

4th Balkan Conference
Conference Proceedings:
**Personal Name in Internal Law and
Private International Law**

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Mirko Živković

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Conference Proceedings

Personal Name in Internal Law and Private International Law

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4th Balkan Conference:

Personal Name in Internal Law and Private International Law

Introductory Note

I am pleased to welcome you to the 4th Balkan Conference on Family Law and Private International Law. Today, we have gathered at the Faculty of Law, University of Niš, to discuss issues related to “Personal Name in Internal Family Law and Private International Law”. In this regard, I take this opportunity to say a few words about the genesis of the Balkan Conference and the topic of the 4th Balkan Conference.

First of all, I would like to note that the idea for organizing the Balkan Conference on family law issues came from Professor Spyridon Vrellis, who certainly deserves our greatest appreciation. The first Balkan Conference was held in Athens in May 2010, the second one in Sofia in October 2010, and the third one in Istanbul in 2013. I personally participated in the second and third conference. The topic of the Sofia conference was Adoption in Family Law and Private International Law, and the topic of the Istanbul conference was Maintenance obligations in Family Law and Private International Law. On both occasions, I noticed the interesting concept of the conferences, based on comparative presentation of both substantive internal law and private international law within the same topic. In fact, the idea was that each country should provide a complete insight into the current situation, particularly in terms of matters with and without foreign elements. All the papers were later published in the *Revue Hellenique de droit international*, which provides a high quality comparative overview of the current state of affairs in the specific area of family law.

This 4th Balkan Conference follows the same concept, which will hopefully become a tradition. Thus, by accepting to organize this conference, we wanted to support two very good ideas: first, to ensure the continuity of the Balkan Conference and, second, to uphold its well-established concept.

In choosing the topic of this 4th Balkan Conference, we have been driven by belief that the issue of personal name is currently one of the hot topics of Private International Law. This is clearly substantiated by the efforts of the European Union to Draft Regulation on the Law Applicable to a Personal Name. We have

been greatly honoured to welcome Professor Walter Pintens, one of the authors of this Draft regulation, who has kindly accepted our invitation to participate in the 4th Balkan Conference at the Law Faculty in Niš. The conference dedicated to the Draft Regulation was held in Marburg (Germany) five months ago (on 27 November 2015). Moreover, this issue is of considerable importance for Serbia given that the current Serbian PIL Act (1982) does not include an explicit provision on personal name. For this reason, in the course of drafting the new 2014 Serbian PIL Act, we have exerted a lot of effort in an attempt to find modern solutions on this matter (Arts. 57-62), in cooperation with and valuable support of the Ministry of Labour, Employment, Veteran and Social Affairs.

Therefore, I am pleased that we now have the opportunity to discuss this very important topic which has been in the focus of Private International Law experts' attention in recent years. I am convinced that the results of our presentations and discussions would be highly useful, and that they will serve as an inspiration for amending the existing legislation and harmonizing Private International Law rules on this matter.

On this occasion, I wish to welcome all the participants of this 4th Balkan Conference, all colleagues from the Faculty of Law in Nis who have joined us, and our students who attend the course in Private International Law. In particular, I would like to thank the Management of the Faculty of Law, University of Niš as well as the Ministry of Education, Science and Technological Development for assistance and support in organizing this Conference.

Dr. Mirko Živković,
Professor of Private International Law,
Faculty of Law, University of Niš

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GARCIA AVELLO: 13 YEARS AFTER PRETEXTS AND ARBITRARINESS

I. Introduction

Regarding my brief contribution to our working on the names and surnames in domestic and private international law, I would like to attempt to assess somehow the Judgment of the Court of the European Community in the case *Garcia Avello and ÉtatBelge*, 13 years after its delivering in 2003¹. I wish to clarify from the outset that it is not my intention to present a complete analysis and exhaustive intellectual statement, but rather to try to discover the true reasoning of that Judgment and make some comments thereon.

Although that case is very well known, it seems useful to recall once again the facts and the conclusion held by the Court.

II. Facts of the case and Court's conclusion

A. The facts

A Spanish national, Mr. Carlos Garcia Avello, and a Belgian lady, Ms. Weber, both Belgian residents, were married and had two children, born in Belgium. Both children have two nationalities, Belgian (because of their mother's nationality) and Spanish (because of their father's nationality). The Belgian Registrar of Births entered into the children's birth certificates the patronymic surname of their father, *Garcia Avello*, in accordance with Belgian Law, providing at that time that a child has the name of his father². Belgian domestic law was applied by the Belgian authorities according to the Belgian conflict-of-laws rules, as the

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1 Judgment of 2 October 2003, Case C-148/02 *Carlos Garcia Avello and Étatbelge* [2003] ECR I-11635.

2 Art. 335 of the Belgian Civil Code, before its modification; see *infra*, III.B.3 (c-ii).

national law of the children³, since the national law of a multinational person, whose one nationality is that of the *forum* (i.e., of Belgium) is considered to be in the *forum* (Belgium) Belgian law⁴.

Several years after children's birth, the parents requested in their capacity as the legal representatives of their children, that the surname of their children be changed to *Garcia Weber*, pointing out that according to Spanish law, the surname of a child is formed by the first part of the surname of his father followed by the first part of the surname of his mother, even if the mother has no Spanish nationality⁵. Under that family name, *Garcia Weber*, the children had been already registered with the consular section of the Spanish Embassy in Belgium. The parents pointed out that the Spanish system of surnames was deeply rooted in Spanish law, tradition and custom, to which the children felt more intimately related. According to parents' allegation, under the Spanish system the surname *Garcia Avello* would suggest that their children were siblings rather than children of their father and deprived from any link to their mother, as far as the name was concerned⁶.

The Belgian Minister of Justice informed the parents that there are insufficient grounds for changing the surname to *Garcia Weber*, because "any request for the mother's surname to be added to the father's, for a child, is habitually rejected on the ground that, in Belgium, children bear their father's surname"⁷. Actually in Belgium a change of surname is authorized only exceptionally and upon proof

3 At that time, art. 3 paragraph 3 of the Belgian Civil Code; now, since 2004, art. 37 of the Belgian Code of Private International Law.

4 Art. 3 paragraph 2, 1o, of the Belgian Code of Private International Law. See Fr. Rigaux / M. Fallon, *Droit international privé* (3rd ed., Larcier, Bruxelles 2005), p. 508 (no 12.28), and pp. 202-203 (no 5.57), who reserve the case where the Belgian nationality is not effective: "Le Code belge de droit international privés'entient au principe de la préférence pour la nationalitébelge [...]. Letextes'exprime de manièreimpérative. Celan'exclut pas pour autanttoutepossibilitéd'écarter la nationalitébelge, de manièreindirecte, via la clause d'exception [...]. Le casd'espècepeut en effetavoirpeu de liens significatifs avec la Belgique et en présenterdavantageavec le pays étrangerdontl'individupossèdeaussi la nationalité" (p.203); but anyway this was not the case in *Garcia Avello*, where the Belgian nationality was the effective one.

5 Art. 194 of the *ReglamentodelRegistro Civil* (1958) (after the *Real Decreto* 193/2000), and art. 109 of the Spanish Civil Code.

6 This very factor seems quite important and should have attracted the attention of the Court much more than it happened. However, though it could justify somehow the Court's solution, the latter did not want to retain it in the conclusion of its answer, and preferred to deal with more general and very delicate *political* points (*infra*, III.A.2(a) and III.B.4). If it had mentioned the above factor in its conclusion, the range of the Judgment in *Garcia Avello* would be restricted for sure, but more sympathetic.

7 See in paragraph 18 of the Judgment.

of serious grounds; *e.g.*, where “there are few connecting factors to Belgium”, or where “a first child born under Spanish jurisdiction has a double surname in accordance with Spanish law, whereas the second child, which has Belgian and Spanish nationality, bears the double surname of its father in accordance with [...] [Belgian law], in order to re-establish the same surname within the family”⁸.

The father brought an application for annulment of the Minister’s decision before the Belgian *Conseil d’État*, which decided to stay the proceedings and refer to the Court of European Community in Luxembourg for a preliminary ruling, the question whether the principles of Community law relating to European citizenship and to the freedom of movement of persons, are to be interpreted as precluding the Belgian administrative authority from refusing under the described circumstances the requested change of children’s surname in the way designated by Spanish law, on the ground that, in Belgium, exceptionally, children bear their father’s surname, and that, exceptionally, the change may be accepted where there are few connecting factors to Belgium or it is appropriate to re-establish the same surname among siblings⁹.

B. Court’s conclusion

The Court answered to that question in the affirmative: “Articles 12¹⁰ and 17 EC Treaty¹¹ must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State [*i.e.*, Belgium] from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State [Belgian and Spanish nationality], in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State [Spain]”¹².

8 Cf. paragraph 12 of the Judgment.

9 Paragraph 19 of the Judgment.

10 According to art. 12 paragraph 1 EC Treaty, “Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”.

11 Art. 17 EC Treaty provides that “1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship. -2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby”.

12 ECR [2003] I-11651-11652.

III. Court's reasoning

What are the critical factors, which incited the Court to reach this –at least in my view- peculiar conclusion? A first reading of the Judgment allows the reader to find out easily two reasons which dictated the Court's conclusion. *First*: discriminatory treatment on grounds of nationality with regard to surname. In other words, Belgian authorities, in non-recognizing a surname formed in the way imposed by Spanish law, proceeded to a prohibited discrimination on grounds of nationality with regard to their surname. *Second*: Difficulties to the free movement of European citizens inside European Union, due to the discrepancy between two different surnames of the children; discrepancy due to the different domestic laws of their respective nationalities. Consequently, such impediments had to be removed.

Despite its *prima facie* logical structure, the Court's reasoning is rather confusing and inappropriate to ground the conclusion adopted by the Court.

A. The reasoning advanced by the Court

1. Discriminatory treatment on grounds of nationality

(a-i) The Court considers that in the case at hand there exist two categories of persons, which are objectively different from each other: those having only Belgian nationality and those having Belgian and Spanish nationality. Therefore, according to the Court, in treating these two different categories of persons in the same way, by refusing them the option to change their surnames, Belgian authorities violated the principle of non-discrimination¹³.

13 See paragraph 37 of the Judgment, where it is stated that “in those circumstances, Belgian nationals who have divergent surnames by reason of the different laws to which they are attached by nationality may plead *difficulties specific to their situation which distinguish them from persons holding only Belgian nationality*, who are identified by one surname alone” [author stresses]. The Court reasoning, however, seems rather confusing. In paragraph 31 it refers to *comparable situations* which must not be treated differently and to *different situations* which must not be treated in the same way; on the other side, in paragraph 34, it refers to *two categories of persons* and searches to determine “whether *those two categories of persons* are in an identical situation or whether, on the contrary, their situations are different, in which case the principle of non-discrimination would mean that Belgian nationals, such as the children of Mr *Garcia Avello*, who also have the nationality of another Member State may assert their right to be treated in a manner different to that in which persons having only Belgian nationality are treated, unless the treatment in issue can be justified on objective grounds” [author stresses]. The Court further ascertains that in Belgium *the situation* of these two categories of persons is different, without saying anything regarding the identity or the difference of *the two categories of persons*. In other words, in the view of the Court, the different situations of the two categories of persons determine and define the difference of the categories. Nevertheless, there is not the different treatment which makes the two

The idea underneath this general statement is that Article 12 paragraph 1 EC Treaty¹⁴ compels Belgium not to treat a person having Belgian nationality in the same way as all other Belgians, solely on the ground that he/she bears the nationality of another Member State as well; in other words, that idea of the Court leads necessarily to the conclusion, that the true meaning of this Article would be to compel Belgium to discriminate among Belgians not on ground of an objective consideration independent to the nationality of the person, as the Court itself explicitly adopts¹⁵, but precisely on the ground of nationality, what is prohibited by Article 12!

(a-ii) The true meaning of Article 12, in my view, is that a Member State must not offer a different (unfavorable or eventually preferential) treatment to foreigners, disregarding the nationality of the forum State, that they also possess, but offer to the citizens of another Member State the same treatment as that provided for its own citizens. Nothing more! If the meaning were as admitted by the Court, it had to be explicitly formulated in the wording of the Article.

(b) I seriously doubt, whether in the instant case a discriminatory treatment whatsoever on grounds of nationality truly occurs¹⁶:

categories different, but it is the similarity (comparability) of the categories which makes the different treatment discriminatory or not. Thus, the correct steps they must have been followed should have been: (1) To consider whether or not the two categories of persons are substantially identical (similar, comparable); and then, (2) to search for their (identical or different) treatment in Belgium or elsewhere. If the Court had proceeded to the first step, it could easily ascertain that the category of persons bearing Spanish and Belgian nationality in Belgium is similar to that of persons bearing exclusively Belgian nationality (they all are considered Belgian nationals), and that in Spain too the above two categories are similar (in principle they all are considered Spanish nationals; art. 9 paragraph 9 of the Spanish Civil Code). Apparently, in the meaning of the Court, both States, in so thinking, are wrong. What would be then the correct solution according to the Court? The answer is: the same treatment of persons holding dual nationality in both States Belgium and Spain. The achievement of this result necessarily presupposes that the two categories of persons are similar in both States. Unfortunately this is not the case. In Spain they are Spaniards, in Belgium they are Belgians. Since the two categories are different in the view of each State concerned, their treatment in these States may be different too, as it is actually. The Court is not satisfied with such a conclusion, and prefers to avoid the logical impasse by an arbitrary choice: In both States (and consequently in all Member States) the Spanish solution is preferable and must be followed. On this point see *infra* III.B.1.

14 See *supra*, fn. 10.

15 Paragraph 31 of the Judgment.

16 R. Frank, "Die Entscheidung des EuGH in Sachen Garcia Avello und ihre Auswirkung auf das internationale Namensrecht", *StAZ* 58 (2005), pp. 161 ff., p. 162, and P. Lagarde, quite analytically in his remarks on *Garcia Avello*, *Rev. crit. DIP* 93(2004) pp. 192 ff., have pointed out the weakness of the Court's argumentation.

(b-i) When the Court affirms without any hesitation, that “it is not permissible for a Member State [Belgium] to restrict the effects of the grant of the nationality of another member State [Spain] [...]”¹⁷, one may reverse this affirmation into a question: Is it permissible for a Member State [Spain] to restrict the effects of the grant of the nationality of another member State [Belgium]? If Belgium should recognize a surname given by Spanish law [*Garcia Weber*], why should Spain not recognize a surname given by Belgian law [*Garcia Avello*]? If the Belgian authorities should change the name appearing in their Register, why Spain should not change the name appearing in its Consular’s Register?

(b-ii) Let us modify the facts! Suppose that Mr. *Garcia Avello* and Ms. *Weber* are resident of Spain, not of Belgium, married in Spain and having two children, born in Spain and both dual nationality, Spanish and Belgian. The children are registered with Spanish authorities under the name *Garcia Weber*, according to Spanish law, and with the consular section of the Belgian Embassy in Spain under the family name *Garcia Avello*, according to Belgian law. Afterwards, the parents request in their capacity as the legal representatives of their children, that the surname of their children be changed from *Garcia Weber* to *Garcia Avello*. Their request supposed rejected by the Spanish authorities, the case is brought before the EC Court. The Court, in conformity with its own case law (in *Garcia Avello*) should conclude that Article 12 EC Treaty precludes Spanish authorities from refusing the requesting change.

(b-iii) Thus, one may admit that the so called *discrimination* is potentially unavoidable. Moreover, to comply with Court’s solution, means to be obliged to proceed to a prohibited discriminatory treatment on grounds of nationality, because the competent authority of a Member State, whose nationality a person bears, is obliged to prefer instead of the solution of its own national law which happens to be the law of the effective nationality too, the solution of another Member State whose nationality the person equally bears, all the more so even though the latter’s State nationality is not effective at all. I would dare to say, that the Court misinterpreted Article 12 and violated it.

(b-iv) Thus, my conclusion on this point is: Since, *in case of dual nationality*, the application of any applicable -on ground of nationality- law constitutes inevitably a preference of one nationality over the other, no prohibited discrimination argument or reasoning is valid. As a matter of fact, here it is not at stake a question of discriminatory treatment on grounds of nationality, but rather a positive conflict of laws, or a parallel validity of different laws¹⁸. If we do not like

17 Paragraph 28 of the Judgment. This Statement goes too far, because it affects, in the end, directly the power of a State to designate the persons bearing its own nationality.

18 The source of the problem is children’s dual nationality. Without the EC Court Judgment, Belgium should do as it did, because in case where the person has more than one nationalities,

such a co-existence or cohabitation of laws, or if we assume that a discrimination prohibited by EU law does nevertheless exist, we must either choose in favor of one or the other domestic law, or modify the existing rules. For example, the solution would be either to amend the connecting factor of nationality in the conflict-of-laws rules regarding surnames, and replace it by another, like the habitual residence¹⁹; or modify (only regarding names or in all cases?) the general trend of applying as *lex patriae*, in case of dual nationality, the law of the forum State if one of the nationalities is that of this State. The Court, however, is not competent to proceed to such choices or modifications.

2. Discrepancy between surnames

The second base of the Court's reasoning regards the difficulties due to the discrepancy between surnames.

(a) Actually the real problem in the *Garcia Avello's* case consists in a discrepancy between surnames of the same persons, due to the fact that two Member States have different substantive rules on this matter. This discrepancy may be the root of difficulties at both professional and private levels. Nevertheless: (i) since the domestic laws regarding surnames are different, said discrepancy is inevitable; (ii) the difficulties for the persons to move from one Member State to another exist in all cases where national laws are different. If we want to wipe out any difficulty of such type, we should unify all branches of law, labor law, tax law, even though their application does not depend on nationality. Certainly one can contradict, that Article 12 EC Treaty regards exclusively discrimination on grounds of nationality. If so, and it is so, I am right in saying that Article 12 is an insufficient and bad rule. It is an insufficient rule, because, it does not abolish all difficulties regarding free movement; and, it is a bad rule, because it neutralizes the nationality as such; it destroys or it leads to destruction the "national" nationality of people in the EU. This, in my opinion, is wrong. And my opinion is not an exclusively legal one; it is much more political. As a political thesis, it

among them that of the forum State, it applies -as *lex patriae*- its own law (*supra*, fn. 4). On its side, Spain would have done as it did, since, -according to Spanish private international law- in principle Spanish law would be applicable to a Spaniard who bears another nationality too (*supra*, fn. 13). Regarding third States, most probably, they would follow the Belgian solution, because Belgian nationality was certainly the effective one, since the family's and children's habitual residence for many years was in Belgium.

19 See *g.*, art. 4 paragraph 1 of the Draft for a European Regulation on the Law Applicable to Names of Persons, elaborated by the *Working Group of the Federal Association of German Civil Status Registrars*. As a general rule this article provides: "The name of a person shall be governed by the law of the State in which this person has his habitual residence"; it adds, in its paragraph 2, that "the change of the habitual residence as such shall not alter the name". See the text of that Draft in *Yearbook of PIL 15 (2013/2014)*, pp. 31-37.

cannot be logically or legally explained. One may agree and adopt it, or disagree and reject it; not persuade each other.

(b) When the Court considers that Belgian administrative practice allows derogations from the rule of the father's surname, but "refuses to countenance among such derogations the case of persons [with dual nationality] [...] who seek to rectify the discrepancy in their surname resulting from the application of the legislation of two Member States"²⁰, it overlooks the fact that the children's (their father's) request, whatever their aim may be, arrives at the conclusion that Belgium is obliged to admit the Spanish solution. The discrepancy will disappear either by unifying the domestic laws on surnames, which does not belong to the Union's competence, or by preferring the rules of one country and obliging the other to recognize them (despite its own law). But who can impose such an obligation to the Member States? In other words who is entitled to solve the dilemma between two surnames of the same person, due to its dual nationality? Certainly, not the Court!

Here we reach the source of inspiration of the Court's judgment; in other words the real implicit reasoning of it.

B. The real implicit reasoning

In my view, what is actually hidden under the Court's reasoning in all aspects is an arbitral preference of the Judges.

1. First aspect

The Judges seem not to like Belgian system, providing that a child shall bear the surname of his father, and explicitly express their preference for Spanish law, because it creates a surname combining elements from both the father's and the mother's surnames²¹. But who did really give the Court such a competence to ponder the domestic laws of the Member States and designate which is preferable? Nobody!

²⁰ Paragraph 33 of the Judgment. Actually the Court focuses solely to the systematic refusal by Belgian practice to admit, regarding children possessing foreign and Belgian nationality, the existence of a serious ground justifying the change of their father's surname, and this, solely because in Belgium children who have exclusively Belgian nationality assume, in accordance with Belgian law, their father's surname.

²¹ See in paragraph 42 *in fine* of the Judgment: "[...] far from creating confusion as to the parentage of the children, a system allowing elements of the surnames of the two parents to be handed down may, on the contrary, contribute to reinforcing recognition of that connection with the two parents".

2. Second aspect

The Court does not like the rigidity of both domestic laws, Belgian and Spanish, both depriving in principle at that time the person from any intervention in the creation of its surname. It certainly prefers that the child (or the parents, or the father) be supplied by the power of choosing, at least to some extent, its family name, and in practice it recognizes that power.

However: Court's feelings of sympathy or antipathy for one solution or another, for one domestic law or another should be kept in the *forum internum* of judges. They are *de lege ferenda* approaches of a legislator or an annotator or an author, or a professor, not of a Court. The Court has no competence to modify the law system on the issue at hand, or to create the right of a person to change his/her surname.

3. Third aspect

(a) As a matter of fact, the Court itself recognized that “[...] as Community law stands at present, the rules governing a person’s surname are matters coming within the competence of the Member States”²². It added, however, that the Member States, “[...] when exercising that competence, [must] comply with Community law”²³. This wording is subsequently repeated several times in other cases.

