques Maury, I, 1960 579.

B. PLAN OF RESEARCH

Names are rather a matter of social habit than of law. Nevertheless, if we restrict ourselves to a research of the legal aspects of the married woman's name, we find that in latin jurisdictions the wife keeps her own name; that in German jurisdictions she assumes the name of her husband's family; and that in common law jurisdictions she assumes as a matter of custom the name of her husband; but if she does not like it, she is free to go her own way since *the law of this country allows any person to assume and use any name*,[2] (emph. add.) and married women form no exception.

These principles were not always well understood by writers and judicial interpreters. Therefore contradictory cases and opinions and Statutes inconsistent with the general principles may be found. But the features are still clearly traceable

As we said at the beginning of this paragraph, names are much more than just a matter of law. Actually our research will show that a comparison of the laws of personal names is necessarily a comparison of the cultures of the peoples whose laws we are analyzing. The name is one, not the most important

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1. Lord LINDLEY in *Cowley v. Cawley*, [1901] AC 450.

of course, but certainly a very expressive indication of those cultures.

We will discover that in the latin jurisdictions the married woman's right to keep, in law, her maiden name was affirmed when the French Civil Code, the law of the *Third State*, was made; that in the German jurisdictions the old concept of *Sippe*, the belonging to a family in which the husband exercises the ruling powers, survives up to our days; that in common law jurisdictions the declared freedom of names is one minor aspect of the spirit of this system of law, which is indeed intended to be a spirit of fundamental rights and freedoms.

Thus the reader should keep in mind that the laws on the names like so many institutions of family law and personal rights reflect where society stands.

Necessarily when a product of the process of civilization is under analysis, history cannot be ignored. Therefore our research will start with a Chapter on History, followed by a study in detail of the married woman's name in the three fundamental systems of law: the latin (France and Italy), the German (Fed.Rep. of Germany) and the common law (England and U.S.A.)

The Scandinavian system of law represents a point of transition, the socialist system a point of arrival in matters

of names. Therefore it was felt necessary to include those two systems in our research.

Private International Law is discussed separately at the end of the chapter dedicated to the substantial rules of law.

The conclusion will give the author's opinion on the present situation, particularly with respect to the nature of the right on a name and the principle of equality of rights.

I - HISTORY

CHAPTER I

H I S T O R Y

While primitive people and people of the antiquity, including Hebrews and Greeks, had only one name for individualization of the person, the Romans, in historic times showed a complex structure as for the name of the free man, since the name, besides means of identification was also a function of the connection between the person of the bearer and the familial and political unit to which he belonged and it followed thus the strict regulations which ruled the Roman family.

A. THE NAME IN ROMAN LAW

The family of the archaic period was not constituted on blood relationship but on the concept of subjection to a common *paterfamilias*. The family was a little sovereign community, constituted for the fulfillment of functions which went beyond the purposes of the domestic society. It was a political organism similar to the *civitas*. Every home was a little state: *maiores nostri...domum pusillam rem publicam esse indicaverunt.*[3]

The individuality of the person had no relevance. The predominant element was the *gens*. This family concept is reflected in the personal denomination, the *nomen gentilium*, the name of the *gens*.

All persons *sub unius potestate aut natura aut iure subiectae* bear the *nomen gentilium* of the *paterfamilias* and they cannot assume any other name as long as they do not change family.

Beside this essential element of denomination the Romans used also a *praenomen*, *quod differentiae causa ponitur*, a *cognomen*, *ad ipsorum inter se gentilium discrimen*, and sometimes an *agnomen*, *quod ab eventu aliquo impositum est*.[4]

1. The name in the Roman family

Children born in *iustum matrimanium*, i.e. contracted between *cives romani* in the form of the *ius civile*, were subject to the *patria potestas* and followed the condition and assumed the name of their father.

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3. SENECAS, ep. 5.47.17

4. IOCACHIMUS MINSINGERUS, *Scolia in Inst. lib. II*, De Legatis, tit. XX, p. 267, par. *Si quidem in nomine*, Basileae 1558.

On the contrary, children born from a marriage contracted according to the *ius gentium*, i.e. *liberi naturales*, children born from *contubernium* between free persons and slaves, and *liberi spurii* followed the condition and assumed the name of the mother.

Between illegitimate children and their natural father there was no parental relationship in law as it is stated in D. 1.5.19: *cum legitimae nuptiae factae sint, patrem liberi sequuntur; vulgo quaesitus matrem sequitur.*[5]

A person who entered a new family as *filius familias* by *adoptio* or *adrogatio*, i.e. as a single person subject to the *patria potestas* of another or as a person who was already *pater familias* of another family, in which case *non solum ipse potestati adrogatoris subicitur, sed etiam liberi eius in eiusdem fiunt potestate tamquam nepotes*[6], acquired the position, the rights and the name as a child of the new family.

Women entered a new family with the *conventio in manum*, *filiae loco* if they became the wives of the *paterfamilias*, *neportis loco* if they became the wives of a child of the *paterfamilias*.

In the classical period, the *conventio* took place

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5. D. 1.5.24. D. 1.10.12.

6. Gai 1.107.

with the *coemptio matrimonii causa.* The wife could enter the family of the husband also through *usu*, if the husband exercised for one whole continuous year the *manus* over her. The effects of the *conventio in manum* were the same as the effects of the *adoptio:* the woman abandoned her family of origin and was completely aggregated to the new family, and she took the *nomen gentilium* of her husband.[7]

These strict rules survived up to the time of the *imperium*. The change which followed in the concept of family and in the relation amongst its members had important repercussions on the name.

The *cognomen* became the predominant element of designation. Children were allowed to assume the mother's together with the father's name or even names of free choice.[8]

Individual *cognomina* were created which had no connection whatsoever with the family.[9] The *nomen gentilium* is still found in the third and fourth century for distinguishing legitimate filiation (*nomen* of the father) from illegiti-

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7. *Ubi eris Gaius, ego ero gaia.* PERREAU, *Le droit au nom en matière civile*, Paris 1910 226-227.

8. HEINECCIUS cited in KOPP, *Namensrecht der Unehelichen vor dem Inkrafttreten des BGB in Deutschland*, Frankfurt a.M. 1959, at p. 87 writes that children born from a concubinage frequently took the name of the father not as a *nomen gentilium* but as a *cognomen* which was added to the *nomen* of the mother.

mate (*nomen* of the mother).

Eventually *quotiescumque unum invenitur cognomen est; nemo enim potest esse sine vocabulo,*[10] and POMPEUS explains that at his time only the *cognomen* is used, the *nomen gentilium* being completely obsolete.[11]

2. Liberty to change a name

The fundamental text is the *L. un. Cod. de mutatione nominis,*[12]

> *Sicut in initio nominis, cognominis, praenominis, recognoscendi singulos impositio privatim libera est, ita horum mutatio innocentibus periculosa non est.*
> *Mutare itaque nomen sive praenomen sine aliqua fraude licito iure, si liber est, secundum ea, quae saepe statuta sunt, minime prohiberis, nulli ex hoc praeiudicio futuro.* 13

This and the other reported sources date all from the time of the *imperium.*[14] That means that there was a long pe-

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9. COSTA, *Storia del diritto romano privato,* 2d ed., Torino 1926, 170 et seq, n.13 and 14.

10. SERVIUS cited in COSTA, *op.cit.*, 172.

11. POMPEUS cited in COSTA, *op.cit.*, 172.

12. C. 9.25.1.

13. SCIALOJA, *Studi giuridici,* vol. III, part I, Anonima Romana Editoriale 1932, 49 et seq, at 52 remainds us that *innocens nomen suum mutare potest.*
See also D. 48.10.13; D. 30.1.4.; D. 36.1.63.10.; I.2.20.29; seq.

riod in which a radical change took place in the system of the Roman names.[15]

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13. continued.
C. 7.14.10.; D. 39.5.19.6.; D. 31.1.76.5.
See also SCIALOJA, *op.cit.*, 61, who points out that the name with or without desinence or derivation to the *nomen* of the father is found in the period of the Republic.
D. 50.1.38.; D 7.25.1.

14. the C.9.25.1. is of 293 A.D.

15. CANNEGIETER, *De mutata Romanorum nominum sub principibus ratione*, Leida 1774: *forma autem et ratio nominum quae Caesarum aetate fuit longe diversa est illiquae sub consulibus et republica salva erat*, from SCIALOJA, *op.cit.*, 58 et seq.

B. INTERMEDIATE LAWS

With the barbaric invasions in Italy the Roman institutions were forgotten. The designation of persons starts again from primitive simplicity. But gradually, in the period between the 11th and the 13th centuries, the necessity of a better identification of persons led again to the use of stable family names. Those names were created from the denomination of the feudal courts, from the land belonging to the feudal families, from the location, the street, the hamlet where the families of the peasants dwelt, or much more generally from the genitive of the father's name (the patronymic)[16], from the nickname, from crafts and professions, from the land of origin, from moral or physical qualities or defects, from good or brave actions done, from habits of life. Lastly they were created with words of pure invention.

1. Early German Laws

In the antique German laws the name is considered as an element which enunciates the belonging to the *Sippe*[17].

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16. e.g. Petrus Jacobi, Raffaello Sanzio, Betto Bardi; Lopez, Diaz, Pérez; Sanches, Alvares; Richardson, Nelson;

seq.

The German customary law is the product of intensive reciprocal influences but also of a long fight between the frequently antithetical concepts of the original German Laws (*Libri Feudorum*) and Roman and Canonic Law.

Also in matters of names the Justinian Roman law was quite different from the old German law.

Theoretically in German law it was irrelevant whether a child was born in or out of lawful wedlock[18]. The governing element was the equality of social rank (*Ebenbürtigkeit*). Children born from persons of different rank followed the condition of the lower rank (*ärgere Hand*)[19]. The governing concept was the *munt*, the *potestas* which the father exercized over

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16. continued.
Björnson, Magnusson, Diedriksdotter; Mac Carthy, McAllister; O'Brien, O'Hare; Clarsen, Amundsen; Alexandrovitch, Petrowna; Filippescu; Papandreu, Papadopoulos; Ali ben Mohammed, Hassan ibn Saud; Bensabat, Benjamin.

17. At a time when no family names existed, these names were created from the father's and the mother's name, e.g. Gerold from Gerhard and Wolfhilde.

18. Charles Martel and Charlemagne were illegitimate children; nevertheless they belonged to their father's family.

19. The distinction between legitimate and illegitimate children was introduced under the influence of the Church.

the children through the *munt* over the mother. All children of his wife, even if they were not his children, were under his *munt*, whereas the children born by a wife who was not under the husband's *munt*, even if they were his children, did not come under his *potestas*.

The wife so subject to the husband's *munt* (and her children) had to bear the name of the husband.

2. The new developing customary law

Trade, increase of population and growing of new larger cities called for more ordinate means of identification.

The Glossators rediscovered and taught the Roman principles of freedom to change a name. But Absolutism did not like of course any private freedom; thus inevitably the name of persons became an interesting object of central-power law-making.

In *France* Henry II prohibited the change of names and arms without patent letters (*Edict of Amboise* 1555, confirmed by the *Code Michéau* in 1629).

The *revolutionaires'* reaction was inevitable. But it was a desoriented reaction. They actually did not know what

the relation was between the name and their motto of"equality". So they started with the rule that *aucun citoyen ne pourrait prendre que le vrai nom de sa famille* (1790); then they discovered that they had to proclaim freedom of change of names, and so they did (*Decret 23/24 Brumaire, an II*) leaving as sole formality the duty to declare the change of name at the City Hall. Eventually (*Loi 6 Fructidor an II et 11 Germinal an XI*) they overruled themselves again and the style of the Absolutisme was reaffirmed by the Bourgeois. BAUDRY-LACANTINERIE[20] wrote:

> *Le nom est une obligation pour les personnes, autant et même plus qu'un droit. Sa fixité est un élément de sécurité générale. Elle est l'un des principes sociaux fondamentaux. En dehors d'elle, les transactions, le crédit, la police, l'administration de la justice, l'ordre public perdent leur base nécessaire, et l'on a pu dire, avec raison, que le nom était, en réalité une institution de police civile.*21

And MERLIN[22] could have said the words which were indeed questionable, in law, also in his time:

> *Les filles qui se marient quittent le nom de leur père pour prendre celui de leur mari.*

The principle of freedom of names could never affirm itself in *Germany*. From the 15th century, we can trace symptoms of increasing weakness of this Roman institute [23]; and towards

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20. BAUDRY-LACANTINERIE/HOUQUES-FOURCADE, *Traité théorique et pratique de droit civil*, I, Paris 1907, 280.

21. see also, for instance, PLINER, *La ley del nombre*, J.A.1969 doctr. 484:*El régimen legal del nombre está fuera de toda posible modificación voluntaria del sujeto, y su tutela misma integra un sistema que excluye absolutamente la autonomia de la voluntad.*

the middle of the 19th century it had completely disappeared[24].

The general statutes of Prussia e.g. (ALR II, 20.1440 b) stated that everyone who used a name which was not his should be punished; and from an ordinance of 1816 we can learn that since experience has taught that the use of the name of someone else or of invented names causes damage to the security in the social relations and to public order it was edicted that nobody should use a name which did not belong to him.

In *common law jurisdictions* the married woman was considered to be part of her husband's household, mother of his children, sharer in his name[25].

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22. MERLIN, *Répertoire universel et raisonné de jurisprudence*, VIII, Paris 1813.

23. HERMANN, *Ueber das Recht der Namensführung und der Namens-Änderung*, AcP 45 (1862) 153, id 315 (at 325).

24. GIERKE, *Deutsches Privatrecht*, I, Leipzig 1895, par.83; 81 and 82; p.719.

25. *Blanc v. Blanc*, (Supr.Ct.) 47 NYS 694, 696 (1897).

C. THE MESSAGE OF HISTORY

History, in matters of names is a tale of vanity of mankind.

Twenty years after the proud french declaration of freedom and equality M. le Comte MERLIN wrote:

> *Il y a dans les familles des biens de qualité fort différente: les uns, comme les terres et d'autres de pareille nature, tombent dans le commerce...les autres, au contraire, comme le Nom et les armes, le rang, la noblesse, ne tombent point dans le commerce; ils sont inaliénables et incessibles: ce n'est point par le titre d'héritier, ni par celui de donataire qu'on les possède; il faut, pour y avoir droit, descendre par les mâles de ceux qui en ont joui; c'est le seul bien indépendant des caprices et des révolutions de la fortune; ce sont ces restes précieux de la vertu et de la gloire des pères, qui excitent dans leurs descendans, une noble et généreuse ardeur de les imiter: c'est ce qui a fait dire à un des plus anciens et des plus célèbres interprètes du droit romain, que, dans le Nom et dans les armes des nobles, réside principalement la mémoire d'une maison et la splendeur d'une race.*26

Actually in France, up to a few years ago, courts and writers maintained that *le nom patronymique est la propriété de la famille qui le porte.*[27]

PLANIOL told them that this was wrong and that the names are in prevalence just *une institution de police.*

Eventually his theory was changed again in later

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26. MERLIN, *op.cit.*, 589.

27. see cases in Dalloz Rép prat 1920, v.Nom-Prénom N.1; Rép Lég 1855, 510.

editions[28]:

> *De ce qu'il n'existe pas de propriété du nom patronymique, il ne faut pas conclure qu'une personne n'ait pas de droits sur le nom que porte sa famille. Si la société marque d'un matricule toute famille et tout individu, c'est d'abord dans l'intérêt social, mais c'est également dans l'intérêt de ceux auxquels elle fournit ainsi le signe fondamental de leur identité. Ce droit est opposable à tous, et c'est par cette opposabilité absolue qu'il ressemble à un droit de propriété. Le matricule apposé par la société sur un individu s'attache à lui, comme un des attributs de sa personnalité, et l'individu acquiert, à la fois, le droit d'user du nom et le droit de le défendre.*

KOHLER[29] and MAZEAUD[30] thought that the name was a right of the personality.

But others said that the name is a sign of the *status familiae*[31].

The theory that the name is *un droit de propriété* has been apparently abandoned. But the effects of this theory (*immutabilité, inalienabilité, imprescriptibilité*) are still alive.

Actually primitive Roman and German concepts of family required the name to be a sign of the belonging to a fam-

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28. PLANIOL/RIPERT/SAVATIER, *Traité pratique de droit civil français*, I, Paris 1952, 114.

29. KOHLER, *Das Individualrecht als Namensrecht*, ArchBürgR 5, 77.

30. MAZEAUD, *Leçon de droit civil*, I, Paris 1967, 565.

31. COLIN/CAPITANT/JULLIOT DE LA MORANDIERE, *Cours Elémentaire de droit civil français*, I, Paris 1947, 590.

ily; and the doctrine of absolute power with its inherent contempt for private life and liberty, led to the development of the concept that the name is *une institution de police*.

After thousands of years society has evolved:

- in latin systems, from a point of advanced freedom, obtained not in the name of justice but simple because of disinterest for the names, to humble deference to the *institution de police*
- in German systems, from the iron rules of *munt* and *potestas* to the iron rules of *munt* and *potestas*
- in common law systems, from disinterest of the law for the names to attempts to affirm some interests in this field.

All jurisdictions show that even where rights and freedoms of names were recognized, those privileges were not accessible to women.

Society (of men of course) was always and everywhere in agreement that a woman must have less rights than a man, "since she is primordially inferior"[32].

We will see in the next chapter that in recent times attempts were made to recognize full equality of rights for

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32. BORSARI, *Commentario*, I, Torino 1871, 484.

the woman.

One thing however are man-made Statutes, another thing are the rules of behavior of society. Our society seems to be not yet prepared to accept the woman as a first class citizen: this is true at least in matters of names.

II - THE MARRIED WOMAN'S NAME

CHAPTER II

THE MARRIED WOMAN'S NAME

An attempt of classification of the rules governing a married woman's name shows the following possible solutions:

The wife keeps her own name. There are two main sub-solutions:

- according to the first, the wife keeps her maiden name for administrative purposes whereas she is normally designated with the name of her husband in social relations (France and countries whose law developed under French influence),

- according to the second, the wife keeps her own name of origin but she adds to it the name of her husband, with or without the prefix *de* (Argentina and Spanish language countries).

The wife adopts her husband's name. This was in past times the general rule. But now under the influence of the constitutional principles of equality almost everywhere more liberal solutions have been introduced. Thus, beside the basic rule of adopting the husband's name, the wife may use her own name adding it to her husband's name (Switzerland,

Greece, Finland); or she *may be allowed* to use her own name alone (in the Scandinavian countries); or she may use either her own name alone or a double name (Poland, Hungary, Israel). In England, the United States and in most common law countries a wife adopts by custom her husband's name, but generally speaking nothing prevents her from changing this name with or without consent or adhesion of her husband, by statute or informally in common law.

The spouses may choose the name which they want to bear during marriage. This approach is found in most socialist countries. The different solutions are that the spouses may keep their own name of origin, or they may use the name of one of them as a common matrimonial name, or they may create a double name from the name of both of them (USSR, Albania, Bulgaria, Czechoslovakia, Yugoslavia, Rumania).

In the Democratic Rep. of Germany spouses are required to use the name of either one of them as common matrimonial name.

Recently the Federal Rep. of Germany and Austria have changed their laws: the new rules are somehow similar to those of the Democratic Rep. of Germany.

A. THE WIFE KEEPS HER OWN NAME

In France the silence of the law on the name of married women has led necessarily the courts to draw the conclusion that a married woman is under no legal obligation to adopt her husbands' name. It is submitted however that the French attitude is not the result of a correct understanding of the nature of the right on a name (see e.g. Art.299 al.2, Art.311 al.1 Code Civil, old formulation).

In Italy there was a provision(slightly changed in 1975) purporting that a wife "adopts" her husband's name. The Cassation however said that "adopts" means that she keeps her own name.

In Argentina the wife has two names: her own and the husband's one.

1. The French Solution[33]

As we have seen,according to the older theory, marriage meant for the wife a scission of the bonds with her own family of origin and integration into the family of her hus-

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33. Provisions similar to France are found in:
BELGIUM: see DE PAGE, *Traité élémentaire de Droit Civil Belge*, t.I, Bruxelles 1962 N.295; KLUYSKENS, *Beginselen van Burgerlijk Recht - Personen-en Familierecht*, Part 7, seq.

band. The personality of the wife was "absorbed" by that of the husband and she acquired his condition and took his name, losing contemporaneously her own family name.

Some writers are still of opinion that a married woman receives as a matter of law the name of her husband. CARBONNIER[34] says:

> *Dans l'usage français, la femme porte le nom de son mari. Bien qu'une opinion répandue ne veuille voir là qu'une convenance mondaine, sans force juridique, il paraît préférable d'admettre que le mariage emporte de plano attribution du nom du mari à la femme, en vertu d'une véritable règle de droit coutumier, aujourd'hui implicitement consacré par les textes qui y apportent des limites...Non pas tant comme marque d'une dépendance de la femme et de la qualité de chef reconnue au mari, que pour affirmer par une sorte de publicité l'unité du ménage et de la famille.*

An argument in favour of this opinion is that since Art. 299 and 311 C.civ. (old form.) provided that the spouses resume

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33. continued.
Antwerpen 1950 42: *De gehuwde vrouw behoudt haar familienaam*; CIEC, *Belgique*, Fiche III; DEKKERS, *Précis de droit civil belge*, t. I, Bruxelles 1954; DUBRU, *L'égalité civile des époux dans le mariage*, 1959 201 (N.277).
LUXEMBOURG: BERGMAN/FERID, *Internationales Ehe-und Kindshaftsrecht*, Verlag für Standesamtswesen, Frankfurt, "Luxemburg" 19; CIEC, *Luxemburg*, Fiche III.
QUEBEC: The Committee for the name of persons of the Civil Code Revision Office correctly proposes: (art.10, Draft) *Consorts retain their respective surnames and given names throughout the marriage*, in *Report on the Name and Physical Identity of Human Persons*, Civil Code Revision Office, Montreal 1975 31.
in several former colonies, e.g.:
DAHOMEY, see HOUNGBEDJI, *Le droit de la Famille au Bas-Dahomey*, Thèse, Paris 1967.
EASTERN CAMEROON, *ALGERIA*, *UPPER VOLTA*, *CHAD*, *CONGO BRAZZAVILLE*, *SENEGAL*.

seq.

their own family name after divorce or separation, these provisions constituted an implied recognition of the custom that married women do as a general rule adopt their husband's name.