(b) The phrase added is used by the Court in order to justify its interference in the matter. *Garcia Avello* is the first step (followed even more clearly five years later, in 2008, by *Grunkin-Paul* Judgment²⁴) towards the insertion of the technique of mutual recognition in private international law’s field regarding surnames; or even, perhaps, towards a new approach in international family law in general, which would replace traditional multilateral conflicts thinking by a duty of mutual recognition²⁵. The Court does not specify, however, the relevant criterion for such recognition: is it the first registered family name? In *Garcia Avello* this does not seem to be the case. The family name according to the law of the person’s habitual residence? It is not the case in *Garcia Avello* either. Or, perhaps, the family name provided by the national law chosen by a person having dual nationality, like actually in *Garcia Avello*? Anyway, it is an indirect means (I would dare to say a devious means) used by the Court to incite (if not compel)

22 Paragraph 25 of the Judgment.

23 *Ibid.*

24 Judgment of 14 October 2008, Case C-353/06 *GrunkinPaul* ECR[2008] I-7639.

25 Cf. J. Meeusen, “The *Grunkin and Paul* Judgment of the ECJ, or How to strike a Delicate Balance between Conflict of Laws, Union Citizenship and Freedom of Movement in the EC”, *ZEUP 2010*, pp. 186 ff., p. 200.

Member States to modify their own rules (domestic and conflict-of-laws rules), if not regarding any relation where conflict-of-laws rules use as a connecting factor the nationality (for example in case of recognition of the paternity before the birth of the child)²⁶, at least regarding surnames, by introducing to some extent private autonomy into choice of law.

(c) There are some examples which showed that the message of the Court was grasped and adopted by States and other circles:

(c-i) Germany, *e.g.*, introduced in *EGBGB* a new Article 48, giving, in principle, a person whose name is governed by German law, the possibility to choose another name obtained previously in another State of the European Union during his/her habitual residence there²⁷.

(c-ii) Belgium, on its side, modified (by Act of May 8, 2014) the ancient Article 335 of the Belgian Civil Code and granted the parents the power to choose the name of their child: either the name of the father or that of the mother or both names²⁸.

(c-iii) Further, various Member States have been convinced of *Garcia Avello* Judgment and played a leading part in the frame of the International Commission on Civil Status (ICCS). The Convention on the recognition of surnames created by this Organization in 2005 (Antalya), found a root of inspiration regarding its Article 4 paragraph 2 in the solution of the Court in *Garcia Avello* case. According to this Article, "(1) The surname attributed, in the Contracting State where he or she was born, to a child possessing two or more nationalities shall, if that State is one of those of which the child is a national, be recognized in the other Contracting States. –(2) However, by way of derogation from the preceding paragraph, the surname attributed at the request of the parents in another Contracting State of which the child is a national shall be recognized in the other Contracting States. Notice of such attribution shall be sent to the

26 Such a hypothesis cannot be excluded. Cf. in C.-Fr. Nordmeier, "Unionsbürgerschaft, EMRK und ein Anerkennungsprinzip: Folgen der namensrechtlichen EuGH-Rechtsprechung für Statusentscheidungen - zugleich Besprechung der Entscheidung des Kammergerichts vom 23.9.2010, StAZ 2011, 148", *StAZ 64 (2011)*, pp. 129-140, p. 130 and fn.12.

27 On art. 48 *EGBGB* see R. Freitag, "Die Namenswahl nach Art. 48 *EGBGB*", *StAZ 66 (2013)*, pp. 69-77; F. Wall, "Anwendungsprobleme des Art. 48 *EGBGB* - Dargestellt anhand von Beispielfällen aus der Praxis", *StAZ 66 (2013)*, pp. 237-247.

28 The new Act provides further, that in case of disagreement or absence of choice the child has the name of the father. The Constitutional Court of Belgium (Judgment no 2/2016 of January 14, 2016) annulled this provision on ground of discrimination. It maintained, however, the effects of the annulled provision until December 31, 2016.

civil registrar for the place of the birth of the child, for entry in the relevant official registers”²⁹.

(c-iv) Besides, the Judgment in *Garcia Avello* obviously inspired the Members of the *Working Group of the Federal Association of German Civil Status Registrars* when they were elaborating their Draft for a European Regulation on the Law Applicable to Names of Persons³⁰. After having established as a general rule the application of the law of the habitual residence of the person, they granted a person a limited freedom of choice regarding the applicable law. According to Article 5 paragraph 1 of the Draft, “A person may choose that his name is governed by the law of the State whose nationality he possesses. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses”.

(d) Certainly, some domestic or private-international-law rules need to be changed and, as a matter of fact, such changes had already been adopted on domestic level before *Garcia Avello* judgment³¹. In conflict-of-laws rules private autonomy

²⁹ A first text of that Convention was adopted by the General Assembly of the ICCS in September 2003 (Madrid). Art. 4 of that previous text provided that “Le nom attribué, selon la loi de l’État contractant du lieu de sa naissance, à un enfant possédant deux ou plusieurs nationalités est reconnu dans les autres États contractants si cet État est l’un de ceux dont cet enfant a la nationalité et celui dans lequel le ou les parents auprès de qui vit l’enfant avaient alors leur résidence habituelle”. See on this text R. Frank, “Die Convention der CIEC über die Anerkennung von Geburts- und Familiennamen vom 25. September 2003”, in St. Saar, A. Roth, Chr. Hattenhauer (Hrsg), *Recht als Erbe und Aufgabe - Heinz Holzhauser zum 21. April 2005* (Erich Schmidt Verlag, 2005), pp. 442-449. Few days after the adoption of that text, the Judgment in *Garcia Avello* was delivered. Then, the Dutch and the German Sections of the ICCS asked for a new reading of the adopted text, because of the impact which that Judgment would have on the Convention (and its future perspectives). The question has been discussed in March 2004 (General Assembly, Strasbourg). Despite various objections from some Sections, a new wording has been proposed (Working Group in May 2004), and the final text has been adopted in September 2004 (General Assembly, Edinburgh). Then the text has been voted once again in the subsequent meeting of the General Assembly (on September 14, 2005, Antalya), and the Convention has been opened for signature two days later, on September 16. It has been signed only by Portugal and has not entered into force yet.

³⁰ See *supra*, fn.19.

³¹ The Greek Civil Code provides in its art. 1505 (as modified by the Act 1329 of 1983), that “the parents are under an obligation to have determined the surname of their children by a joint irrevocable declaration made by them. The declaration is made before the marriage either in the presence of a notary or to the official before whom the marriage is celebrated. The official is under an obligation to ask for such declaration. -The surname so determined which is common to all children may be either the surname of one of the parents or a combination of their two surnames which however must in no case comprise more than two surnames. -Where the parents have omitted to make a declaration about the surname of their children in conformity with the conditions set out in the preceding paragraphs the children shall have

regarding surnames may be a good solution not only in case of persons having dual nationality but also in general for all persons who, thus, could choose between the law of their nationality (or of one of their nationalities) and the law of their habitual residence³². Nevertheless, such changes must be made in a Member State, only if and because this Member State in its autonomous competence considers that new rules are better than previous ones; not because it is compelled by Community law or incited by the EC Court to do so.

EC Court actually usurped a competence (in other words a part of the sovereignty) of the Member States. This is wrong, because this is not its role.

4. Fourth aspect

(a) Finally, there is a fourth point, in my view extremely important, clearly expressed in the reasoning of the Judgment. It regards the type of society aimed at, within the European Union³³. As usually, Attorney General *Jacobs* is quite clear, clearer than the Court itself: “the concept of ‘moving and residing freely in the

for surname the surname of their father” [English translation by C. Taliadoros, *Greek Civil Code* (Ant.N.Sakkoulas Publishers, Athens-Komotini, 2000)].—In the Netherlands, an Act of 1997 (entered into force in 1998) allowed the parents to choose, regarding their child, either the name of the father or that of the mother; on this Act see W. Pintens, “Der Personennamen in der romanischen Rechtsfamilie”, *StAZ 69* (2016), pp. 65 ff., p. 67.

32 See W. Pintens / D. Pignolet, “La détermination du nom de l’enfant en droit international privé belge et l’influence de la jurisprudence de la Cour de Justice”, *Private Law: past, present and future – Liber Amicorum Valentinas Mikelénas* (Justitia, Vilnius 2008), pp. 247 ff., p. 256.

33 The Danish Government had submitted written observations, as well as oral ones at the hearing on 11 March 2003. In the paragraph 40 of the Judgment, we can read that “according to the Danish Government, that [the Belgian] practice, in so far as it applies the same rules to Belgian nationals who are also nationals of another Member State as it does to persons who are nationals of Belgium alone, contributes to facilitating integration of the former in Belgium and to attainment of the objective pursued by the principle of non-discrimination” (author stresses). On this point the Court objects in paragraph 43 of the Judgment, that “[...] with regard to the objective of integration pursued by the practice in issue, suffice it to point out that, in view of the coexistence in the Member States of different systems for the attribution of surnames applicable to those there resident, a practice such as that in issue in the main proceedings is neither necessary nor even appropriate for promoting the integration within Belgium of the nationals of other Member States”. Since the antiquity, the application to all people residing in the territory of a State of the law of that State has always been considered as favoring the integration of all people into a homogenous community. Regarding the law applicable to names of persons, W. Pintens / D. Pignolet (*supra*, fn. 32) p. 256, correctly pointed out that granting a person the possibility of choosing as applicable to his/her name, instead of the law of nationality, the law of the habitual residence, “a le bénéfice de faciliter l’intégration de l’étranger dans la société de sa résidence habituelle”. For the Court this does not constitute an appropriate means!

territory of the Member States' is not based on the hypothesis of a single move from one Member State to another, to be followed by integration into the latter. The intention is rather to allow free, and possibly repeated or even continuous, movement within a single 'area of freedom, security and justice', in which both cultural diversity and freedom from discrimination are ensured"³⁴.

(b) Such thoughts might be correct or not. In any event, what kind of society Europe wishes to create (for example a society of gipsy or *juifserrants*, or a society completely integrated in the mentality or the way of life of Central European Countries), is not Court's duty or jurisdiction. It is a highly political issue, which must be decided very carefully on the highest level, unanimously by the Member States and not without the wish of their people; certainly not by the Court.

(c) As far as I am concerned, I wish that each Member State keeps the right to organize its own society in the way it prefers, and the Central European authorities are limited in their competence to decide exclusively on a restricted number of matters. The better these authorities do their restricted job, the better for the people of Europe.

34 Paragraph 72 of Attorney General's Opinion.

UNIFICATION OF THE LAW APPLICABLE TO NAMES ***An academic proposal¹***

I. Introduction

Unification of private international law in the field of the law of names has been very exceptional. The only international organization dealing with this matter is the International Commission of Civil Status.² An example is the 1980 Convention on the law applicable to names and forenames, but unfortunately only Italy, the Netherlands, Spain and Portugal ratified this instrument. Another example is the 1958 Convention on name changes which is applicable between nine States.

But in practice, it was not the tentative to unify international names law, but the case law of the European Court of Justice that brought the law of names to the fore. In a series of judgments the Court of Justice of the European Union (ECJ) came to the conclusion that the lack of harmony of decision on the names of persons within the European Union violates two fundamental principles of EU law, the principle of non-discrimination on the basis of nationality and the freedom of movement and residence, today both enshrined in the Treaty on the Functioning of the European Union in Articles 18 and 21.³ From the *Garcia Avello* case can – in a broad interpretation – be concluded that a citizen having the nationality of the Member State of his residence as well as the nationality of

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1 This contribution is widely based on Dutta/Frank/Freitag/Helms/Krömer/Helms, One Name Throughout Europe – Draft for a European Regulation on the Law Applicable to Names, Yearbook of Private International Law (YPIL) 2013/2014, 31 ff. and Dutta/Pintens, The mutual recognition of names in the European Union, NiPR 2014, 559 ff.

2 See Pintens, The impact of the International Commission on Civil Status (ICCS), in Scherpe (Ed.), European Family Law, I, Cheltenham, 2016, 124 ff.

3 ECJ 2 October 2003, C-148/02 (*Garcia Avello*); ECJ 14 October 2008, C-353/06 (*Grunkin-Paul*). See Dutta/Pintens, NiPR 2014, 559.

another Member State should have a choice between the law of both States when determining or changing his name. From the *Grunkin and Paul* case we learn that a name which has been acquired in one Member State has to be recognised in the other Member States as well. This case law indicates that we are evolving towards a European right of the citizen to have one name throughout Europe.⁴

The lack of harmony of decisions in Europe – which is the cause of the ECJ’s case law – is due to different conflict rules within the laws of the Member States. Most systems use nationality as the pertinent connecting factor for the names of persons, other domicile or residence. In some Member States persons can, within certain limits, choose the law applicable to their names; other systems deny a freedom of choice.

Therefore, it is necessary in order to avoid discrimination and to favour the freedoms of the Treaty that a certain level of unification is reached. This was also the reason why the European Commission included the law of names in the EU Justice Agenda 2020.

Against this background, in 2012 the Federal Association of German Civil Status Registrars established a working group with the task to elaborate an academic proposal for a European solution guaranteeing the stability of names within the Union. The working group published a Draft for a European Regulation on the law applicable to the names of persons which was accompanied by an explanatory report. English, French and Polish versions of the Draft Regulation with a short version of the report have been published.⁵

4 Dutta/Pintens, *NjPR* 2014, 559.

5 Dutta/Frank/Freitag/Helms/Krömer/Helms, *Ein Name in ganz Europa – Entwurf einer Europäischen Verordnung über das internationale Namensrecht*, *StAZ* 2014, 33 ff.; *One Name Throughout Europe – Draft for a European Regulation on the Law Applicable to Names*, *Yearbook of Private International Law (YPIL)* 2013/2014, 31 ff.; *Un nom dans toute l’Europe. Une proposition de règlement sur le droit international du nom*, *RCDIP* 2014, 733-738; *Jedno nazwisko w całej Europie – projekt europejskiego rozporządzenia o międzynarodowym prawie nazwisk*, *Kwartalnik Prawa Prywatnego* 2016, 81 ff. and 215 ff. See also Dutta/Pintens, *The mutual recognition of names in the European Union*, *NiPR* 2014, 559 ff.; Mączyński, *Propozycja jednoliceń międzynarodowego prawa nazwisk w Unii Europejskiej*, in *Festschrift Tomaszewskiemu*, Warszawa, 2016, p. 199 ff. In November 2015 the Draft was discussed in a workshop at the University of Marburg. Dutta/Helms/Pintens (Hg.), *Ein Name in ganz Europa. Vorschläge für ein internationales Namensrecht der Europäischen Union*, Frankfurt, 2016.

II: Cornerstones of the Draft Proposal

1. A twofold approach: Unification of European conflict law and mutual recognition

In order to guarantee a stability of names the Draft does not only propose a unification of the conflict rules (Art. 4 to 11). It also supplements its choice-of-law provisions by an obligation for all Member States to recognise names which have been registered in a civil status registry in a Member State (Art. 12).

A unification of the conflict rules alone would not safeguard that a person has the same name throughout the European Union. The application of foreign law entails difficult questions of interpretation and adjustment. Furthermore, even if a common connecting factor such as habitual residence or nationality is used, different authorities can come to the applicability of different laws. Additionally, an incorrect application of the law when registering the name can never be entirely excluded. Nevertheless, the European citizen can have in many cases a stability interest in using a name even if unlawfully registered.

Introducing solely an obligation to recognise a name without harmonising the conflict rules does not solve all problems. As the name of a person is established by the competent authority according to its own choice-of-law rules not only at his or her birth but also upon later changes of his or her family status, a mere obligation to recognise could lead to arbitrary results. The civil status of a person would be dependent on the application of the law in the Member State in which the change of the status was initially registered. Furthermore, third state cases would not be dealt with.

2. Principle of habitual residence

As a general rule, Article 4 of the Draft favours not nationality but habitual residence as the primary connecting factor even though, in the majority of the European private international law systems, the name of a person is still governed by the law of nationality.⁶ Following the habitual residence principle is in line with the *status quo* in current European private international law. In the Rome I Regulation, the Rome II Regulation, the Rome III Regulation and the European Succession Regulation habitual residence is the predominant connecting factor. This position of the European legislator should also be followed in a European conflict rule on names. Submitting a person to the law of the habitual residence stresses – in accordance with fundamental ideas of primary European

⁶ See Pintens, Stand des Internationalen Namensrechts in Europa: Status Quo und Regelungsbedarf, in Dutta/Helms/Pintens (n.5), S. 22 ff. Exceptions are Denmark and Switzerland, where the name of a person is governed by the law of the domicile.

Union law (e.g. Art.18 and 21 TFEU) – the interests of foreigners in being treated equally and in being integrated in the societies where they actually live. Furthermore, the use of habitual residence as a connecting factor quite often leads to a harmony between jurisdiction and applicable law. Birth and marriage – which are relevant for the name of a person – will mostly be registered in the State in which the person habitually resides. Therefore, the Draft enables the registrars to apply regularly their own law with which they will be most familiar. This factor cannot be overestimated as the registration processes in question constitute day-to-day business.

Article 4 para. 2 clarifies that a change of the habitual residence by the person as such has no consequences on the stability of the name. Only events having relevance to a person's name after the change of the applicable law are governed by the newly applicable substantive law.

3. Choice of law

Article 5 of the Draft grants a person a limited freedom of choice regarding the applicable law, although the majority of legal systems, so far, provide for mandatory conflict rules.⁷As mentioned above it could be inferred from the *Garcia Avello* case that a person being a national of more than one Member State can choose between the laws of all those States. Furthermore, the idea of self-determination and the respect for personality rights would be best implemented if European Union citizens were able to choose, at least within certain limits, the legal system governing their names. Such an approach would take account of the growing mobility and the multiple legal systems increasingly faced by European Union citizens.

According to Article 5 para.1 of the Draft, a person can choose the law of his or her nationality. In case of multiple nationalities the person has the choice between the laws of all those nationalities. If the person has exercised his or her right to choose the applicable law, a modification of this choice shall only be possible in case of a change of civil status, habitual residence or nationality (Art. 5 para. 2). As to the choice of spouses and registered partners for their names during their relationship, Article 5 para. 3 contains a specific rule. Spouses and registered partners shall have the possibility to commonly submit their names to the law of the habitual residence or nationality of one of them.

⁷ Exceptions are Germany (Art. 10 para. 2 and 3 of the Introductory Act to the Civil Code) and Switzerland (Art. 37 para. 2 of the Private International Law Act).

4. Principle of mutual recognition

A stability of names within the European Union can only be achieved if the names which have been registered in one Member State are recognised in the other Member States. Combined with a harmonisation of the conflict rules for names the adoption of a principle of mutual recognition in the area of names can be easily justified. Arbitrary results – one of the dangers of a pure recognition approach – would not be lurking as all civil-status registrars in the European Union would be bound to apply the same substantive law to a name, due to harmonised conflict rules. Nevertheless, as already shown, a duty of mutual recognition remains necessary as a supplement to the harmonisation of conflict rules. Furthermore, the impact of a supplementary recognition principle would be relatively limited for Member States which, so far, do not have an *ex lege* recognition of names. Moreover, a special treatment of names – in contrast to other status relations – can be well justified: citizens can legitimately rely on the stability of their names even if incorrectly registered.⁸ The working group was of the opinion that one can be more generous in the area of names as third party interests are not touched upon and that the public interest of the State in a lawfully acquired name is – in the face of alternative possibilities to reliably identify a person – more and more ousted by the personality rights of the bearer of the name.

Recognition in the sense of Article 12 para. 1 means the direct acceptance of the name which has been registered in another Member State. Based on this recognition the name of the person in question is deemed to be the name registered; the registration in a Member State does not only entail a presumption that the name was correctly determined abroad. The recognition pursuant to Article 12 is carried out *ipso iure*. The person whose name is concerned has no option whether he or she invokes the registered name. If the civil-status registrar does not know that a relevant register entry exists in another Member State – which will happen only rarely – the frictions will be balanced by the proposed harmonised conflict rules which will safeguard that the civil-status registrar will come, in the regular case, to the same result as his or her colleague in another Member State.⁹

The object of recognition according to Article 12 para. 1 is the registration of the name in the civil-status registry of a Member State. In most cases the duty to recognise will relate to the first registration of the name of the person concerned upon his or her birth or a subsequent registration after a change of the family status of that person, in particular, a marriage or the conclusion of a registered partnership. This also applies to systems, for example the English, in which status changes with name consequences are not registered in the margin of the birth

8 Dutta/Pintens, NiPR 2014, 560 ff.

9 Dutta/Pintens, NiPR 2014, 561.

certificates but in a register of corrections. In this case an extract from this register can be produced. Following the Draft Regulation the duty to recognise can also concern the registration of a name after a choice of law by the person based on Article 5 para. 1-3 of the Draft Regulation.¹⁰

If Article 12 para. 1 of the Draft Regulation speaks of the 'competent authority of a Member State' this wording shall clarify that only register entries by such authorities are to be recognized which are – under national law – generally competent to authoritatively document the name of a person; hence, in Germany, for example, only the civil-status registrars and not the aliens or passport authorities. As the working group proposed the harmonisation of the relevant conflict rules within the European Union the relevance of the (international or local) jurisdiction of the authority is reduced anyhow. The birth will be certified in the regular case at the place where the child is born, marriages at the place where the marriage is celebrated; a further connection factor of the parties concerned to the place of registration will not be required in most systems. For the rest, it can be trusted that the Member States define their jurisdiction for the registration of names appropriately; there is no evidence to the contrary, so far. Hence, the working group saw no necessity to harmonise the jurisdiction to register names, as Article 2 of the Draft Regulation explicitly clarifies. In extreme cases the Member States can, of course, revert to the public policy exception in Article 12 para. 3 of the Draft Regulation.¹¹

The correct application of the conflict rules and the applicable substantive law in the Member State of registration is not a precondition for recognition as can be inferred by Article 12 para. 2 and 3 *e contrario*. In an area of freedom, security and justice which is based on mutual trust it can be assumed that, in principle, all authorities of the Member States will correctly apply the harmonised conflict rules for names proposed by the working group. However, just as the application of foreign law under the proposed conflict rules, the recognition shall still be subject to a public policy review according to Article 12 para. 3. This will also be in conformity with EU law. The Court of Justice has accepted in the *Sayn-Wittgenstein* case the decision of the Austrian authorities to enforce the Austrian ban on the use of hereditary titles towards a German decision on adoption by invoking the *ordre public* exception.¹²

In the case of conflicting registrations Article 12 para 2 establishes a priority principle: The prior register entry in a Member State takes precedence over a

¹⁰ Dutta/Pintens, NiPR 2014, 561.

¹¹ Dutta/Pintens, NiPR 2014, 561.

¹² ECJ 22 December 2010, C-208/09, § 83ff. See also ECJ 2 June 2016, C-438/14 (Bogendorff). Hereto Dutta, Namenstourismus in Europa, FamRZ 2016, 1213 ff; Pintens (Fn. 6), S. 19 ff.

later entry in another Member State which is irreconcilable with the former. Under Article 12 the revision of an incorrect registration which does not comply with the applicable substantive law is, in principle, only possible in the Member State of registration. The revision of a prior entry in that Member State is not excluded if the name has in the meantime been recognised by other Member States based on Article 12 para. 1 and, accordingly, registered in the registries of those Member States; in such a case no conflict in the sense of Article 12 para. 2 shall be assumed.¹³

If a change of name based on the exercise of an option under the applicable substantive law, a change of the family status or a later choice of law is registered in a Member State an earlier registration in another Member State loses its binding effects. According to Article 12 para. 1 the more recent register entry has to be recognised in the other Member States; due to the change of circumstances (the exercise of an option, a change of family status, a choice of law) a conflict with the earlier register entry in the sense of Article 12 para. 2 does not exist. The fact that the name of a person has been first registered in a register of a certain Member State does not mean that all following changes of that name, for example, as a consequence of a marriage, divorce, etc., have to be registered first in that Member State. Rather a distinction has to be made between a revision of an incorrect registration, which has to be done in the Member State of registration alone, and a change of name based on changed circumstances.¹⁴

5. Change of name by an authority

According to Article 13 para. 1 the proposed Regulation shall not determine the applicable law for the change of a name by a competent authority. Traditionally, the Member States regard the change of a name by an authority as a matter of their public law which is not subject to the conflict rules for names. Nevertheless, the Draft provides for an obligation to recognise such changes of names. However, pursuant to Article 13 para. 2, this obligation is limited to changes of names which have been ordered by a competent authority of a Member State whose nationality the person in question has or in which he or she habitually resides.

III. An academic paper

The Draft Regulation is not more than an academic paper proposing a solution to safeguard the stability of names within the European Union as demanded by the European Court of Justice. The details of the proposal can, of course, be debated, notably the particulars of the Draft Regulation's conflict rules. One can imagine

13 Dutta/Pintens, NiPR 2014, 561.

14 Dutta/Pintens, NiPR 2014, 561.

that some would favour another solution: nationality of the bearer with a choice of law for the law of residence or domicile. The basic message of the proposal, however, should not be swept away prematurely. It promotes the idea that the European legislator has to get to the root of the problem by introducing a legal harmony of decision with a twofold approach: the introduction of uniform conflict rules in combination with a duty of mutual recognition of names.

IV. Draft for a European Regulation on the Law Applicable to Names of Persons

Chapter I Scope

Art. 1 [Scope]

This Regulation shall apply to the names of persons.

Art. 2 [Competence of the Member States for the registration of names]

This Regulation shall not affect the competence of the authorities of the Member States for the registration of persons.

Art. 3 [Universal application]

Any law specified by this Regulation shall apply even if it is not the law of a Member State.

Chapter II Applicable law

Art. 4 [*Applicable law in the absence of choice*]

(1) The name of a person shall be governed by the law of the State in which this person has his habitual residence.

(2) The change of the habitual residence as such shall not alter the name.

Art. 5 [*Choice of law*]

(1) A person may choose that his name is governed by the law of the State whose nationality he possesses. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses.

(2) A person may alter the choice of law if his civil status, habitual residence or nationality changes. The person may stipulate in this case that his name is gover-

ned by the law of the State whose nationality he possesses or in which he has his habitual residence. The second sentence of paragraph 1 shall apply accordingly.

(3) Spouses and registered partners may agree that their names are governed by the law of the State

(a) whose nationality one of them possesses; the second sentence of paragraph 1 shall apply accordingly, or

(b) in which one of them has his habitual residence.

For an alteration of this choice of law paragraph 2 shall apply accordingly.

(4) The choice of law must be made before the competent authority and shall be made expressly or shall be clearly demonstrated by the declarations or the circumstances of the case.

(5) The existence and substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.

(6) The competent authority shall inform the parties of the possibility of a choice of law.

Art. 6 [Dependent treatment of preliminary questions]

Preliminary questions on which the name of a person depends are governed by the conflict rules of the State whose law is applicable to the name.

Art. 7 [Exclusion of renvoi]

The application of the law of any State specified by this Regulation shall mean the application of the rules of law in force in that State other than its rules of private international law.

Art. 8 [Public policy]

The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the law of the forum.

Art. 9 [States with more than one legal system – territorial conflicts of laws]

Where a State comprises several territorial units each of which has its own system of law or a set of rules concerning the names of persons:

- (a) any reference to the law of such State shall be construed, for the purposes of determining the law applicable under this Regulation, as referring to the law in force in the relevant territorial unit;
- (b) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;
- (c) any reference to nationality shall refer to the territorial unit designated by the law of that State, or, in the absence of relevant rules, to the territorial unit chosen by the person.

Art. 10 [States with more than one legal system – inter-personal conflicts of laws]

In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of the name of a person, any reference to the law of that State shall be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the person has the closest connection shall apply.

Art. 11 [Non-application of this Regulation to internal conflicts of laws]

A Member State which comprises several territorial units each of which has its own rules of law in respect of the name of a person shall not be required to apply this Regulation to conflicts of laws arising between such units only.

Chapter III Recognition

Art. 12 [Recognition]

(1) A name which has been registered by a competent authority of a Member State shall be recognised in all other Member States.

(2) Paragraph 1 does not apply if the registered name is incompatible with a name which has been previously registered in another Member State.

(3) A Member State may refuse the recognition of a name based on this Article only if such recognition is manifestly incompatible with the public policy (ordre public) of this Member State.

Chapter IV Change of name by the competent authority

Art. 13 [Official change of name by the competent authority]

(1) If the competent authority of a Member State changes the name of a person, the authority is not bound by the provisions in Chapter II.

(2) The recognition of a decision of a competent authority of a Member State, whose nationality the person possesses or in which the person has his habitual residence based on paragraph 1, is subject to Art. 12.

WHOSE FAMILY NAME UPON BIRTH AND MARRIAGE? - MACEDONIAN AND EUROPEAN PIL PERSPECTIVES -

Abstract: This article is an examination of the issues of family name in private international law with main focus to the situations of birth and marriage. It provides a comparative overview of the current situation in the EU Private International Law and in the Macedonian Private International Law. This analysis considers also the extent to which the law and culture in the European Context are interconnected. The main hypothesis in this article is that the Laws governing names have function as a form of social control. Hence, all states are using their legislative power to determine content, right and protection of the family name.

I. Introduction

The issue of personal names is a sensitive one, as a name often represents a person's relation to his or her background; sometimes it is even a sort of heirloom passed from one generation to another within one family, and often by hearing the name it is possible to determine the origin of its bearer. Moreover, as states, "a personal name has various functions; it symbolizes the uniqueness of an individual, as well as represents its social relations". As a person is a social being, personal names often show that a person belongs to a particular community; sometimes even their social status may be evident merely from their name. Names differ across cultures, and even within one culture personal names have undergone serious changes directly related to changes in the culture per se.¹

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1 See Feldman, Harold, *The Problem of Personal Names as a Universal Element in Culture*, American Imago 16 (1959): 237-250.

In comparative law, theories on the cultural origin of law warn the comparative lawyer that even when legal rules share the same wording it is necessary to look at different factors – or formants, in the terminology developed by Sacco – to have a realistic look at the functioning of a legal system.² For example, in Spanish-speaking countries, newborn receive the first surname from the father and the second surname is the first surname of the mother:

- Juan García Fernández + Marta López González => Martin García López

On the other hand, in Portuguese speaking countries, newborn receive the first surname from the mother and the second surname is the first surname of the father:³

- Juan García Fernández + Marta López González => Martin López García

The sense of personal identity and uniqueness that a name gives us is at the heart of why names interest us and why they are important to us as individuals and to our society as a whole. Thus, it may pointed out that personal names are part of an individual's rights, including the right to private life or privacy.

II. Family names – Internal Considerations

Personal names perform various functions; they are means of identification of a person among other individuals, as well in personal documents issued to the individual. The name a person acquires immediately after birth becomes a very important part of their life, thus becoming an essential part of their rights. Nevertheless, personal names are language units as well, they are to be included in various documents, such as diplomas and certificates; therefore, they are bound to occur in sentences, either written or spoken, thus becoming part of the language they are used in.⁴

Under national substantive law, typical components of a name are given **name + family name**. A name serves as important symbolic representations of individual identity and as a crucial tool for documentation of persons residing within state borders. In particular, substantive laws governing names have function as a form of social control - the personal name cannot offend the public morality. Thus, it is very important for a state to strike a balance between the individual right of a name, the cultural heritage of the individual and the public moral and interest.

2 Guido Comparato, *Nationalism and Private Law in Europe*, Oxford, 2014, p. 191.

3 For a comparative view, see : A GUIDE TO NAMES AND NAMING PRACTICES, available at: https://www.fbiic.gov/public/2008/nov/Naming_practice_guide_UK_2006.pdf.

4 Karina Naumova, Legal aspects of transcription of personal names in the Latvian language, RGS L RESEARCH PAPERS NO. 11, Riga, 2014, p. 1-2.

III. Family names – International Considerations

Harmonization and unification regarding personal names is a process that is evolving step by step, not only at European, but also at international level. In the context of European law, despite increasing acceptance of the plural character of law, European private law remains largely organised around ideas of unity and related hierarchical structures, even in its post-national shape.⁵ Hence, the European Union (EU) has a limited role in family law matters and matters regarding personal status.⁶

On international level, the Commission d'état civil – CIEC is the most important international organisation that deals with the civil status of the individuals. CIEC is an intergovernmental organisation whose aim is to facilitate international co-operation in civil-status matters and to improve the operation of national civil-status departments.⁷ Until today, CIEC has 10 Member States⁸ and 9 Observer States.⁹

Since its creation the CUEC has adopted 34 multilateral Conventions, which are legally binding instruments. The depositary of the Conventions, of which 28 are currently in force, is the Swiss Federal Council. The object of the Conventions is either to harmonise the substantive law of the member States in civilstatus matters or to facilitate the functioning of civil status across frontiers, notably by means of normalised multilingual documents, thereby simplifying formalities for persons living abroad. Being confronted with the problem of the increasing number of languages to be used in the multilingual forms, the CUEC drew up Convention No 25, signed at Brussels on 6 September 1995, creating a system of code numbering for the entries appearing in civil-status records and documents. The Conventions adopted since that date include coded appendices (for example, life certificate, certificate of nationality).¹⁰

5 Leone Nigia, Prologue: Of Pluralism and European Private Law, published in *Pluralism and European Law*, Oxford, 2012, p.2.

6 For more see: <https://www.gov.uk/guidance/eu-law-and-the-balance-of-competences-a-short-guide-and-glossary>.

7 See: http://www.ciec1.org/SiteCIEC/PAGE_Principale/0CsAAPKswjx2VkJFSTUVS3RpEwA?WD_ACTION_=MENU&ID=A37&_WWREFERER_=http%3A%2F%2Fus.search.yahoo.com%2F&_WWNATION_=5.

8 Member States : Belgium, France, Greece, Luxembourg, Mexico, the Netherlands, Poland, Spain, Switzerland and Turkey.

9 States with observer status: Cyprus, the Holy See, Lithuania, Moldova, Peru, Rumania, the Russian Federation, Slovenia and Sweden.

10 See: http://www.ciec1.org/SiteCIEC/PAGE_Principale/0CsAAPKswjx2VkJFSTUVS3RpEwA?WD_ACTION_=MENU&ID=A37&_WWREFERER_=http%3A%2F%2Fus.search.yahoo.com%2F&_WWNATION_=5.

In the field of in the field of personal name, flowing CIEC conventions are the most important:

1. Convention relative aux changements de noms et de prénoms, signée à Istanbul le 04.09.1958 / Convention on changes of surnames and forenames;
2. Convention sur la loi applicable aux noms et prénoms, signée à Munich le 05.09.1980 / Convention on the law applicable to surnames and forenames;
3. Convention relative à la délivrance d'un certificat de diversité de noms de famille, signée à La Haye le 08.09.1982 / Convention on the issue of a certificate of differing surnames;
4. Convention sur la reconnaissance des noms, signée Antalya le 16.09.2005 / Convention on the recognition of surnames.

Upon succession of former Yugoslavia, Republic of Macedonia is a party to only two conventions:

1. Convention relative à la délivrance de certains extraits d'actes d'état civil destinés à l'étranger, signée à Paris le 27.09.1956 / Convention on the issue of certain extracts from civil status records for use abroad (Convention n.1)
2. Convention relative à la délivrance d'extraits plurilingues d'actes de l'état civil, signée à Vienne le 08.09.1976 / Convention on the issue of multilingual extracts from civil status records (Convention n. 16).

IV. Family names – PIL consideration (conflict of laws)

In the context of PIL, when a given PIL rule leads to the conclusion that a court in a given State (X) is competent to adjudicate a private law dispute with an international element, that decision can usually be traced to the existence of a certain connection – the existence of one or more connecting factors – which serves to provide a legally sufficient link between the forum State (and its courts) on the one hand and the parties and circumstances of the particular case on the other. Similar connecting factors are also at work when a competent court in a given State (X) decides to choose and apply the substantive law of that State or of a different State (Y).¹¹ Each country has its own conflict of laws rules dealing with these issues, and their rules can differ considerably.¹²

11 J. Lookofsky, K. Hertz, *EU-PIL European Union Private International Law in Contract and Tort* (JurisNet, Copenhagen 2009) p. 15.

12 M. James, *Litigation with a Foreign Aspect. A Practical Guide* (Oxford University Press, 2010) p. 5.

The most remarkable evolution of private international law in the past two decades appears to have been its swift and intense Europeanization. Today, private international law is to a large degree European private international law. The impact of the rule of non-discrimination, of fundamental rights and, especially, mutual recognition even mark a kind of European conflict revolution.¹³

Following conflict of law rules can be identified in the area of personal names:

1. Conflict of law rules for personal status (determining the applicable law for personal name);
2. Conflict of law rules for marriage (whose personal name upon marriage);
3. Conflict of law rules for parent-child relationship. Adoption (whose personal name upon birth).

First problem in the process for determining the applicable law for the personal names is the problem of classification/characterisation – which conflict of law rule shall be applied regarding family name upon marriage and birth? The problem of characterisation is one of the most difficult in the conflict of laws, and it has generated an enormous amount of writing in many languages. It might well be thought that its difficulties and obscurities increase in direct proportion to the amount of juristic discussion of it. There has been considerable difference of opinion as to how the problem should be solved. The courts are usually criticised for solving it the wrong way and nearly all the cases referred to above have been the subject of severe criticism. It is true that the solutions arrived at have caused, or are capable of causing, considerable difficulties. This is so much so that in some areas, legislation has been used to turn the law around.¹⁴

Various solutions to the problem of characterisation have been put forward. In the context of the personal names, the *lex fori* theory is to be applied.

i. Classification/characterisation under the lex fori theory

This was proposed by the German and French writers, Kahn and Bartin, who 'discovered' the problem in the 1890s. It has been the prevailing theory in continental Europe, and by and large, has been adopted in practice by the English courts. According to this theory the court should characterise the issue in accordance with the categories of its own domestic law, and foreign rules of law in accordance with their nearest analogy in the court's domestic law.¹⁵ Objections

13 J. Meeuen 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflict Revolution' 9 *European Journal of Migration and Law* (2007) p. 287.

14 Pippa Rogerson, *Collier's Conflict of Laws*, Cambridge, 2013, p. 268.

15 *Ibid.*

raised to the *lex fori* theory are that its application may result in a distortion of the foreign rule and render it inapplicable in cases in which the foreign law would apply it, and vice versa.¹⁶

If we apply the *lex fori* theory in the process for determining the applicable law for personal names, we can identify two possible connections: a. Connection per family and b. Connection per person (use of one connecting factor for personal status; use of conflict of law rule for personal names (one rule fits all) and use of conflict of law rule for personal names (Kagel's ladder)).

a. Connection per family

The use of the contention per family is part of the traditional approach where the personal name is considered to be part of the effects upon marriage and part of parental rights. It means that the court or other authority will use the ***reattachment accessorie mechanism*** (strong influence from substantive law) in the process for determining the applicable law for personal names. Thus, the use ***reattachment accessorie mechanism*** for family names upon marriage will result to apply for family name of a person – the rules regulating the effects of marriage in general (personal effect of marriage).

The ***reattachment accessorie mechanism*** was used in Germany until 1986. In a landmark decision on this issue, the Bundesgerichtshof, the highest German Court in civil matters, came to the conclusion that the change of name as a consequence of marriage falls both under the conflicts norm concerning the status of a person and the rules regulate the effects of marriage in general. The Court held that in principle the law governing the personal status applied, and the wife was entitled to bear at her choice the name accorded to her by the law governing the effects of her marriage in general.¹⁷ Same approach was used in Republic of Macedonia until the adoption of the new PIL Code from 2007. Namely, under article 42 (Personal and statutory property relations of spouses) the applicable law for the personal name upon marriage was determined in accordance with the ***reattachment accessorie mechanism***.¹⁸ This approach is still in force in Serbian PIL Law (under article 36).

16 For more see: Gavroska Poliksena, Deskoski Toni, Меѓународно приватно право, Скопје, 2011, p. 243-245.

17 Rainer Gildeggen, Jochen Langkeit, *The new conflict of laws code Provisions of the Federal Republic of Germany: introductory comment and Translation*, GA. J. INT'L & ComP. L., 1986, p. 232.

18 Article 42 (1) Personal relations between the spouses, as well as their statutory patrimonial relations are governed by the law of the state of which both spouses are nationals. (2) If the spouses are nationals of different states, the law of the state in which both of them they have their domicile will apply. (3) If the spouses have neither common nationality nor domicile in the same state, the law of the state will apply in which they both had the last common

b. Connection per person

Connection per person can be analyzed from 3 different positions:

- use of single connecting factor for personal status;
- use of conflict of law rule for personal names (one rule fits all) and
- use of conflict of law rule for personal names (Kagel's ladder).

b (i). Connection per person - use of single connecting factor for personal status

Connection per person – use of single connecting factor for personal status is a PIL approach where the personal name is considered to be part of the personal status of persons. It means that the issue of a person's right to a name can be classified under the personal status; the applicable law is therefore the law governing a person's legal capacity and capacity to execute acts in law (the *lex causae* of the personal status). For example, Czech¹⁹ and Swedish²⁰ PIL classified the questions of name as belonging to the law of personal status.

b (ii). Connection per person use of conflict of law rule for personal names (one rule fits all)

Connection per person use of conflict of law rule for personal names (one rule fits all) is a modern PIL approach. In practice this type of determining the applicable law will lead to the application of specific conflict of law rule irrespective of the classification under the substantive law. Several single connecting factors can be used: *lex nationalis* or *lex domicilii* of the person. It must be pointed out that same conflict of law rule will apply to all name questions (family name upon birth, marriage, adoption). This approach is contained in the Macedonian PIL Act. Under Article 19²¹ the questions relating to personal names shall be governed by the law of the State of which the person whose personal name is being designated or altered is a national.

b (iii). Connection per person - use of conflict of law rule for personal names (Kagel's ladder)

Connection per person - use of conflict of law rule for personal names (Kagel's ladder) – is a Post Modern PIL approach, under which the question for personal

domicile. (4) If the applicable law cannot be determined according to paragraphs (1), (2) or (3) of this Article, the law of the Republic of Macedonia will apply.

19 See: http://ec.europa.eu/civiljustice/applicable_law/applicable_law_cze_en.htm#III.3.

20 See: http://ec.europa.eu/civiljustice/applicable_law/applicable_law_swe_en.htm.

21 See Article 19 of Macedonian PIL Act.

names is classified as autonomous one. It reflects the best practice to deal with personal names as a individual rights. Therefore, in all jurisdictions where this approach is in force, there is also a conflict of law rule for the protection of the personal names. Namely, the protection of personal name is under the conflict of law rules for non-contractual obligations.

Several connecting factors can be used in the cascade conflict of law rule. *Lex nationalis*, *lex domicilii* and *habitual residence* are among the connecting factors that are commonly used.

“Nationality” means the legal bond between a person and a State and does not indicate the person’s ethnic origin.²² Nationality also represents a person’s political status, whereby he or she owes allegiance to some particular country. Apart from cases of naturalisation, it depends essentially on the place of birth of that person or on his or her parentage.²³ In Continental Europe, most civil laws define nationality as a personal quality, providing that the national law of a person governs his family relations and all matters linked – directly or indirectly – to the personal status. It also holds that the national law best responds to the expectation of a person who relies on the law in planning his or her family, even if the conduct takes place wholly within another state’s jurisdiction. The concept of nationality as a person-bound quality was first introduced with the Napoleonic civil code.²⁴

We can point out to several factors that have made nationality an important connecting factor in matters relating to personal status such as personal identity. This concerns first of all the stability of nationality as compared to habitual residence (it is habitual residence rather than domicile counterpart of nationality as a connecting factor). The element of stability, in turn, is closely linked to legal certainty and predictability. Use of nationality instead of habitual residence is also considered to be more appropriate as it takes into account a person’s cultural identity, thereby paying due respect to fundamental human rights.²⁵ International harmony may be ensured at the outset when the PIL rules of the countries in question employ the same connecting factor. Nationality, seen from the point of view of Mancini and his followers, may be regarded as naturally

22 Article 2 (a) of the European Convention on Nationality; also Article 2 of the Law on Nationality of Republic of Macedonia from 2004.