> *Une femme mariée porte régulièrement et normalement le nom de son mari. Cet usage séculaire, reposant sur des sentiments et des conceptions élémentaires, tels que la communauté étroite des intérêts moraux et matériels des époux, n'a pendant longtemps été consacré par aucun texte positif. Aujourd'hui il en est différemment, et deux articles du Code civil, remaniés par la loi du 6 février 1893, consacrent cet usage. L'un de ces textes est l'art. 299, al. 2: "Par l'effet du divorce, chacun des époux reprend l'usage de son nom". L'autre est l'art. 311, al. 1: "Le jugement qui prononce la séparation de corps ou un jugement postérieur peut interdire à la femme de porter le nom de son mari ou l'autoriser à ne pas le porter".* 35

This opinion is shared by MAZEAU[36] and several other distinguished writers[37], who say that the married woman has

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33. continued.
The wife acquires the right to use her husband's name, without losing her own in:
HAITI.
A married woman keeps her maiden name (Art. 9(1) BW provides however that she may use the name of her husband or add this name to her own) also in:
THE NETHERLANDS: see van SASSE van ISSELT, *Der Familienname der verheirateten Frau nach niederlandischen Recht*, StAZ 1971 150; PETIT, *Het naamrecht van de gescheiden vrouw*, NJB 1970 1136; ASSER/deRUITER, *Personen-en familierecht*, I, Zwolle 1974, 27 LUIJTEN/van KERKHOFF, *Het Personen-en familierecht in het nieuwe burgerlijk wetboek*, Zwolle 1970 8; POLAK/van ZEBEN, *Personen-en familierecht*, Kluwer, Deventer, art. 9 p.4.

34. CARBONNIER, *Droit civil*, 1. Introduction, les Personnes, 8th ed., Paris p.195.
See also JULLIOT DE LA MORANDIERE, *Droit civil*, I, Paris 1965 437, and JOSSERAND, *Cours de droit civil positif français*, I, Paris 1930 135: *...l'événement qui détermine le plus souvent un changement de nom n'est autre que le mariage: la femme, qui se marie, conserve sans doute son*

seq.

actually a duty to assume and bear the husband's name.

The better opinion however seems to be that the wife acquires only a right to use her husband's name, for the time of her marriage[38], being it in her discretion to exercize this right or not. Indeed *la jurisprudence considère bien facultatif pour la femme l'usage du nom de son mari*[39]. Some decisions categorically exclude the existence of a duty as well as a right of the wife to use her husband's name and affirme that the actual identity of the wife remains always her identity of birth[40].

PLANIOL said[41] that the wife has no other than her maiden name[42] since there is no indication in the law that marriage should have an effect on her name (*puisque le nom indique la descendence*[43]). Accordingly, in law the wife should not be permitted to

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34. continued.
nom de famille, mais elle a l'usage du nom de son mari qu'elle est en droit de porter. Il est vrai qu'on a nié l'existence d'un tel droit; on a soutenu que la femme n'acquiert pas, par le mariage, le nom de son mari et qu'en s'en servant elle se conforme à une simple pratique mondaine, sans valeur juridique. Cette opinion singulière est contraire à la tradition: elle ne tient aucun compte de certaines dispositiones du Code civil...En réalité, le droit, dont l'existence est contesté, est de formation coutumière; en plus, il est implicitement consacré par la loi écrite...
See also Trib civ Seine19.1.1948, D 1948 136; Rép prat dr belge v. Nom et prénom n.44; OLG FFT. 17 11 1966,FamRZ 1968 527.

35. COLIN/CAPITANT/JULLIOT DE LA MORANDIERE, *op.cit.*, N.586.
see also: COLIN/CAPITANT/JULLIOT DE LA MORANDIERE, *Traité de droit civil*, I, Paris 1957 N.832; BEUDANT/LEREBOURS-PIGEONNIERE, *Cours de droit civil français*, Paris 1936, 406.

change her name[44]. This opinion was however changed in later editions.

It seems thus that the wife has two names: her maiden name for all administrative purposes and the husband's name for social relations:[45]

> *La femme mariée n'a légalement et juridiquement d'autre nom que celui qu'elle portait avant son mariage. Elle n'acquiert par mariage que le droit de jouissance du nom du mari. Ce droit d'usage lui permet d'employer, dans la vie civile ou commerciale, soit le double nom, soit uniquement le nom du mari. Cet usage n'a pas force de loi. Si on le lui donnait c'etait pour constater un fait, l'état de mariage dans lequel elle se trouvait.* 46

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36. MAZEAUD, *op.cit.*, N. 538.

37. CARBONNIER, *op.cit.*, 196; AUBRY & RAU, *Droit civil français*, I, Paris 1964 203; COLIN/CAPITANT/JULLIOT DE LA MORANDIERE, *Cours, cit.*, N.586, 590; with some doubt: PLANIOL/RIPERT/SAVATIER, *op.cit.*, 110; see also: PERREAU, *op.cit.*, 230.

38. This is not anymore true after the new law of divorce. See MERLIN, *op.cit.*, N. 584.
See also MARTY/RAYNAUD, *Droit civil*, I, Paris 1956 N.948; MAZEAUD, *op.cit.*, N.538; CARBONNIER, *op.cit.*, 196; COLIN/CAPITANT/JULLIOT DE LA MORANDIERE, *Cours cit.*, N. 584; PLANIOL/RIPERT/SAVATIER, *op.cit.*, 110; Dalloz Rép prat v. Nom-prénom n.18.

39. MARTY/RAYNAUD, *op.cit.*, N.948; see id. N.955.
See also: De JUGLART, *Cours de droit civil*, t.I, vol.I, 5th ed., Paris, 128; FERID, *Das französische Zivilrecht*, I, Frankfurt a.M. 1971 220; JULLIOT DE LA MORANDIERE, *op.cit.*, 437; COLIN/CAPITANT/JULLIOT DE LA MORANDIERE, *Traité cit.*, N.832; PERREAU, *Droit, cit.* 231; LEBRIS, *L'effet du divorce sur le nom des époux*, D 1965 Chron 141, at 146; HECKMANN, *Der Name der französischen Ehefrau*, FamRZ 1962 458;

40. J-Cl Rép prat (agg. 1968) v.Nom n.23; see also Paris 17 9 1941, DA 1941 364.

The use of the husband's name is of course in contradiction with the Law 6 Fruct An II and 11 Germ An XI[47].

It has been said that the wife has a right of standing in court if the object of the action is the defence of her husband's name[48]. On the other side it seems that the husband has a right to prohibit the use of his name by the wife[49].

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41. PLANIOL/RIPERT/BOULANGER, *op.cit.* N.513.

42. see also ROGUIN, *Traité de droit civil comparé*, Le mariage, Paris 1904 125; Trib civ Seine 19 1 1948 cit; J-Cl Rép prat v. Nom n.23; Paris 17 9 1941 cit; see also Dalloz Nouv rép v. Nom-prénom n.28; Rép prat dr belge v. Nom-prénom n.43.

43. see also LEBRIS, *op.cit.*, 145; ROGUIN, *op.cit.*, 125; Paris, 17 9 1941 cit; Rép prat dr belge v.nom-prénom n.43; Trib civ Seine 19 1 1948 cit.

44. PLANIOL/RIPERT cited in Rép prat dr belge v. Nom-prénom n. 43. The new edition of PLANIOL/RIPERT/SAVATIER, *op.cit.*, 110 reads as follows: *Contrairement à une opinion répandue, le mariage ne fait pas acquérir à la femme le nom de son mari, mais seulement l'usage de ce nom. Cela se comprend d'autant mieux que le nom indique la descendance.*

45. CARBONNIER, *op.cit.*, 196; FERID, *op.cit.*, 220; JULLIOT DE LA MORANDIERE, *op.cit.*, 437; COLIN/CAPITANT/JULLIOT DE LA MORANDIERE, *Traité, cit.*, N.832; MARTY/RAYNAUD, *op.cit.*, N.948; PLANIOL/RIPERT/BOULANGER, *Traité élémentaire de droit civil*, I, Paris 1952 N.513: *La femme conserve son nom patronimique, mais elle a le droit d'user du nom de son mari dans les actes de la vie civile ou même commerciale;* COLIN/CAPITANT/JULLIOT DE LA MORANDIERE, *Cours, cit.*, N.586; BEUDANT, *op.cit.*, 407; HECKMANN, *op.et loc.cit.*; Trib civ Seine 19 1 1948,
Notaries use to identify a married wife in their deeds with her maiden name but allow her to sign with her married name: PLANIOL/RIPERT/BOULANGER, *op.cit.*, N.515.

46. J-Cl Rép prat v. Nom n.23. See contrary critic of JOSSERAND, *op.cit.*, 216, cit.at note 34 p. 33 ante.
PLANIOL/RIPERT/BOULANGER, *op.cit.*, N.517, see also N.513.
See also Paris 24 3 1944, DA 1944 98; Trib civ Seine 19 1 1948 cit.; Dalloz Nouv rép v. Nom-prénom n.32.

In Italy Art.143-bis Code civ.[50] states that a married woman adds the husband's name to her own.

The previous rule (Art.144 Code civ.) provided that the wife adopts *(assume)* the husband's name. Although the dictionary definition of the word *assume* is very clear, it has been said that it is not so in Italian law since the same word, it is said, has been employed either with the meaning of "adopts in substitution" of another name (e.g. in Art.262 and 299.2 Code civ.) or with the meaning of "adopts and adds" to his own name (Art.299 Code civ.). This is not true. There was quite a difference between Art.299 Code civ. which stated that the adopted child assumes the name of the adoptant and adds this name to his own, and Art.144 Code civ. stating that the husband is the head of the family and the wife assumes his name. Anyway nobody knew in Italy for a long time which was the correct name of a married woman. Therefore, in spite of Art.144 Code civ. Italian wives were

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47. Trib civ Seine 19 1 1948 cit.; Dalloz Rép prat v. Nom-prénom n.17.

48. PLANIOL/RIPERT/SAVATIER, *op.cit.*, 110; KAYSER, *La défense du nom de famille d'après la jurisprudence civile et d'après la jusprudence administrative*, Rev trim dr civ, 1959 10 at 16, 17 et 19.

49. Paris 24 3 1944 cit.; contra PLANIOL/RIPERT/SAVATIER, *op. cit.*, 112: *En dehors d'une instance en séparation de corps, il ne paraît pas possible au mari de faire interdire à sa femme de porter son nom.*

50. as introduced by the Family Reform Law of May 19. 1975.

expected to use in official documents their maiden name followed by "*in*" and their husband's name, or their husband's name followed by "*nata*" and their maiden name (e.g. *Signora Rossi in Bianchi* or *Signora Bianchi nata Rossi)*, but to adopt their husband's name in social relations. Just by custom, not in law.

But from 1961 things were said to be clear. The Court of Cassation had spoken.[51] Assumes, the Court said, means that the wife has the right to add the husband's name to her own, that this is only a right not a duty, and that it is lawful for her to use only her maiden name. In reality, nothing was changed after this decision: married women continued signing documents "*Bianchi in Rossi*", and to call themselves just *Rossi* in social relations. Exactly as in France.

The same 1961 judgment of the Cassation stated, in the same breath, that if a wife persistently refuses using her husband's name, this could lead to separation due to her fault, since the use of her maiden name might constitute in certain situations sort of contempt towards her husband. A very questionable judgment indeed.

Eventually the Constitutional Court intervened[52] holding that Art.156(5) Code civ.- which stated (old formulation) that when granting a separation the Tribunal could prohibit to the wife the use of her husband's name - was unconstitutional in its meaning, construed *a contrariis*, that it excluded the wife's right to cease using the name of the husband, at least when separation had been granted by reason of his fault.

The Cassation's wisdom in matters of names was dispensed also in another delightful case[53]: an English lady living *more uxorio* with an Italian who since some forty years had lived separate and apart from his "former" wife and who eventually had obtained a decree of legal separation in 1939 wanted to have the same name as her "husband" in order to avoid confusion and nuisance. Thus she went home to England and by deed poll changed her name into the surname of the man with whom she actually lived as man and wife in Milan since many years. The first wife, who lived in another town quite far away (Bologna), did not like this. She went to Court, where she succeeded in the trial division. But the Court of Appeal correctly held that since the appellant had a right to use the man's name according to her national law and since the appellee suffered no prejudice at all - considering also that she lived separate and apart from her husband since forty years and that she resided in another town - no "usurpation" of the name had occurred and the appeal should be allowed.

This reasonable judgment was overruled by the Court of Cassation with the following motivation: ...according to Italian law the right of the wife to her husband's name is a consequence of the unity of the family, and this right is so strong that even in case of separation due to the wife's fault, only in absolutely exceptional circumstances the court could prohibit to her the enjoyment of this name and only

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51. Cass I, 13 7 1961 N.1692, G It 1962, I 1 21, note AZZOLINA; Giust Civ 1961 I 1344, note STELLA RICHTER; F It 1962 I 89.

with the purpose of avoiding that the right to the name (intended as expression of human personality and dignity of the family) might be dishonored. According to Italian law the institution of family belongs to public order in consideration of the ethical and social ends which the family is destined to achieve and of the public interest which is inherent in the achievement of that purpose. The court held that the use by the "mistress" of the name which belonged to the "legitimate"wife was against public order. The court emphasized that in this case public order comprehended "good morals".

The reader be reminded that this is a rather recent case: it was decided in 1955.

It is submitted that Art. 143-bis Code civ. *new formulation* has brought no substantial modification to the 1961[54] Cassation's interpretation of the married woman's right to the name. She will continue keeping her own name; and as well as "*assume*" did not mean "*assume*", the word "adds" probable does not mean that she "has to add". The Reform Law did not touch all other aspects of the married woman's name. Thus the previous cases and writings should still be consulted[55].

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52. C Cost, 13 7 1970 N. 128, G It 1970 I 1 1519.

53. Cass I, 21 10 1955 N. 3399, Giust Civ 1956 I 242.

54. see note 51 at p.39.

55. Trib Napoli 27 10 1955, Dir e Giur 1956 160, note DE CUPIS; Trib Milano 13 6 1955, G It 1956 I 2 706, note AZZOLINA; App Roma 27 7 1956, G It 1957 I 2 122; Trib Genova 17 2 1960 Temi Gen 1960 221; Cass I 14 4 1961 N. 801, Giust Civ 1961 I 956.
BIN, *La riforma del diritto di famiglia*, Torino 1975; DE CUPIS, *I diritti della personalità*, Milano 1961; FERRARA,

2. The Latin-American Solution[56]

In Argentina the married woman adds her husband's name with the prefix "*de*". This rule was customary until 1969 when the Reform Law N.18.248 of June 10, 1969[57] provided sta-

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55. continued.
Diritto delle persone e di famiglia, Napoli 1941; ONDEI, *Persone fisiche, diritti della personalità*, Torino 1965; PROTETTI', *Delle persone e della famiglia (art.1-78), Commentario teorico-pratico al Cod.civ.*, Roma 1971; STOLFI, *I segni di distinzione personali*, Napoli 1905; AZZOLINA, *Sul dovere della donna sposata di fare uso del cognome maritale*, G It 1962 I 1 1922; AZZOLINA, *Sul diritto della donna sposata di usare congiuntamente il cognome patronimico e quello maritale*, G It 1951 2 707; BARBERO, *I diritti della famiglia e del matrimonio*, JUS 1956 I; BRIGUGLIO, *Sul cognome della donna sposata*, Riv trim dir e proc civ 1957 1621; CARATTONI, *Sul diritto della moglie all'uso del cognome del marito*, Mon trib 1961 1294; DEGNI, *Le persone fisiche e i diritti della personalità*, in Trattato di diritto civile italiano, Utet, Torino 1939; DE ROSA, *Sulla validità degli accordi circa il cognome della moglie separata*, G It 1957 I 2 122; LOJACONO, *Cognome della moglie e rapporti sociali in una recente decisione della Suprema Corte*, Riv dir matr e stato persone 1961 226; LOJACONO, *La parità della donna nella legge naturale e nella legge positiva*, Riv dir matr e stato persone 1960 535; STELLA RICHTER, *Contributo alla determinazione del cognome della donna coniugata*, Riv dir matr 1964 205; TRABUCCHI, *Il principio costituzionale di parità e la pretesa della moglie separata a non far uso del nome del marito*, Riv dir civ 1970 469; VINCENZI, *Cognome della moglie e potestà maritale*, F It 1962 I 89; older doctrine: SCADUTO, *Sul cognome della donna maritata*, in Annali Ist Scienze Giuridiche, Ec Pol e Soc R Univ Messina 1927.
Similar to the Italian solution is Art.40 of the *ETHIOPIAN* Civil Code of May 5, 1960 which states that: 1) A married woman shall retain her personal family name, 2) She may, while her marriage lasts, be designated or designate herself by the name of her husband, 3) Such faculty shall continue, in her favour as well as to her prejudice after the marriage, unless this has been dissolved by divorce or the woman has married again.

tutory authority to this usage[58].

According to case authority which, it is submitted, has still validity, the wife had (and has) not only a right, but also a duty to bear the husband's name[59].

The serious problems caused by the divorced wife's name[60], are now solved by Art. 9 of the new law[61].

PLINER[62] commenting on the new law said that the family name of the husband is not assumed by the wife as a consequence of marriage. The wife has only a right and a duty to use her husband's name without having however a possibility to integrate this name as part of her name and she has no

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56. Provisions similar to Argentina exist in:
MEXICO: VILLEGAS, *Compendio de derecho civil*, I, Mexico DF 1967 198: *...en nuestro derecho la mujer casada solo agrega a su apellido el de su marido, con la particula "de" para indicar su nuevo estado que le otorga el matrimonio.* If the husband has more surnames she normally adds only one but if she wishes, she may add all of them.
COSTA RICA: there are no provisions on the name of a married woman. Customarily the Spanish law is applied, i.e. the wife keeps her own name and adds the first surname of her husband with the prefix "de". See *Texto completo del Anteproyecto de Cod.civ. unif., Art.31.*
EQUADOR: Decr. n.402 10 2 1966 in Registro Oficial 14 2 1966 n.690: *A la mujer casada le corresponde el apellido de su marido con la proposicion "de"...La mujer divorciada usara los apellidos que le correspondian en el estado de soltería. La mujer separada judicialmente seguira llevando el apellido de su marido.*
COLOMBIA: ART.31 Decr ejec. 1009 of 1939. See also: VALENCIA ZEA, *Derecho Civil*, parte general y Personas, Bogotà 1966 388.
URUGUAY: ODRIOZOLA, *Nombre, domicilio, estado civil*, Montevideo 1970 17. See Art. 191 Codigo Civil.

seq.

right to transmit this name to her children. The wife has just the right to use this name as long as the marriage lasts.

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56. continued.
BOLIVIA: The wife keeps her maiden name but she may add her husband's name (with the prefix "de"). A divorced woman is not allowed, by custom, to keep her former husband's name. See also BERGMANN/FERID/RAU, *op.cit.*, "Bolivien".
CHILE: BERGMANN/FERID/GESCHE, *op.cit.*, "Chile".
DOMINICAN REPUBLIC: Inf. Dr.Wellington J.Ramos Messina, Santo Domingo, of Feb.2, 1970: *El matrimonio otorga a la esposa, el derecho de usar el apellido del marido, pero segun nuestros usos, esta usara en primes lugar su apellido proprio, unido luego al del marido mediante la preposicion "de". En caso de divorcio pierde este derecho.*
PARAGUAY: see Ley de Derecho Civiles de la Mujer N. 236, Sept 6. 1954.
GUATEMALA: see Art. 108 Codigo civ.
PERU: it seems that the wife has to add her husband's name. See Art. 171 Codigo civ.; see also CORVETO VARGAS, *Manual Elemental de Derecho Civil Peruano*, I, Lima 1954 89. For the case of divorce or separation see art. 254 et 273.HECTOR CORNEJO CHAVEZ, *Derecho Familiar Peruano*, I, Lima 1960 248 n.224 b.
SPAIN: the wife keeps her name. It happens sometimes that a wife adds to her surname the first surname of her husband, with the prefix *de* which means *mujer de.* See SCHREMBS, *Mädchen- und Ehename deutscher Frauen in den romanischen Ländern und den Benelux-Staaten*, StAZ 1964 205. See also BATILE, *El derecho al nombre*, 159 Revista general de legislacion y jurisprudencia 320 (1931); LOPEZ LOPEZ/MELON INFANTE, *Codigo Civil*, version critica del Texto y estudio preliminar,Madrid 1967; ESPIN CANOVAS, *Manual de Derecho Civil Espanol*, IV. Familia, Madrid 1962.
PORTUGAL: the wife has a right to use the husband's name. See Art. 1675 Codigo civ.

57. B O June 24 1969 N. 21.709.

58. Art.8: *La mujer, al contraer matrimonio, añadirá a su apellido el de su marido, precedido por la preposición "de". Si la mujer duese conocida en el comercio, industria o profesión por su apellido de soltera, podra seguir usandolo después de contraido el matrimonio para el ejercicio de esas actividades.*

The husband's name indeed will never become an *atributo de la personalidad de la mujer.*[63]

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59. see: BORDA, *Tratado de Derecho civil argentino*, parte general, I, Buenos Aires 1965 328; SPOTA, *Tratado de derecho civil*, parte general, I, Buenos Aires 1961 1181; ETCHEVERRY BONEO, *Derecho al nombre*, La Plata 1910 511; ORGAZ, *Personas individuales*, Cordoba 1961 223; AA LI 20 653 n.3. If she insists in not using the husband's name, this might be a ground of divorce (BORDA, *op.cit.*, 328; SPOTA, *op.cit.*, 1182) unless there are good reasons (L L 90 99(1958)). But on the *Libreta civica* she is registered in her maiden name (L L 90 99 (1958)): administrative bodies do not like the trouble of registering continuous changes.