23 http://www.lawreform.ie/_fileupload/consultation%20papers/wpHabitualResidence.htm, para. 15. (4.7.2015)

24 M.-C. Foblets, *Conflict of Laws in Cross-Cultural Family Disputes. Choice-of-Law in a time of unprecedented mobility* (1997), p. 50.

25 W. O. Vonk, *Dual Nationality in the European Union, A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States*, 2012, p. 117.

contributing to this goal, since it represents, at least in the field of personal and family law, a connecting factor based on rational grounds.²⁶

On the other side, The ECJ's complex jurisprudence demonstrates that Article 12 EU prohibits any disparate treatment mandated by a Member State's national law if it arises from subjective connecting factors that cannot be justified objectively; however, it does not prohibit any differentiation arising from subjective connecting factors that are objectively justified. In this framework, the doctrine has raised the question of whether the adoption of the nationality connecting factor as part of the neutral rules of conflict is compatible with the Community principle of non-discrimination.²⁷

Since the 1950's, however, domicile became more popular as the connecting factor for personal and family matters. Domicile is a "connecting factor" or link between a person and the legal system or rules that will apply to him in specific contexts, such as the validity of a marriage, matrimonial causes (including jurisdiction in, and recognition of, foreign divorces, legal separations and nullity decrees), legitimacy, succession and taxation. Thus, for example, the law of the country of the domicile of a person will determine the construction and the legal effect of his personal name.

Habitual residence has for some time been used as a connecting factor. It has played a most important role in the Conventions of the Hague Conference on Private International Law, since it is perceived as providing an alternative to nationality and as being free of the difficulties associated with domicile, such as those in regard to intention, origin, dependency and prolepsis.²⁸

The term habitual residence was used for the first time in a number of bilateral treaties on Legal Aid in which the authority of the habitual residence of the applicant was designated as the proper authority competent to issue a certificate of indigence. A similar provision is to be found in the first Hague Convention in Civil procedure of 14 November 1896. Why preference was then given to this term rather than the usual reference to domicile, has not become apparent.

26 P. Franzina, 'The Changing Role of Nationality in International Law' in: A. Annoni, S. Forlati eds, *The evolving role of nationality* (New York, 2013) p. 198.

27 B. Ubertazzi, 'The Inapplicability of the Connecting Factor of Nationality to the Negotiating Party in International Commerce' 10 *Yearbook of Private International Law* (2008), p. 716. According to Ubertazzi, p. 719: "I believe that the application of the nationality connecting factor is compatible with Community law when neutrally used to determine the law applicable to capacity, like in the Italian private international law's provision on personal status".

28 http://www.lawreform.ie/_fileupload/consultation%20papers/wpHabitualResidence.htm, para. 18.

Various authors have attempted to define further what factual situation “habitual residence” is supposed to denote. F.A.Mann does not see any difference of principle between “habitual residence” and domicile.²⁹ In fact, the only difference is that in order for one person to obtain “habitual residence” no formal condition regarding administrative registration or obtaining a residence permit. For example, in the new Romanian Private International Law, habitual residence, represents, for natural persons, the synonym for domicile.³⁰ In *Cruse v. Chittum*, an early case which concerned the recognition of an overseas divorce, habitual residence was said to denote “regular physical presence which must endure for some time. In several cases, the courts have said that is is a question of fact; this has turned out to be over-optimistic and, unavoidably, legal rules have developed.”³¹

c. Article 20 of Draft Macedonian PIL Code – at first glance

Connection per person - use of conflict of law rule for personal names (Kagel's ladder) can be found in article 20 of Draft Macedonian PIL Code. Under this article the name of a person and the change of the said name shall be governed by the national law of the person. The effect of the change of nationality on the name shall be determined by the law of the State whose nationality the person has acquired. Where any such person is stateless, the effect of the change of his or her habitual residence on the name shall be determined by the law of the State in which the said person establishes his or her new habitual residence. The protection of the name shall be governed by the law which is applicable according to the provisions for non-contractual obligations. The name and the change thereof may be governed by Macedonian law, should this be requested by a person who is habitually resident in the Republic of Macedonia.

V. INTERNATIONAL APPROACH REGARDING FAMILY NAMES

i. Applicable law for family names in Germany

Under German private international law, legal questions raised by the personal legal status of a natural person are governed by the law of the state to which the nationality of the person refers. Where a person has more than one nationality, section 5(1), first subparagraph EGBGB stipulates that reference must be made to what is known as the effective nationality, i.e. the nationality of the state with which the multiple national is most closely connected. If, by contrast, a

²⁹ Ibid, p. 428.

³⁰ C. Darisecu, 'New Romanian Choice-of Law Rules on Marriage Effects', available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1537200, p. 92.

³¹ J. G., Collier, *Conflict of Laws*, Cambridge, 2001, p. 55.

person with multiple nationality also has German nationality, section 5(1) second subparagraph provides that this nationality alone shall apply. The nationality criterion is applicable as regards the right to bear a name (for details see section 10 EGBGB) and the legal capacity of natural persons.³²

ii. *Applicable law for family names in Spain*

The Munich Convention of 5 September 1980 applies to surname and forenames, under which the surname is determined by the national law.

In conjunction with the above, Article 9 of the Civil Code states that the applicable law is determined by the nationality of the natural persons and it governs capacity and civil status, family rights and obligations and succession. Dual nationality as provided for by Spanish law follows what is laid down in international treaties. If they make no provision, preference is given to the nationality corresponding to the last habitual residence and failing this, the last nationality acquired, unless one of them is Spanish, which takes precedence. For persons of indeterminate nationality (they cannot prove it, hence they are not stateless) the law of the place of habitual residence is applied as the personal status. Article 12 of the New York Convention of 28 September 1954 applies to stateless persons, under which the applicable law is the law of the stateless person's country of domicile or, failing that, the law of his country of residence. Lastly, the personal status of legal persons is determined by their nationality and it governs everything to do with capacity, establishment, representation, operation, transformation, winding-up and closure, although the respective national laws are taken into account in the case of mergers of companies of different nationalities. Companies that have their domicile in Spanish territory have Spanish nationality, irrespective of the place where they were established, although companies whose principal establishment or enterprise is situated in its territory must be domiciled in Spain.³³

iii. *Applicable law for family names in Italy*

Personal status and capacity and the existence and content of personal rights, including the right to a name, are governed by the national law of the interested party, except for the rights that derive from family relationships, to which the referral rules laid down by Act 218 /1995 apply on a case-by-case basis.³⁴

32 See http://ec.europa.eu/civiljustice/applicable_law/applicable_law_ger_en.htm

33 See: http://ec.europa.eu/civiljustice/applicable_law/applicable_law_spa_en.htm.

34 See: http://ec.europa.eu/civiljustice/applicable_law/applicable_law_ita_en.htm

vi. Applicable law for family names in Netherlands

A person's status is in principle governed by his or her national law. For Dutch citizens this is stipulated in Article 6 of the AB; for non-Dutch citizens, his or her status must similarly be deduced from this provision. There are many exceptions from Article 6 of the AB in separate laws.

The provisions of the Names Convention have been incorporated in the Family Names and Given Names (Conflict of Laws) Act. This Act also stipulates additions that are specific to Dutch private international law. Pursuant to Article 1 of the WCN, a person's name is governed by his or her national law, including the provisions of private international law under that law. If a person holds both Dutch and a foreign nationality, Dutch law applies (Article 2 of the WCN). If the person holds more than one nationality, but not Dutch nationality, the law of the nationality with which the person, all circumstances taken into consideration, has the strongest ties (Article 1 paragraph 2 of the WCN) applies. Article 5b of the WCN governs the choice of surname in international cases.³⁵

v. Applicable law for family names in Poland

In general, personal status is governed by the personal law of the persons concerned, as stipulated in the conflict of laws rule in the Portuguese Civil Code. Personal law is the law of the individual's nationality or, in the case of a stateless person, the law of the place of his habitual residence (in the case of a person of full age) or of legal domicile (in the case of a minor or a person with judicial disability). In the case of a person with no habitual residence, personal law will be that of the place of occasional residence, or, where this cannot be determined, the law of the place where the person is located at the time. Personal law for legal persons is that of the State in which their principal and effective head office is located. The transfer of head office from one State to another does not cause loss of legal personality, if the laws of both countries are in agreement on this point. The merger of entities with different personal laws is governed by both personal laws concerned. The personal law of international legal persons is the one indicated in the agreement setting them up, or in their Articles of Association. If no law is indicated, the law of the country in which the principal head office is located will apply.³⁶

vi. Applicable law for family names in Finland

What law to apply to the determination of surnames is prescribed in section 26 of the Names Act. If a person is habitually resident in Finland at the time when

³⁵ See: http://ec.europa.eu/civiljustice/applicable_law/applicable_law_net_en.htm

³⁶ http://ec.europa.eu/civiljustice/applicable_law/applicable_law_pol_en.htm.

grounds for the determination of a surname appear or at the time when an announcement on the surname is made, the surname shall be determined according to Finnish law. If a person is not habitually resident in Finland, the surname shall be determined in accordance with the surname law that a competent authority is to apply in the state where the person habitually resides at the said time.³⁷

vii. Applicable law for family names in Sweden

Swedish private international law regards questions of name as belonging to the law of personal status. This means, for example, that the taking by one spouse of the other spouse's name is not classified as a matter of the legal effects of marriage in the personal sphere. According to Section 50 of the Personal Names Act (1982:670), the Act does not apply to Swedish nationals who are habitually resident in Denmark, Norway or Finland; it may be concluded *a contrario* that it does apply to Swedish nationals elsewhere. Section 51 states that the Act also applies to foreign nationals who are habitually resident in Sweden.³⁸

VI. Conclusion

The decision to change your last name once you get married is an option in many countries. Usually the woman will take the man's last name, which is a practice based on tradition, but lately it seems that more women are choosing to keep their maiden names. Also, there have been instances where men have taken their wives' last names. In the context of PIL there are many questions that need to be answered after the celebration of marriage. The question of family name is among the most important one having in mind all consequences.

Several PIL approaches can be used in the process of determining the applicable law for family names upon marriage. First one is the use of connection per family and the second one is connection per person (use of single connecting factor for personal status, use of conflict of law rule for personal names (one rule fits all) and use of conflict of law rule for personal names (Kagel's ladder)). After comparative analysis of laws regarding the personal names it may be said that there is a strong trend for enacting a special conflict of law rule for personal names. Republic of Macedonia and Serbia are among those countries that have prepared a draft code under which such post modern PIL approach is included.

37 http://ec.europa.eu/civiljustice/applicable_law/applicable_law_fin_en.htm.

38 http://ec.europa.eu/civiljustice/applicable_law/applicable_law_swe_en.htm.

SURNAME AND THE LAW APPLICABLE TO SURNAME UNDER TURKISH LAW

INTRODUCTION

In the globalized world, the mobilization of the individuals increases which leads to the growth of family relationships with foreign element. Surname is probably one of the most significant legal issues, which arises from the cultural and legal diversity of the different nationals. Every individual brings their cultural aspects to the family relation and these cultural aspects undoubtedly have legal impacts.

This paper examines the possible problems when claims regarding the surname with a foreign element are brought before a Turkish court. In this regard, this paper will analyze the applicable law to surname according to Turkish Code of International Private and Procedural Law¹ (“PIL Code”) under three sections: (I) General Rules, (II) Surname Acquired via Family Law Relationships, (III) Administrative Decisions. Under the section (II), the issue shall be dealt depending on the type of relationship: (A) Birth, (B) Adoption, (C) Marriage and (D) Divorce. Depending on the connecting factors, Turkish conflict of law rules may either refer to a foreign law or to Turkish law. Accordingly, in each section, Turkish surname regime will be explained under Turkish Civil Code² (“TCC”), Surname Code³, and the Code on the Civil Registration Services⁴ and the recent jurisprudence.

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1 Law No: 5718. Official Gazette numbered 26728 and dated 12.12.2007 and entered into force on 12 December 2007.

2 Law No: 4721. Official Gazette numbered 24607 and dated 08.12.2001 and entered into force on 1 January 2002.

3 Law No: 2525. Official Gazette numbered 2741 and dated 2.7.1934 and entered into force on 2 January 1935.

4 Law No: 5490. Official Gazette numbered 26153 and dated 29.4.2006.

I. GENERAL RULES

The law applicable to a foreigner's surname is a significant issue regulated by the private international rules of the national states. Turkish private international law doctrine⁵ considers the right to name as one of the most fundamental and indispensable rights of persons. Unlike many other jurisdictions⁶, there is no specific conflict of laws rules stipulating the law applicable to surnames under the Turkish PIL Code. As a result, the law applicable to surnames of foreigners is determined by the views of the doctrine, international treaties⁷ and the decisions of the Turkish Court of Cassation⁸.

A. Connecting Factors

Turkish private international law doctrine does not envisage a single connecting factor for the determination of the surname. The law applicable to the foreigner's surname is determined depending on the legal cause for the acquisition, change or the loss of the surname. Where the acquisition, change or loss of the surname is due to a family law relationship, the surname of a foreigner shall be determined by the conflict of law rules regarding that family law relationship⁹. Marriage, divorce, adoption and establishment of paternity are examples to such family law relationships. Part (II) of this paper is reserved for the explanations of the conflict of laws rules stipulated under the Turkish PIL Code for each family law relationship. On the other hand, where the acquisition, change or loss of the surname is *not* due to a family law relationship, then the doctrine states that the law

5 **Nomer**, Devletler Hususi Hukuku, İstanbul 2015, p. 225; **Emde**, Die Reform des Internationalen Namensrecht, Frankfurt 1988, p. 9.

6 Examples to such countries are as follows: Germany, Austria, Netherlands, United Kingdom, Spain, Italy, Sweden, Denmark, Finland, Poland, Luxemburg and Estonia.

7 According to the Turkish Constitution Art.90 international treaties duly put into effect have the force of law. In light of PIL Code Art.1 (2), related provisions of international treaties are primarily applied to the international private law cases. Turkey is a party to the following conventions prepared by International Commission on Civil Status related to surname and forename: Convention on Changes of Surnames and Forenames dated 04.09.1958; Convention on Decisions Concerning the Ratification of Civil Status Records dated 10.09.1964; Convention on the Recording of Surnames and Forenames in Civil Status Registers dated 13.09.1973; Convention on the Issue of a Certificate of Differing Surnames dated 08.09.1982.

8 Under Turkish legal system, the Court of Cassation is the last instance court for reviewing decisions and judgments of civil courts. Among the 30 chambers of the Court of Cassation, only the decisions rendered by the Grand Chamber of Unification of Jurisprudence have the force of law.

9 **Nomer**, p. 226; **Ekşi**, Vatandaşlık Hukukumuzda Türkçe Olmayan Ad ve Soyadı Meselesi, İstanbul 2008, p. 146; **Çelikel/Erдем**, Milletlerarası Özel Hukuk, İstanbul 2016, p. 206-207; **Tekinalp/Uyanık**, Milletlerarası Özel Hukuk Bağlama Kuralları, İstanbul 2016, p. 125.

applicable to surname is determined by the State of the foreigner's nationality¹⁰. Turkish courts, too, follow this view of the doctrine. For instance, German rules prevailed where a German citizen made an application to the Turkish Court of Cassation¹¹ for the recognition of a gender reassignment decision and a change of name decision duly rendered in Germany. The medical report regarding the gender reassignment surgery was not compatible with the requirements under the Turkish domestic law. Nevertheless, the Turkish court did not apply the Turkish domestic law by stating that law applicable to the surname of a foreigner is determined by the State of his nationality. Thus, the Turkish court applied the German law to the case and recognized the decision on the new surname of the foreigner.

B. Stateless Persons and Multiple Citizenships

The law applicable to the stateless people and people with multiple citizenships is regulated under both international treaties and the Turkish PIL Code. Article 12 of the United Nations Convention Relating to the Status of Stateless Persons¹² dated 28.09.1954 stipulates the connecting factors for the law applicable to surname of the stateless persons as his/her domicile, in the absence thereof, place of his/her habitual residence. Article 12 of Geneva Convention Relating to the Status of Refugees¹³ dated 28.07.1951 stipulates the connecting factors for the law applicable to the surname of the refugees as their domicile or the state where they are residing. Turkey has signed and ratified both of the conventions. The provisions under the Turkish PIL Code art. 4 are in harmony with the connecting factors stipulated under the said international treaties. PIL Code art. 4 states that with respect to a stateless person, the law of the place of his/her domicile, in the absence thereof, place of his/her habitual residence, and in the absence thereof, the state where he/she is residing on the date of the lawsuit shall apply.

Regarding the issue of multiple citizenships, PIL Code art. 4 (b) states that if a person has multiple citizenships where he/she is also a Turkish citizen, Turkish law shall apply. PIL Code art. 4 (c) states that if the foreigner has multiple citizenships where he/she is not a Turkish citizen, the law of the state with which he/she is most closely connected shall apply¹⁴.

10 **Tekinalp/Uyanık**, p. 124-125; **Çelikel/Erdem**, p. 208; **Şanlı/Esen/Ataman-Figanmeşe**, Milletlerarası Özel Hukuk, İstanbul 2015, p. 118.

11 2nd Chamber of Turkish Court of Cassation dated 21.12.2009. Case No: 2009/9678 Decision No: 2009/22090.

12 Turkey has ratified the treaty on 10.07.2014. Official Gazette no: 10.07.2014/29056.

13 Turkey has ratified the treaty on 05.09.1961. Official Gazette no: 05.09.1961/10898.

14 **Akıncı/Demir-Gökyayla**, Milletlerarası Aile Hukuku, İstanbul 2010, p. 7; **Nomer**, p. 115; **Tekinalp/Uyanık**, p. 64.

C. Public Order

Along with the conflict of laws rules, public order has also a great significance in the acquisition of a foreign surname. Public order is defined in a Turkish Court of Cassation decision as “the entirety of the rules protecting the fundamental structure and fundamental interests of the Turkish society”¹⁵. Turkish PIL Code art. 5 stipulates that if the provision of the foreign law to be applied in a certain case is openly contrary to the public order of Turkey, that provision shall not be applied. Where it is deemed necessary, Turkish law shall be applied. In addition to art. 5, PIL Code art. 54 stipulates the condition of not being openly against public policy as a requirement for a foreign decision to be recognized and enforced in Turkey. Turkish private international law doctrine states that public order should be interpreted in a restricted and narrow way and be applied exceptionally in order to avoid the inappropriate application of Turkish domestic law to the cases with a foreign element. The mere fact that the foreign law contains a different rule cannot enable the application of Turkish domestic law by reason of public order¹⁶. Only the foreign rules that truly tremble the values of the Turkish society and the Turkish Republic should be filtered by the public order doctrine. Nevertheless, Turkish Court of Cassation refers to the public policy exception quite often. As the definition of public order is rather vague this issue is highly debated¹⁷.

D. Overriding Mandatory Rules of Turkish Law

Another issue that affects the law applicable to surname is the interference of the overriding mandatory rules of Turkish domestic law. Where the direct application of certain domestic rules is mandatory for the implementation of the State’s certain policies, such rules are directly applied to a private international law case instead of the competent foreign law¹⁸. Overriding mandatory provisions of Turkish law are generally related to rules regarding foreign trade, defence, social and economic policies of Turkey. PIL Code art. 6 stipulates that where the competent foreign law is applicable, in cases which the provisions of Turkish law are overriding mandatory rules in terms of scope of application and purpose of regulation, the mentioned Turkish provision shall prevail. In a past deci-

15 Decision of the Grand Chamber of Unification of Jurisprudence of the Court of Cassation dated 10.02.2012. Case No: 201/1 Decision No: 2012/1.

16 **Nomer**, p. 160-161, 172; **Tekinalp/Uyanık**, p. 43.

17 **Esen**, Türk Vatandaşı Erkeğin Yabancı Eşinin Soyadını Alamayacağına İlişkin Bir Yargıtay Kararı Üzerine Düşünceler, MHB, Yıl: 24, Sayı: 1-2, Prof. Dr. Sevin Toluner Armağanı, 2004, p. 439-450.

18 **Tekinalp/Uyanık**, p. 48.

on¹⁹, Turkish Court of Cassation considered Turkish domestic law provisions relating to surname acquired with marriage²⁰ as overriding mandatory rules. Turkish domestic legislation does not allow men to acquire his wife's surname or women to continue to use solely her maiden name after marriage. Decisions considering the said provision as an overriding mandatory rule of Turkish law, received criticism from the doctrine.

E. Renvoi Doctrine

Renvoi indicates the interpretation of the reference made by the local PIL rules to the law of a foreign state as a reference made to the PIL rules of that foreign state instead of the substantive rules.

Under the Turkish legal system, the doctrine of *renvoi* is applied solely regarding the disputes arising from the law of persons or family law. Art. 2 (3) of the Turkish PIL Code regulates the application of *renvoi* doctrine. Accordingly, if the provisions of the applicable foreign conflict of laws rules refer to another foreign law, this referral will only be taken into consideration in conflicts related to law of persons and family law. The substantive provisions of this referred foreign law shall be applied, avoiding an endlessly loop of *renvoi*.

Rules regarding surname relates both to law of persons and family law. Thus, the doctrine of *renvoi* will be applied in determining the law applicable to surname. Through the application of Turkish PIL Code if the law applicable to surname is found to be a foreign law, the Turkish judge shall take into consideration the conflict of laws rules of that foreign law and apply the substantive law of the state referred by it.