60. BETTINI, *El nombre de la mujer casada-divorciada*, J A 1967 II 259, note to Code civ. Cap 13 12 1966; BUSSO, *Codigo Civil anotado*, I Buenos Aires 1958 152; DIAZ DE GUIJARRO, *El nombre de la mujer divorciada*, J A 46 1136; ALLENDE, *El divorcio vincular y el apellido de la mujer*, L L 80 908; ALLENDE, *Efecto del divorcio vincular sobre el apellido marital*, L L 82 308.
See also: C Civ I Capital 27 9 1939, L L 16-234; C Civ 2a. Capital 23 8 1946, L L 48-10 (restrictive interpretation); C N Civ Sala B 11 10 1957, L L 89-355; J A 1957 IV-566; C 2a CC La Plata Sala III 28 8 1962, L L 108-757 (more fle ible); C 2a C C La Plata Sala I 23 6 1953, L L 71-183; J A 1953-III-218; CN Civ Sala C, 9 6 1961, L L 103-697.

61. Art. 9: *Decretado el divorcio será optativo para la mujer llevar o no el apellido del marido. Cuando existieren motivos graves, los jueces, a pedido del marido, podrán prohibir a la mujer divorciada el uso del apellido de su cónyuge.*

62. PLINER, *El nombre de las personas*, Buenos Aires 1966.

63. PLINER, *La ley del nombre*, J A 1969 doctr 484; ACUNA ANZORENA, *Del nombre de la mujer casada*, L L 20 653; idem, *El nombre de la mujer divorciada*, L L 20 657; BETTINI, *El nombre de la mujer casada, de la casada divorciada y de la viuda*, J A 1970-IV 315; CERMESONI, *El nombre de la mujer casada*, J A 11 542; GRANILLO, *El nombre de la mujer casada*, Cordoba 1953, idem, *Uso del Apellido marital por la esposa*, Rev Univ Nac Cordoba 1953 386; J J M V, *Efectos del divorcio: supresion del apellido del marido*, Bol Inst Ensen Pract 1950 170; ZANNONI, *Apellido y estado civil. El caso particular de la mujer casada y divorciada*, L L 130 957.

B. THE WIFE ASSUMES HER HUSBAND'S NAME

It has always been the view in Germany that husband and wife must bear the same name. Since this "marriage" name has practically always been the man's name, great problems arose when the new German constitution (*Grundgesetz*) came into force.

The recent reforms in Germany and Austria have taken as model the solution of Eastern Germany ("the spouses have to bear as common marriage name the family name of either one of them"). Switzerland is following in the same steps (Art 160 Var.I Draft Revision ZGB). The bastions of the purest doctrine of disdain for the woman's personality are collapsed.

Sweden represents the transition between the German/socialist and the English solution, and has been therefore treated in this paragraph.

1. The German solution [64]

Long before the new BGB entered into force, married women assumed by custom the name of their husbands[65].

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64. Provisions similar to the German solution (before the Reform Law) are found in:
SWITZERLAND: where the wife loses her maiden name and she has no right to use her previous name for the identi-

seq.

The BGB of 1900 provided in paragraph 1355 that the wife received the family name of her husband and the commentaries explained that the unity of the family name was a condition and a consequence of the marriage and that the position of preminence of the man as head of the family necessarily required that his name was the one which

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64. continued.
fication of her person, Art. 161 ZGB. There is a customary provision according to which the wife's maiden (or widow) name may be added to the man's name thus constituting a double matrimonial name. This name is accepted by the registrars of civil status. See LEMP, *Berner Kommentar zum Schweizerischen ZGB*, II, 1.Abt.,2. 1963 53; SCHNYDER, *Familien- und Vornamen nach schweizerischem Recht*, StAZ 1964 177, in case of divorce the wife loses the "matrimonial" name: Art.149 ZGB.
AUSTRIA: where the former Par 92 ABGB provided that a wife assumed her husband's name. This provision has been recently changed and the wife's name is now regulated by Par 93 ABGB worded as follows: the spouses must bear the same family name. This is the name of the man unless the spouses declare before their marriage that the wife's name shall be the matrimonial name. If family name is the name of the man, the wife has the right to add to this name her own maiden name (with hyphen). Modifications of the husband's name during marriage are automatically extended to the wife. See KLANG/ADLER, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, I, Wien 1933 Par 43, p.286 note 20. For the case of adoption of the wife see OPET/BLUME cited in KLANG/ADLER, *op.cit.*, 286 note 20: the husband must give his consent.
The married woman continues enjoying during marriage all the rights of protection and defence of her maiden name, according to Par 43 ABGB. See EHRENZWEIG, *System des Österreichischen allgemeinen Rechts. Familienrecht*, 1963 (Nachdruck 1971) Par 434.3; contra: KLANG/ADLER, *op.cit.*, 285. Actually her maiden name is said to be in a latent status (just the use of it is temporarily lost): e.g. if the wife gives birth to a child which is disavowed by the father and becomes illigitimate, or if the wife alone adopts a child, the name of either of those children would be her maiden name.See KRAMER/MAENHARDT in BERGMANN/FERID, *op.cit*,

seq.

had to be extended to all members of the new family.

The new German Constitution (*Grundgesetz = GG*) contained detailed rules and dates for the abolishment of all provisions which were in conflict with the principle of equality of rights.

The precept of Art 3 GG which provides that men and women have equal rights was formally implemented several years after the prescribed dateline. Nevertheless, with the coming into force of the Constitution, the courts disregarded immediately all provisions which contradicted its basic principles.

This cannot be said for the married women's name

64.- continued.
66; EHRENZWEIG, *op.cit.*, Par 66.1. That the name of origin is not lost results also from Par 11 AV zum PstG. Of different opinion: KLANG/ADLER, *op.cit.*, 285, in particular note 13: ...*der Mädchenname tritt nicht nur zurück.* Other cases where the woman may voluntarily reassume her maiden name or may be compelled to do so are those regulated by Par 63, 64 and 65 EheG 1938 amend., the general rule for a divorced wife being to keep the matrimonial name (Par 62 EheG).
FINLAND: Marriage Act June 13, 1929 Par 32 provides that the wife assumes the surname of her husband. She may declare, before the ceremony takes place, that she wishes to use her maiden name which shall preceed the husband's name.
GREECE: Art. 1388 Cod.civ., the wife may add her name to the husband's name if she has a justified interest, and the husband has no right to prevent her from doing so. See LESKE-LOEWENFELD, *Das Eherecht der europäischen und der aussereuropäischen Staaten*, I, Köln 1963 1009; BayObLG 31 7 1970, StAz 1971 51; DÖLLE, *Familienrecht*, I, Par 37 II 1 b, p.463 note 49; BALIS, *Oikogeneiakon Dikaion*, Athen 1956 Par 40, 76 cited by BayObLG 31 7 1970 in StAZ 1971 52, explains that the wife may not add her name without the consent of her husband. However the husband has no right to

seq.

which actually was not considered a constitutional issue. Courts and authors were convinced that Par 1355 BGB was perfectly in line with the *GG* and a writer of the authority of DÖLLE said that the marriage name had to be the man's name in order to maintain "order" in society.[66]

The Federal Court[67] held that spouses cannot have but one equal name and this name must be the name of the husband. The court agreed that this might have some adverse economic effects for the wife, nevertheless in the court's view that could not justify a different solution.

The Provincial Supreme Court of Bavaria[68] held that

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64. continued.
refuse his consent if the wife has a well justified interest in the use of her name. An arbitrary refuse has not to be observed.
TURKEY: Art. 153(1) Cod.civ.

65. GIERKE, *Deutsches Privatrecht*, I, Leipzig 1895 718, in particular at note 7; STAUDINGER/BRANDL/COING, *Kommentar zum Bürgerlichen Gesetzbuch*, I, Berlin 1957, Par 12 note 27; HERMANN, *Ueber das Recht der Namensführung und der Namensänderung*, AcP 45 (1862) at 331. See also: ALR II 1, Par 192; ABGB Par 92; Saxonian Project 1852 Par 143, to 1960 Par 1663.

66. *Das ist ein Zugeständnis an den Gleichbewertungsanspruch der Frau, das mit dem Gebot einer klaren Ordnung verträglich ist*, DÖLLE, *Die Gleichberechtigung von Mann und Frau im Familienrecht*, JZ 1953 353 (at 357).
DÖLLE qualified his opinion by adding that the wife should have the right to add her maiden name to the husband's name (this actually constituted the main object of the modification of Par 1355 BGB which took place some years later).

67. BGH 13 7.1957, BGHZ 25 (1958) 163.

68. BayObLG 19 11 1954, FamRZ 1955 22.

the provision of Par 1355 BGB was not modified by the constitutional principle od equality of rights. The Court conceded that Par 1355 BGB advantaged the man, but, in the opinion of the judges this unequal treatment was not based on a concept of unequality between men and women. Indeed, it was said, the rule of Par 1355 BGB is based on antique traditions and its function is to give expression to the close unity which keeps together husband and wife. The court defined this as a rule of policy (*Ordnungsfunktion*) which springs from the necessity of having each family individuated by just one name.

The Administrative Court of Hessen[69] said that it was unimportant whether the wife through Par 1355 BGB suffered some sort of injustice and whether the right of her personality was compromised, since the principle of equality should not interfere with rules of policy established as a safeguard for the institution of marriage, which is *also* under the protection of the constitution. The judgment goes on saying that to allow the wife - she was in the case at bar a physician, well known under her own name - to continue keeping her name after marriage would have necessarily led to a chaotic disorder[70].

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69. Hess VGH 17 8 1956, DÖV 1957 220.

70. DÖLLE, *Die Gleichberechtigung von Mann und Frau im Familienrecht*, JZ 1953 353 (at 357). See also OVG Koblenz 17 2 1954, FamRZ 1954 199: *nach dem Eintritt der Gleichberechtigung ist Par 1355 noch als vollgültig und eine davon abweichende Namensänderung bei bestehender Ehe als nicht zulässig anzusehen;* OVG Hamburg 11 11 1955, JZ 1956 172: *eine wirkliche Gleichberechtigung bei einem gebotenerweise einheitlichen Familiennamen ist nicht durchführbar.*

Just as one lonely swallow, the Adm.Tribunal of Frankfurt[71] had the courage to affirm categorically that Par 1355 BGB was outlawed in Hessen since it provided on the basis of an unacceptable distinction between man and woman the automatic loss of a right of the personality. The court very courageously said: As long as Parliament will not have properly provided otherwise within the guidelines of the Constitution, each spouse will keep his own name. The judgment was of course overruled by the Trib. of Appeal.[72]

Par 1355 BGB was eventually modified. The new formulation read as follows: "The name of marriage and family is the name of the husband. The wife has a right to declare to the Registrar of marriages that she wants to add to the name of the husband her maiden name".[73]

Common name still remained the husband's name. The double name was only a personal name of the wife, it was not transmissible to her children (unless in case of administrative change of the name which is indeed favoured according to section 3 of the *NamÄndG* if the actual family name is a *Sammelname* i.e. a very frequent name [74]). The addition was to be made

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71. VG Frankfurt 27 7 1955, FamRZ 1955 361.

72. OVG Hessen 17 8 1956, StAZ 1957 341.

73. A similar suggestion had been made when the new BGB was discussed (1896). But it was not accepted. See KOHLER, *Das Namensrecht der Ehefrau*, AcP 107 (1911) 246; 36 DJT (1931) I 562.

with a hyphen and of course the name had to be "added"[75]. The right to declare the intention of using the double name could be exercized at the marriage ceremony or later (even after dissolution of marriage due to death of the husband or divorce). The declaration could be made by a wife with limited capacity[76], and also if the marriage was celebrated before July 1, 1958[77]. An agreement between the spouses by which the wife engaged herself to make no use of the faculty provided forth in Par 1355.2 BGB was void. Once the choice was made, it became irrevocable: the double name was the only name which the wife was entitled to bear. If she later wanted to bear only the family name of her husband she had to follow the procedure of the *NamÄndG* (Law of change of names).[78]

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74. In that particular case also the heraldic attribute of the wife may be extended to the other members of the family: FamRZ 1965 325-26. For the special case of extension of the double name of a wife in the case of socalled "farm-names" (*Hofname*) see OVG Münster 23 2 1960, FamRZ 1960 237 and OVG Münster 6 3 1968, FamRZ 1969 648.

75. OVG Hamburg 11 11 1955 cit. See also: SOERGEL-SIEBERT/LANGE, *Bürgerliches Gesetzbuch*, V, Par 1355 note 16; STAUDINGER/HÜBNER, *Kommentar zum Bürgerlichen Gesetzbuch*, Berlin 1954 Par 1355 note 13; BGB/RGRK/SCHEFFLER, *Das Bürgerliche Gesetzbuch*, Kommentar herausgegeben von Reichsgerichtsräten und Bundesrichtern, Berlin 1959, Par 1355 note 4; ERMAN/BARTHOLOMEYCZIK, *Handkommentar zum Bürgerlichen Gesetzbuch*, 3rd ed. Münster, Par 1355 note 3; PALANDT/DIEDERICHSEN, *Bürgerliches Gesetzbuch*, 33rd ed. München, Par 1355 note 4.

76. per analogy: RGZ 86 116.

77. *GleichberG* Art 8 I 1.

78 see SOERGEL/LANGE, *op.cit.*, Par 1355 note 19; BGB-RGRK/SCHEFFLER, *op.cit.*, Par 1355 note 4. This author is of opinion

seq.

Some uncertainty remained about the possibility for a wife to use Par 1355.2 BGB if she had obtained the husband's name according to the provision of Par 1740 g BGB[79].

What the wife was allowed to add was the maiden name[80] not the name of a previous marriage.

The amendment introduced the words "name of marriage and family" (*Ehe- und Familienname*) whilst the older wording was just "name of family". This does not mean that Parliament wanted to make a distinction between the name of marriage and the name of a family, which would have been unreasonable since a name can be attributed only to a person. Thus the meaning of *Ehe- und Familienname* was that the family name of marriage was the name that the *wife* (she only being the destinary of the provision) had to bear as an effect of marriage. And this name had to be the name of the husband[81].

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78. contined.
that the choice could have been made also in case of marriages celebrated before April 1, 1953.As for the procedure, see SOERGEL/LANGE, *op.cit.*, Par 1355 note 20 and BGB-RGRK/SCHEFFLER, *op.cit.*, Par 1355 note 4, 7 and following.

79. SOERGEL/LANGE, *op.cit.*, par 1355 note 15.

80. as it was at the time of the declaration. If a married or divorced wife was adopted only her "maiden name" was changed. OLG Celle 7 8 1970, NJW 1970 2249. *Contra*, in case of a widow: STAUDINGER/ENGLER, *Kommentar zum Bürgerlichen Gesetzbuch*, Berlin 1954 seq.., Par 1758 note 11.
If the wife alone adopts a child, and she bears a double name, the adopted child receives either the adoptant's maiden nam or her husband's name (with his authorization: Par 1758 a. 1). The provisions of Par 1758.2 BGB and of Par 1758 a. BGB have been held to be both constitutional by the Constitu-

seq.

The wife received the name of the husband at the moment of the celebration of marriage. Therefore she had to sign the documents of marriage under the new name[82].

After the modification of Par 1355 with the addition of the subparagraph, the courts definitely ceased to have doubts on the constitutionaly of Par 1355 BGB.[83] Also the majority of authors expressed satisfaction[84]. Nevertheless some isolated voices of doubt were still heard[85] and a few crusaders

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80. continued.
tional Court and the Federal Court: BGH 13 7 1957, NJW 1957 1473; BVerfG 25 7 1963, FamRZ 1963 510; contra: GERNHUBER, *Lehrbuch des Familienrechts*, München 1971, Par 62 IX.4: *Geblieben ist eine Benachteiligung des weiblichen Geschlechts, die antiquiert und kleinlich wirkt.*

81. BGB-RGRK/SCHEFFLER, *op.cit.*, Par 1355 1.1.

82. BGB-RGRK/SCHEFFLER, *op.cit.*, Par 1355, note 3; SOERGEL/LANGE, *op.cit.*, Par 1355, note 5; ERMAN/BARTHOLOMEYCZIK, *op.cit.*, note 2.

83. e.g.: BVerwG 27 11 1959, FamRZ 1960 113, note of BOSCH; BVerwGE 9 354; OLG Hamm 21 10 1966, NJW 1967 450; OLG Karlsruhe 3 7 1958, FamRZ 1958 326.
The issue has been raised recently by the LG Mannheim 24 8 1972, NJW 1973 80.
The BVerfG 26 11 1963, FamRZ 1964 75 has stated that the obligation to bear a common marriage name is not unconstitutional. The Federal Court observed however: *Allerdings bliebe offen, wie der einheitliche Name lauten müsste. Diese Lücke könnte...durch die Rechtsprechung ausgefüllt werden. Es wären durchaus Gestaltungen denkbar, nach denen die Ehegatten einen einheitlichen Ehe-u. Familiennamen führen, ohne dass dagegen unter dem Gesichtspunkt der Gleichberechtigung Bedenken erhoben werden können.*

84. STAUDINGER/HÜBNER, *op.cit.*, Par 1355 N.3; ERMANN/BARTHOLOMEYCZIK, *op.cit.*, Par 1355 N.1 b; PALANDT/LAUTHERBACH, *op.cit.*, Par 1355 Vorbem; BOSCH, note at judgment BGH 14 7 1956, FamRZ 1956 309; DÖLLE, *Familienrecht*, I, Karlsruhe 1964;

seq.

pursued condemning Par 1355 BGB as unconstitutional, even in the new amended formulation[86].

Par 1355 BGB has been changed again with the recent Family Reform Law, the *Erste Familienrechtsreformgesetz (1.EheRG)* of June 14, 1976[87]. The new formulation reads as follows:

> Par. 1355 - (1) The spouses have a common family name (matrimonial name),
>
> (2) The spouses may decide that the matrimonial name be the name of birth (*Geburtsname*) of the bridegroom or the name of birth of the bride. The choice must be declared to the officer who solemnizes the marriage at the time of celebration. If the spouses do not decide on this issue, the matrimonial name will be the name of

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84. continued.
MÜLLER-FREIENFELS, *Kernfragen des Gleichberechtigungsgesetzes*, JZ 1957 685; EISSER, *Die Anerkennung der Persönlichkeit der Ehefrau im neuen Eherecht*, FamRZ 1959 177; GRAF VON BERNSTORFF, *Der Familienname in der deutschen Rechtsordnung*, NJW 1957 1901; GRAF VON BERNSTORFF, *Der Familienname als Gegenstand der Gleichberechtigung*, FamRZ 1963 110.

85. DÖLLE, *Fam.Recht, cit.*, II 110; BEITZKE, *Familienrecht*, München 1974 Par 12 I; LEHMANN/HENRICH, *Deutsches Familienrecht*, 1967 Par 11 I.

86. KRÜGER, *Die Nichtverwirklichung der Gleichberechtigung im Regierungsentwurf zur Familienrechtsreform*, JZ 1952 613; idem JZ 1958 361; KRÜGER, *Der Name der Frau nach bürgerlichem Recht*, AcP 1957 232; BGB-RGRK/SCHEFFLER, *op. cit.*, Par 1355 N.2; RAMM, *Gleichberechtigung und Ehe- und Familienname*, FamRZ 1962 281; RAMM, *Familienname und Grundgesetz*, FamRZ 1963 337; GERNHUBER, *Lehrbuch des Familienrechts*, München 1971 Par 16 I 2: *Par 1355 ist die Frucht eines durch verfassungsrechtliche Bedenken gemilder-*

seq.

birth of the man. As "name of birth" the law intends the name which has to be entered in the certificate of birth of the spouses at the time of the celebration of marriage.

(3) The spouse whose name does not become the matrimonial name may make a declaration to the officer of civil status (*Standesbeamter*) with the purpose to put before the matrimonial name the name which the interested spouse bears at the time of the marriage. The declaration must be made publicly.

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86. continued.
ten konservativen Denkens, das den Mann begünstigt und deshalb mit der Verfassung nicht in Einklang steht...die Zahl der Argumente ist erstaunlich gross, wie immer, wenn ideologische Vorurteile letztlich bestimmend sind...als Zerstörung des historischen Denkens wird uns die Preisgabe des Mannesnamens dergestellt...ein modernes Namensrecht zerstört nur das patriarchalische Familienbild, nicht mehr die Familie und schon gar nicht unser geschichtliches Denken...

87. according to Art. 12 N.13 a. of the *1. EheRG* the new rule is in force as from July 1, 1976.
The *1. EheRG* is published in BGBl I 1421-1463. For the first commentaries on the new law see: REICHARD, StAZ 1976 177; DIEDERICHSEN, NJW 1976 1169; RUTHE, FamRZ 1976 409.
For the history of the new formulation of Par 1355 BGB see: first project for reform of the law of marriage and family: BT-Drucks. VI-2577; second project for reform of the law of marriage and family: BT-Drucks. VI-3453.
On the *Diskussionsentwurf* see: FREIMUTH/JANSEN/KURTENBACH/SIEKMANN/WOLF, *Der Diskussionsentwurf eines Gesetzes über die Neuregelung des Rechts der Ehescheidung und der Scheidungsfolgen*, FamRZ 1970 431.
On the *Referentenentwurf* see: BOSCH, *Eherecht in Gefahr?*, FamRZ 1971 57; DEINHARDT, *Kritische Betrachtungen zum Entwurf eines Gesetzes über die Neuregeleung des Rechts der Ehescheidung und der Scheidungsfolgen*, FamRZ 1971 273; LANGE, *Zum Entwurf eines Ersten Gesetzes zur Reform des Ehe- und Familienrechts*, FamRZ 1971 481; HELD, *Die Stellungnahme des Bundesrates zur Reform des Eherechts*, FamRZ 1971 491; MIRBACH, *Über die Notwendigkeit weiterer namensrecht-*

seq.

(4) The spouse who is widow(er) or divorced keeps the matrimonial name. She (or he) may re-assume the name born before marriage, provided a publicly certified declaration is made to the officer of civil status.

The choice of the matrimonial name can be made only at the marriage ceremony[88]. The celebrating officer has to advise the future spouses about the provisions of the law. If they do not make a choice, the name of the man will be the matrimonial name. It seems that a contract containing an agreement on the future matrimonial name is unenforceable according to Par 888 II ZPO[89].

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87. continued.
licher Änderungen im Rahmen des 1. Eherechtsreformgesetzes, FamRZ 1971 502.
On the BT-Drucks. VI-2577: LANGE, *Die Folgen der Ehescheidung im Entwurf eines Ersten Gesetzes zur Reform des Ehe- und Familienrechts*, FamRZ 1973 581.

The Project of a 1st EheRG (= BT-Drucks. 7(650) was presented on June 1, 1973 and discussed on June 8 1973 (40th Meeting's Reports pag. 2225 D-2243 A).
The provisions on the name were as follows: *Die Verlobten sollten verpflichtet sein, bei der Eheschliessung den gemeinsam zu führenden Ehenamen zu bestimmen.*
On Jan. 31, 1975 (147th Meeting's Rep. p 10187 D-10208 C), the National Assembly decided to withdraw from the 1.EheRG the *Gesetz über den Ehe- und Familiennamen*, Bt-Drucks. 7-3119. But the Senate (BR) was of opinion that the new provisions on the name should be treated together with the other provisions on the reform of the law on the marriage and family (1.EheRG) and that the necessity to make a choice and the retroactive effect on existing marriages should be deleted from the project. Moreover the BR requested that the spouses

seq.

Under the new law a choice of name may be made only for marriages celebrated after July 1, 1976[90].

The so-called old marriages have apparently no other choice than the rather cynical way of obtaining a divorce and remarry with choice of name[91].

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87. continued.
should not be allowed to antepone their name of birth to the matrimonial name (BT-Drucks. 7-3268). The Committee (*Vermittlungsausschuss*) did not take into due consideration those suggestions of the Senate: it just restricted the retrospective effect to marriages entered into after April 1, 1953 (the deadline of GG Art 117 I): Bt-Drucks. 7-3358; The National Assembly (BT) accepted (159th Meeting's Rep., p.11145 C - 11147 A), the Senate (BR) refused ratification (418th Meeting's Rep. p. 83B-85D).
On April 7, 1976 the Committee submitted a new project which suggested to reinsert the provisions on the name of the family into the 1.EheRG, to eliminate the obligation to make a choice and any retroactive force (BT-Drucks. 7-4992). This project was accepted by the BT on April 8, 1976 (235th Meeting's Rep. p.16407 C - 16412 D) and by the BR on April 9, 1976 (433rd Meeting's Rep p.128C-136B).

88. an exemption is contained in Art. 3(4) 1.EheRG which provides for the insertion of Par 13 a. after Par 13 of the EheG.

89. DIEDERICHSEN, *Der Ehe- und Familienname nach dem 1.EheRG*, NJW 197 1169

90. Thus the instance of unconstitutionality may be raised again.

91. see RUTHE, *Die Neuordnung des Namensrechts*, FamRZ 1976 409 note 41 at 411; DIEDERICHSEN, *op.cit.*, 1177 at V.

The EheRG provides (Par 1355 (3)) that the spouse whose name did not become the matrimonial name may, it is submitted at any time, put before the matrimonial name the own name of birth or the name borne at the time of the marriage. That means that in case of several divorces and remarriages, if a spouse chooses to keep in every marriage his previous name, it could result at the end a quite long series of names: the law provides no maximum number of names[92].

2. Scandinavian countries

Although the Scandinavian jurisdictions have generally speaking quite peculiar solutions, as far as the names of married women are concerned a certain similarity with the German system can be observed. Thus it seems appropriate to discuss Swedish law under this chapter.[93]

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92. different e.g. in Rumania where only a double-name is admitted: Art. 27 Fam Law Dec. 29, 1953 as amended by Decr. Oct. 8, 1966 and July 30, 1974.

93. Similar provisions are found in:
DENMARK: according to Par 4 *Law ov Personnavne* (Law 140 of May 17, 1961 in force since Jan 1, 1962) the wife receives at marriage the name of the husband if she does not declare to the celebrating authority that she continues bearing her own name.
See also Par 9.2, and Par 11. In every day life it happens frequently that a wife who has declared her wish to continue using her name actually

seq.

The evolution from the use of only given names (*förnamn*) to the adjunct name (*tillnamn*) and finally to the family name (*släktnams - familienamn - efternamn*) took very long time in Sweden[94]. People in the country opposed any innovation and Parliament was towards the end of the past century still very hesitant to introduce a legal obligation for every citizen to assume a family name. The assumption was that it would have been a to strong intervention in this always respected field of autonomous rights of the per-

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93. continued.
uses the husband's name together with her own one, and sometimes also the given name of her husband. In these cases the name of the husband is added without hyphen to the wife's name. See LESKE/LOEWENFELD, *Das Eherecht der europäischen und der aussereuropäischen Staaten*, I, Köln 1963, "Dänemark" 289.
NORWAY: Par 4 of the Law on the name of persons (*Lov om personnamn*, 29 mai 1964 nr. 1) also provides that the wife assumes at marriage the name of the husband, if she does not declare her different intention. See also Par 5. If the wife remarriesshe loses the name acquired with the preceding marriage unless there are good reasons to the contrary. There is a possibility for the husband to be authorized to assume the wife's name (Par 12).
ICELAND: all persons must bear an icelandic name (*prenoun*) or two of them and may add the father's, the mother's or the stepfather's name. Name and adjunctive name (*nafn og kenningarnafn*) must be written for the whole life in the same orthography (Art. 1 Law N.54 of June 27, 1925 *Lög um mannanöfn:* LM). Children take the (given) name of their father adding *-son* or *-dottir*, e.g. the son Björn of Eric Magnusson will assume the name Björn Ericsson, his daughter Astrid-Ute will have the name Astrid-Ute Ericsdottir. Family names are very seldom. The wives of those men who have the right to bear a family name may assume the name of their husbands. (*Konur þeirra manna, sem rett hafta ti þess að bera aettarnöfn, mega nefna sig aettarnafnimanns sins*, LM, Art. 3, last Par). If however the husband does note have a family name - and this is the normal rule in Island - the wife will continue bearing her own maiden

seq.

son, an intrusion which could lead to substantial changes of customs and habits[95].

Regulations were issued on December 5, 1901 with a royal ordinance called *slöktnamnförordningen (SlF)*, which remained in force until 1963, when the new law on the names, *namnlagn (NL)* of October 11, 1963 was promulgated. The *SlF* definitly abolished the custom of free changes of names[96] and introduced the principle that for the future only those people could assume a new family name, i.e. a name which was not yet used in Sweden in the same phonetic or graphic form, who did not have a family name at all or had a very common name in *-son*.[97] The law prescribed that spouses

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93. continued.
name. See HEISE, *Islandisches Ehe-Kindschafts-und Namensrecht*, StAZ 1959 329; LESKE/LEOWENFELD, *op.cit.*, 324. The rules of Iceland are apparently somehow different from those of the other Scandinavian countries. They were nevertheless discussed at this place because of the common historical background.

94. *tillnamn* is normally a patronymic made by the father's name (rarely from the mother's) adding *-son* or *-dotter*. CARSTEN, *Das schwedische Namensrecht*, StAZ 1969 313.

95. SOU 1960: 5, p.50 cited by CARSTEN, *op.cit.*, 314.

96. The liberty to change names had caused some inconveniences particularly amongst soldiers and sailors, therefore since 1667 a law prohibited to sailors to change their names. In the 18th and 19th century, circulars and service orders of military commanders reinforced on frequent occasions this prohibition. CARSTEN, *op.cit.*, 314.

97. Later the administrative practice allowed this form of change of name to all bearers of names ending with *-son* even if they were not common names.

could only assume jointly a new family name, that the change of the father's name affected a change of the legitimate children's name, and that the divorced wife had a right to reassume her maiden name.

Special regulations were introduced on December 12, 1915 on the divorced wife's name, and on June 14, 1917 on the name of illegitimate and adoptive children. Two laws of June 11, 1920 ruled on the name of married wives and legitimate children. The right on the name of legitimate, illegitimate and adoptive children was treated again in a law of June 10, 1949, which practically took over the antecedent regulations. The new law of 1963 abolishes the bipartition of the right on the name, which until that date was treated partly in family law, partly in special laws (public laws), and unifies all rules relating to the name in a systematic coordinated text[98].

A married woman acquires with the marriage the family name of her husband if she does not declare to the *pastor* or to the registrar (*vigselförrättaren*), before the celebration, that she wants to keep the family name which she had before marriage, or another name if there are sound reasons for so doing. The wife is entitled to make the declaration at any time after the celebration of marriage.[99] A married wife, who has assumed

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98. CARSTEN, *op.cit.*, 313 seq.

the family name of her husband may add this name, if she wishes, to the family name which she bore before marriage. If she has retained at marriage her antenuptial name she may add this name to the family name of the husband by declaring her intention to do so to the *pastor*[100].

The custom which allows the married woman to bear the name of the husband without losing her own maiden name was in earlier times limited to the larger towns whereas in the country and amongst the peers a woman continued bearing her maiden name also after marriage.

Towards the end of the 19th century the custom to assume the man's name became the general rule. Nevertheless it was always out of doubt that the wife had only a right and not a duty to assume the name of her husband.

In 1915 a new administrative practice was introduced which provided that in the registers of personal status the wife had to be registered from that time on with the name of her husband. This was however only an administrative regulation which did not modify the substantial right of the married woman on her own name.

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99. This rule allows the wife, who has a professional activity and who has kept for that reason her ante-nuptial name, to assume later the husband's name.

100. The provisions on adjunctive names are available also to widows and divorced wives. The adjunctive name is an intermediate supplementary personal name of the wife, which she may but must not use. Par 6 *NL*.

The Marriage Law of 1920 provided that the wife had to assume the surname of her husband and that she would lose the use of her maiden name; however she could add her maiden name to the name of her husband if she expressely requested it. This rule was strongly criticized since it did not take into due consideration the interests of married women engaged in professional activities.

The opposers of the new law thought that there was no need to continue with the formula of a common marriage name and they developed several propositions which constituted the basis for the work of the Reform Commission which had drafted the new Law on the Name of Persons[101].

The Commission, taking into consideration the interests of a married woman to keep her own maiden name[102], disregarded the arguments based on the concept of a common marriage name as essential element for the stability of mar-

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101. For example it was proposed to grant to the wife the right to choose between the name of her husband and her own maiden name. It was also proposed to leave the spouses free to choose a common marriage name between the name of the husband and the name of the wife, a solution which was recently introduced in numerous states of Eastern Europe. According to the Commission, the name had to be treated in the same way as the nationality (with some minor limitations). It is interesting to note that in all these discussions the question of the right on a name never was taken into consideration. CARSTEN, *op.cit.*, 319.

102. The Commission proposed to renounce to a common family name and to leave to the wife the right to choose between assuming the name of her husband or keeping her own name.

riage[103], and reached the conclusion that for obtaining a correct solution for a married woman's name there were the following possibilities:

- either the wife keeps her own name if she does not declare that she wants to assume the husband's name,
- or the wife automatically assumes her husband's name if she does not declare before marriage that she wants to keep her own family name.

Though admitting that the first solution was theoretically better, the Commission preferred the second on the basis that married women would probably continue assuming their husband's name as a general rule. Thus it seemed unwise to compel the majority to make a declaration of choice.

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103. The Commission underlined that it had not found any concrete example of how the abolition of a common marriage name could adversely influence a marriage, and came to the conclusion that the question of the name of the spouses is of a very secundary importance for the good success of a marriage and could be therefore ignored. The Commission observed also that those who sustained the necessity of a common marriage name had no elements in favor of their thesis in the tradition of Sweden where since remote times the wife has always had the right to choose amongst her own name and the name of her husband.

C. THE NAME IS RATHER A SIGN OF THE WIFE'S IDENTITY

There is no such thing in common law jurisdictions as a general duty of public law to bear a particular name, nor is the concept known of an exclusive right in a name. Thus VANN J. in *Smith v. United States Casualty*[104] could cite the case of a man with eight sons, each of them having a different surname and none the surname of the father. And WAHL J.[105] could style the lapidary sentence:

> *The proudest patronymic in the land is available to the lowliest individual, and this without anyone's permission.*

These are good examples of the new world's pride in individual freedom, which admitted no administrative interference in matters unrelated to the public interest.

In all common law countries society has tried to make the wife a property of the husband, labeled, of course, with the man's name, as any other of his properties. It had a hard time and could never fully succeed with this doctrine, although its advocates had no hesitation to affirm that

> *for several centuries, by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name.*[106]

Which is not true as can be shown by lots of examples. E.g. the wife of Chief Justice COOK (1552-1634) never took her

husband's name but was always known as Lady Hatton.

1. England[107]

In England a custom derived from the patriarcal concept of the family requires a woman to assume at marriage the surname of her husband in substitution of her father's name. She acquires however the husband's name only by repute, since the name is the sign of a person's identity[108]. The name which

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104. 90 NE 947 (1910).

105. *Appl. of Green*, 283 NYS 2d 242 (1967).

106. *Chapman v. Phoenix National Bank of City of New York*, 85 NY 437 (1881).

107. Generally speaking the common law rules apply also in:
IRLAND: see BERGMANN/FERID, *op.cit.*, "Irland" 21.
CANADA: (not in Quebec). See *Report of the Royal Commission on the Status of Women in Canada*, Ottawa, Information Canada 1970 226; *A woman's name*, A Study Paper, Ontario Law Reform Commission, Toronto 1975.
SOUTH AFRICA: SPIRO, *The name of a married woman*, 66 SALJ 189 (1949).
NEW ZEALAND: the wife may change her name whenever she wants according to the Birth and Death's Registration Amendment Act, 1953 S.17.
AUSTRALIA: Australian Capital Territory, N.17 1963, An Ordinance Relating to the Registration of Births, Deaths and Marriages, s. 22(3): "Sub-section (1.) of this section does not apply to a change in a person's surname consequent upon the person's marriage". North South Wales, the legislation of this state does not contain any provisions in relation to loss of family names by divorce or marriage. It is not the practice to enter a notice of change of name of a female in the margin of the registrar of births where the change of name is effected as a result of or subsequent to marriage. (Inf.Registrar Gen.). The Northern Territory of Australia

seq.

the wife acquires at marriage can be unilaterally changed by her, according to the general rule that everybody may freely change his name[109].

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107. continued.
N.42, 1963, An Ordinance Relating to the Registr. of Births, Deaths and Marriages, sec.17 and 21 (3) worded as sec. 22 (3) Australian Capital Territory. Queensland: information of the Solicitor General "...unable to find any legislation passed by the Queensland Parliament which deals with the acquisition of family names by marriage. Of course marriage is governed by the Commonwealth Marriage Act. It is customary for a woman upon marriage to discard her former surname and to assume the surname of her husband. There is no legislation dealing with the loss of name by divorce or marriage."Tasmania, The Marriage Registration Act 1962,sec. 8: "If the Registrar-General is satisfied that any person whose marriage is registered is lawfully using a name other than the name by which he is described in the Register, the Registrar-General may, upon payment of the prescribed fee, cause to be entered in the Register a note of the name so used by that person". Western Australia:according to the Change of name regulation, 14 Geo V, N.XIX N.40 of 1923, it is unlawful for any person to assume, use, or purport to assume or use any name other than that which such person had assumed under any statute, deed poll or license, or by marriage.... See also Registr. of Births, Deaths and Marriages, 10. Eliz. II, N. XXXIV N.34, 1961, Amend. N.28 1965, which provides that the Registrar General shall not cause an entry to be made in the registration of the birth of a woman, by reason only of the change of the name of that person consequent upon marriage or upon the change of such a name, to a name other than the maiden surname of that person.
CYPRUS: The common law of England was applied until recently in the Rep. of Cyprus under sec. 29 (1)(c) of the Courts of Justice Law 1960.
SIERRA LEONE, *JAMAICA*.

108. HALSBURY's, *The Laws of England*, 3d edn. London 1957 829. The practice that a married woman takes her husband's name is not compelled by law and she may continue to use her maiden, married, or anyother name she wishes to be known by: TURNER-SAMUELS, *The Law of Married Women*, London 345. See: *Fendall v. Goldsmid*, (1877) 2 PD 263; *Dancer v. Dancer*, [1948] 2 All E R 731; *Chipchase v. Chipchase*, [1939] P 391; *Chipchase v. Chipchase*,[1942] P 37; *Sullivan v. Sullivan*, (1818) 2 Hag Con 238; *Wakefield v. Mackay*, (1807) 1 Hag Con 394.

In *Fry, Reynolds v. Denne*[110] VAISEY J. said:

> *I am quite well aware that many women, both married and unmarried, make use of pen-names and theatre-names, and there is, so far as I know, nothing to compel a married woman to use her husband's surname, so that the wife of Mr. Robinson may, speaking generally, go by the name of Mrs. Smith if she chooses to do so.*

2. U.S.A.

In U.S.A. married women are expected to assume the name of their husband. In the older cases this was held to be a duty (*the maiden name of the wife is absolutely lost*)[111] but eventually the better opinion prevailed which held that there is no legal requirement for the wife to assume her husband's name.

This is consistent with the common law rule that any person may assume any name he wishes, and is at least not in open conflict with the constitutional principle of equality. In most divorce Statutes provisions are contained empowering the divorce court to change the name of the wife, or to allow her to resume her maiden name, or a name which she bore

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109. "and married women form no exception", see STRANGER-JONES, *Eversley's Law of Domestic Relation*, London 1951 53. See also JOHNSON, *Family Law*, London 1958 56.

110. [1945] 2 All E R 205.

before marriage; thus the usage that married women assume their husband's name is impliedly recognized[112].

In Louisiana the influence of French principles of law is still traceable.

a. The older doctrine in U.S.Law

In old times wives were considered their husband's property, *chattels rather than beings*[113], and they had to assume their husband's name; they had to be *branded like cattle* as the advocates of women's Liberation say[114].

If we go through some of the cases we meet indeed quite unpleasant situations. In *re Kayaloff*,[115] a musician who had reached notoriety under her maiden name was negated to receive a certificate of naturalization under this

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111. *Chapman v. Phoenix*, cit. at note 66.

112. Ala Code 1958 Tit 34 par 39(1); Alaska Stat 1973, 09.55.210; ARS 1973, 25-325; Ark Rev St 1962, 34-1216; Cal Civ Code Par 4362; Conn Publ Act No 73-373; Del C c 13 Par 1536; DC Code 1973, Par 16-915; Ga Code Ann 1969, 30-116; 30-121; Hawaii Rev St 1968, 574-5; SHA ch 40 Par 17; Burn's Ann St 31-1-11. 5-18; KSA 60-1610; KRS 403.230; Me RS 1965, 19 Par 752; Md Ann Code 1973, art 16 par 32; MGLA ch 208 Par 23; Mich Stat Ann Par 25.181; MSA 518.27; RSMo 452.100; NRS 127.130; NHRS 458.24; NJSA 2A:34-21; NY Dom Rel Law 240-a; NC GS 50-12; Ohio RC 3105.16; Okla St tit 12 par 1278; ORS 107.105; 23 PS Par 98; RI Gen Laws 15-5-17; SC Code 20-117; SD CL 1967, 25-4-47; Vernon's Ann Civ St 5931; VS 15 558; Va Code Ann Par 20-121; RCW 26.08.150; WVa Code Par 48-2-23; WSA 247.20; CZ Code tit 8 Par 201.

113. *Blanc v. Blanc*, (sup Ct) 47 NYS 694-696 (1897).

114. STANNARD, *Married women v. Husbands' names*, San Francisco 1973.

115. 9 F Supp 176 (1934)

name since the court held that a woman at marriage takes the surname of her husband, and this is her legal name and if she wishes naturalization, the certificate must be issued in the surname of her husband. In *Rago v. Lipsky*[116], the fact that a married woman had reached professional and political notoriety under her maiden name has been considered irrelevant in order to her duty to cancel her registration in the electoral lists and to be reregistered under the name of her husband. In *Appeal of Hanson*,[117] Mrs Hanson had submitted a request to be allowed to continue working in her legal profession under her maiden name; in the same request she had given assurance that she would bear the name of her husband in all other circumstances and relations of life. The request was dismissed. The court said that it recognized the common law rule that a married woman could use her maiden name for many purposes particularly after divorce, but the court considered itself incompetent to intervene in the affairs governed by the rules of the Board of Law Examiners. In *Bacon v. Boston Elevated Ry Co.*,[118] a car belonging to a married woman registered under her maiden name was considered illegally registered and recovery by the owner for personal injuries in a collision with an electric car was precluded.[119]

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116. 63 NE 2d 642 (1945)

117. 198 A 114 (1938)

118. 152 NE 35 (1926)

Generally speaking, except in Hawaii where a married woman is ordered by *Statute* to assume her husband's name[120], whenever the wife is said to be bound to assume her husband's name, this rule is supported only by custom[121].

b. The more correct approach

The more liberal opinion considers that the use of the name of the husband by a married woman is let to her discretion since there is no statutory or other legal requirement that she must use her husband's surname. It is common place among women who pursue careers after marriage to use both their husband's and their own maiden name[122]. Thus the wife is entitled to use her husband's name but she has no duty of doing so.[123]

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119. see also *Korsun v. McManus*, 63 NE 2d 457 (1945); LOMBARD, *Massachusetts Practice, Family Law*, I, 2, 2A, 3, Boston 1967, par 1076: In the case of a void marriage if the wife continues using the name of the husband and she results identified with that name, the registration of a car in the name of the husband has to be considered valid; *Freeman v. Howkins*, 14 SW 364 (1890): a citation of a married woman in her maiden name is null and void.

120. Hawaii Rev St 574-1 (1968). The same rule seems to apply, as a matter of law, in:
ALABAMA: Forbush v. Wallace, 341 F Supp 317 (1971) and
INDIANA: re Hauptly, 312 NE 2d 857 (1974).

121. e.g. in:
CONNECTICUT: Custer v. Bonadies, 318 A 2d 639 (1974)
MARYLAND: Stuart v. Board of Supervisors, 295 A 2d 223 (1972)
OHIO, Krupa v. Green, 177 NE 2d 616 (1969)
see also Ark, OAG 74-75, April 19. 1974; Cal, OAG, March 12,

In California it was held that a married woman may be sued in her maiden name if she is sufficiently identified by that name[124]. And in *Sousa v. Freitas*[125] it was said that there is nothing in law that automatically a wife's name is changed unless she herself has consented to the change[126].

In the Nebraska case *re Taminosian*[127] the dissenting opinion of Mr. Justice SEDWICK[128] was that a change of the husband's name does not necessarily change the name of the wife since, it was submitted, husband and wife might have different surnames.