II. SURNAME ACQUIRED VIA FAMILY LAW RELATIONSHIPS

A. Birth

1. Child Born in Wedlock

According to the Turkish private international law doctrine²¹, if the child is born during marriage or if the paternity is established through a paternity suit or recognition of paternity; the surname of the child is determined by the conflict

19 Decision of the Grand Chamber of Unification of Jurisprudence of the Court of Cassation dated 10.7.2013. Case No: 2013/18-122 Decision No: 2013/1059.

20 Turkish Civil Code art. 187. Accordingly, women in Turkey are not allowed to use solely their maiden name after marriage, even if both spouses agree to such an arrangement. Maiden name can only be used with and before the husband's surname.

21 Şanlı/Esen/Ataman-Figanmeşe, p. 149; Nomer, p. 275; Çelikel/Erdem, p. 207, 261.

of laws rule regulating the effects of paternity. The effects of paternity are regulated under the PIL Code art. 17. According to art. 17 effects of paternity are subject to law, which has governed the establishment. If there is a common national law of the father, mother and child, that law shall govern if not, common habitual residence law shall govern the effects of parentage. Thus, the judge should first decide whether there is a common national law of the father, mother and child. If either mother or father has a dual citizenship one being Turkish, then in light of art. 4 (b) of PIL Code Turkish citizenship shall prevail. However, such prevail of the Turkish citizenship over a foreign citizenship cannot prevent the establishment of a common national law. If the parents have a common foreign national law while one of them has a dual citizenship, art. 4 (b) shall not be applied for the best interest of the child.

If there is no common national law, the judge should decide whether there is a common habitual residence.

If there is neither a common nationality nor a common habitual residence, then the doctrine²² states that the conflict of laws rule regulating the establishment of paternity shall apply. Turkish PIL Code art. 16 (1) stipulates the rule regarding the establishment of paternity. Article 16 (1) states that the establishment of paternity is subject to the national law of the child at the time of birth, if not established then to the law of his habitual residence. If the paternity can not be established pursuant to these laws, the national law of the mother or father at the time of birth of child, and if it is not established then the law of common habitual residence of parents and if it is still not established the law of place of birth of child shall govern the establishment of parentage. The doctrine states that the connecting factors stipulated in this article shall be interpreted as alternative options for the best interest of the child²³. The judge shall apply one of the said connecting factors regarding the child's best interest to determine the law establishing the paternity.

2. Child Born out of Wedlock

Where the child is born outside of marriage or when the paternity is not established, PIL Code art. 16 (1) shall determine the law applicable to the surname of the child. Article 16 (1) is in fact the conflict of laws rule on the establishment of paternity and pursuant the view of the doctrine²⁴ this rule also regulates the surname of the child born out of wedlock. According to art. 16 (1) the national law of the child at the time of birth, if not established then the law of his/her habitual residence shall determine the applicable law. If the paternity cannot be established pursuant to these laws, the national law of the mother of the child,

22 Nomer, p. 275; Şanlı/Esen/Ataman-Figanmeşe, p. 147; Çelikel/Erdem, p. 264.

23 Nomer, p. 268.

24 Şanlı/Esen/Ataman-Figanmeşe, p. 135.

and if it is not established then the law of habitual residence of the mother and if it is still not established the law of place of birth of child shall govern the establishment of parentage. Doctrine states that the connecting factors stipulated under art. 16 (1) are alternatives to each other²⁵. The judge shall apply one of the said connecting factors regarding the child's best interest.

3. Annulment of Paternity

PIL Code art. 16 (2), states that annulment of paternity is also subject to the conflict of laws rule, which governs the establishment of paternity. PIL Code art. 16 (1) is the conflict of laws rule on the establishment of paternity. Thus, in the case of an annulment of paternity, Art 16 (1) will determine the surname of the child. Accordingly, the establishment of paternity is subject to the national law of the child at the time of birth, if not established then to the law of his habitual residence. If the paternity cannot be established pursuant to these laws, the national law of the mother or father at the time of birth of child, and if it is not established then the law of common habitual residence of parents and if it is still not established the law of place of birth of child shall govern the establishment of parentage. As mentioned previously, the doctrine states that the connecting factors stipulated in this article shall be interpreted as alternative options for the best interest of the child.

4. Public Order

Public order might intervene due to the meaning of the surname of the child. A surname such as "Hitler" would probably be found in violation with the public order and a different surname would be granted to the child by the Turkish courts, regarding the child's best interest. On the other hand, according to the modern private international law rules and the Turkish doctrine²⁶, acquiring an individual name²⁷, a variable surname²⁸ or an *apellidos*²⁹ with birth does not violate the public order.

25 **Nomer**, p. 268.

26 **Pürselim Arning**, Türk, Alman ve İsviçre Milletlerarası Özel Hukukunda Ad, Ankara 2014, p. 216, 218.

27 According to the legal systems of Sri Lanka, Vietnam, Indian and Pakistan forename of the husband is transferred to the next generations. Thus, forename in such legal systems has a similar function as surname in the Turkish legal system (**Pürselim-Arning**, p. 210 Fn. 787,788,789).

28 Surnames with a suffix indicating sex; the suffix changes according to sex of the individual (**Pürselim-Arning**, p. 215 Fn. 801).

29 According to the Spanish law, the child acquires a surname from both his/her parents. This dual surname of the child is known as *apellidos*. The surname, which is passed to the next

5. Turkish Domestic Law

a. In General

Through the application of Art.17 if the applicable law is found to be Turkish law, then the provisions of Turkish Civil Code shall prevail. The surname of the child is stipulated in the article 321 TCC. Under Turkish Law, surname is a personal right, which is under the protection of personality. Thus, the provisions regarding the surname are mandatory provisions. Furthermore, Turkey is a party to the United Nations Convention on the Rights of the Child³⁰. Article 7 of the said convention stipulates “the child shall have the right with birth to a name”.

b. Child Born in Wedlock

According to the art. 321 TCC, if the mother and the father are married, child bears the family surname. Under Turkish law, there is not any article, which defines the family surname. However, referring to the art. 187 TCC, it is accepted that the family surname is the common surname of the husband and wife, which is actually the husband’s surname³¹. Spouses do not have the right to agree on a different family surname³². This is supported by the art. 4 (1) of the Surname Code, which states that it is the husband’s right and obligation to choose surname. Therefore, the children may not choose to bear the mother’s surname or both the mother’s and the father’s surnames together³³. On the other hand, it is possible for the spouses to file a lawsuit for name change according to the article 27 of TCC and change the family surname³⁴.

Accordingly, children born in wedlock shall bear the surname of their father. This is a mandatory provision. The death of the father during the birth of children shall not prevent the children to bear their father’s surname³⁵. Furthermore, any change in the father’s surname shall affect the minor children’s surname as well. For instance name change due to adoption or lawsuit. However, the adult

generation, is the first surname of the child which is his/her father’s surname (**Pürselim-Arning**, p. 217 Fn. 804).

30 Turkey has ratified the treaty on 11 December 1994. Official Gazette No: 22138/01.12.1994.

31 **Abik**, Kadının Soyadı ve Buna Bağlı Olarak Çocuğun Soyadı, Ankara, 2005, p.55; **Dural/Öğüz/ Gümüş**, Türk Özel Hukuku Cilt III: Aile Hukuku, İstanbul, 2014, p. 158; **Öztañ**, Aile Hukuku, Ankara, 2015, p. 213. Please also see our below explanations on the surname of the married women.

32 **Öztañ**, p.1010.

33 **Öztañ**, p.1011.

34 **Baygın**, Soybağı Hukuku, İstanbul, 2010, p. 100; **Öztañ**, p.1011.

35 **Öztañ**, p.1011.

children have a right to maintain their previous surname in case of a change in their father's surname.

As a rule, the surname of the children shall not be changed in case their parents got divorced. In other words, the child shall bear the surname of the father even their parents got divorced or the marriage is annulled. On the other hand, this issue has become controversial due to a decision of the Constitutional Court in 2011. The Constitutional Court has abrogated the first sentence of the art. 4 (2) of the of the Surname Code, which states that the child shall bear the surname chosen by the father even if the custodial rights are given to the mother in case of annulment of marriage or divorce as it is against the principle of equality and the purpose of the custodial rights³⁶. Under Turkish Law, joint custody is only possible during marriage. In case of divorce, parents may not have joint custody. Therefore, as a rule, the custody is given either to the mother or the father of the child.

Based on this decision, this issue is brought before the Constitutional Court again upon an individual application in 2015, where a mother to whom the custodial rights of the child is given upon the divorce, requests to change the child's surname with her maiden's surname³⁷. In this case, the Constitutional Court admits that there is a legal loophole regarding the surname of the child in case of divorce and further decided that the abrogation of the first sentence of the art. 4 (2) of the Surname Code, does not constitute a legal basis for a change of surname in case of divorce. Thus, the Constitutional Court rejected the claim of the mother regarding the change of the child's surname. Accordingly, as a rule, the mother to whom the custody of the children is given does not have a right to choose the surname of the children.

The claim for name change may be brought before the courts in a lawsuit according to the article 27 of TCC. Since the children have a legitimate interest to bear the same surname with the mother to whom the custody rights are given, the courts shall decide on the change of surname of the children³⁸. Furthermore, the children who are willing to change their surnames may file a lawsuit for name change according to the article 27 of TCC. Since (sur)name is a personal right,

36 Decision of the Constitutional Court dated 8.12.2011 and numbered 2011/165 (published in the Official Gazette dated 14.02.2012 and 28204.

37 Individual application decision of the Constitutional Court dated 25.6.2015 and application numbered 2013/3434 (published in the Official Gazette dated 2.10.2015 and numbered 29490).

38 **Baş/ Kurtulan**, "Çocuğun Soyadına İlişkin Anayasa Mahkemesi Kararlarının İncelenmesi", in Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi, Volume:10, No: 135-136, İstanbul, 2015, p.77-90 (85); **İşintan**, "Anayasa Mahkemesinin 8.12.2011 Tarihli Kararı Işığında Türk Hukukunda Velayet Hakkı Kendisine Verilmiş Kadının Çocuğun Soyadını Seçme Hakkı Mevcut Mudur?", in Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 2012/1, p.265-279

the minor children, who have power of discretion, may personally apply to the court. However, the court shall consult to their legal representatives as well.

c. Child Born out of Wedlock

The surname of the child born out of wedlock is regulated in the art. 321 TCC. However, the said article has changed since its first acceptance. At first, it was regulated that if the mother and the father are not married, child bears the mother's surname. Accordingly the child born out of wedlock shall bear the surname of the mother whether the paternity is linked with the father or not and therefore the child born out of wedlock did not have a right to bear the father's surname. This provision was found unconstitutional and abrogated by Constitutional Court on 2.7.2009 with the ground that the regulation was creating inequality between the child in wedlock and child born out of wedlock since it does not enable the child born out of wedlock to carry the father's surname³⁹. Now, the child born out of wedlock whose paternity is linked with the father has no right to bear the mother's surname. According to the article 28 (4) of the Code on the Civil Registration Services and the articles 23 (1) and 103 (1) of Regulation on the Application of the Code on the Civil Registration Services, which regulates that once the father acknowledges the child, then the child shall be registered under her/his father's surname.

A child, who was born within 300 days after the dissolution of the marriage, also bears the father's surname (art. 22 Regulation on the Application of the Code on the Civil Registration Services). Furthermore, according to the art. 23 (4) of the Regulation on the Application of the Code on the Civil Registration Services, the child born out of wedlock shall acquire the father's surname upon the claim of the mother and the child, once the child's paternity is later linked with the father⁴⁰. Once the child acquires the father's surname, any change in the father's surname shall affect the minor children's surname as well. However, the adult children have a right to maintain their previous surname.

In case the father rejects the paternity of the child born in wedlock or born within 300 days upon the dissolution of the marriage, then the child loses the right to bear the father's surname and shall acquire the mother's surname. In case the

39 Decision of the Constitutional Court dated 2.7.2009 and numbered 2009/105 (published in the Official Gazette dated 7.10.2009 and numbered 27369). For a critic on this decision, please see: **Akkayan Yıldırım**, "Evlilik Dışı Çocuğun Soyadı ve 02.07.2009 Tarih, 2005/114 E. 2009/105 Sayılı Anayasa Mahkemesi Kararının Bu Bağlamda Değerlendirilmesi", in Prof. Dr. Rona Serozan'a Armağan, Cilt I, İstanbul, 2010, p.69-89 (81-88).

40 Paternity of the child shall be linked with the father either upon the acknowledgement of the father (art. 282, 295 TCC) or upon final decision of the paternity suit (art. 282, 301 TCC) or upon the marriage of the mother and the father (art. 282, 292 TCC).

mother bears two surnames, the child shall acquire the mother's maiden's name. Changes in the mother's surname due to marriage, shall not affect the child's surname while any other change in the mother's surname shall also affect the child's surname.

Children who are willing to change their surnames shall file a lawsuit for name change according to the article 27 of TCC. Since name is a personal right, the children, who have power of discretion, may personally apply to the court. However, the court shall consult to their legal representatives as well. The child born out of wedlock who lives with her/his mother, may request surname change in order to bear the same surname with the mother. However, in such a case, it is accepted that the court shall consult to the father or his heirs since such a change may be detriment to the father's interest.

B. Adoption

PIL Code art. 18 (3) is the conflict of laws rule that regulates the effects of adoption. The effects and consequences of adoption include the surname of the adopted. Thus, the doctrine states that the PIL Code art. 18 (3) shall be taken into account for the determination of the law applicable to the surname of the adopted⁴¹. Accordingly, the adoption itself shall be governed by the national law of the adoptive parent, and in case of a joint adoption, by the law governing the general provisions of the marriage. The national law of the adoptive parent shall be determined according their citizenship at the filing date of the adoption suit.

1. Public Order

Public order might intervene in the case where a married woman is adopted. When a married Turkish woman is adopted by a foreigner; she might have the right to acquire the foreign surname of the adoptive parent pursuant art. 18 (3). Whereas, according to Turkish domestic law, an adopted married woman shall continue to use his husband's surname. In such a scenario, Turkish national courts might bring forward the argument of violation of public order while the doctrine would argue the opposite. In a recent decision of the Constitutional Court⁴² it is stated that the Turkish domestic law, which prevents women to continue to use solely their maiden name after marriage is against the Turkish Constitution. This approach of the Constitutional Court supports the doctrine's view. Nevertheless, the civil law provisions relating to the surname of married women has not yet amended by the Turkish parliament.

41 **Nomer**, p. 279; **Çelikel/Erdem**, p. 207, 289; **Şanlı/Esen/Ataman-Figanmeşe**, p. 175.

42 Case No: 2013/2187. Date of the decision: 19.12.2013.

Public order might also intervene where the adopted demands to use both his former surname and the surname of the adoptive parent based on the applicable foreign law. In such a case the doctrine considers that there is no violation of public order⁴³. Nevertheless, Turkish Court of Cassation is of the opinion that for the male adopted to have two surnames would be against Turkish public order; and thus applies Turkish law⁴⁴.

2. Turkish Domestic Law

Through the application of art. 18 (3), if the applicable law is found to be Turkish law, then Turkish Civil Law provisions shall prevail. Under Turkish Civil Law, the surname of the adopted is stipulated depending on the type of adoption: adoption of minors or adoption of adults.

a. Adoption of Minors

In case the adopted is a minor, then she/he shall automatically acquire the surname of the adoptive parent(s) (art. 314 (3) TCC). The adopted may not revert to her/his previous surname once she/he becomes of age. This is a mandatory provision. Thus, the parties may not agree otherwise. However, if the adopted has an interest to retain the surname of his actual parents, then the adopted may claim for a surname change in accordance with the art. 27 TCC.

Under Turkish Law, as a rule, married couples may only adopt jointly. In such a case, the adopted minor shall acquire the family surname. However, in exceptional cases a married person who is at least 30 years old is permitted to adopt singly where joint adoption proves impossible since the other spouse permanently lacks capacity to consent or has been of unknown whereabouts for more than two years or if the spouses have been separated by court order for more than two years (art. 307 (2) TCC). In such a case, the adopted shall acquire the surname of the adoptive parent. Accordingly, if the husband adopts the child, then the adopted shall acquire husband's surname. If the wife, who retains only her previous surname, adopts the child, then the adopted shall acquire, wife's previous surname. However, if the wife, who retains the husband's surname, adopts the child, then the adopted shall acquire the husband's surname. The latter may be challenging if the woman who adopts the child got divorced from the husband whose surname is acquired by the adopted.

43 **Ataay**, Şahıslar Hukuku, Birinci Ayrım, Giriş-Hakiki Şahıslar, 3.Baskı, İstanbul 1978, p. 184, see also p. 184 Fn. 42.

44 18th Chamber of Turkish Court of Cassation decision dated 15.09.2011. Case No: 2011/7038 Decision No: 2011/8854.

Joint adoption is not allowed for unmarried couples under Turkish Law (art. 306 TCC). Under Turkish Law, unmarried people are permitted to adopt singly if they are at least 30 years old. In such a case, then the child shall acquire the surname of the adoptive person. If an unmarried woman adopts a child and the woman later gets married, then the adopted shall retain the previous surname of the woman.

b. Adoption of Adults

If the adopted is an adult, she/he may choose to acquire the surname of the adoptive parent(s). The adopted adult shall indicate her/his choice of surname during adoption. Otherwise, she/he shall retain her/his surname.

In case the adopted is a married man and he wishes to acquire the surname of the adoptive parent(s), then the family surname shall change accordingly (art.105/b.6 Regulation on the Application of the Code on the Civil Registration Services). Thus the surname of his wife and minor children shall change whereas the adult children have the right to retain their previous surname.

In case the adopted is a married woman and wishes to acquire the surname of the adoptive parent(s), then she may acquire her adoptive surname along with her husband's surname (art.105/b.7 Regulation on the Application of the Code on the Civil Registration Services). In case the married woman already bears her previous surname along with her husband's surname, then her previous surname shall change accordingly. She may as well decide to use only the adoptive surname upon applying to the court as explained below⁴⁵. The adopted married woman, who declared her wish to acquire the surname of the adoptive parent(s) but did not use it during her marriage, shall acquire the surname of the adoptive parent(s) upon divorce.

C. Marriage

The conflict of laws rule regulating the effects of marriage is PIL Code art. 13 (3). Doctrine states the law applicable to surname acquired with marriage shall also be determined by PIL Code art. 13 (3)⁴⁶. According to art. 13 (3), the general provisions of marriage shall be governed by the common national law of the spouses. If the spouses are of different nationalities, the law of their common habitual residence shall govern and in the absence of a common habitual resi-

⁴⁵ Please see our explanations below on the Turkish domestic law regarding the surname acquired via marriage.

⁴⁶ **Nomer**, p. 226; **Şanlı/Esen/Ataman-Figanmeşe**, p. 117, 127; **Çelikel/Erdem**, p. 207, 239; **Tekinalp/Uyanık**, p. 154.

dence, Turkish law shall govern. The connecting factors stipulated under art. 13 (3) shall be determined according to the date of marriage.

1. Public Order

Public order might intervene where a foreign law allows the Turkish husband to acquire his wife's surname. As mentioned previously, Turkish domestic legislation does not allow men to acquire his wife's surname or women to continue to use her maiden name after marriage. Turkish Court of Cassation is of the opinion that applying foreign law which grants men the right to acquire their wives' surname after marriage would be violating the Turkish public order⁴⁷. This view of the Turkish Court of Cassation was reflected to a decision where a Turkish man demanded his Turkish surname to be changed with his Swiss wife's surname based on the Swiss family law. In that case, Swiss law was the common habitual law of the spouses and so was the competent law according to the Turkish PIL Code art. 13 (3) as the spouses lacked a common nationality. The Turkish Court of Cassation refused to apply Swiss family law to the case. Instead the court raised the argument of public order and applied Turkish law pursuant Turkish PIL Code art. 5. Consequently the court did not allow the Turkish husband to acquire his wife's Swiss surname.

A similar problem arises during the enforcement proceedings of a foreign court decision. In the previous case, had the Turkish husband tried to enforce a court decision of a name change suit filed in Switzerland, then the Turkish Court of Cassation would have most probably raised the public order argument through PIL Code art. 54⁴⁸. Article 54 stipulates the condition of "not being openly against public order" as a requirement for the enforcement of a foreign court decision.

Turkish doctrine disagrees with the Turkish Court of Cassation and criticizes its approach in thinking that such foreign laws relating to the husbands' surname do not shake the values of Turkish society⁴⁹.

47 18th Chamber of Turkish Court of Cassation decision dated 25.02.1997. Case no: 1997/288. Decision no: 1997/1496.

48 **Pürselim-Arning**, p. 162.

49 **Nomer**, p.161; **Akıncı/Demir-Gökyayla**, p. 9; **Pürselim-Arning**, p. 247.

As an additional point, according to the modern private international law rules and the Turkish doctrine, acquiring an individual name⁵⁰, a variable surname⁵¹ or *apellidos*⁵² of the husband due to marriage does not violate the public order.

2. Turkish Domestic Law

a. Legal Framework

Through the application of PIL Code art. 13 (3) if the applicable law is found to be Turkish law, then Turkish Civil Law provisions shall prevail.

The art. 187 TCC under the title “Surname of the Woman” stipulates the surname of woman upon marriage⁵³. Accordingly, women acquire their husband’s surname automatically upon the conclusion of marriage⁵⁴. Women, who would like to retain their prior surname before their husband’s surname, must apply to the marriage officials during the ceremony or later to the civil registry offices with a written declaration.

The latter right is not subject to any time limit. Therefore, married women may always apply to the civil registry offices during the marriage to retain their prior surnames⁵⁵ along with their husband’s surname. The sole limitation to the

50 According to the legal systems of Sri Lanka, Vietnam, Indian and Pakistan forename of the husband is transferred to the wife. Wife acquires and uses the forename of the husband. Thus, forename in such legal systems has a similar function as surname in the Turkish legal system (**Pürselim-Arning**, p. 250 Fn. 912, 913, 914).

51 Variable surnames are surnames with a suffix indicating sex; the suffix changes according to sex of the individual (**Pürselim-Arning**, p. 253 Fn. 907).

52 According to the Spanish law, the child acquires a surname from both his/her parents. This dual surname of the child is known as *apellidos*. Thus, Spanish citizens have two surnames. If a Turkish woman gets married with a Spanish man she shall acquire two surnames from her husband (**Pürselim-Arning**, p. 250 Fn. 898).

53 Under Turkish Civil Code, the only legally accepted union is contracted between a man and a woman before the competent officials. In other words, same-sex marriages are not allowed under the Turkish Civil Code (art. 134). Thus, a same-sex marriage concluded between foreign partners is invalid from the Turkish law perspective. Therefore, the art. 187 TCC stipulates only the surname of the married woman.

54 **Oğuzman/Seliçi/Oktay Özdemir**, *Kişiler Hukuku*, İstanbul, 2014; p. 110; **Dural/Öğüz/Gümüş**, *Türk Özel Hukuku Cilt II: Kişiler Hukuku*, İstanbul, 2013; p.158.

55 The prior surname of the women could be her maiden’s surname, her adoptive surname, her surname acquired with the change of nationality, her surname from the previous marriage or her surname which was changed with a lawsuit for name change according to the article 27 of TCC. On the other hand, in case the woman retains her surname from her previous marriage, along with her new husband’s surname, her previous husband may ask the court to cease such consent in change of circumstances according to the article 173 (2)

latter right is that married women, who already bear two surnames due to a preceding marriage, may choose to retain only for one of those prior surnames. For instance, a widow who retains her maiden's surname along with her deceased husband's surname shall choose one of these prior surnames to retain along with her new husband's surname.

The art. 187 TCC is a mandatory provision. Therefore the married women have a limited right to choose: either to bear their husband's surname or to retain their prior surname along with their husband's surname⁵⁶. Likewise, it is not possible for the spouses to choose a different "family surname"⁵⁷. The surname of the husband is accepted as the family surname in this provision for the representation of the family with a single surname before the public.

As a matter of fact, this provision was first introduced to the Turkish Civil Code of 1926 as art. 153 under the title "Family Name"⁵⁸ upon an amendment in 1997 with the purpose of providing equality to woman⁵⁹. Before the amendment in 1997, the married women acquired the surname of the husband without a choice to bear their prior surname together with the surname of the husband.

of TCC. In such a case, the judge shall have the discretion to decide whether the woman still has an interest to bear her surname from the previous marriage and whether such usage is a detriment to her previous husband. If the judge forbids the woman to retain her surname from the previous marriage, then the woman shall have a right to apply to the civil registry offices in order to use her previous (maidens) surname. **Öztan**, p. 209-210.

56 **Ergene**, "İnsan Hakları Hukukundaki Gelişmeler Işığında Türk Hukukunda Kadının ve Çocuğun Soyadı Meselesi ve Medeni Kanun'da Değişiklik Önerisi", in *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni*, Year: 31, No: 2, İstanbul, 2011, p.123-176 (129-130); **Kılıçoğlu Yılmaz**, "Kadının Bitmeyen Soyadı Sorunu", in *Ankara Barosu Dergisi*, 2014/4, p. 581-592 (585); **Yüksel**, "Türk Medeni Kanunu Bakımından Kadın-Erkek Eşitliği", in *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, Volume 17, No: 2, 2014, p. 175-200 (183).

57 **Yüksel**, p.184.

58 For the critics of the article before the amendment, please see **Kılıçoğlu**, "Medeni Kanun Açısından Kadın-Erkek Eşitliği", *Ankara Barosu Dergisi*, 1991/1, p.9-17 (12); **Oktay**, "Medeni Kanunda Kadın", *Kadınların Gündemi*, İstanbul, 1997, p. 51-64 (56-57).

59 The Turkish Civil Code of 1926 was adopted, in fact merely translated from Swiss Civil Code for the purpose of modernization in the newly built Republic of Turkey. The Turkish Civil Code of 1926 imposed a nationwide consistency in the legal system, providing equal rights to all citizens before the law, irrespective of their language, religion, race or gender and supporting the social status of women in Turkey. However, due to the constant changes in the society, living conditions, global values, and economical, social and technological circumstances, the Turkish Civil Code of 1926 fall behind the day and has been periodically amended. Finally, it was abrogated by Turkish Civil Code of 2002. **Özsunay**, "Chapter 18 The Scope and Structure of Civil Codes: The Turkish Experience" in *The Scope and Structure of Civil Codes*, Julio César Rivera (editor), Springer, 2013, pp. 387-408 (388).

The wording of the provision as amended in 1997 was kept in the Turkish Civil Code of 2002. Today this provision is criticized in legal doctrine and considered as one of the provisions of the Turkish Civil Code, which is contrary to the European Court of Human Rights and the Convention on Elimination of Discrimination Against Women (CEDAW)⁶⁰, as well as the principle of equality between men and women (art. 10 of the Turkish Constitution) and the principle of equality between the spouses (art. 41 of the Turkish Constitution)⁶¹. Accordingly, this provision has been brought before the courts of first instance, Court of Cassation, Constitutional Court and even before the European Court of Human Rights and evolved by the jurisprudence.

b. Recent Developments in the Jurisprudence

This issue was firstly discussed in the decision of the Constitutional Court dated 29.9.1998 upon the application of Ankara 4. Civil Court of First Instance for annulment on the ground of unconstitutionality⁶². It was claimed that the art. 153 TCC of 1926 was contrary to the art. 12 on nature of fundamental rights and freedoms and art. 17 on personal inviolability, corporeal and spiritual existence of the individual of the Constitution. However, Constitutional Court did not find the said provision unconstitutional with the grounds that the lawmaker had used its discretion right for the public interest and public order since the said provision is important for the establishment of the family union and development the family relations and it is endorsement of a custom.

According to the art. 152 of Turkish Constitution, once the Constitutional Court decides on an allegation of unconstitutionality brought by a court, there shall be no other allegation of unconstitutionality with regard to the same legal provision within ten years upon the publication of the decision on the Official Gazette. In other words, this issue was sealed to further discussion of unconstitutionality by the Constitutional Court until 29.9.2008.

60 Official Gazette numbered 18858 and dated 14.10.1985 and entered into force on 19 January 1986.

61 **Abik**, p. 144; **Çakırca**, “Kadın Erkek Eşitliği Açısından MK m.187’nin Değerlendirilmesi”, in Prof. Dr. Rona Serozan’a Armağan, Cilt I, İstanbul, 2010, p.703-748 (743); **Ergene**, p.137; **Nomer**, “Avrupa Birliğine Üye Devletlerde ve Türkiye’de Evlenen Kadının ve Ortak Çocuğun Soyadı”, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Year: 22, No: 2, İstanbul, 2002, p.421-450 (447); **Oktay Özdemir**, “Aile Hukukunda Eşitliğe Aykırı Hükümler”, in Prof. Dr. Zahir İmre’ye Armağan, İstanbul, 2009, p.289-305 (291); **Serozan**, “Anayasa Mahkemesi’nin Yeni Medeni Kanun Kurallarına İlişkin Kararlarının Değerlendirilmesi”, in Anayasa Mahkemesi’nin Medeni Hukuka İlişkin Kararlarının Değerlendirilmesi Sempozyumu, İstanbul, 2013 p.137-165 (151).

62 Decision of the Constitutional Court dated 29.9.1998 and numbered 1998/59 (published in the Official Gazette dated 15.11.2002 and numbered 24937).

However, the debate on the surname of the married women raised again upon the Ünal Tekeli v Turkey decision of the European Court of Human Rights dated 16.10.2004⁶³ where European Court of Human Rights held that the art. 187 TCC constitute a violation of art. 8 on the right to respect private and family life and art. 14 on the prohibition of discrimination of the European Convention of Human Rights. Subsequently, there were attempts in the Turkish Parliament to change the art. 187 TCC⁶⁴. Nevertheless, the said provision has not been changed.

Following Ünal Tekeli v Turkey decision, Ankara 5. Court of First Instance has concluded a landmark decision on 4.11.2009⁶⁵. In its decision, the court stated that the married women shall maintain their previous surnames considering the Ünal Tekeli v Turkey decision of the CEDAW. The Court further stated that the CEDAW shall prevail against the art. 187 TCC according to the art. 90 of the Turkish Constitution which regulates that in case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

Upon the elapse of the time limit, the issue of surname of the married women was brought before the Constitutional Court once again for annulment on the ground of unconstitutionality⁶⁶. In its decision dated 10.3.2011, Constitutional Court rejected the unconstitutionality of the said provision with the grounds that the law maker had used its discretion right in accordance with the principle of rule of law due to public interest and public order. According to the decision, the said provision is important for the establishment of the family union and development the family relations, determination of the lineage and further for the systematic record of civil registry and prevention of discordance in the legal documents⁶⁷. Once again, the issue was sealed to further discussion of unconstitutionality by the Constitutional Court until 10.3.2021.

63 Decision of the European Court of Human Rights, Ünal Tekeli v Turkey dated 16.11.2004 with the application no: 29865/96.

64 For a detailed information on the proposal for an amendment in the provisions of the Turkish Civil Code on the surnames of the children and the women drafted by the Ministry of Justice, please see **Ayan**, "Anayasa Mahkemesi Kararları ve Çocuklar İle Kadının Soyadına İlişkin Değişiklik Tasarısı Taslağı Işığında Soyadının İlk Kez Edinilmesi, Kendiliğinden Değişmesi ve Değiştirilmesi", in Gazi Üniversitesi Hukuk Fakültesi Dergisi, Volume 16, No: 4, 2012, p. 19-90 (70 et seq.).

65 Decision of the Ankara 5th Family Court dated 4.11.2009 and numbered 2009/1359.

66 Decision of the Constitutional Court dated 10.3.2011 and numbered 2011/49 (published in the Official Gazette dated 21.10.2011 and numbered 28091).

67 For a critic on this decision, please see: **Çakırca**, "Evli Kadının Soyadına İlişkin Güncel Gelişmelerin Değerlendirilmesi", in İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Volume: LXX, No:2, 2012, p. 145-164 (150-154).

However, further developments happened upon the adoption of the Law amending certain provisions of the Constitution of the Republic of Turkey numbered 5982 dated 7.5.2010 in the public referendum on 12.9.2010 which authorize Constitutional Court to conclude and finalize the individual applications and accordingly Constitutional Court started to receive applications as of 23.9.2012.

In the meantime, the issue of surname of married woman in Turkey has been brought before the European Court of Human Rights several other times and in all those decisions, European Court of Human Rights held that the art. 187 TCC constitute a violation of art. 8 on the right to respect private and family life and art. 14 on the prohibition of discrimination of the European Convention of Human Rights⁶⁸.

Interestingly, Constitutional Court has changed its approach to the surname of the married women in the decisions upon individual application and has decided that the married women may maintain their previous surnames with the grounds that otherwise would violate art. 8 on the right to respect private and family life and the art. 14 on the prohibition of discrimination of the European Convention of Human Rights and the art. 17 of the Turkish Constitution on the protection and improvement of the spiritual existence⁶⁹. Furthermore, it has been emphasized by the Constitutional Court that the art. 187 of TCC has been implicitly abolished and is no longer in effect and therefore the courts of first instances shall not take the said provision into consideration.

Parallel to the Constitutional Court in its decisions of individual application and the European Court of Human Rights, the courts of first instances also decided that the married women has the right to solely maintain their previous surnames on the grounds that otherwise would contradict with the art. 8 on the right to respect private and family life and the art. 14 on the prohibition of discrimination of the European Convention of Human Rights, the art. 16 on the marriage and family life of CEDAW, the art. 17 on personal inviolability, corporeal and spiritual existence of the individual and the art. 90 of the Constitution⁷⁰.

68 Decisions of the European Court of Human Rights, *Leventoğlu Abdülkadiroğlu v Turkey* dated 28.5.2013 with the application no: 7971/07; *Tuncer Güneş v Turkey* dated 3.9.2013 with the application no. 26268/08; *Tanbay Tüten v Turkey* dated 10.12.2013 with the application no. 38249/09.

69 Please see individual application decisions of Constitutional Court dated 19.12.2013 and application numbered 2013/2187 (published in the Official Gazette dated 7.1.2014 and numbered 28875); dated 6.3.2014 and application numbered 2013/4439 (published in the Official Gazette dated 25.4.2014 and numbered 28982); dated 16.4.2015 and application numbered 2014/5836 (published in the Official Gazette dated 11.7.2015 and numbered 29413).

70 See for example decision of Ankara 11th Family Court dated 10.06.2014 and numbered 2014/824.

On the other hand, Court of Cassation in its early decisions has reversed the decisions of the court of first instances with the grounds that such application is against the mandatory provision of Turkish Civil Code and that there are any contrary provisions neither in the international conventions nor in the Turkish Civil Code⁷¹. However, Court of Cassation in its late decisions has changed its approach and decided that the he married women has the right to solely maintain their previous surnames in line with the decisions of the Constitutional Court in its decisions of individual application⁷².

Finally, General Assembly of Civil Chambers of the Court of Cassations has rendered that the married women has the right to maintain solely their previous surnames and such application has no effect on the establishment of the family union and the discordance in the civil registry could be resolved technically⁷³.

c. Assessment of the Current Situation

Considering all those developments in jurisprudence, it is accepted in practice that the art. 187 of TCC has been implicitly abolished and that the woman shall solely retain their prior surnames upon marriage. According to a view in the legal doctrine, the married women now have the right to use solely her previous surnames. In case, the women shall not use their rights, then the art. 187 of TCC shall be applied as a default provision⁷⁴. On the other hand, such approach would bring the question of child's surname. As stated above the art. 187 of TCC stipulates not only the married woman's surname but also the "family" name.

Furthermore, art. 90 of Turkish Constitution is a provision, which enables the courts with the discretion to choose the prevailing international convention. However, art. 16 of CEDAW, only stipulates that the same right to choose a family name are to be given to both husband and wife. It does not provide how both spouses shall choose the family name meaning the surname of the child. In other words, this provision does not provide a norm that enables legal certainty and security. Therefore the art. 187 of TCC is still effective and therefore it has not been implicitly abolished. Under the current conditions, the only possible way

71 See for example decision of the 18th Civil Chamber of Court of Cassation dated 3.4.2014 and numbered 2014/6256 (Available on www.lexpera.com).

72 See for example decision of the 2nd Civil Chamber of Court of Cassation dated 28.4.2015 and numbered 2015/8704 (Available on www.lexpera.com).

73 Decisions of the General Assembly of Civil Chambers of the Court of Cassation dated 30.9.2015 and numbered 2015/2011 (Available on www.lexpera.com).

74 **Öztañ**, p. 212 fn. 750.

for married women to retain their prior surnames exclusively is to bring an action before the courts⁷⁵.

D. Divorce

Turkish PIL Code art. 14 (1) regulates the conflict of laws rules regarding the consequences of divorce. Doctrine states that art. 14 (1) also covers the effects of divorce on the surname⁷⁶. Article 14 (1) states that the grounds and provisions for divorce and separation shall be governed by the common national law of the spouses. If the spouses have different nationalities, the law of the place of their common habitual residence, in case of absence of such residence, Turkish law shall govern. If the marriage is ended due to death or disappearance of one of the spouses, then the law applicable to the surname of the other is also determined also by art. 14 (1). The connecting factors stipulated under art. 14 (1) shall be determined according to the date of the filing of the suit.

1. Public Order

Some of the foreign family law systems prohibit divorce. Prohibition of divorce is closely related to the restriction of social rights and freedoms of individuals. Where the foreign law applicable to a case brought before the Turkish court prohibits divorce, a possibility of violation of public order arises. Doctrine⁷⁷ suggests that if one the spouses is Turkish then the prohibition of divorce might be considered as a violation of the Turkish public order. Also, if the habitual residence of the party whose national law prohibits divorce is Turkey, then such a prohibition might be considered as a violation of Turkish public order⁷⁸. As a result, Turkish law would be applied to such cases and the prohibition on divorce would be lifted by the Turkish courts. On the other hand, where the national laws of both of the spouses prohibit divorce, then the doctrine⁷⁹ states that public order argument should not be raised.

75 For the same view, please see: **Öcal Apaydın**, "Son Yargı Kararları Işığında Kadının Soyadı Meselesi Çözümüne Kavuşturulmuş Mudur?", İnönü Üniversitesi Hukuk Fakültesi Dergisi, Volume 6, No: 2, Year 2015, p.435-458 (456).

76 **Nomer**, p. 258; **Şanlı/Esen/Ataman-Figanmeşe**, p. 117, 130; **Çelikel/Erdem**, p. 207, 245; **Tekinalp/Uyanık**, p. 168.

77 **Nomer**, p. 258; **Çelikel/Erdem**, p. 246; **Şanlı/Esen/Ataman-Figanmeşe**, p. 77; **Tekinalp/Uyanık**, p. 173.

78 This view is in accordance with the German Private International Law doctrinal views (**Pürselim-Arning**, p. 264 Fn. 965).

79 **Cin**, Eski Hukukumuzda Boşanma, Konya 1988, p. 16.

2. Turkish Domestic Law

The surname of the women upon divorce is regulated under the art. 173 TCC. Accordingly, in case of divorce or annulment of the marriage, the surname of woman shall revert to her prior surname (i.e. her maiden's surname, adoptive surname or changed surname). If the woman was widow prior to her marriage, then she may apply to the court to allow her to bear her maiden's surname instead of her widow surname⁸⁰. In cases when the court decides on the dead or absence of her husband, the married woman shall retain her husband's surname⁸¹.

Furthermore, divorced women may ask the court to permit her to bear the surname of her immediate ex-husband if she has a legitimate interest to do so and if that shall not detriment the ex-husband (art. 173/III TCC)⁸². The legitimate interest is commonly interpreted as business or professional interest of the woman⁸³. However, the court shall broadly interpret the "legitimate interest" of the women and also take the interest of the children into account⁸⁴.

This right is not subject to any time limit in the TCC. However, art. 178 of TCC stipulates a time limit for all claims related to the divorce, which is one year upon the decision of the divorce. Accordingly, such claim of woman is also limited to one year upon the decision of the divorce⁸⁵. Nevertheless, it would be appropriate to bring such request during the divorce or annulment lawsuit⁸⁶. In case, such a claim is brought with a separate lawsuit after the decision of divorce or annulment, this lawsuit shall be filed against the immediate husband in the family courts⁸⁷.

80 **Abik**, p. 245; **Gençcan**, Boşanma, p. 791. See also the decision of the 2nd Civil Chamber of Court of Cassation dated 27.3.2007 and numbered 4968 (Available at **Gençcan**, Boşanma, p. 791).

81 **Abik**, p. 207.

82 It should be further noted that this provision is criticized in the legal doctrine since it only provides a conditional right for the divorced women. **Kılıçoğlu Yılmaz**, p. 590.

83 **Akıntürk/ Ateş-Karaman**, p. 290; **Gençcan**, Boşanma, p. 793; **Öztan**, p. 217. See also the decision of the 2nd Civil Chamber of Court of Cassation dated 19.3.2009 and numbered 5094 (Available at **Gençcan**, Boşanma, p. 793).

84 **Akıntürk/ Ateş-Karaman**, p. 290; **Abik**, p. 247; **Öztan**, p. 217.

85 **Gençcan**, Boşanma, p. 796. See also the decision of the 2nd Civil Chamber of Court of Cassation dated 26.3.2009 and numbered 5643 (Available at **Gençcan**, Boşanma, p. 796).

86 **Öztan**, p. 217.

87 See also the decisions of the 2nd Civil Chamber of Court of Cassation dated 29.1.2002 and numbered 784; dated 30.4.2009 and numbered 8449 and the decision of the General Council of Civil Chambers dated 16.11.2005 and numbered 617 See also the decision of the 2nd Civil Chamber of Court of Cassation dated 26.3.2009 and numbered 5643 (Available at **Gençcan**, Boşanma, p. 794-795).

The immediate husband has a right to ask the court to cease such consent any time in change of circumstances. If the court decides accordingly, then the woman shall revert to her previous surname. It is however debated whether the woman may request to revert to her surname from the previous marriage. It could be interpreted that the woman has a legitimate interest to do so, if for example she would like to have the same surname with her children from the previous marriage.

Finally, the question whether the divorced women may retain both their previous surname and their immediate husband's surname after the divorce is as well debated⁸⁸. According to the wording of the art. 173 TCC, the divorced women shall only use their immediate husband's surnames. In other words, such right is provided to the divorced women only with regard to the "surname of her immediate ex-husband". On the other hand, the rationale of this provision is to maintain the social status of the women after her divorce. Therefore, if the women retain their previous surname along with their husband's surname during the marriage, then such right shall be provided to them upon the divorce. For instance, divorced women shall have the legitimate interest to retain the same surnames with her children from her both marriages.

III. ADMINISTRATIVE DECISIONS

Turkish legal system regulates the principal way to acquire Turkish citizenship by birth on the basis of descent. According to the Turkish Citizenship Law⁸⁹ art. 7, a child born to Turkish parents or to a Turkish mother and a foreign father is a Turkish citizen. According to art. 7 (3), a child born to a Turkish father and a foreign mother is a Turkish citizen only if the principles and procedures ensuring the establishment of descent are met.

Article 8 regulates the secondary way to acquire Turkish citizenship by birth on the basis of birthplace. Article 8 (2) states that, a child found in Turkey is deemed born in Turkey unless otherwise proven. A child who is born in Turkey is given a Turkish citizenship only if the parents of the child cannot be identified or if the child cannot acquire any citizenship from his/her parents. In such an instance, Turkish domestic law applies to the surname of the child born in Turkey. Consequently, following the Turkish domestic law, the Turkish General Directorate of Population and Citizenship Affairs assigns a Turkish name and surname to such children.