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121. continued.
1974; Ga, OAG 74-33, Mar. 15, 1974; Ill, OAG 5-695, Feb. 13, 1973; Me, OAG, Apr. 12, 1974; Mass, OAG 74/75-5, Sept. 16, 1974; Mo, OAG, May 1, 1974; Nev OAG 311, Mar 15, 1966; NC, OAG, Mar.27, 1974; Pa, OAG 62, Dec.20, 1973; SC, OAG June 6, 1974; Tex, OAG H-432, Oct 25, 1974; Vt, OAG 179, Feb 4, 1974; Va, OAG, June 6, 1973, all affirming that as a matter of usage (or sometimes by operation of law) a married woman changes her name into the name of her husband.

122. BISKIND, *Boardman's New Family Law with Forms*, New York 1964, par 13.

123. GROSSMAN, *The New York Law of Domestic Relations (with Forms)*, Buffalo 1947, par 49.

124. *Bogart v. Woodruff*, 96 Cal 609 (1892) and *Emery v. Kipp*, 154 Cal 83 (1908).

125. 89 Cal Rptr 485 (1970).

126. As for the change of name by a married woman without her husband's consent, see in *re Camara* No 125025, Sup Ct of Cal, July 2, 1971.

127. 150 NW 824 (1915).

128. BARNES and HAMER JJ., concurring in dissent.

In New York a woman, whether married or not, is permitted to vote under her maiden name if she so prefers[129]. There is no statutory or other legal requirement for a woman to assume her husband's surname: she has just the right to use it[130].

In Texas the *dictum* in *Freeman v. Hawkins*[131]:

> *On the marriage of Mary E.Robinson the law conferred on her the surname of her husband,*

is in contradiction with *Wilkerson v. Schoonmaker*[132], a judgment of the same year in which it was held that:

> *A deed made to a married woman by her name previous to her marriage, her identity being shown, is valid to convey land,*

and was not followed in *Rice v. The State*[133] where it was explicitly said that:

> *There is nothing in our Statute requiring or compelling the wife to take or assume the name of her husband.* 134

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129. Art.15 par 412(3) New York Election Laws.

130. GROSSMAN, *op.cit.*, 35 (par 49).
BISKIND, *op.cit.*, par.13

131. 14 SW 364 (1890).

132. 77 Tex 615 (1890).

133. 38 SW 801 (1897).

134. See also *Leake v. Saunders*, 126 Tex.69 (1935).
It was followed however in *Kidd v. Rasmus*, 285 SW 2d 415 (1955) where the court held that at marriage the wife takes the husband's surname which becomes her legal name.

In Wisconsin notwithstanding the Equal Rights Statute of 1921[135], State authorities insist in negating married women the right to use their maiden name[136].

In Ohio as early as in the 1941 case *Bucher v. Brower*[137] it was held that since the finding of the court was that Mrs. Gertrude A.Bucher did not change her name at the time of her marriage to Mr Marshall, but that she retained her name by an agreement with her husband, this was good for the court: *Nowhere in the Statutes is a woman so prohibited.* *Bucher* was affirmed and generalized in *Krupansky v. Green*[138] KOVACHY J. said:

> *The object and purpose of describing a person by a name is to identify such person... Under the facts of this case, Blanche Krupansky can be identified by no name other than that of Blanche Krupansky. She has brought this about by 1) arranging an antenuptial written contract to that effect with her husband; 2) scrupulously using no other name in all of her activities; 3) notifying the Board of Elections of such desire; 4) obtaining a notation on her registration card to the effect that she is married and will retain her single name by the Board of Elections; 5) voting in three elections under such name.*
> *Thus it appears she made the use of her maiden surname after marriage agreeable to her husband, used such name after marriage openly and notoriously, with no deviation whatever, and obtained a public documentation of the same. By these actions, Blanche Krupansky has clearly demonstrated her intent and purpose to be identified and known by the name of Blanche Krupansky and by no other name.* 139

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135. "Women shall have the same rights and privileges under the law in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying property, care and custody of children, and in all other respects", Wisconsin Statutes Annotated, Par 246.15.

In Maryland it was held in *Stuart v. Board of Supervisors*[140] that there is no statutory requirement that a married woman has to adopt her husband's surname:

> *Consistent with the common law...we hold that a married woman's surname does not become that of her husband where, as here, she evidences a clear intent to consistently and nonfraudulently use her birth given name subsequent to her marriage...the mere fact of marriage does not, as a matter of law, operate to establish the custom and tradition of the majority as a rule of law binding upon all.*

c. The unilateral change of name of the married woman.[141]

Some *Statutes* provide that the change of name of the husband affects also the name of the wife[142]. Some others provide that the extension to the wife of the husband's change affects her only if she joins in the application.[143]

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136. see Governor Knowles' veto to a bill of 1969 introducing women's right to retain their name after marriage, and other references in STANNARD, *op.cit.*, 36. See also *State ex Re. Thompson v. School Directors*, 179 Wis 284 (1923).

137. *State ex rel. Bucher v. Brower*, 21 OO 208 (1941).

138. (C app.) 177 NE 2d 616, 622 (1961)

139. see also SKEEL J. in the same case.

140. 295 A 2d 639(1972).

141. 57 AmJur 2d 282; 65 CJS 25; 20 Yale L.J. 387 (1910-1911); BERNARD, *Law for the family*, New York 1962, 128; 24 Tul L Rev 495, 499 (1950); LOMBARD, *op.cit.*, par 303. CALIFORNIA: *Weingand v. Lorre*,(C App) 41 Cal Rptr 778 (1964), *Trower v. Trower*, (C App) 66 Cal Rptr 873 (1968); *Sousa v. Freitas*, (C App) 89 Cal Rptr 485 (1970).

seq.

In Pennsylvania and Vermont the adhesion of the other spouse is necessary for obtaining the statutory decree of a change of name[144]. In some other States (Florida, Illinois) one spouse may join into the request of the other, or the requerant may include in the application the other spouse with her or his consent[145].

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141. continued.
MISSISSIPI: Marshall v. Marshall, 93 So 2d 822 (1957).
NEW YORK: Queen v. Queen, (Sup Ct) 135 NYS 2d 536 (1954); *App. of Green*, (Civ Ct) 283 NYS 2d 242 (1967); *re Anonymous*, (Civ Ct) 293 NYS 2d 834 (1968); *Appl. of Middleton*, 304 NYS 2d 145 (1969).
OHIO: Pierce v. Brushart et al., 92 NE 2d 4 (1950), *Krupa v. Green*, cit.
Almost all States have regulated the matter of the change of names also by Statutes which do not abrogate the common law unless it is expressely said. They are only alternative methods of change of names. See in *NEW YORK: Smith v. United States Casualty Co.*, 90 NE 947, 950 (1910).

142. *IOWA:* ICA 674.10;
MICHIGAN: Stats Ann 27.3178(561): the husband being the "head of the family";
VERMONT: VS 15 814.

143. *MINNESOTA:* MSA 259.10. See also:
NEBRASKA: re Taminosian, 150 NW 824 (1915): *The change of the husband's name does not necessarily change the name of the wife.*

144. *PENNSYLVANIA:* 54 PS 2;
VERMONT: VS 15 811. The analogous rule seems to exists in:
OREGON: ORS 109.310.

145. *FLORIDA:* FSA 62.031(5) and
ILLINOIS: SHA 96.1.

The unilateral change of name by a married woman seems to be admissible in Virginia[146] whereas it does not seem to be allowed in Iowa and Kentucky[147].

An interesting case is *re Evetts' Appeal*[148] where it was held that the court has the power to change a wife's name against the wishes of her husband. Of considerable importance is also the recent case *re Hauptly*[149] where it was held that a married woman may reassume her pre-marriage name by consistent use after marriage.

Actually it seems that there is nothing in law that might prevent a married woman from assuming during marriage under the *common law* any name (different from her husband's name) as long as there are no statutory prohibitions[150]. If a married woman wants to change name according to a statutory provision by application to a court, she should be aware that generally statutory changes are under the judge's discretion and that only consistent and exclusive use of a pre-marriage name may be persuasive to the court.

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146. *VIRGINIA:* Code 8-577.1: "...and if applicant is a woman who is or has been married..."

147. *IOWA:* ICA 674.1: "...any person who...is unmarried, if a female,... may ask for change of name"; and *KENTUCKY:* KRS 401.010:"any person, who is not a married woman...".

148. (C App) 392 SW 2d 781 (1965).

149. 312 NE 2d 857 (1974).

d. The situation in Louisiana

In Louisiana under the civil law a woman does not lose her patronymic name through marriage and her legal name never varies with a change in her marital status[151].

SAMUEL J., of the Court of Appeal, said in *Wilty v. Jefferson Parish Democratic Executive Com.*[152] that:

> *In Louisiana a married woman retains her maiden name and bears the name of her husband as a matter of custom,*

and SANDERS J., of the Supreme Court, affirmed that:

> *The common law fiction of merger between husband and wife, from which a charge of the wife's legal name arises, has never obtained in Louisiana. Rather, this State has followed the civil law doctrine. After marriage, the legal name of a woman continues to be her maiden name, or patronym. The surname of her husband is used only as a matter of custom to indicate the marital status of the wife.* 153

e. Given name and middle initial

It has been held consistently by U.S. Courts that although a married woman may be expected to assume her husband's sur-

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150. *ALABAMA:* Code 1940 13.278; *Comer v. Jackson*, 50 Ala 384, 387;
HAWAII: Rev St 574-5;
LOUISIANA: LSA-RS 13:4751, note OAG 1942-44, p 963; *Webber v. Webber*, (C App) 167 So 2d 519 (1964).
MASSACHUSSET: GL 210.12; *Petition of Merolevitz*, 70 NE 2 249 (1946).

151. Notes to Form N. 208 c., La Code Civ. Pro. Ann.

152. (C App) 156 So 2d 800 (1963).

153. *Wilty v. Jefferson*, (Supr Ct) 157 So 2d 718 (1963). See also *Succession of Kneipp*, 134 So 376 (1931).

name, as far as the Christian name is concerned the correct rule should be that the wife keeps her own.[154]

There is however authority that a wife is designated not only with the surname of her husband but also with his Christian name or names together with the abbreviation "Mrs"[155].

The law does not recognize any relevance to the middle initial. Nevertheless it has been held in numerous decisions that it is preferable that a married woman uses her own middle initials instead of those of her husband[156].

f. Constitutional right to the pre-marriage name

The equal rights amendment[157] will necessarily render unconstitutional the rule that a wife must assume by operation

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154. *Carlton v. Phelan*, 131 So 117 (1930);
57 AmJur 2d 281; 65 CJS 5; 35 ALR 417;
ALABAMA: Roberts v. Grayson, 173 So 38 (1937);
CALIFORNIA: Emery v. Kipp, 97 P 17 (1908)
LOUISIANA: Wilty v. Jefferson, cit.
MINNESOTA: Brown v. Reinke, 199 NW 235 (1924);
NEBRASKA: Kelle v. Crab Orchard Rural Fire Protection Dist., 83 NW 2d 51 (1957).

155. 57 AmJur 2d 281; 65 CJS 5;
ALABAMA: Roberts v. Grayson, cit.
NEBRASKA: Carroll v. State, 73 NW 939 (1898).

156. 57 AmJur 2d 281; 65 CJS 5, 6; 35 ALR 417, 418.
CALIFORNIA: Emery v. Kipp, cit.

157. Section 1). Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.
Section 2). The Congress shall have the power to enforce by appropriate legislation the provisions of this article.

seq.

of law the name of her husband at marriage. Quoting from GORDON[158]:

> *By imposing a surname on a married woman without regard to her individual factual situation, the state is arguably depriving her of a property right - her name and reputation - without due process of law. Similarly, by conditioning the grant of benefits or issuance of licenses to a married woman or reregistration in her husband's name, the state may be acting in violation of the due process clause. Moreover, a statute preventing a married woman, from determining her own name may be viewed as an infringement of her constitutional right of privacy. At the minimum, due process would require an opportunity to rebut the statutory presumption that the woman had, in fact, assumed her husband's name.*

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157. continued.
Section 3). This amendment shall take effect two years after the date of ratification.

158. GORDON, *Premarriage Name Change, Resumption and Reregistration Statutes*, 74 Col L Rev 1508 at 1513 (1974).

D. THE SPOUSES MAY CHOOSE THE NAME WHICH THEY WANT

Ideological prejudices are normally removed by new ideologies. Accordingly the ideological denial of equal rights to the woman could only be eradicated with an ideological turnover, as it was the case in Soviet Russia and its satellites.

Since the rule of the compulsory attribution to the wife of her husband's name was manifestly in contradiction with the fundamental Soviet doctrine of equality of rights (Communism), necessarily it had to be changed.

We have no objections on how the better socialist solution was achieved: what counts is the result.

1. U.S.S.R.

ENGELS, asked what influence Communist society would have had on the family answered that it would transform the relations between the sexes into a purely private matter which concerns only the persons involved and in which society should have no occasion to intervene. It could do this since it did away with private property and educated children on a communal basis removing in this way the bases of traditional

marriage, i.e. dependence of the woman on the man and of the children on their parents. The family of the future should be considered essentially a naturalistic unit rather than a social institution. The individual marriage so conceived could not be indissoluble, since when love comes to an end, separation would benefit all parties concerned.[159]

Marriage and divorce were amongst the first institutions to be regulated by the new revolutionary Soviet laws. In December 1917 divorce, on consent of the spouses or on request of only one spouse was introduced. Shortly later, civil marriage substituted the religious institute.

The scarce provisions of these first regulations were substituted in 1918 by the Code of laws relating to civil registration of deaths, births and marriages (October 17, 1918).

The new Family Code of the *RSFSR* showed a radical abandonement of the traditional concepts of marriage and family. Family relations were separated from the relations within a marriage: all parental relationship was considered not any more based on marriage but only on birth.[160] The Code declared that

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159. GEIGER, *The Family in Soviet Russia*, Harvard, Mass, 21-23. See also SEIFERT, *Das sowjetrussische Eherecht*, Diss. 1940 40; FLORKOWSKI, *Das sowjetische Ehescheidungsrecht*, Diss. Göttingen 1967 44.

160. GSOVSKI, *Soviet Civil Law, Private Rights and their Background* seq.

birth alone is the basis of the family and of course no difference is admitted between birth within or out of marriage.[161]

The Code of 1918, in the attempt to realize a complete equality of the spouses, restricted to a minimum the effects deriving to them by their marriage relation. The only mandatory disposition was the imposition of a common marriage name which could be, in the free choice of the spouses, either the husband's name, or the wife's name, or a name composed from both of them.[162]

This first law did not allow the spouses to keep each their own antenuptial name. Things were changed however with the Code of Laws on Marriage, Divorce, Family and Guardianship of November 19, 1926.[163]

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160. continued.
under the Soviet Regime, Ann Arbor 1948 111, and the citation from BRANDENBURGSKY at 112.

161. GSOVSKI, *op. et loc. cit.*; SCHLESINGER, *The Family in the USSR*, London, 348.

162. DE DOLIVO, *Le mariage en droit sovietique*, Paris 1936, 88; GEIGER, *op.cit.*, 56.
Art.100 Code of 1918: - Married persons use a common name (the matrimonial surname). On the registration of marriage they may choose whether they will adopt the husband's or the wife's surname or their joint surnames.
Art.101 Code of 1918: - Married persons retain their matrimonial surname during marriage and also after the dissolution of the marriage by death or by declaration of the court that one of the parties is to be presumed dead.
Art.102 Code of 1918: - When a marriage is dissolved by divorce, the petition for divorce must state by what surname the married parties wish to be known henceforth. In de-

Marriage is considered more and more a private matter. The registration to which the law refers has no constitutive character, *it is only the proof of the formalization of marriage.*[164]

De facto marriages become frequent. Divorce is simplified: whilst the Law of 1918 prescribed the intervention of the Court (Art. 87, 88, 89 and 90), the Code of 1926 reduces divorce to the *registration of the fact that cohabitation is terminated*[165] (Art. 18, 19, 20, 21, 22).

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162. continued.
fault of agreement between them on this question, the divorced husband and wife shall bear for the future the name which each of them was respectively known before marriage.
Sources from SCHLESINGER, *op.cit.*, 35.

163. Art. 7 Code of 1926: - By registration of a marriage the spouses may declare that it is their desire to bear a common name, which may be either the wife's or the husband's name, but they may also declare that each prefers to maintain the own name.
The mandatory formulation of Art.100 of the Code of 1918 (...the spouses use a common name...) has been abolished by the Code of 1926 (...the spouses...may declare...if it is their desire...).
For the source and other references see SOLOWEITSCHIK, *Das Eherecht Sowjetrusslands und seine Stellung im internationalen Privatrecht*, Leipzig 1931 54; SEIFERT, *op.cit.*, 41, refers to the particular rules in the Codes of Laws on Marriage and Family in *BelSSR* (Art. 18), *AzeSSR* (Art. 20, where the use of a double name is admitted), *UkrSSR* (Art. 12), where the use of the double name by one spouse only is admitted, if the other spouse gives his or her consent. According to DE DOLIVO, *op. et loc.cit.*, the possibility of use of a double name exists also in *GeoSSR*. For the *RSFSR* the possibility of using the double name was abolished by an amendment of October 16, 1924, see SOLOWEITSCHIK, *op.et loc. cit.*
See also: THE CODE OF LAWS ON MARRIAGE, FAMILY AND GUARDIAN

seq.

As far as the spouses' name is concerned we may suppose that,given the liberal character of the provisions and the ample possibility of choice, the spouses were entitled to act according to the provisions of Art. 7 and 21.

In 1936, a radical change in the policy of family took place.[166]

Marriage and Family are not any more considered a private matter from which society and public administration are excluded. Now the State affirms its faculty to model and rule family and matrimonial life and a new principle is expressed by the following concept: there is no need anymore to exclude parents from the education of their children, since parents have now reached a high political and cultural level. Family is now the cell of communist education for the new generation and marriage is the very basis of the family.[167]

With the reform of July 8, 1944 the registration of marriage becomes an essential condition for the realization of

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163 . continued.
SHIP of the Russian Socialist Federated Soviet Republic, London 1936 7: *The joining of two surnames of persons registering the marriage into a hyphenated one for both of them is not permitted.* (Par 47 of the instruction issued by the People's Commissariat for Home Affairs and the Central Statistical Administration [*TSSU*] 1927 N. 468).

164 . SCHLESINGER, *op.cit.*, 350; GSOVSKI, *op.cit.*, 113.

165 . GSOVSKI, *op.cit.*, 122.

its legal effects, inequality between legitimate and illegitimate children is introduced, divorce can be granted only by courts with a procedure manifestly intended to discourage the spouses desiring to obtain it.[168]

The rule on the name (Art. 7) remained the same. As for divorce, the Edict of April 16, 1945 of the *RSFSR* provides that the court when granting a decree of divorce, shall restore to each spouse the prematrimonial name, if so requested.

Further modifications have been introduced recently after the confirmation of the fundamental rules for the legislative activity of the Republics of the Union on June 27, 1968.[169]

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166. BILINSKY, *Das sowjetische Eherecht*, Studien des Instituts für Ostrecht, München 1961, band 13 p.58.

167. FLORKOWSKI, *op.cit.*, 49.
SCHLESINGER, *op.cit.*, 297.

168. GREGNANIN, *Il matrimonio della Repubblica Socialista Federativa Sovietica Russa nella filosofia e nel diritto*, Milano 1956 71 et seq.; FLORKOWSKI, *op.cit.*, 52; GSOVSKI, *op.cit.*, 122.
In particular: DAVID/HAZARD, *Le droit soviétique*, tome II Paris 1954 318 seq.; HAZARD/WEISBERG, *Cases and readings on Soviet Law*, Columbia University, New York 1950 377.

169. PRAVDA N.180, June 28, 1968; BERGMAN/FERID/GEILKE, *op.cit.*, 38 seq.
In the years 1969-1970 the Republics of the Union conformed their Family Codes: *ArmSSR* with Law of July 18, 1969, in force from January 1, 1970; *AzeSSR* with Law of June 13, 1969 in force from November 1, 1969; *EstSSR* with Law of July 31, 1969 in force from January 1, 1970; *GeoSSR* with Law of June 18, 1970 in force fron October 1, 1970; *KazSSR* with Law of August 6, 1969, in force from January 1, 1970;

seq.

Article 11 of the Fundamental Dispositions of June 6, 1968 prescribes that at celebration of marriage the spouses may choose according to their desire the name of one of them as common family name, or they may keep their ante-nuptial name.[170] It is left free to the Republics of the Union to rule that the spouses have a right to use a double name.[171] The spouses are obliged to deciare their choice.

The change of name of one of the spouses during marriage does not entail the change of the name of the other spouse.[172]

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169. continued.
KirSSR with Law of December 26, 1969 in force from July 1, 1970; *LettSSR* with Law of April 18, 1969 in force from October 1, 1969; *LitSSR* with Law of July 16, 1969 in force from January 1, 1970; *MolSSR* with Law of December 26, 1969, in force from April 4, 1970; *RSFSR* with Law of July 30, 1969 in force from November 1, 1969; *TadSSR* with Law of June 19, 1969 in force from January 1, 1970; *TurSSR* with Law of December 25, 1969 in force from May 1, 1970; *UkrSSR* with Law of June 20, 1969 in force from January 1, 1970; *UzbSSR* with Law of June 6, 1969 in force from October 1, 1970.
Sources: GEILKE, *op.cit.*, 16.

170. See e.g. MARRIAGE AND FAMILY CODES OF: *RSFSR*, Art. 18; *BelSSR*, Art. 19.1; *EstSSR*, Art. 17; *KazSSR*, Art. 17; *LettSSR*, Art. 18.1; *LitSSR*, Art. 18; *UkrSSR*, Art. 19.1; *UzbSSR*, Art.22.

171. The double name is admitted e.g. in the MARRIAGE AND FAMILY CODES of: *BelSSR*, Art. 19.2; *UkrSSR*, Art. 19.1.2, with the limitation however that the double name be composed of not more than two elements. See GEILKE, *op.cit.*, 35.