88 Please see **Öztañ**, p. 217 for this debate.

89 Law No: 5901. Official Gazette numbered 27256 and dated 12.6.2009.

CONCLUSION

Having examined the rules pertaining to the surname regime under Turkish law, this paper concludes that the Turkish legislature has failed to adopt the new trends in family law relationships. Unfortunately, Turkish legislature and the courts consider surname as a public order issue based on the fact that the provisions of the Turkish Civil Code on the surname are mandatory. Therefore, the Turkish Courts tend to apply the Turkish domestic rules instead of foreign rules, which respect the party autonomy to choose the family surname. In the light of the recent case law, it is expected that a reform in the surname regime will take place and hopefully the rules regarding the surname of the married women will be aligned with the global trends which will certainly open the discussion on the surname of the children as well.

RIGHT TO PERSONAL NAME AND CROATIAN LEGAL FRAMEWORK DE LEGE LATA AND DE LEGE FERENDA

Abstract: *Right to personal name is one of many expressions of personal identity. Additionally, it reflects a single individual in familiar and social context and is also a mean by which the state identifies its subjects. As such, personal name is regulated by different branches of law (constitutional, civil and administrative) and requires careful approach. Legal regulation of personal names in Croatia entails several legal acts (Law on Personal Name, Family Law Act, Life Partnership Act) which are not well tuned. The existing Proposal for the amendments of the Law on Personal Name refers only to some of the problems, so there is still room for the improvements.*

In private international law sphere situation does not exactly correspond with the one in substantial sphere, since there is no choice of law rule which is specifically dedicated to the law applicable to personal name in Croatian PIL Act. Additionally, doctrinary approach is inconsistent which causes uncertainty in respect to application of certain provisions which are used instead to settle this question. 2015 Draft PIL Act, which is officially presented in July this year, contains special rule for personal name but also leaves some room for consideration.

In this article, autor tried to give her view of the existing situation as well as to give some suggestions for consideration with regard to the possible amendments on substantial level and also with regard to 2015 Draft PIL Act.

Keywords: *personal name, PIL Act, Draft PIL Act, Croatia.*

I. INTRODUCTION

Right to personal name is one of many expressions of the right to personal identity. Most of earlier legal theories have declared this right as *sui generis* property right,¹ but today it is generally accepted as self-standing right.² Just as

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1 See: Finžgar, A.: *Osebnostatne pravice*, Ljubljana, 1985, pp. 92-93, Resta, G.: *Autonomia privata e diritti della personalita*, Napoli, 2005, p. 33 et seq.

2 Mitić, M.: *Pravo na ime*, Anali Pravnog fakulteta u Beogradu, br. 5-6, 1969, p. 602.

other personality rights it is absolute in character, strictly personal in nature, non-transferable and imprescriptible right.³ It serves a person „for individualization, identification of his/her person and personality which is distinct and unique“.⁴ Name is an important attribute of every person.⁵ It serves as important symbolic representation of individual identity and it reflects a single individual in familiar and social context. It is also a mean by which the State identifies its subjects.⁶ Obviously, it is a multifaceted right, so it is regulated by constitutional, civil, and administrative laws.

Just as in most of the countries in the neighbourhood, first legal act regulating right to personal name within Croatian territory dates back to XXth century, more precisely to 1929.⁷ Of course, at that time Croatia was part of politically bigger picture – Kingdom of Yugoslavia so, technically, it was Yugoslav law but applied also within the territory of Croatia.⁸ From that time onwards every political change led towards the change of relevant legal act – in 1947,⁹ 1965,¹⁰ 1973.¹¹ Finally, in 1992, after acquiring independence, first Croatian Law on Personal Name was enacted.¹² Despite the fact that it was amended couple of times, this law lasted for almost 20 years. In a country where laws are changing almost like the weather it is a long life. New Law on Personal Name was enacted in 2012,¹³ mostly due to the fact that the „old“ one limited number of words allowed in a name which in many cases presented an obstacle, not only for foreigners but also for Croatian citizens born abroad. Also, a large part of its text was oldfashioned,

3 Matijević, B.: Prava osobnosti – pravo na identitet i ime, Hrvatska pravna revija, No. 9, 2006, pp. 13-17.

4 Radolović, A.: Pravo ličnosti kao kategorija građanskog prava, doktorska disertacija, Zagreb, 1985., p. 264. (hereafter: Radolović, 1985).

5 Finžgar, op. cit., p. 105. The ECtHR has described a name as the principal factor that individualizes a person in society – Case No 664/06 *Losonci Rose and Rose v Switzerland*, par. 51.

6 Rossolillo, G.: *Identità personale e diritto internazionale privato*, CEDAM, 2009, pp. 8-13 (hereafter: Rossolillo), Rossolillo, G.: Personal identity at a crossroad between private international law, international protection of human rights and EU law, *Yearbook of Private International Law*, Vol. 11, 2009, p. 14 (hereafter: Rossolillo (2009)).

7 For details see: Dropulić, J.: Pravo na osobno ime, Hrvatska javna uprava, Vol. 6. No. 2, 2006, pp. 125-126, 129-130.

8 Zakon o ličnim imenima, Službene novine, 47-XXI of 19 February 1929.

9 Zakon o ličnim imenima, Službeni list FNRJ, 105/1947.

10 Zakon o ličnom imenu, Službeni list SFRJ 8/1965.

11 Zakon o osobnom imenu, NN SFRJ 51/1973 and 47/1990.

12 Zakon o osobnom imenu, NN RH 69/92, 26/93 and 29/94.

13 Zakon o osobnom imenu, NN RH 118/12.

some provisions even contradictory to new regulations, and it was generally inadequate to the requirements of modern society.

In this article, Author will first present substantive aspects of Croatian 2012 Law on Personal Name followed by its private international law aspects *de lege lata*. Then she will present provisions on personal name contained in Croatian PIL Act as well as in the 2015 Draft PIL Act. Finally, she will attempt to outline her views with regard to the further development of the concept.

II. SUBSTANTIVE ASPECTS

Even though Croatian Constitution¹⁴ does not entail an express provision on personal name, in some of its decisions Croatian Constitutional Court has confirmed that it is a constitutional right which is protected by the provision of Art. 22(1) – Man's liberty and personality are inviolable.¹⁵ This question came up with regard to the right to change of one's personal name. Constitutional court declared that the right to change a name emanates from Arts. 14, 16 and 22 of the Constitution. One of the judgments states that „personal name of a man is at the same time the affiliation of his/hers identity and as such belongs to his/hers protected personality ... Constitution, in its Art. 22, raises protection of personality to the point of sanctity ... Personal name is the designation of identity of a person as a holder of rights and obligations in legal traffic which is part of legally determined public policy“ (author's translation).¹⁶ The other judgments declares that „personal name represents a means of identification of persons

14 Ustav Republike Hrvatske, NN RH 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

15 It could easily lead to a conclusion that Croatian law accepts the „monistic“ conception of personal rights, where there is just one single right of personality which is articulated in several aspects. See more in: Dogliotti, M.: *Le persone fisiche*, in: Rescigno, P. (ed.), *Trattato di diritto privato*, Vol. 2, t. I, UTET, Torino, 1982, pp. 5-188. On the other hand, the existence of different laws in Croatia which protect particular aspects of personal rights may lead towards opposite conclusion. For the „pluralistic“ conception and its features see: Pino, G.: *The Right to Personal Identity in Italian Private Law: Constitutional Interpretation and Judge-Made Rights*, in: Van Hoecke, M./Ost, F. (eds.), *The Harmonization of Private Law in Europe*, Hart Publishing, Oxford, 2000, pp. 225-237. However, none of the above mentioned conclusions would be correct since at this moment in time, with regard to its regulation as well as its protection, Croatian law stands somewhere in the middle of the two approaches. Radolović, A.: *Prava ličnosti u građanskom pravu Hrvatske*, *Vladavina prava*, No. 1, Zagreb, 1988, p. 82 (hereafter: Radolović, 1988), Gavella, N.: *Osobna prava*, I dio, Zagreb, 2000, p. 30, Radolović, A.: *Specifični postupovnopравни problemi u zaštiti prava osobnosti*, *Zbornik PFZ*, 63(3-4) 2013, pp. 701-702 (hereafter: Radolović, 2013).

16 USRH, U-III-257/1996.

within their family and their community, and for the individual right to a personal name is his/her personal right“ (author’s translation).¹⁷

Legal regulation of personal names in Croatia includes several legal acts. The most extensive one is administrative Law on Personal Names¹⁸ which deals with the determination and change of personal name of Croatian citizens (Art. 1). Then there is a 2015 Family Law Act¹⁹ which deals with determination of a surname following different status changes and, finally, there is 2014 Life Partnership Act²⁰ which deals with the determination and change of surname of registered partners.

1. Determination of (child’s) personal name

As has already mentioned, increased migration and globalization made an old law unapt to respond to the requirements of modern society. Some of its provisions were too restrictive, some outdated, some even in collision with protection of privacy.²¹ Many of these deficiencies were removed by the New Law on Personal Names, enacted in 2012.

Besides determining its scope of application *ratione materiae* and *ratione personae*, it explicitly prescribes a duty to use acquired personal name (Art. 1(2)). Name, as well as surname, may be composed of unlimited number of words in which case there is a possibility to give a statement to the civil registrar of abbreviated personal name which will be used as a name for legal purposes. Same possibility exists with respect to a child, only in this case statement may be given by child’s parents or any other person which is, according to Family Law Act provisions, entitled to determine child’s personal name. Such statement may be revoked, but only once. Both, the statement and its revocation, must be entered into Civil registry records and are effective from the date of inscription (Art. 2.).

17 USRH, U-III-484/1998.

18 Zakon o osobnom imenu, NN RH 118/12.

19 Obiteljski zakon, NN RH 103/15.

20 Zakon o životnom partnerstvu osoba istog spola, NN RH 92/14.

21 Namely, according to Art. 7 of the „old“ Law on Personal Name, after receiving the application for change of personal name competent body had a duty to announce this request, as well as the new proposed personal name, on the notice board. Every citizen had the right to, within 30 days from the day of announcement, express his/her disagreement with the proposed name which had to be taken into an account by the competent body when deciding on the proposed name change. This provision of the Law on Personal Name directly clashed with Art. 2 of the Law on personal data protection, which strictly limits the possibility of revealing the personal data to others. Dropulić, op. cit., pp. 131-134.

With regard to the determination of the child's personal name, it may be determined by the *child's parents*. When child's name is determined by parents they both must agree. Child can bear a surname of only one or of both parents. In case they do not agree, it will be determined by the competent Social Welfare Center within 30 days from submission of request by one of the parents. Child's personal name may also be determined by a *single parent* (if the other one is not alive, or is judicially declared dead, or his/her domicile is unknown, or is deprived of parental responsibility, or is entirely or partially deprived of capacity to act) or *child's guardian* with the approval of the competent Social Welfare Center (if parents are not alive, or are judicially declared dead, or their domicile is unknown, or are deprived of parental responsibility, or are entirely or partially deprived of capacity to act) or by a *Social Welfare Center* if the child's parents are unknown (Art. 3). According to Art. 13(1) of the 1993 Civil Registries Act,²² determination of the child's personal name must be done within 30 days from the child's birth.

2. Change of personal name

2.1. Change of personal name irrespective of the change of status

According to Art. 6(1) of the Law on personal names, every person has a right to change his/her personal name. Child's personal name can be changed upon a request lodged by the *child's biological parents*, or *child's adoptive parents*, or *child's guardian* with the approval of the competent Social Welfare Center (Art. 7(1)). If the child's parents are not married, child's personal name can be changed upon a request lodged by a parent with whom child lives or who has parental responsibility of the child, with the approval of other parent. If they both do not agree, the approval of a competent Social Welfare Center is needed. Only if it finds that the proposed change is in the interest of the child it will be accepted. The approval of the competent Social Welfare Center is not needed if the domicile of the other parent is unknown, or if he/she is deprived of parental responsibility or entirely deprived of legal capacity, or when judicial decision on partial deprivation of legal capacity expressly states that he/she is not entitled to take any legal action in connection to the status (Art. 7(3-4)). If the child is older than 10 years of age his/her consent is needed.

According to the provisions of the Law on Personal Name, right to change a personal name is also subject to certain exceptions. Thereby, change of personal name will not be authorised if the proposed name „offends and endangers rights and freedoms of other people, legal order and public moral or if the proposed name does not constitute personal name within the meaning of the Law on Personal

22 Zakon o državnim maticama, NN RH 96/93, 76/13.

Name“, or if an applicant is a person against whom criminal proceedings are being conducted for a criminal offence prosecuted *ex officio* (Art. 8).

2.2. Change of personal name in connection with the change of status

Possibility of changing a personal name in connection with status is anticipated by several legal acts – the Family Law Act and the Law on Personal Name with respect to future or ex spouses, the Life Partnership Act with respect to future or ex registered partners, the Law on Personal Name with respect to the child whose parenthood (motherhood or fatherhood) is determined before he/she attained 18 years, and the Family Law Act and Law on Personal Name with respect to the adopted child.

According to Art. 30 of the Family Law Act, future spouses may agree: that everyone keeps his/her own surname or to take as a common surname surname of one of them. They may also agree to take as a common surname both of their surnames or to add other spouse's surname to his/her surname, in which case they must decide which one of their surnames will come first and which one second. In case of marriage annulment or divorce each ex spouse may retain a surname that he/she had at the time of termination (Art. 48) but, according to Art. 5 of the Law on Personal Names, there is also a possibility of returning to the surname previously held after the breakdown of marital ties. To that end statement must be given in front of Civil registrar within one year from the date of divorce. After the expiration of this period such change of personal name is possible only in an ordinary procedure for the change of personal name.

With regard to the change of personal name of registered partners, which is governed by Art. 38 of the Life Partnership Act, registered partners may choose between the same options as the future spouses. In case of the annulment or termination of life partnership each of ex registered partners may retain a surname that he/she had at the time of termination of the life partnership (Art. 24).

According to the Law on Personal Name, in case of a child whose parenthood (motherhood or fatherhood) is determined before he/she attained 18 years, parents may agree on a new personal name, through the statement given in front of Civil registrar or Social Welfare Center or competent Court. This statement must be inscribed in Civil registry records. If the child is older than 10 years he/she must consent to the change of personal name (Art. 4).

Determination of a personal name of the adopted child is governed by the Family Law Act. According to Art. 198, adoptive parents determine the adoptee's personal name. The adoptee acquires common surname of his/hers adoptive parents or, in case they don't have a common surname, it is determined in com-

pliance with the Law on Personal Names. Also, if the competent Social Welfare Center finds that it is in the interest of the adoptee, the adoptee is entitled to keep his/hers earlier personal name or to just add adoptive parents' surname to his/hers earlier name. If the adoptee is older than 12 years of age he/she must consent to the proposed change of personal name.

3. Protection of personal name

Until 2005 and the new Law on Obligatory Relations²³ infringement of the right of personality was considered a part of right to compensation of an immaterial damage, but was not covered by the definition of the term immaterial damage.²⁴ New Law has changed this situation and today infringement of the right of personality as an immaterial damage is expressly defined and regulated. According to Art. 19(1-2) of the Law on Obligatory Relations „every person has a right of protection of his/hers personal rights“, personal name being explicitly stated as the one of them. Thus, infringement of an individual's right to bear a name or unlawful use of personal name creates a right to an action for cessation of the offence and for damages in torts (Arts. 1099-1106).

III. PRIVATE INTERNATIONAL LAW ASPECTS

In private international law sphere situation does not exactly correspond with the one in substantial sphere. There is no choice of law rule which is specifically dedicated to the law applicable to personal name in Croatian PIL. Namely, 1991 Private International Law Act (hereafter: PIL Act),²⁵ which is a common heritage of all former Republics of Yugoslavia, does not contain an express provision related to either personal rights or a right to personal name. Additionally, doctrinary approach is inconsistent which causes uncertainty in respect to application of certain provisions which are used instead to settle this question.²⁶

1. Determination and change of child's personal name

With regard to the determination of the name of the child at birth as well as the change of the child's last name in case of recognition of paternity, legitimization, establishment of paternity or maternity of an illegitimate child, contesting

23 Zakon o obveznim odnosima, NN RH 35/05, 41/08, 125/11, 78/15.

24 Radolović, A.: Pravo osobnosti u novom Zakonu o obveznim odnosima, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 27, br. 1, 2006, p. 152 (hereafter: Radolović, 2006).

25 Zakon o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima, NN RH 53/91.

26 Dika, M./Knežević, G./Stojanović, M.: Komentar zakona o međunarodnom privatnom i procesnom pravu, Beograd, 1991, pp. 126, 131.

marital paternity or maternity, primarily applicable is the common *lex nationalis* of parents and children. If they are nationals of different countries, law of their common *lex domicilii* applies. If they have no common nationality or domicile but any of them is national of Croatia, Croatian law applies. Finally, if none of them is national of Croatia, the national law of the child will be applied (Art. 40).

Change of personal name as a consequence of adoption is governed by the law that regulates the effects of adoption, which prescribes common *lex nationalis* as a primary connecting factor. In case where there is no common nationality it is governed by the law of the state in which they are domiciled. If the adopter and the child are nationals of different states and have no common domicile, Croatian law is applicable if any of them is national of Croatia. Finally, if none of them is national of Croatia, national law of the child will be applied (Art. 45).

2. Determination and change of an adult's personal name

The uncertainty mentioned above is evident, especially, with regard to the change of a last name in connection to a marital status change. Namely, in cases of nullity of marriage, divorce or the termination of marriage due to the death of one of the spouses which according to some authors should be governed by provisions of Art. 38 PIL Act (the law applicable to personal relationships of spouses after termination or declaration of nullity of marriage) there is also an opposite view. Some other authors believe that it should be governed by provisions of Art. 14 (law applicable to the status). Pursuant to the latter view, grammatical interpretation of the expression „personal relationships“ points to „relationships that arise simultaneously for both spouses and concern both of them“.²⁷ Thus, this article should not be applied to status questions concerning only one spouse. On the other hand, none has been said on the application of Art. 36 which determines the applicable law to personal effects of marriage. Does it also cover a change of personal name or not? However, prevailing view is that the change of a last name of the future spouses is governed by the provisions of Art. 36, which prescribes the law of their common nationality as a primary connecting factor. In case they don't have a common nationality, the law of their common domicile applies. If there is no common nationality nor a common domicile, applicable is the law of the state in which they had their last domicile. In an absence of any of the respective connecting factors, Croatian law applies.

Change of personal name of registered partners is not even anticipated since the respective Law dates back to 1982 and is, with minor redactions, only accepted into Croatian law in 1991.

²⁷ *Ibidem*.

3. Protection of personal name

Protection of personal name in internationally „coloured“ cases depends upon the type of infringement. If the case concerns an unauthorised use of someone's personal name Art. 146 of Croatian Penal Code applies.²⁸ In case of claim for damages, according to Art. 28 of Croatian PIL Act, *lex loci delicti commissii* or *lex loci damni* applies, depending on what is more favourable for the injured person.

4. Recognition of foreign established personal names

Registrar's acts drawn up by foreign authorities will generally be recognised (except when they offend public policy) but practice of Croatian Civil registries shows that in number of cases registrars ignore private international law attribute of the case or, if they take it into an account, they tend to connect it with civil status (Art. 14 PIL Act) and only rarely to marital status (Art. 36 PIL Act).²⁹

According to Art. 6(5) of the Law on Personal Name, Croatian nationals who changed their name abroad may ask for its inscription in Civil registry (no need to initiate procedure for a change of personal name) under the condition that they don't use their earlier name in legal affairs since they acquired a new personal name.

IV. 2015 DRAFT PIL ACT

Behind the 2015 Draft PIL Act there are some years of work and discussions. Fortunately, since it allowed some ideas to mature and evolve in the right direction. So it was with regard to personal name. Namely, Croatian legal doctrine has never before given an answer on the characterisation of the name and it was necessary to establish first how should it be characterised. If it is characterised as a status question, as is the case in most of the European countries,³⁰ it would imply an application of the national law of the individual or the law of the State of his/her residence/domicile. If it is tied to the law applicable to the situation giving rise to the acquisition or change of personal name it would imply submitting the individual to different applicable laws depending on the family relationship at issue and consequently endangerment of the stability of

28 Zakon o kaznenom postupku, NN RH 125/11, 144/12, 56715, 61/15.

29 See: Župan, M.: Normiranje mjerodavnog prava za osobno ime – novina hrvatskog Zakona o međunarodnom privatnom pravu, u: Deskoski, T. (ur.): Recent trends in European Private International Law – Challenges for the national legislations of the South East European countries, Skopje, 2011, p. 183.

30 Rossolillo, op. cit., pp. 8-13, Rossolillo (2009), op. cit., p. 143.

the name itself.³¹ Having in mind that „the trend existing in many legal orders, is to overcome the principle that the husband's/father's name is transmitted to the wife and child“ so „the name loses its function as an expression of a family link“,³² the initial inclination was towards the characterisation of the personal name as a status question but was followed by the new dilemma – whether to adopt a general provision for status questions with the direction towards either national law or law of the state of domicile, or to adopt a separate legal category and a separate provision for personal name.³³

First doctrinary attempt to offer some „new solutions for the old problems“, including right to personal name, dates back to 2001. Namely, group of authors from Faculty of law in Zagreb offered their Thesis for the new PIL Act.³⁴ Personal name was characterised as a status question and consequently systematized with other personal rights.³⁵ Applicable law for personal name was dealt with in Art. 18. According to this article, determination of personal name is governed by the *lex nationalis*, while change of personal name due to the change of marital status is governed by *lex nationalis* of one of the spouses or Croatian law, if at least one of the spouses has his/her habitual residence in Croatia. Protection of personal name is governed by the *lex loci delicti commissi*. With the exception of its last paragraph, this particular thesis has been accepted as a platform for further discussions in the 2010 Draft for the new Croatian PIL Act. Due to the fact that it is of an utmost importance in CIEC Conventions³⁶ and all the benefits it offers to the parties and the public authorities having to deal with the determination and change of personal name,³⁷ scientific working group³⁸ has decided to

31 Rossolillo (2009), op. cit., p. 145.

32 *Ibidem*.