172. DE DOLIVO, *op.cit.*, 88; GEILKE, *op.cit.*, 35, also note N.4; BILINSKY, *op.cit.*, 53; ROMASHKIN, *Fundamentals of Soviet Law*, Moscow 373; SOLOWEITSCHIK, *op.cit.*, 54; CODE OF LAWS ON MARRIAGE, FAMILY AND GUARDIANSHIP, *op.cit.*, 7 note a., reference to Par 17 of the instruction issued by the People's Commissariat for Home Affairs, 1928 N. 180.

2. Other socialist States

Family, as we have seen, has become a vital factor in the development and the consolidation of socialist society. Thus, when the eastern European countries were attracted in the communist orbit, they had to change their family laws, and as a consequence, the provisions on the name. Some countries applied the Soviet doctrine very liberally (Yugoslavia even in a more advanced way); others (such as Hungary or Poland) with some reluctancy.

As far as the name is concerned the situation is as follows:

In Albania the Soviet rules apply. Double names in whatever order are admitted. Children receive the name of the father. In case of divorce each spouse returns to his pre-marriage name, unless special authorization is obtained by the divorce court.[173]

In Bulgaria the spouses declare to the Registrar of marriages what name they want to bear (keep their own, assume or add the other spouse's name)[174]. "Own name" means the name of origin, not the pre-marriage name.[175]

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173. Code of Family of the People's Rep. of Albania, L 4020 of 23.6.1965, Drejtësia popullore 1965, N.4 p.49, Art.43-56. The previous law provided that children assume the common

seq.

In Rumania[176] besides the general rule there are special provisions allowing the unilateral change of a spouse's name (adhesion of the other spouse is necessary if he bears the common family name)[177]. Children may receive the name of one of their parents (or the double name) as agreed by the spouses.[178]

A better solution is achieved in Yugoslavia,[179] where the spouses are free to keep their own name, or to assume the other spouse's name or to use both names in whatever order and to keep the name so acquired after divorce if they want; and the children receive the name of one of their parents or of both of them, or another name.[180]

The citizen has indeed a right to change his name and there are only few grounds on which the change will not

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173. continued.
name of their parents unless a different agreement has been taken: L Marr N.601 of 18 5 1948, Art.6

174. Code of Fam. of the People's Rep. of Bulgary, March 15, 1968, DV 22 3 1968 n.23, p.1 Art. 7.

175. Art.6, Law on Persons and Family 23 July 1949 D A 9 8 1949 N.182 and amendments.

176. Art. 27 and 28 Law of Family N.4 of 29 12 1953 amended Decr. 8 10 1966, Buletinul Of. RSR N.64 of 8 10 1966 p. 458.

177. not applicable to foreigners. Art. 8 Decr. N.975 23 10 1968 in Buletinul Oficial RSR N.136 of 29 10 1968 Art.14.

178. Law of Family, Art.62.

179. Art.6 Law on the names of persons of 8.2.1965 in Sluzbeni list 28 6 1965 N.28 p 1157. See also SR of Croatia, Law on the name Art.6 in Narodne Novine 28 12 1973 p 737 N.511; SR of Bosnia and Herzegovina, Law on the Names, Art.6, Gazette of Laws 20 12 1971, XXVII N. 35/71.

be granted.[181]

In Czechoslovakia the spouses may choose between keeping their name or assuming the name of one of them.[182] The name is not lost in case of divorce, unless so desired and declared within a month from the divorce decree.[183] If the spouses keep their name they are expected to declare whose name will be given to their children.[184]

In Hungary the wife may either use the surname of her husband (together with some explicatory word about her status of married woman) - to which she is always allowed to add her own name - or keep her own name. In this case she must so declare to the officer of civil status before the marriage ceremony.[185] No changes of the so established names are possible unless leave of the competent administrative authority is obtained.[186] The children's name might be the father's or the mother's surname.[187]

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180. Art. 3 Law on the names of persons cit.

181. Art. 8 foll. Law on names of persons cit.

182. Law of Family 4 Dec. 1963 N.94 Sbírka Zákonu, Dec.13, 1963 Par 8(1).

183. Par. 29 Law of Fam cit.

184. Par 8(2) Law of Fam. cit.

185. Par. 26(1) Law N. IV/1952.

186. Par. 26(4) Law N. IV/1952, Par. 6(1), 7(1) Ministr. Disp. 2/ 955/ IV.23/BM to order in Council N.11/1955/II.20/MT.

In Poland the wife may keep her name if she so declares at the marriage ceremony. She may add the husband's name. She may also assume only the name of her husband. But if she does not make an explicit declaration, she assumes automatically the name of her husband. If the wife adds the husband's to her name, the name so composed shall not have more than two elements. If the wife and/or the husband bore already before marriage a name composed of more elements it is in the wife's choice to decide with what elements she will form her new name.[188] The children receive the name of the father but if the mother keeps her own name (or if she has choosen to add to her name the surname of the husband) the spouses may agree that the children should bear the name of the mother.[189] The change of the family name of a married person can only take place with the adhesion of the other spouse, and is extended to him. In special circumstances however a change may be granted without agreement of the other spouse.[190]

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187. Par 9 Decret N.23/1952 implementing the Law N. IV/1952 (Csjt = Csaladjogi törvény Leu); Par 42(1), (2) Csjt.

188. Art. 25(1), (2) DzU 5 3 1964 N.9, Pos 308 (new form.19 12 75).

189. Art. 88(1) DzU 5 3 1964 cit.

190. Art. 4(1), (2) Law of Nov. 15, 1956, DzU 30 11 1956 N.56 Pos 254 (Amend: Law 13 11 1963, DzU N. 50 Pos 281).

Inadequate is the approach of the Democratic Rep. of Germany. According to Par. 7 *FGB* the spouses must bear a common family name. This may be the name of the man or of the woman according to their choice which must be made at the time of marriage. The choice is irrevocable.[191]

The name which the spouses may choose as their common marriage name ought not to be their name of origin.[192] Divorced spouses may keep their matrimonial name if they so wish.[193]

The project of the *FGB* (*Familiengesetzbuch*) provided more reasonably that the spouses could use a common family name or keep their own, choosing in the latter case the name which they wanted to give to their children.[194]

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191. Par 7 *FGB* 1965: 1.) Die Ehegatten führen einen gemeinsamen Familiennamen. Sie können den Namen des Mannes oder den der Frau wählen. Die Kinder erhalten den gemeinsamen Familiennamen. 2.) Die Entscheidung der Ehegatten über ihren Familiennamen ist bei der Eheschliessung zu erklären und in das Ehebuch einzutragen. Die Erklärung ist unwiderruflich. See also BRINTZINGER, *Das Namensrecht der SBZ*, StAZ 1967 229, 257; BENJAMIN, *Das Familiengesetzbuch - Grundgesetz der Familie*, NJ 1966 1(at 4); HAUSCHILD/SCHMIDT, *Die Bedeutung des Einführungsgesetzes zum Familiengesetzbuch*, NJ 1966 12; GRANZOW, *Das neue Familiengesetzbuch der DDR*, FamRZ 1966 217; ROHDE, *Die Familiengemeinschaft in der sozialistischen Gesellschaft*, NJ 1965 235.

192. GRANZOW, *Der Entwurf des Familiengesetzbuches der 'DDR' vom April 1965*, FamRZ 1965 465.

193. Par. 28 *FGB*.

194. Entwurf eines Familiengesetzbuches der Deutschen Demokratischen Republik, Par.10: Namen - 1) Die Ehegatten können

seq.

A poll showed however that this solution was not considered favorably by the majority of the population.[195] Obviously in Eastern Germany the necessary sociological work has not been done adequately before questioning the population. Unbelievable enough, in the official Law Journal of the Ministry of Justice, we read comments like this: as far as the name is concerned we should accept some inconsistency and keep as common name of the family the name of the man.[196]

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194. continued.
entweder einen gemeinsamen Familiennamen führen oder ihre bisherigen Familiennamen behalten. Als gemeinsamer Familienname kann der Name des Mannes oder der Name der Frau gewählt werden. 2.) Wollen beide Ehegatten ihren bisherigen Familiennamen behalten, so haben sie bei der Eheschliessung eine Entscheidung darüber zu treffen, ob die gemeinschaftlichen Kinder den Namen des Mannes oder den Namen tragen. 3.) Die Entscheidungen nach Absatz 2 sind bei der Eheschliessung zu erklären und in das Familienbuch einzutragen. Sie sind unwiderruflich.
BENJAMIN, *Einige Bemerkungen zum Entwurf eines Familiengesetzbuches*, NJ 1954, 349.

195. BENJAMIN, *Das Familiengesetzbuch - Grundgesetz der Familie*, NJ 1966 1; JANSEN, *Zum Entwurf des Familiengesetzbuches der DDR*, Staat und Recht, 1965 866; ROTH, *Wirkungen der Verfassung der Deutschen Demokratischen Republik auf das Familienrecht*, NJ 1949 245.

196. NJ 1949 244.

E. CONFLICTS OF LAW

Conflicts in matters of names is a field in which the difference between civil and common law comes in clear evidence. In civil law systems the nature of the "right" to a name is classified as a right of property, or as a right of the personality or as an incident attached to the family (for married women's names: marital) status, or as a duty of public law as opposed to a right. Accordingly the law applicable in private international law might be either the *lex situs* which would be quite strange with reference to the property "name", or the personal law of the bearer of the name, or the *lex fori*. In common law jurisdictions conflicts problems in matters of names do not seem to have occupied the courts: there is no interest and no protection for a name. Actually, in some early decisions the expression "property in a name" may be found[197]; however, it is submitted, this happened *per incuriam* since it is well established in English and American law that nobody can prevent the *bona fide* assumption of his name by anybody else.

Nobody went so far as to classify the right on a name, in conflicts of laws, as a property: this theory was just good

for domestic compliance to proud bearers of proud names.

There are however difficulties in matters of classification of the nature of the right to a name and, with particular reference to the married and divorced woman's name, in the definition of the expression "personal law". At least in civil law countries.

1. France

In France as early as in 1910 PERREAU[198] taught that the classification of the name as an institute relating to the *police civile* had to yield to the prevailing nature of the name as a right of the personality. In his own words:

> *le nom faisant corps avec la personne... il sera nécessairement régi par le statut personnel de l'intéressé, c'est-à-dire, d'après l'opinion dominante, par sa loi nationale.*

This is still the opinion of authors and courts in France (qualifying the words "national law" with "or law of the domicile" when the concept is generalized as usual).[199]

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197. *Edison v. Edison Polyform & Mfg Co*, 67 A 392 (1907).

198. PERREAU, *Du droit des étrangèrs en France sur leur nom et leur titre nobiliaire*, Clunet 1910 1027

199. See cases cited by DAYANT, *Le nom en droit international privé*, J-Cl dr int, particularly No 4.
BAT IFFOL/LAGARDE, *Droit International Privé*, 6th ed., II Paris 1976, N 404.

As far as the married woman's use of the husband's name is concerned (in case of different nationality of the spouses) French authors are of opinion that the "personal law" is not the wife's personal law, i.e. her national law or the law of her domicile, since the wife's "marriage" name is closely linked with and dependant on the marriage, and it is thus unconceivable to consider it apart from that institution.

Essentially, it is said, the "marriage" name's role is to show the married *status* of a woman, whereas it never becomes a means of identification, i.e. a right of the personality of the wife.

As we have seen already, in France a married woman is deemed to keep in law her maiden name. The use by her of her husband's name is exclusively an effect of marriage. Therefore her right to use it, and how to use it, is a matter which belongs to the province of the effects of marriage.[200]

Apparently it has not yet been decided by French courts whether the effect of marriage on the married woman's name should

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200. DAYANT, *op.cit.*, N. 11; PONSARD, *Droit transitoire et nom des personnes*, Melanges en l'honneur de P.Roubier, I 1961 385, at 408: *chacun des époux, et spécialement la femme, n'a sur le nom de l'autre qu'un droit d'usage et conserve son propre nom patronymique; on comprend donc que ce droit d'usage soit surtout analysé comme un effet du mariage et que, sur le plan du droit international privé comme sur celui du droit transitoire, il suive toutes les variations de la loi applicable aux effets du mariage.*

seq.

be governed in conflict cases (when the spouses have different nationalities, or when they have their domicile in different jurisdictions) by the husband's personal law, the wife's personal law, or the law of the place where marriage was celebrated or possibly, in cases of disagreement upon the wife's name after divorce, where divorce has been granted[201].

2. Federal Republic of Germany

German Private International Law contains no specific conflicts rule on the wife's name.

For a long time the general judicial opinion was that the proper conflicts rule was Art. 14 EGBGB which regulates the

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200. continued.
PLANIOL/RIPERT/SAVATIER, *op.cit.*, N.96 bis; LOUIS-LUCAS, *Qualification et répartition*, 46 Rev crit 166 (1957); MALAURIE, Rép Dalloz de dr int, v. Nom-Prémon-Noblesse, N.14.

201. MALAURIE, op.cit., N.16;
BELGIUM: See GRAULICH, *Principes de droit international privé, Conflit de lois, Conflit de juridictions*, Paris 1961, N.89 A: *Le nom, mode de désignation des personnes ("leur étiquette légale"), fait évidemment partie du statut personnel. Le point de savoir si la femme divorcée peut continuer à porter le nom de son ex-conjoint,... doit être tranchée par application de la loi nationale.*

effects of marriage. This interpretation, it was said, was justified by the argument that according to Par. 1355 BGB the wife acquired the husband's name as an automatic effect of the marriage ceremony.

Nevertheless it has never been clear whether in case of different personal statutes of the spouses the law of the effects of marriage was, as far as the wife's name was concerned, the husband's personal law[202], or whether a cumulative connnection had to be applied.[203]

WENGLER[204] opposed strongly these theories: according to this distinguished writer, the personal law (*lex patriae*)

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202. OLG Hamm, 20 8 1970, FamRZ 1970 658.
See other cases in STURM, *Der Name der Ehefrau aus kollisionsrechtlicher Sicht, Zum Beschluss des BGH vom 12.5. 1971*, FamRZ 1973 394, at 395 note 19; DÖLLE, *Die persönlichen Rechtsbeziehungen zwischen Ehegatten im deutschen IPR*, RabelsZ 16 (1951) 360; WOLFF, *Das internationale Privatrecht Deutschlands*, 3rd ed. 1954 198; RAAPE, *Internationales Privatrecht*, 5th ed. 1961 326; ERMAN/MARQUORDT, *BGB II*, 4th ed. 1967 Art. 14 Anm 4c; PALANDT/LAUTERBACH, *op.cit.*, 30th ed. 1971 Art. 14.

203. OLG Düsseldorf 9 8 1967, FamRZ 1967 626. Other cases in STURM, *op.cit.*, 396 note 20.

204. Ann. to KG 15 10 1962, NJW 1963 593; Ann. to BGH 12 7 1965, JZ 1966 179; Gutachten zum internationalen und ausländischen Familien- und Erbrecht I, Berlin 1971 137; Note de jurisprudence in Clunet 45 (1956) 90 (at 97); Ann. to LG Frankfurt 11 6 1963, NJW 1963 2230; Ann. to BGH 12 5 1971 NJW 1972 1002.
See also the very straightforward opinion of SIMITIS, *Zur Namensführung der verheirateten Frau im internationalen Eherecht*, StAZ 1971, 33 (at 34); very hesitant and somehow inconsistent: GAMILLSCHEG, *Der Namenserwerb bei der Eheschliessung*, in Gedenkschrift Franz Gschnitzer, 1969 181 (at 192).

of the wife should govern all effects of marriage and divorce on the name[205].

When eventually the Federal Court (BGH) overruled in 1971[206] its previous doctrine, it was actually WENGLER's victory.

The BGH, without having knowledge of the recent judgment in which the Constitutional Court[207] held that no point of contact could be taken into consideration if it was not conform to the Federal Constitution, said that in all cases in which one of the spouses was a German national, the wife had a right of choice, as far as her "marriage" name was concerned, between her personal law (*Heimatrecht*) and the law of the habitual residence (*gewöhnlicher Aufenthalt*).

The BGH classified the wife's name as a right of the personality as well as a right depending upon the effects of marriage, qualifying however that the personal statute of the wife deserved higher rank, since in no circumstance a person

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205. WENGLER qualified at some time his opinion with a compromise: Ann. to LG Frankfurt 11 6 1963, NJW 1963 2230; Ann. to BGH 12 5 1971, NJW 1972 1002. He said that as long as Par 1355 BGB remained in force German wives should be in all events allowed to bear the name of their foreign husbands.

206. BGH 12 5 1971, BGHZ 56 193; FamRZ 1971 426; NJW 1971 1516; RabelsZ 35 (1971) 741; StAZ 1971 216; WM 1971 1207.

207. BVerfG 4 5 1971, FamRZ 1971 413.

should be compelled to bear, against his will, a name which contradicts his personal law. The Court explicitly observed that from the point of view of the equality of rights there were well founded reactions against the attribution of the husband's name, also in consideration of the conclusive finding that the man's personal statute appeared to the Court incapable of taking in due account the name's (and its bearer's) relation to its social environment.

The principle laid down by the BGH was generalized by the OLG Hamburg[208] which held that the same rule applied when both spouses were foreigners of different nationality[209].

3. England and U.S.A.

In Common Law the name of a person is not characterized as a question of *status*, although it seems that in some cases this has been affirmed[210].

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208. OLG Hamburg 26 6 1972, FamRZ 1972 505.

209. The most recent comprehensive essay on the wife's name in conflicts of laws is the cited article of STURM, FamRZ 1973 394.

210. *Kranz v. Kranz*, 7 NYS 2d 830 (1938); *Baumann v. Baumann*, 165 NE 819 (1929) (O'BRIAN J. and CRANE J. dissenting); *Gold v. Gold*, 287 NYS 217 (1936); *Niver v. Niver*, 111 NYS 2d 889 (1951).

However under statute law it is quite conceivable that the married woman's name might be considered as an effect of marriage. Accordingly situations similar to those arising in France and in Germany could occur in conflict cases. Generally speaking however and in the absence of express contrary statutory provisions, the wife can always obtain in common law what she cannot obtain under statute, i.e. to keep her maiden name or to assume her husband's name during marriage or after divorce. Apparently these problems have not yet occupied *ex professo* the Courts.[211]

It is submitted however that should the issue arise, the Courts would presumably characterize the name of a married woman, in common law, as a matter of her personal statute, under statute law possibly as a matter related to the effects of marriage. In either case the law of the wife's domicile should govern, at least in England according to the provisions that a married woman may have a domicile apart from that of her husband.[212]

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211. see e.g. for a marginal issue (name in which to sue) *Sousa v. Freitas cit.*

212. Domicile and Matrimonial Proceedings Act 1973 sec.I. In England an alien is not permitted to change his name by deed poll or by other means provided in common law.

III - NATURE OF THE RIGHT ON A NAME AND THE PRINCIPLE OF EQUALITY

CHAPTER III

NATURE OF THE RIGHT ON A NAME AND THE PRINCIPLE OF EQUALITY

The foregoing analysis demonstrates that in the main systems of law:

a) there is uncertainty on the nature of the right on a name,

b) the married woman's name is mainly an expression of the wife's social inferiority within the family.

A. THE NATURE OF THE RIGHT ON A NAME

Five theories have been proposed for the nature of the right on a name. It has been said that the name is a property, a sign of the belonging to a family, a right of the personality, an institution of public order, an objective juridical situation rather than the object of a right.

1. A property

A name, of course, is not a property in the very mean-

ing of the word.

This theory was in earlier times found almost in all decisions of the civil courts. According to it the bearer of a name could forbid every usurpation even in complete lack of prejudice; i.e. the protection was the same as the one accorded to property. This theory is in contradiction with the characters of the right on and to a name.

A property is alienable and is subject to acquisitive prescription , whilst the name is not transferable, not assignable, is out of commerce and imprescriptible. Property comprehends exclusive attribution of a thing which can not belong contemporaneously to more persons in its totality, whilst the name belongs contemporaneously to all members of a family. Even the parallelism between inheritance and transmission of the name is only apparent, given that the name is transmitted from father to son before the parent's death, and the use is common to all members of the family. And also the historical origins of names are completely different from the origins of ownership.

Nevertheless the fiction of the property in a name was continuously resorted to by the courts, whenever names of past dignities were used ("usurped" is the most frequently employed word) by commoners.

Some examples: Prof. *Alfredo Acquaviva* made use on his

business cards of the name *Alfredo Acquaviva d'Aragona*, not for impersonating somebody who bore that name but, it is submitted, for fun in this good sounding name. A certain lady *Acquaviva d'Aragona Tomacelli* who apparently proved to be direct descendant of *Giulio Antonio Acquaviva* (who obtained the name d'Aragona from King Ferdinand the Second in 1479) succeeded in causing lots of trouble to *Professore Alfredo* since he was found to have "usurped" the lady's name[213].

A certain Mr. *Noya di Lannoy Count of the Holy Roman Empire*, was very upset[214] when he noticed that his name had been printed somewhere with di in capital letter (Di) and with the only mention Peer (*nobile*) instead of his full dignity "Count of the H.R.E.". He said in court that no pecuniar damage was derived to him; and, it is submitted, nobody had usurped his names. He just wanted that the historic truth on his property-name be publicly recognized. Given the prohibition of art. XIV disp.trans. of the Italian Constitution,[215] the Court of Cassation was materially unable to do something for him. But his case went through all levels of jurisdiction.

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213. *ITALY:* Cass 14 4 1961 N.801, F It 1961 I 734.

214. *ITALY:* F It 1972 I 436

215. *ITALY:* Italian Constitution, Dec.27, 1947, XIV trans: *I titoli nobiliari non sono riconosciuti. Omissis.*

Mr. *Arbellot de Rouffignac*'s ancestors bore apparently just the name *Arbellot* ; but they liked to add *de Rouffignac* this being the name of the county where the Arbellots dwelled. After some lengthy peaceful enjoyment of this name by the Arbellot family, Mr. *Marie-Joseph-Hugues-René Martial de Rouffignac* protested against this "usurpation". The Cour d'Appel de Poitiers[216] said that *Martial de R.* was right since he belonged to a family of a *noblesse ancienne et immémorable* and that therefore he had

> *le droit et le devoir d'interdire à qui que ce soit d'usurper un nom auquel sont attachés tant de souvenirs, d'honneurs et de gloire, que seuls ont le droit de porter les descendants de cette maison.*

The Court pointed out that the name is not a property, but in the same breath it continuously referred to the "usurpation" of the name.[217]

Another delightful case is *Tandefelt c. Armand de Durfort*[218]. The *Baron Nicolas-Antoine de Ligny, comte de Tandefelt de Luxembourg* used these fancy names in France affirming that he had been adopted by the Countess *Eugénie Karlovna Luksemburg de Ligni* and that therefore he had a right to bear the names.

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216. *FRANCE:* 3 7 1952, Gaz Pal 1952 2 372.

217. *FRANCE:* Affirmed Cour de Cass 17 5 1966, Sem Jur 1967 J 14934

218. *FRANCE:* C.Appel Paris 8 3 1966, Gaz Pal 1966 1 343

Some French people (*la dame d'Hunolstein, le comte de Dreux-Brézé, le comte de Bouillé, le comte de Durfort*) brought him before the *qadi* affirming that he had usurped the famous name. The Court of Appeal found the time to write an exceptionally long judgment in order to declare that in the case of "usurpation" of a name "*célèbre ou présentant une valeur historique*" the descendants of somebody who bore that name (maybe some long time ago) are entitled to obtain that the "usurper" be enjoined from further using it.

Even PERREAU, a writer who actually knew everything about names, could not resist the temptation of reverence for the glorious French names. He wrote:[219]

> *Malgré nos idées utilitaires et démocratiques, noms et titres demeurent, par les souvenirs qu'ils évoquent, des éléments précieux du patrimoine moral des familles. Rien d'étonnant donc s'ils sont ardemment convoités et jalousement conservées dans celles des grands serviteurs de la France, dont la chronique particulière se mêle intimement à notre histoire nationale.*

Actually in Italy, France and Germany there is lot of fun with courts kept busy by people claiming exclusive rights in names[220] of - at least in Italy and Germany - prohibited[221] dignities. Interesting enough, courts are serious in listening to them instead of devoting their time to more realistic and practical matters.

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219. *FRANCE:* note to Cass 6 3 1923, S 1924 I 178

220. Impliedly but very clearly the *Consiglio di Stato* of Italy

seq.

An interesting feature appears to the reader of the cases: while in earlier times the expression "property of the name" was used without hesitation, in recent judgments this expression is abandoned. Now courts say that the name is a matter of *status* and personality; nevertheless they continue speaking of "usurpation" of the name, which clearly derives from the old theory of property.

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220. continued.
held that the question of whether a family had an exclusive right on the name *"Dall'Onda"* was a matter of subjective rights thus excluded from the jurisdiction of the Administrative Court. C. Stato IV, 19 10 1966 N.686, G It 1967 III 177.

221. In *ITALY* and *GERMANY* dignities have been abolished by Constitution. But in practice they still exist since the spirit of the constitutions was easily defeated by the incorporation of the heraldic titles in the names. It is very interesting that in countries like the Federal Republic of Germany, where there are no feminine forms of names (*Frau Hohenzoller* or *Frau Bauer* would not be allowed to call themselves officially *Frau Hohenzollerin* or *Frau Bäuerin*), in the very moment when dignities - which are now only names - are involved, the feminin form is allowed: thus the wife of a man called *Freiherr von Bohlen* (*Freiherr* being something like Duke) will call herself, as a matter of name *Freifrau von Bohlen*, and the wife of *Herr Graf Müller* will call herself *Frau Gräfin Müller* (not *Müllerin*): BayObLGZ 1955 245. SOERGEL/SIEBERT/SCHULTZE-v.LASAULX, *op.cit.*, Par 12 Rdn 6. However a lady whose name is *Luise Graf Müller* (i.e. who has a double name composed of *Graf* and *Müller*, ~~*Graf*~~ being a real name, not a dignity-made-name) is prohibited from calling herself *Luise Gräfin Müller* even if her husband's name is exactly the same as that of the other *Frau Müller*. Nevertheless authors are very serious in affirming that dignities are abolished.

2. Enunciation of a family *status*

This theory is consistent with the actual nature of the name. Indeed the name is acquired by filiation or marriage: this is the law in France, Italy and Argentina, in Germany and Sweden, in the common law and in some socialist jurisdictions.

The theory however is mostly in open conflict with the principle of equality of rights. In France, Italy and Argentina[222], in Sweden and in the common law jurisdictions[223], as well as in some socialist states[224], the children receive their father's name and nobody cares to explain why the so-called "legitimate" children's name should not be their mother's name, which incidentally would be in any event the better solution[225]: *mater semper certa*...

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222. *FRANCE:* Arg. ex Art 57 Code civ.
ITALY: Arg ex Art. 237 Code civ.
ARGENTINA: Art. 4 Ley 18248 of June 10, 1969.

223 *SWEDEN:* Par 1(1) NL.
GERMANY: Par 1616 BGB has been changed by the 1. EheRG. The formulation is that legitimate children receive the name of their parents.

224. *ALBANIA:* Decr. N. 2022 of April 2, 1955 Gaz.Zyr. 1955 N.4. (Par.43)
POLAND: Art.88(1) Law of Feb.25, 1964, DzU 5.3.1964 (Amend. 19.12.1975, DzU 12.1975 N.45 Pos 234, in force Mar. 1,1976).
HUNGARY: Par 9(5) Decr. L. 23/1952.

As we have seen, as a matter of *status* in France the wife is deemed to assume by custom her husband's name, in Italy she"adds" the man's name, in Argentina she adds this name with the prefix "de", in the Federal Republic of Germany she receives automatically the husband's name in substitution of her ante-nuptial name if the spouses do not declare that they both prefer to assume the wife's name as a common marriage name, in Sweden she receives the husband's name if she does not declare that she wants to bear another name, in England and in the USA the wife receives the husband's name if she does not acquire the right to keep her name by agreement with her husband or by other positive conduct. Even in some Socialist States (Hungary, Poland) the wife receives her husband's name as a consequence of marriage.

There is no way of questioning: all matters related to the acquisition of the "marriage" name must be governed, under these circumstances, by the marriage statute.

Things could be expected to be different as for the loss of the name after dissolution of the marriage. But sometimes they are not. In France and Italy the divorced wife

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225. As a welcome collateral result the classification of matrimonial, natural, adulterous etc. children could be abolished since with respect to their mother they are all her equal children.

loses her marriage name[226], in Argentina she may keep her marriage name but the man can enjoin the use of his name[227]. In Germany under the old rules the wife kept the name but her former husband could enjoin the use of his name if e.g. his former wife's conduct was against good morals (*sittenwidriger Lebenswandel*)[228]: this has been changed now by the so far correct provision of Par. 1355 (4) BGB[229]. In USA the divorced wife may be enjoined from using her husband's name (normally in the courts'discretion) e.g. in Alabama, Alaska, Nevada, New Hampshire, Oregon, Washington[230].

If the woman could keep her maiden name and give it to all her children (matrimonial of all marriages and extra-matrimonial children) one result would be certainly secured: all children would have the same name and they would show with their common name their belonging to a family: exactly what the public administration requires. The only person out of this "order of names" would be the man. Well, if homogeneity is

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226. *FRANCE:* Art. 264 (11.7.1975) Code civ.; this general rule is however qualified by subparagraphs 2 & 3 of the same section.
ITALY: Art. 11 Divorce Law of Dec. 1, 1970 n. 898.

227. *ARGENTINA:* Art. 9 Ley 18248/1969.

228. *GERMANY:* Par. 56, 57 EheG.

229. correct also *SWEDEN:* Par. 7 NL.

230. see foregoing note 120.

sought, the way of avoiding a difference of names between the husband (and father) and the rest of his family is to have him assume his wife's name.

The so-called function of public order of the name together with its genealogical function could be (and could have been) much better achieved with the matriarchal system[231].

In conclusion the theory of the name as enunciation of a *status familiae* is correct under all examined systems of law.

The recourse to the characterization of the name as a question of *status* is also a classic method for obtaining an easy protection of the name by affirming that the *status* of the claimant has been "usurped": indeed the characterization

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231. It is unbelievable, how many cases are reported in U.S.A. alone of women asking for change of their children's name (in their custody) from the father's name into their present name or into the name of their other children. The provision was not granted, e.g. in the following cases: DEL: *Degemberg v. McCormick* (Ch) 184 A 2d 468 (1962); FLA: *Lazow v. Lazow* (C App) 147 So 2d 12 (1962); MO: *Re Thomas* (C App) 416 SW 2d 52 (1967); NJ: *Sobel v. Sobel* (Supr Ct) 134 A 2d 598 (1957); MISS: *Marshall v. Marshall* 93 So 2d 822 (1957); NY: *Appl of Otis* (Supr Ct) 126 NYS 2d 651 (1954); *Galanter v. Galanter* (Supr Ct) 133 NYS 2d 266 (1954); *Appl of Simon* (City Ct) 148 NYS 2d 14 (1955); *Appl of Zipper* (Supr Ct) 153 NYS 2d 282 (1956); *Appl of Baldini* (City Ct) 183 NYS 2d 416 (1959); *Appl of Seif* (Supr Ct) 243 NYS 2d 172 (1963); *Appl of Keach* (City Ct) 274 NYS 2d 938 (1966); *Re Epstein* (City Ct) 200 NYS 897 (1923; *Re Lyons* (Sup Ct) 19 NYS 2d 839 (1940), superseded by the amend. of 1953; *Re Cohn* (Supr Ct) 50 NYS 2d 278 (1943); *Appl of Ebenstein*

seq.

as an usurpation of *status* justifies the right of each and any member of the "damaged" family to sue the wrongdoer without need to prove any damage or prejudice.

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231. continued.
(Supr Ct) 85 NYS 2d 261 (1948), superseded by the amend. of 1953; *Nitzberg v. Board of Education of City of N.Y.* (Supr Ct) 104 NYS 2d 421 (1951); *Steinbach v. Steinbach* (Supr Ct) 119 NYS 2d 708 (1953), superseded by the amend. of 1953; *Appl of Sloan* (Supr Ct) 118 NYS 2d 594 (1953), superseded by the amend of 1953; *OHIO: Dolgin v. Dolgin* C App) 205 NE 2d 106 (1965); *PA: Pollock Petition* 31 D & C 2d 514 (1963); *Di Bacco Petition* 32 D & C 2d 90 (1963). See also: *MICH:* Stats Ann OAG Nov. 21, 1956 n.2793 note to Par 27.3187 (561); KRS OAG 40.475 note to 401.020; *MINN:* MSA 259.10; *VT:* VS 15.812, but read together with the note OAG 1944, 293.
Provision granted: *NY: Appl. of Horn* (Supr Ct) 21 NYS 2d 453 (1940); *Appl of Proman* (City Ct) 63 NYS 2d 83 (1946); *Appl of Gallagher* (City Ct) 85 NYS 2d 719 (1948); *Re Almosino* City Ct) 122 NYS 2d 277 (1953); *Re Widrick's Adoption* (Supr Ct) 212 NYS 2d 350 (1960); *Appl of Fein* (Civ Ct) 274 NYS 547 (1966); *Appl of Yessner* (Civ Ct) 304 NYS 2d 901 (1969); *PA: Rothstein Petition* 28 D & C 2d 665 (1962); *TEX: ex Parte Taylor* (C App) 322 SW 2d 309 (1959); *Newman v. King,* 433 SW 2d 420 (1968): the Ct of Appeal, *King v. Newman,* 421 SW 2d 149 (1967)hasdismissed, but the Supr.Ct affirmed; *ARK: Clinton v. Morrow* 247 SW 2d 1015 (1952); *NJ: Bruguier v. Bruguier* (Supr Ct) 79 A 2d 497 (1951).

We find frequent traces of matriarchal systems in history; still they are applied by some Asian peoples, e.g. by the non-christian Indonesian tribes Minaukabau, Korindu, Senendo where the children receive besides a given name, the mother's and the grandmother's surname.

3: Manifestation of the Individual Personality

Personality means the individual as a whole. It can be manifested by a man's reputation, talent, skill, creations, works, accomplishments, image, name: it is the totality of a person in all his continuously changing aspects within the world where he lives.

CALLMAN[232] defines the right of the personality as:

> *...the sum of all those manifestations of man that comprise his nonpecuniary or idealistic interests, which, in contrast to materialistic values, are inseparably linked with, or are the very essence of personality as expressed in thought, feeling and action. The right of personality embraces man's association with culture whereas his property interests comprehend only his connection with economy. The right of personality is therefore the greatest of all private rights, embracing the highest interests of mankind. It is the pith of that humanism which enables man to develop his creative energies, powers and capacities and participate in all the richness of a free life. In an era in which the over-emphasis of the material is constantly increasing man's disregard for the ideal, the right of personality must be preserved to protect important idealistic values. If property rights conflict with human rights, the former must, of course, give way.*

The right of personality is commonly called the right of privacy but actually it is much broader in scope and function.

The personality manifests itself distinguishing one individual from all others through elements of identity. The human being exists in society if he establishes and maintains

his identity: without identity he has no rights nor duties.

One important element of a persons's identity is his name . Not the name, *qua* name, as erroneously held e.g. by the Supr Ct of Washington in *State v. Hinkle*[233] where it was said that:

> *nothing so exclusively belongs to a man or is so personal and valutable to him as his name. His reputation and the character he has built up are inseparably connected with it. Others can have no right to use it without his express consent, and he has a right to go into any court at any time to enjoin or prohibit any unauthorized use of it. Nor is it necessary that it be alleged or proved that such unauthorized use will damage him. This the law will presume...*

but the name as *identity-indicium*[234], as a means of identification of the person, which admits no distinction between family and given name, pseudonym and nickname, word-name, figure-name, code-name etc., since they all may be equivalent in their strengh of individualization[235].

Dean PROSSER said:[236]

> *...The mere use of a name similar to that of the plaintiff is probably never actionable in itself, since in the absence of statute a person may be given or assume any name he likes; but where the name is tied up and identified with other aspects of his personality, such as his reputation in business, or incidents in his life, and its use amounts to an appropriation of such values, recovery is permitted.*

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232. CALLMAN, *Unfair Competition and Trademarks*, 2nd ed. 1950 51.

233. *State ex rel. La Follette et al. v. Hinkle*, 229 P 317 (1924)

234. This expression is very properly used by RIDER, *Legal Protection of the Manifestations of Individual Personality - The Identity-Indicia*, 33 SCLR 31 (1959).

This is exactly the point. If Mr. *Finkelstein*[237] in the pursuit of happiness desires to forsake his original name and to assume the name of *Ferris*, that might be satisfactory to society: family names are not copyrighted and every famous man has namesakes not related to him and the assumed name might be viewed as a compliment to the man whose name has been assumed. On the other hand if the name as a symbol of a person's identity is involved, if the other's name is used to pirate his identity for some advantage, e.g. by impersonation to obtain credit, then protection of the name, i.e. protection of the identity-personality becomes vital in order to maintain law and order in society[238].

Nulla quaestio, the name as a symbol of the person's identity is of course a right of the personality. But this is not the same name as the one referred to by Codes and Statutes. Or is there somebody who would sustain that the very ceremony of marriage (or the decree of divorce) changes so radically

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235. It has been argued that family names are less frequent than given names and therefore better adapt for identification. This is not true as a general rule: the given names Thassilo or Adelelm are by sure less frequent than the family names Smith or Allen.

236. PROSSER, *Torts*, 2nd ed. 1955 Par 97 at 639.

237. *Appl. of Ferris et al.*, 34 NYS 2d 001 (1942).

238. see PROSSER, *op.cit.*, 403; *Burns v. Stevens*, 210 NW 482 (1926); *Vanderbilt v. Mitchell*, 67 A 97 (1907).

the identity of a woman that she has to change from one hour to the other her *identity-indicium "name"*?

4. Label for Administrative Records

The name as taught by PLANIOL is nothing else than an institution of civil policy, the obligatory form of designation of persons, something like a role-number or administrative etiquette given at birth to each individual for the purpose of good administration. The individual, it is said, must have a name for complying with his duties towards the State. This name does not represent for him a subjective right. However this does not mean that he has no action against the "usurpation" of his name; actually there is an action according to the rules of delictual liability [239] but he must provide proof of prejudice[240].

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239. e.g. *FRANCE:* Art. 1382 - 1383 Code civ.

240. PLANIOL/RIPERT/SAVATIER, *op.cit.*, 114, in particular the passage cited at p. 26.
See also: PLANIOL/RIPERT/BOULANGER, *op.cit.*, 525.

So far the doctrine of the name as a function of public order.

In principle there are no specific objections against the public administration labelling each individual with a mark of individualization (the"word-names" are by reason of the frequent homonymies the worst marks that could have been choosen, of course). But what is mostly objectionable and inconsistent with this label of public order is that it is not immutable forever as everyone would expect. Who has ever heard that the Social Insurance Number or the Military *Matricula* Number of an individual changes as a consequence of adoption, legitimation, marriage, divorce etc? It is submitted that the function of public order of the name is individualization, just as it can be obtained with any code-number. However numbers never change, because there is no reason to change; names change continuously by operation of the very law, which has as its primary requirement the immutablity of names.

Effectively there is no reason of changing continuously the name of persons. If public administration is so strongly interested in names, it should have affirmed a straightforward immutability: children receive at their birth whatever name the law prescribes, women always keep their maiden name. And no subsequent recognition, legitimation, disawoval, adoption, marriage, divorce can change this name; and no administrative change of name whatsoever is permitted.

We disagree of course with the public function of the name. But if it must be, then it should be linear and consistent with its declared principles and scopes.

5. An "objective situation"

ROUBIER[241] thinks that there is no right at all, on or to the name (*droit au nom*). Personality, he says, has no subjective rights, it has just *intérêts légitimes* protected by means of defence of the personal rights and by actions for damages.[242] He says:[243]

> *Il semble donc que la voie serait ouverte, qui conduirait à considérer le nom sous l'aspect d'une situation objective, et c'est bien ainsi que le considérait Planiol, lorsqu'il disait que le nom était une institution de police civile et la forme obligatoire de la désignation des personnes, quelque chose d'analogue en somme à ce qu'est le numéro matricule donné au soldat dans la vie militaire. L'intéressé n'a pas seulement le droit, mais le devoir de porter son nom.*

In our opinion this definition should be qualified, but it is acceptable.

Actually it seems that the "right on a name" is not an absolute subjective right[244]. It has rather the connotations

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241. ROUBIER, *Droits subjectifs et situations juridiques*, Paris 1963.

242. ROUBIER, *op.cit.*, 366: *Nous estimons donc que la doctrine traditionnelle était bien fondée, lorsqu'elle omettait de*

seq.

of a multifarious *situation juridique*, it appears to be more a duty than a right.

The name is the effect and consequence of situations and relations of life, to which the law shows interest and provides strict regulations. What a person is allowed to have protected is not his right to a name, but his duty to bear it. In a wide sense, he acts vicariously for the Attorney General when he applies to a court for having attributed or protected the name which the law compells him to bear.

The "situation" of being a member of a family or a married woman purports by automatic operation of law the duty to obtain "identification" by a certain name; if the private interest on a name corresponds to the provisions of public law to bear it, in appearence a private right is recognized. However there is no such sort of right, what is easily proven by the prevalence of public law, whenever a conflict with the private interest arises.

Thus apparently there is no right on (or to) the name. There is only the duty to a name.

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242. continued.
parles de droits subjectifs, autour de la personnalité. La vérité est qu'il n'y a, en pareille matière, que des intérêts légitimes, protégés par des actions en justice.

243. ROUBIER, *op.cit.*, 368.

244. SOERGEL/SIEBERT/SCHULTZE-v.LASAULX, *op.cit.*, Bar 12 Rdn. 12.

6. Nature of the Right on a Name and Conflicts of Law

In order to obtain protection of a name, *qua* name (especially *qua* dignity) the right on a name must be construed as a property. The concept frequently resorted to of the protection of a name through the protection of a *status* is arbitrary since the name is not a *status*: if somebody pretends to have a *status* which does not belong to him, the action against him would be an action of *status* and the name may be treated in the course of this action as a collateral issue since, provided that the name is in many circumstances the consequence of a *status*, a change in *status* may affect a change in name. But it is not correct to mix up the two concepts, i.e. to grant the protection of a name through an action of *status*, just by saying that the assumption of "A"'s name by "B" is tantamount to saying that "B" has usurped "A"'s *status*. This is unacceptable. In order to "usurp" a *status* there must be intention and conduct aimed to "usurp" that *status*, not the name connected with that *status*. Name and *status* are not equivalent institutes.

In conflicts of law a protection of a right so classified can be only obtained according to the law of the place where such property is situated. It might be argued that the

lex rei sitae could be the place where the property "name" is normally enjoyed. However since classification is prevalently made according to the *lex fori*, if Mr. *Duca della Melagrana*, an Italian *nobile*, complains that the emigrant *Salvatore Ligio* has adopted and uses in U.S.A. the same words (Mr. *Duca della Melagrana*) as his name - let us assume that he does so just for obtaining happiness through euphony - the American court , seized by this action, would probably not classify as property but as invasion of privacy (if any, and if the particular State of the U.S.A. has a privacy Statute), in which case the applicable law would be the "proper" law of the tort.[245]

Whenever a name is acquired or lost as an effect of the change in a person's *status familiae* the nature of this "right on the name" has nothing to do at all with "names" . The only possible characterization is that of the relevant question of *status*, and in the same way as when protection of a *status* is sought, in conflicts of law the governing statute will be that of the effects of that *status:* the law of the relation between parents and children, the law of the effects of marriage and divorce, the law of the Statute of adop-

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245. It is not the scope of this research to go into details of the "proper" law of a tort. The issue might be probably the principle of preference for the most significant relationship which is in our understanding the law of the place where the adopted name is used being this as the main place of the action the controlling social environment also for

seq.

tion, etc.; with all the known difficulties in case of different personal statutes.

According to whether the *status* is acquired, lost, granted or denied, a change of name might be the automatic consequence.

If the identity of a person is at issue, the personality itself is in danger. The identity of a person can be compromised in a great variety of ways, also by use of another person's name with the mischievous intent of creating confusion between identities or otherwise endangering somebody's else personality. In this case full protection must be awarded against the wrongdoer with no hesitation.

The governing law in conflicts cases will be either the personal statute of the damaged (European solution) or the law of the tort (in U.S.A) according to the possible different characterizations (right of the personality, right of privacy).[246].

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245. continued.
possible effects on other holders of the name. However adverse effects like those known from the field of unfair competition or defamation through the press might occur also in other jurisdictions.

246. The invasion of one's right of privacy is a tort: see e.g. *Continental Optical Co. v. Reed*, 86 NE 2d 306 (1949). *Eick v. Perk Dog Food Co.*, 106 NE 2d 742 (1952): *A person may not make an unauthorized appropriation of the personality of another, especially of his name or likeness, without being liable to him for mental distress as well as the actual pecuniary damages which the appropriation causes.*

In common law jurisdictions also the change, i.e. the abandonment of the old name and the acquisition of a new one, by repute, is a matter of identity. The conflicts law will probably be the personal statute of the bearer of the name, provided there are no adverse statutory provisions.

We need thus all three different approaches (property, status, personality) according to the different institutes involved: protection *qua* name requires the characterization of the name as property; acquisition or loss through family *status* the characterization through the corresponding institute; acquisition, change or protection of identity the characterization as right of the personality.

In our analysis we met also the characterization of the name as an institute of public policy. Admittedly public administration has imposed to the name of persons also this function and nature. Involved are mainly changes of names (European jurisdictions) and strict adherence to the established rules of automatic attribution through *status* (questions of *status* being *per excellence* under control of public law).[247]

There are no conflicts laws. Public law is governed by the *lex fori*.

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247. This is another *via crucis* in our systems of so-called "privat law".

All these different "natures" of the right on a name led the courts, through confusion and concern, and under the omnipresent fear of unconstitutionality, to the development of conflicts rules of compromise: the cumulative connection[248] and the double characterization[249].

"Leave it to the wife to elect between the *lex domicilii* and her national law". This (the BGH's) finding is a good compromise, although it is in(welcome) contradiction with traditional principles:private people are allowed a choice in matters of imperative rules of public law, the law of the domicile progresses, the foreign institutes play their role in the process of characterization.

The lead points towards the preference for the law of the most significant social and environmental relationship as governing law in situations of conflicts.

The principle of nationality is indeed unrealistic. If Miss *Lopez* marries Mr. *Müller* and lives with him in Germany, there is no reason of having her use the Spanish system of married women's names (*Lopez y Müller*). But if the family moves to Spain, or if Mrs. *Müller* divorces and goes back to her country, of course she should be allowed to adhere in Spain to the

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248. OLG Düsseldorf 9 8 1967 cit.; SOERGEL/SIEBERT/KEGEL, *BGB* 7 vol., 1970 Art. 14 Rdn. 4 amd 27.

249. BGH 12 5 1971 cit.

Spanish onomastic system.

7. Conclusion

"Allowed".. This is the word which leads us to the conclusion. Why should Codes and Statutes "allow" a person to use one and not another symbol for designating his or her identity in society? If a man wants to identify himself by wearing always a tie of the same design and colour, this seems to be all right with the law; if the same man starts telling around that his name is *Bill Redtie* (in his birth certificate he was called *John Blackshirt*) this is not any more as good for the law; if he signs a contract with the name *Bill Redtie* this is not good at all for the law: because, it is said, what counts is what has been written some 50 years ago in the books, what the father's name was, not the name or the features under which a man is known in society.

Is this harassment, which seems to be of no use to anybody, just chicanery, necessary? Or is it of some use? Indeed it helps show ing the distinction between "legitimate" and "illegitimate" children, between commoners and peers, between chaste and "adulterous" wives perhaps, if one of the children has a different name from the others. If this is all what the provisions of the laws on names are for, then they are poor laws.

B. THE EQUALITY OF RIGHTS

The name of persons is much more than a pure matter of law. The name is the expression of character, fame and title[250], the instrument used to show to the world authority and power, the medium which symbolizes the different ranks in society.

If the name were just a matter of law, it would be a very secondary issue, not worth while to be researched and discussed at length.

Actually, the explorer who unveils the essence of the name discovers that he is indirectly confronted with fundamental issues of human life, the issues of equality and unequality of rights, of freedom and subjugation.

The name is a mirror of the level of maturity (?) obtained by mankind in the long tragedy of its history.

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250. *Nomen habere; honesto nomine.*
Ein guter Name ist besser als Silber und Gold (German proverb); *Ein hohes Kleinod ist der gute Name* (SCHILLER); *Wenn der Leib in Staub zerfallen, lebt der grosse Name noch* (SCHILLER).
see VICO, *La scienza nuova*, II, B.U.R.Milano 1963.

1. The Divine and the Human Law

HEGEL distinguishes between divine and human law, the former being the family, the latter the power of the State; the first, he says, is the feminine character, the second is the male[251]. The man has his real life in State, science, combat and work; the wife's life is quiet contemplation, piety and ethicality (*Pietät*) are her ethical conceptions. This piety is defined as the law of the old Gods, of the prehistoric (*des Unterirdischen*), the eternal law of which nobody can tell where it comes from; and it is represented as the opposite of the manifest law, the law of the State. This is the highest ethical and tragic antithesis. It is individualized in the femininity on one side, the masculinity on the other[252].

The difference between man and wife is like the difference between beast and plant[253]; the wife is steady and universal[254].

Piety and impiety: two concepts of law, two consciences. The conscience which belongs to the divine law sees in the human

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251. HEGEL, *Phänomenologie des Geistes*, it.transl: *Fenomenologia dello spirito*, Nuova Italia, Firenze 1960 II 243.

252. HEGEL, *Grundlinien der Philosophie des Rechts*, Reclam, Stuttgart 1970 Par 166.

law an explosion of violence, the conscience which is bound to the human law sees in the divine law the disobedience to the commands of the State[255].

Piety and impiety: the bases of matriarchal and patriarchal systems. And with the affirmation of the patriarchal system, subjugation and authority prevail, in family and society. The *Moloch* of anarchy and oppression triumphs.

Irony of destiny: the so-called laws of God, the religions, boosted the affirmation of the patriarchal systems of obedience and authority in the family. AUGUSTINE[256] predicated that the relation of command and obedience within a family, between the father, chief of the house, and all other members was the basis for a good relation of command and obedience in society. And the PROTESTANTISM qualified this principle by teaching that a person must learn, as a general rule, to yield, obey and work[257],

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253. HEGEL, *Grundlinien cit.*, Par 166: *Frauen können wohl gebildet sein, aber für die höheren Wissenschaften, die Philosophie und für gewisse Produktionen der Kunst, die ein Allgemeines fordern, sind sie nicht gemacht. Frauen können Einfälle, Geschmack, Zierlichkeit haben, aber das Ideale haben sie nicht. Der Unterschied zwischen Mann und Frau ist der des Tieres und der Pflanze: das Tier entspricht mehr dem Charakter des Mannes, die Pflanze mehr dem der Frau, denn sie ist mehr ruhiges Entfalten, das die unbestimmtere Einigkeit der Empfindung zu seinem Prinzipe erhält. Stehen Frauen an der Spitze der Regierung, so ist der Staat in Gefahr, denn sie handeln nicht nach den Anforderungen der Allgemeinheit, sondern nach zufälliger Neigung und Meinung. Die Bildung der Frauen geschieht, man weiss nicht wie, gleichsam durch die Atmosphäre der Vorstellung, mehr durch das Leben als durch das Erwerben von Kenntnissen, während der Mann Stellung nur durch die Errungenschaft des Gedankens und durch viele technische Bemühungen erlangt.*

the fundamental pedagogical aim of the Protestant concept of family being to recognize as the main objective of any social organization the physical superiority provided by Natur to the man as an expression of the "God-intended" relation of super-ordination and stable order, where the *pater familias* is the legal representative, the uncontrolled depositary of power, the supporter of the family, the clergyman and priest of his home[258].

Faith in God and subjugation to the chief of the family are the two eternal principles of society[259].

For thousands of years it has been affirmed and proclaimed that the husband and father has a moral and legal prerogative to obtain obedience and subordination, to manage the business of the family, to decide and administer, since he is the chief of the family[260].

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254. HEGEL, *Fenomenologia cit.*, 17.

255. see HEGEL, *Fenomenologia cit.*, 24.

256. AUGUSTINUS, *De civitate Dei*, XIX c. 16.

257. HORKHEIMER, *Traditionelle und kritische Theorie - Autorität und Familie*, Fischer Bücherei, Frankfurt a.M. 1970 207: *Der Mensch soll sich nicht vor der Kirche beugen, wie es im Katholizismus geschah, sondern er soll sich schlechthin beugen lernen, gehorchen und arbeiten. Auch der Gehorsam gilt nicht mehr wesentlich als ein Mittel zum Erreichen der Seligkeit oder ist auch nur fest durch die weltliche und göttliche Ordnung umgrenzt, sondern er wird unter dem Absolutismus in steigendem Mass zu einer Tugend, die ihren Wert in sich selbst trägt. Der Eigenwille des Kindes soll gebrochen und*

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In this state of political, social, moral and religious defeat, in which all means are called in support against the anti-authoritarian moment inherent in the wife[261],

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257. continued.
der ursprüngliche Wunsch nach freier Entwicklung seiner Triebe und Fähigkeiten durch den inneren Zwang zur unbedingten Pflichterfüllung ersetzt werden.

258. TROELTSCH, *Die Soziallehren der christlichen Kirchen und Gruppen*, Tübingen 1923 557.

259. LE PLAY, *Les ouvriers européens*, 2nd ed. Paris 1877-79, IV p.12.

260. On the wife's duties of obedience and subjugation see: *ARAB REP. OF EGYPT:* in BERGMANN/FERID, *Ehe-und Kindschaftsrecht*, 4th ed. Frankfurt 1969-, p. 44; *ARGENTINA:* art. 53 L.matr.civ. 2/11/1888, n. 2393; *BRAZIL:* art. 233 c. civ. (L. 27/8/1962); *CHILE:* art. 131, 132 c. civ.; *COLUMBIA:* art. 176, 177 c.civ.; *DOMINICAN REP.:* art. 213 c. civ. (L. 18/12/1940); *EQUADOR:* art. 155, 156 c. civ.; *ETHIOPIA:* art. 635, 1 c. civ.; *GREECE;* art. 1387 c. civ.; *HAITI:* in BERGMANN, *op. cit.*, p. 9; *HONDURAS:* art. 167 -168 c. civ.; *INDIA:* in BERGMANN, *op. cit.*, p. 26; *INDONESIA:* art. 103 -118 c. civ.; *IRAK:* in BERGMANN, *op. cit.*, p. 9, note 1; *IRAN:* art. 1105 civil code; *LIBERIA;* par.46, cod. lib; *LIECHTENSTEIN:* Art.44 Law of Marriage,13.12.1973; *LUXEMBURG:* art. 213 c. civ.; *MOROCCO:* art. 36, 2 code stat. pers. succ.; *NICARAGUA:* art. 151 c. civ.; *PORTUGAL:* art. 1674 c. civ.; *PARAGUAY:* (there is needed some consent for certain activities) art. 7 of the *Law of the civil rights of the women* of 26/8/1954; *PERU:* art. 161 c. civ.; *SOUTH AFRICA:* in BERGMANN, *op. cit.*, p. 22; *SPAIN:* art. 57 (which requires obediance of the wife, 59 (which states that the husband administers the goods, and 60 (where it is stated that the husband represents the wife) c. civ.; *SWITZERLAND:* art. 160 ZGB; *THAILAND:* art. 1454 c. civ.; *TUNISIA:* art. 23 decr. 13/8/1956 stat. pers.; *TURKEY:* art. 152 c. civ.; *URUGUAY:* art. 128 c. civ.; *VENEZUELA:* art. 140 c. civ.; *VIETNAM: (SOUTH)*, art. 42, ord. 15-64 of 23/2/1964.

seq.

in which the wife herself becomes, through her docile submission under the law of the patriarchal family, a moment of exaltation of the husband's authority[262], the modern Con-

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260. continued.
See however: *AUSTRIA:* new formulation of Par.91 ABGB (1.1. 1977); *FRANCE:* new art. 213 C.civ., modified by L 70-459 of 4.6.1970; *GERMANY:* (Fed.Rep.), old par. 1354 BGB deleted with GleichberG Art.125 of 18.6.1957; *ITALY:* new Art. 143 bis (19.5.1975). All these changes were effected by reason of the previous provisions being contrary to the principle of equality of rights.
The concept of the man's supremacy is repudiated, for ideological reasons, in the states of Eastern Europe: *ALBANIA:* Art.2Fam.Code, 23.6.1965; *BULGARIA:* articles 1 and 2 Fam. Code 15.3.1968; *CZECHOSLOVAKIA:* Fam Code 4.12.1963, Art. 1 Fund.Princ. and Par.18; *GERMANY:* (Democratic Rep.) par. 13, 14, 15 Law 27.9.1950 (which also abolished Par.1354 BGB) and par. 2 FGB of 20.12.1965; *HUNGARY:* par. 23 Law of Marriage, Family and Custody, IV/1952; *YUGOSLAVIA;* Art. 3 Fund.Law of Marriage 3.4.1946 and succ.amendments; *POLAND:* Art.23 Code of Fam. and Custody, 25.2.1964; *USSR:*Art.126 const.RSFSR and Art. 3 code of marriage and Family of the RSFSR.
See also *ISRAEL;*Law 5711-1951; *CHINA:* (People's Republic) Art. 7 Law of Marriage 13.4.1950; *CUBA:* Law n.9 of 20.12.1950 and Law 18.7.1967; *FINLAND:* Par.31 Law of Marriage 13.6. 1929 and following modif.(some limitations); *MEXICO:* Art.167 c.civ.; *PARAGUAY:* Art. 5Law of civil rights of the wife n. 236 of 26.8.1954 (however limited by Art.17 same statute).

261. even EVA's sin is invoked and explained as a reason for the punishment of the wife (the punishment being her subjugation to the man): TROELTSCH, *op.cit.*, 557.

262. HORKHEIMER, *op.cit.*, 225: Indeed she helps the man in his authoritative exercize of power and oppression on their children and she supports him in his being a tyrant and a victim of tyranny in order to maintain her and her children's economic "welfare".

stitutions proclaimed the equality of rights between man and woman, between husband and wife.

It is true that HEGEL himself said categorically: *Equality,"sameness"(= Dieselbigkeit) of rights and duties - man shall not have more value than the wife.*[263] But there is a long way between declaration of rights and realization of the declared precepts.

2. Equality and the Married Woman's Name, particularly in the latest Reforms

The "implementation" of the principle of equality of rights between man and wife, with respect to their name, turned out to be a disaster.

The "socialist" solutions of the two Germanies and of Austria are absolutely unsatisfactory.

After the noise and publicity which was made in Germany (Federal Republic) about the Family Reform Law one could legitimately expect a somehow correct solution, e.g. at least along with the basic guidelines expressed 22 years earlier in the SPD project[264] where it was proposed that the spouses have

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263. HEGEL, *Grundlinien cit.*, Par 167 (at p. 314).

264. SPD Entwurf eines GleichberG, 13 1 1954 Drucksache N.178 II Wahlperiode; see RAMM, *Gleichberechtigung und Ehe- und Familienname*, FamRZ 1962 281 (at 286). See also history of the new provision in note 87 at page 56.

to declare at the marriage ceremony to the registrar which name of either one of them or double name (in whatever order they wished, it is submitted) they wanted to assume as their marriage name.

Parturient montes..., or better the reactionary policy triumphed again.

GRAF VON BERNSTORFF[265] wrote:

> *The family conscience of the educated levels in our people ought to be considered as a remarkable factor of civilization, since the intellectual products of the forefathers continue living in it... the name would not express anything more about the descendance from the man's stirp, and thus about the belonging to a family... the danger of people's classification in their time, beyond history is connected with the abandonment of the genealogical overview... it is clear that the liberalization of the marriage name is part of the general context of the manifestations of dissolution which at present we are experiencing in all fields... a principle*[266] *can also be discussed to death! (man kann ein Prinzip auch totreiten)* 267

In the Federal Republic of Germany and in Austria the wife continues receiving automatically the man's name if no declaration is made by the spouses.[268]

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265. GRAF VON BERNSTORFF, *Freie Wahl des Ehenamens?* FamRZ 1971 131.

266. is the principle of equality or the principle of supremacy of man meant?

267. *Quidam* HÜBENER, 14. Beiheft zu DRiZ, 51, went so far as to affirm that a... *freie Namenswahl die Ehe entwerte, weil die Unterscheidung durch den Namen zwischen unehelicher Mutter und deren Kindern einerseits und ehelicher Mutter und ihren Kindern andererseits unter Umständen wegfalle.*

The Latin jurisdictions preferred leaving things in the twilight: in Italy as we have seen the Reform Law on Family provides that the wife adds the man's name, in France the new Divorce Law permits the wife to keep in certain circumstances her husband's name *avec l'accord du mari* which is manifestly contrary to the character of "inalienability" of the name[269].

The Swiss Reform Law is the next to come. The proposals on the family name are either that the spouses have a choice between the names of one of them but with attribution of the man's name to the wife if no choice is made (variant 1.) or that the wife assumes the husband's name (variant 2.).[270]

In the U.S.A. Statutes and Courts have frequently arrogated to themselves the power to tell a married woman what her name was, thus depriving her of the ancient common law right to keep her maiden name. UNA STANNARD said, as far as the

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268. This is the East Germany solution which has been manifestly copied.

269. Any convention on the name is null and void being contrary to the nature of the name as a means of correct identification: this we have been always taught by French authors and Courts. See already the contradiction in the following cases (before the coming into force of Law 75-616, July 10, 1975 Art 264): Civ 13 10 1964, J-Cl 1964 II 13891 note R.L.; D 1965 209 note FOULON-PIGANIOL; Gaz Pal 1964 2 401 note anonym; Civ 20 2 1924 DP 1924 1 19; Paris Trib Gr Inst 8 5 1970, Gaz Pal 27 11 1970; Paris 7 1 1959, D 1959 58; Paris 2 12 1960, J-Cl P 1960 II 11881 concl. NEPVEU.

270. NAF-HOFMANN, *Revision des Ehe-und Ehegüterechts im ZGB*, Zurich 1976.

U.S.A. are concerned: *In regard to married women's names, England has been the torchbearer of liberty, not America*[271].

In fact we are far away from equality of rights, in U.S.A. as well as in England. Besides the uncertain possibility of a married woman to keep her maiden name, the general rule is indeed that the wife is identified in society by her husband's surname and, *incredibile dictu*, in U.S.A. also by his Christian name.

The socialist solutions are generally speaking acceptable. They were developed however from a wrong concept. They are just the result of a political exigency.

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271. STANNARD, *op.cit.*, 39.
It is worthnoting that English authority sometimes is referred to by American courts for obtaining a result which is opposite to the English law: i.e. *Chapman v. Phoenix Ntl' Bank* cit at note 106; *Rago v. Lipsky* cit at note 116.

CONCLUSION

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"As Heaven is far from earth, so far is the real spirit of equality from the exaggerated spirit of equality[272]. Not just equality, but equality of rights is the end which the law must realize. Each person should be granted the same conditions of start.[273]

But women and married women in particular will never obtain full equality of rights as long as they keep obeying to the man[274], as long as they continue supporting the authority of men in the "education" of children, as long as they keep renouncing to fight the rules of the patriarchal family. They are thus co-responsible of the catastrophic effect of parental authority on the new generations[275].

And the constitutional principles of equality of rights with respect to their name will hardly be implemented: society will continue calling them with their husbands' names.

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272. MONTESQUIEU, *Esprit des Lois*, It. transl., *Lo spirito delle leggi*, Paravia, Torino 1960 121.

273. This is the reason why we can never agree with the practical upholding of the "boast of heraldry" especially under the hypocrite formula of "part of the name". Every person has a right to obtain the highest distinctions,

seq.

It is not a matter of names, of course, it is just also a matter of names.

Perhaps it lies in the women's hands to bring a new era of thousands of years of better history for the world, if, against the law of war and tyranny, of authority and arrogance, of pride and vanity of men, State and religion, they succeed in re-establishing the law of peace and love on earth[276].

In the same time they would of couse secure their right to keep their name after marriage and to give this name to their children.

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273. continued.
to became - why not - a Prince or a Duke. But the dignity has to die with its bearer; and every generation must start conquering again, with its own merits, its dignities, its titles and awards. This is mostly an European problem. The better American view was clearly expressed by McGEEHAN J. in *Appl of Ferris et al.*, cit. at note 237: *In America there will always be men ready to exploit religious and ancestral differences but such men will constantly lose stature as time passes and will eventually disappear through their own smallness.*

274. NIETZSCHE, *Gesammelte Werke*, Musarionausgabe, XIV 95, very cynically said: *Ihr sucht einen Führer und wollt euch gerne kommandieren lassen!*

275. MARX, *Gesamtausgabe*, I Abt, III, Berlin 1932 396: *Die*

seq.

Let us hope that if this happens they will be more generous than men were, and that they will not take vengeance by compelling men to assume for the next 4000 years the wife's name at marriage. Otherwise it would start all over again with names and Bills of Rights.

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275. continued.
feigsten, widerstandsunfähigsten Menschen werden unerbittlich, sobald sie die absolute elterliche Autorität geltend machen können. Der Missbrauch derselben ist gleichsam ein roher Ersatz für die viele Unterwürfigkeit und Abhängigkeit, denen sie sich in der bürgerlichen Gesellschaft mit oder wider Willen unterwerfen.

276. If this really happens we will discover finally whether ENGELS was right when he said that all the injustice of classes was brought by the patriarchal systems, whereas the matriarchat represented a system without social tensions and slavery of human beings: ENGELS, *Der Ursprung der Familie, des Privateigentums und des Staats*, Zürich 1934 40. See also FROMM, *Die sozialpsychologische Bedeutung der Mutterrechtstheorie*, in *Zeitschrift für Sozialforschung*, III 1934 196.

Appendix

The thesis was ready for presentation, when the essay of HEPTING, R., *Die Neufassung des Par. 1355 BGB und das internationale Ehenamensrecht - Kann ein Ausländer bei Eheschliessung den Namen seiner deutschen Verlobten annehmen?*, StAZ 1977 157, was published.

This important discussion about the liberty of choice of the spouses' name in West Germany and the growing tendency to prefer as connecting factor the law of the domicile in matters of names and to qualify the name more and more as a private right is worth to be brought to the attention of the reader.