33 For comparative overview of different legal systems see: Župan, op. cit., pp. 183-184.

34 Sajko, K./Sikirić, H./Bouček, V./Babić, D./Tepeš, N.: Izvori hrvatskog i europskog međunarodnog privatnog prava (sa sudskom i arbitražnom praksom i tezama za Zakon o međunarodnom privatnom pravu), Informator, Zagreb, 2001, pp. 255-340.

35 *Ibidem*, pp. 274-284.

36 Convention no. 4 on changes of surnames and forenames (Istanbul), 4. 11. 1958., Convention no. 14 on the recording of surnames and forenames in civil status registers (Bern) 13. 11. 1973.

Convention no. 19 on the law applicable to surnames and forenames (Munich) 5. 11. 1980.

Convention no. 31 on the recognition of names (Antalya) 16. 11. 2005.

More about it see in: Lehmann, M.: What's in a name? Grunkin-Paul and beyond, Yearbook of Private International Law, Vol. 10, 2008, pp. 153-155.

37 Kropholler, J.: Internationales Privatrecht, Mohr Siebeck, Tübingen, 2001, p. 325, Rossolillo (2009), op. cit., p. 57.

38 Prof. Krešimir Sajko, prof. Hrvoje Sikirić, prof. Vesna Tomljenović, prof. Vilim Bouček, prof. Ivana Kunda, prof. Davor Babić, prof. Mirela Župan, prof. Ines Medić.

go on with nationality as primary connecting factor. One of the proposals that stood out the most came by prof. Župan in 2012. For the sake of clarity we will just transpose it here in their original form.

1. The name of a person shall be governed by the law of the State whose nationality he/she possesses. In case of change of nationality, the law of the State of new nationality applies.

2. Without prejudice to Art. 1, spouses may, before or after celebration of marriage, declare that their names will be governed by: the law of the State whose nationality one of them possesses, or Croatian law, if one of them has his habitual residence there. If the declaration is given after the celebration of marriage, it has to be notarised.

3. Without prejudice to Art. 1, holders of parental responsibility may, in front of Civil Registrar, declare that the the child's surname will be governed by: the law of the State whose nationality one of the parents possesses; Croatian law, when one of the parents has his habitual residence there. If the declaration on the change of surname is given after the issuance of birth certificate, it has to be notarised.

4. In order to produce effects, choice made in accordance with the previous paragraph of this Article, if concerning the change of surname of the minor aged 10 or more, must be approved by the minor if he/she is capable of expressing his/her opinion.

5. Protection of personal name is governed by the law applicable to protection of the right to identity.

Newest, 2015 Draft of Croatian PIL Act³⁹ approved by the governmental working group came with the following solution:

1. The name of a person shall be governed by the law of the State whose nationality he/she possesses.

2. If marriage is celebrated in Croatia, spouses may agree that their names are governed by the law of the State whose nationality one of them possesses or Croatian law if at least one of them has his/her habitual residence in Croatia.

3. Holders of parental responsibility may, in front of civil registrar, declare that the the child's name will be governed by the law of the State whose nationality one of them possesses or Croatian law if at least one of them has his/her habitual residence in Croatia.

³⁹ Which has been made public in July this year. Dostupno na <https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=3787>.

V. SUGGESTIONS FOR CONSIDERATION

As has already shown, Croatian substantive law on personal name may be described as rather liberal law. There are very few limitations with regard to the determination or change of personal name. Some of the provisions which were causing problems in practice are abandoned⁴⁰ but there is still room for improvements. Namely, there are different age limits for the child's acquiescence to change of personal name. In ordinary procedure child must be 10 or older while in case of the adoption adoptee must be 12 or older. There is no mention of the maturity of the child or his/her mental capacity or the duty to take into an account younger child's opinion. We see no reason for such different treatment. Moreover, we believe that there should be no age limit since every child is different and should be scrutinised on an individual basis. We support this view with the views expressed in the General Comment No. 12, of the Committee on the Rights of the Child, which discourages the introduction of age limits, either in law or in practice, that restrict the child's right to participation in decision-making. According to this Commentary, views of the child must be „given due weight in accordance with the age and maturity of the child“.⁴¹ So, the age by itself does not necessarily provide guidance as to children's level of understanding. Many very young children can display a high level of maturity.⁴² To conclude, the greater the impact on the life of a child, the more important it is to ensure that an appropriate assessment of the child's age and maturity has been undertaken.

With regard to their surname, registered partners may choose between the same options as the future spouses and they may retain their surname after the termination of their partnership but they do not have the option to return to their earlier surname at some later time under the more favourable conditions, as ex spouses do. We believe they should be given the same possibility.

Some of these omissions are due to the fact that both the Life Partnership Act and the Family Law Act are enacted few years after the Law on Personal Name. Thus, it is necessary to reconcile the Law on Personal Name with these acts. Unfortu-

40 For example, provision which required public announcement of the application for a change of personal name and the reasons stated therein which was heavily criticised from the protection of privacy point of view, especially from the transsexual community which repeatedly reported occurrence of discrimination and abuse as a consequence of its publicity. There were number of articles in the newspapers witnessing this problem.

41 General Comment No. 12 (2009), The Right of the Child to be Heard, CRC/C/GC/12,1 July 1009, p. 8-9.

42 Landsdown, G.: Every Child has the Right to be Heard – A resource guide on the UN Committee on the Rights of the Child General Comment No. 12, Unicef, 2011, p. 37. Also: Landsdown, G.: Can you hear me? – The right of young children to participate in decisions affecting them, Bernard van Leer foundation, The Hague, 2005.

nately, existing Proposal for the amendments of the Law on Personal Name⁴³ is so far limited to the more favourable change of surname of registered partners after the termination of their partnership and to the change of the child's name proposed by child's parent. In the first case Proposal anticipates that ex registered partners may return to their earlier surname by giving a statement to the Civil registrar within one year from the date of termination of their partnership (Art. 1). In the later case it was necessary to reconcile with Art. 100 of the Family Law Act which requires legal representation of the child (guardian *ad litem*) since it concerns essential personal rights of the child. Proposal anticipates that it is for the court to decide on the proposed change in a case when parents cannot agree on it. Having in mind that „being identified with a certain name in some ways shapes one's personality and identity, so that, once this identification has occurred, it would be in contrast with a fundamental right of the individual to subsequently deprive him or her of the name in question“⁴⁴ it might be worth considering whether this representation should be extended to all cases involving a change of a child's name irrespective of the applicants' agreement especially due to the fact that the relevant age for taking into an account the child's view is set rather high. One might claim that it could overburden the courts with trivial issues but, in our view, any right considered fundamental (especially involving a child) requires enhanced level of protection.

With regard to private international law aspects it is necessary to consider two things: national traditions and idiosyncrasies⁴⁵ on one side and the requirements of the EU law on another side. Namely, it is undisputed that Member States have jurisdiction over matters of civil law and also the right to adopt laws with a view of protecting their culture and their languages as a matter of public policy⁴⁶ but the primacy of EU law means that the Member States must ensure that their national laws do not infringe any rights guaranteed to citizens of the EU by the EU law.⁴⁷ Thus, when exercising given discretion Member States should respect the EU law. Or, in a words of AG Jääskinen - There is a need to protect the Union's rich heritage, but such efforts should not affect the rights of the Union's citizens disproportionately. Nevertheless, it is left to the national court to apply the proportionality test to determine whether the national measure is too strict.⁴⁸

43 Nacrt prijedloga zakona o izmjenama i dopunama Zakona o osobnom imenu, RH Ministarstvo uprave, Zagreb, prosinac 2014, retrieved from <https://uprava.gov.hr>, 12. 5. 2015.

44 Rossolillo (2009), op. cit., p. 143.

45 Which are allowed to co-exist for as long as they do not breach the ECHR obligations, as confirmed in Case No 71074/01 *Mentzen v Latvia*, EctHR, 7 December 2007.

46 Opinion of AG Jääskinen in *Runevič-Vardyn*.

47 Case C-135/08 *Janko Rottman v Freistaat Bayern*, ECLI:EU:C:2010:104.

48 Opinion of AG Jääskinen in *Runevič-Vardyn*, para. 84. Also para. 91(3) of the Judgment. For detailed explanation of this case see: Dagilyte, E./Stasinopoulos, P./Łazowski, A.: The

So what are the rights guaranteed to the citizens of the EU by the EU law?! The answer may be inferred from the present CJEU case law which, generally speaking, confirms that national rules may constitute an obstacle to exercising free movement rights.⁴⁹ *Konstantinidis* has taught us that the right to have one's name spelt in accordance with one's wishes is a constitutional tradition of the Member States and a means to ensure the bearer's dignity, moral integrity and sense of personal identity and as such have to be respected.⁵⁰ *Garcia Avello*, sometimes understood as about recognition of the name given at birth, even though it actually concerns a name change, requires different situations not to be treated in the same way.⁵¹ *Grunkin Paul* shows that that even if a measure itself is not discriminatory, it can still infringe the general principle of equal treatment. Even where a person has only one nationality, his or her home State may not refuse to recognize a name change by the State in which he or she is born and resides.⁵² More specific, although in this particular case nationality was not an issue, there was a discrimination based on residence.⁵³ *Sayn-Wittgenstein* showed that having retrospectively to erase a component of a name has the potential of creating various personal and professional inconveniences.⁵⁴ Finally,

importance of being earnest: spelling of names, EU citizenship and fundamental rights, Croatian Yearbook of European Law & Policy, Vol. 11, 2005, pp. 1-45.

49 Honorati, C.: Free circulation of names for EU citizens, *Il Diritto dell'Unione Europea*, No. 2, 2009, pp. 379-402.

50 Case C-168/91 *Christos Konstantinidis s Stadt Altensteig-Sandesamt and Landsratamt Calw-Ordnungsamt*, ECLI:EU:C:1993:115, para. 27 of the Opinion.

51 Case C-148/02 *Carlos Garcia Avello v Belgian State*, ECLI:EU:C:2003:539. Honorati, op. cit, p. 380. Ballarino, T./Ubertaini, B.: On Avello and other judgments: a new point of departure in the conflict of laws, *Yearbook of Private International Law*, Vol. 6, 2004, pp. 85-125.

52 Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul*, ECLI:EU:C:2008:559. See: Lehman, op. cit, p. 143.

53 Lehmann, op. cit., pp. 135-164. Thus, according to European law, individuals are entitled to recognition of the situation validly established in his/her State of origin. Or, in words of AG Sharpston - „Whilst the mere fact of choosing to use nationality rather than habitual residence (or *vice versa*) as a connecting factor does not itself offend against the requirement of equal treatment in Community law, a refusal to recognise the effects of measures which are valid under another legal system using another connecting factor does seem to offend“. Thus, decisions concerning names registered in other Member States must be accepted as „*faits accomplis*“. In our view, it is questionable whether it can be achieved without harmonisation of conflict rules. Kinsch, P.: Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law, in: Boele-Woelki, K./Einhorn, T./Girsberger, D./Symeonides, S.(eds.): *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, Eleven International Publishing, 2010, pp. 259-275. Also: Župan, M.: Izbor mjerodavnog prava u obiteljskim, statusnim i nasljednim stvarima, *Zbornik PF Sveučilišta u Rijeci*, Vol. 33, No. 2, 2012, p. 656.

54 Case C-209/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, ECLI:EU:C:2010:806.

Runevič-Vardyn stressed out that although the rights deriving from the status of citizenship are described as fundamental, there is an implicit conviction on behalf of the court that the right to a name and the right to family life for EU citizens are both subservient to constitutional traditions.⁵⁵

Reference can also be made to the right to private life, as granted by Art. 8 of the European Convention on Human Rights,⁵⁶ Art. 7 of the EU Charter of Fundamental Rights⁵⁷ and Art. 7(1) of the UN Convention on the rights of the child.⁵⁸ Namely, the right to private life has been interpreted to include names and there is a vast amount of ECtHR case law regarding the matter.⁵⁹ From the private international law perspective maybe the most interesting cases are those which concern the right to maintain a name – *Burghartz*,⁶⁰ *Mentzen*,⁶¹ *Tekeli*⁶² and *Daróczy*.⁶³ Even though it was not the ECtHR's primary consideration, these judgments show that the right to maintain a name that has become a part of the personal identity of the individual has its place under the European Convention.⁶⁴ Thus, despite their sovereignty with respect to the regulation of personal names, States cannot disregard the importance of a name as an element of self-identification and self-determination of the individual.⁶⁵ In cases in which name has been used for a long period of time and has become a part of the subject's personal identity, compelling the individual to change or modify his/her name or forbidding the use of that name might be considered disproportionate interference with his/her private or family life. Hence, there is no obligation for contracting states to secure

55 Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilnius miesto savivaldybės administracija and Others*, ECLI:EU:C2011:291. See: Dagilyte *et alii.*, op. cit., p. 37.

56 Retrieved from http://www.echr.coe.int/Documents/Convention_ENG.pdf, 10. 3. 2016. There is no explicit reference to the right to personal name in the Covention, but the jurisprudence of the ECtHR proves that right to personal name falls within the parameters of the right to family life, guaranteed in Art. 8 of the ECHR.

57 Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>, 10. 3. 2016.

58 Retrieved from <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, 10. 3. 2016.

59 Case No 16213/90 *Burghartz v Switzerland* (22 Feb. 1994) – surname is an inherent part of a person's personal and family life. Case No 28957/95 *Christine Goodwin v United Kingdom* – a person's forename must be protected under Art. 8 ECHR.

60 Case No 16213/90 *Burghartz v Switzerland* (22 Feb 1994).

61 Case No 71074/01 *Mentzen alias Mencena v Latvia* (7 Dec 2004).

62 Case No 29865/96 *Ünal Tekeli v Turkey* (16 Feb 2005).

63 Case No 44378/05 *Daróczy v Hungary* (1 June 2008).

64 Rossolillo (2009), op. cit., p. 150.

65 *Ibidem*, p. 151.

continuation of a name in every case but there is an obligation for contracting States to „give prevalence to individual’s rights when State interference would seriously violate the individual’s personal identity, i.e. the name with which the subject already identifies“.⁶⁶

So, where does the officially proposed Croatian law (2015 Draft PIL Act) stands?!

According to Art. 18(1), „the name of a person shall be governed by the law of the State whose nationality he/she possesses“. Using a nationality as a connecting factor in name matters can symbolize a State’s interest to make sure that names are configured and acquired in a manner consistent with their own laws. But, the use of nationality as exclusive connecting factor can be problematic for a number of reasons. This solution must be read in conjunction with other relevant provisions of the Draft PIL Act, as well as with the existing European (case) law. According to Art. 3(2) lit. 1 of the 2015 Draft PIL Act, if a person holds multiple nationality, including Croatian, Croatian nationality prevails. Such solution directly contradicts with Arts. 18 and 20 TFEU and with the CJEU case law.⁶⁷ Dual nationals are undoubtedly in a different situation compared to single nationals since dual nationals can bear different names under different laws. Treating a request for the change of surname of a dual citizen equal to that of a „single citizen“ amounts to an unequal treatment⁶⁸ and consequently infringement of the EU law.⁶⁹ A right to acquire a name pursuant to another Member States’ law is sufficient to grant the concerned applicant a right to acquire that name in Croatia. Persons holding dual nationality, where one of them is Croatian, should also be able to have foreign law directly applied by Croatian authorities to their name acquisition. Same problem exists in case of multiple foreign nationalities since, according to Art. 3(2) lit. 2 of the 2015 Draft PIL Act, only the effective nationality will be considered relevant. Therefore, a person should be given a possibility to choose between the laws of any of the States whose nationality he/she possesses.

Art. 18(2) and (3) allows for limited freedom of choice (nationality or Croatian law if habitually resident there) in case of marriage celebrated in Croatia and for

⁶⁶ *Ibidem*, p. 152.

⁶⁷ See: Mansel, H.-P.: The Impact of the European Union’s Prohibition of Discrimination and the Right of Free Movement of persons on the Private International Law Rules of member States – With comments on the Sayn-Wittgenstein Case before the European Court of Justice, in: Boele-Woelki, K./Einhorn, T./Girsberger, D. & Symeonides S. (eds.): *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, Eleven International Publishing, 2010.

⁶⁸ Kupiers, J.-J.: *EU Law and Private International Law, The Interrelationship in Contractual Obligations*, Martinus Nijhoff Publishers, Leiden/Boston, 2012, p. 298.

⁶⁹ Confirmed by the judgment in *Garcia Avello*.

holders of parental responsibility but, since according to Art. 9(2) of the 2015 Draft PIL Act renvoi applies in name matters, this solution becomes questionable. Even more so if its application results with referral back to Croatian law, when Croatian substantial law applies. Fortunately, Croatian substantial law on personal names is liberal enough to accommodate variety of personal names but it is just a lucky coincidence and should not be relied upon. Instead, in name matters renvoi should be restricted and true choice of law enabled.

According to some authors, possibility of choice must also be given with respect to the consequences of parental recognition, establishment of paternity or adoption for the surname of children.⁷⁰ Taking into consideration Art. 42 (establishment and contestation of paternity),⁷¹ Art. 43 (validity of parental recognition)⁷² and Art. 44. (adoption) of the 2015 Draft PIL Act, it becomes obvious that Art. 18(3) covers the two previous situations but not the adoption. Namely, Art. 44(1) expressly states that the law applicable to adoption covers not only the conditions for establishment and cessation of adoption but also the effects of adoption. It might be worth considering whether such solution, with regard to acquisition of personal name, puts this category of parents/children in an unequal position due to their status.

There are also some other points which might be considered. Applicable law for change of surname of registered life partners seems to be overlooked. We see no obstacle to give them also the possibility to choose applicable law, either the same as is given to the spouses or through a special rule. If so, we would recommend the adoption of the same rule as suggested in Art. 5(3) of a Draft for a European Regulation on the Law Applicable to Names of Persons⁷³ - they should be given the opportunity to choose between the laws of any of the States

70 De Groot, G.-R.: Towards European Conflict Rules in Matters of Personal Status, 11 Maastricht J. Eur. & Comp. L. 115, 2004, p. 118.

71 Law applicable to establishment or contestation of maternity or paternity is the law which, at the time the court is seised, is

- the law of the child's habitual residence, or
- if it is in the best interest of the child, law of the State of the child's nationality or law of the State of nationality of the person whose maternity or paternity is being established or contested.

72 Law applicable to validity of parental recognition is

- the law of nationality or habitual residence of the child at the moment of recognition, or
- the law of nationality or habitual residence of the person who is recognising her maternity or his paternity at the time of recognition.

73 Working Group of the Federal Association of German Civil Status Registrars: One name throughout Europe – Draft for a European Regulation on the Law Applicable to Names, Yearbook of Private International Law, Vol. 15, 2013/14, pp. 31-37.

whose nationality one of them possesses and the laws of the states in which one of them has habitual residence.

In all cases in which choice is allowed it should be made in front of civil registrar (as in internal cases), and not notarised. Namely, notarisation is often connected with significant costs which could constitute an infringement of Community law.⁷⁴ Furthermore, change of name by the competent authority also seems to be overlooked. Even though it is a matter of public law and as such does not entail choice of law, having in mind our still strictly positivistic and formalistic legal approach it might be worthwhile considering to expressly state the abovementioned fact.

Finally, there is a question of recognition of personal names validly acquired abroad. Neither the actual PIL Act nor the 2015 Draft PIL Act contain respective special rule. However, according to Art. 6(5) of the Law on Personal Name, Croatian nationals who changed their name abroad may ask for its inscription in Civil registry (no need to initiate procedure for a change of personal name) under the condition that they don't use their earlier name in legal affairs since they acquired a new personal name. Such solution is more or less aligned with comparable solutions abroad.

VI. CONCLUSION

The sense of personal identity and uniqueness that a name gives us is at the heart of why names interest us and why they are important to us as individuals and to our society as a whole.⁷⁵ Despite their universality, there is a great deal of difference from one culture to another in how names are given. Choice of names may be particularly sensitive for immigrants since naming customs reflect deeply held values.

Two aspects are important in the legal regulation of personal names: the person's right to self-realisation and right to the inviolability of family and private life on the one hand, and public interest in the preservation of the national language for the future generations, on the other. There is also a social control exercised by the laws governing names. As a complex right, it is regulated by constitutional, civil, and administrative laws. But the question remains, how to reconcile national constitutional values with the EU legal order. The CJEU has not taken a standpoint on whether it is better to do this through more liberal recognition rules, flexible substantive rules or choice of law rules. Whichever approach we

74 De Groot, *op. cit.*, p. 117.

75 Deluzain, H.E.: Names and Personal Identity, 1996. Retrieved from: www.behindthename.com/articles/3.php, 23. 8. 2016.

choose it might be complicated because public law aspects are intertwined with private ones and the interests of the EU are intertwined with those of the Member States. On the other hand, there is some tension between all those interests. Is there a solution tailored to fit all of them it is hard to say. So far it is still work in progress, on national and international level. But there is also another important aspect of the right to personal name that has to be remembered. Being a fundamental right, personal name requires even better protection as well as continuity. In most of the cases it will be respected either because of national law or an international obligation but, „in intrinsically democratic societies, the incentive for its protection is the right itself, and not international obligations“.⁷⁶ And that is what all legislators have to keep in mind.

⁷⁶ Lucas, E.: Dialogue of the Deaf Between Vilnius and Warsaw, *The Economist*, London, 10 February 2012.

PERSONAL NAME IN SERBIAN FAMILY LAW AND PRIVATE INTERNATIONAL LAW DE LEGE LATA AND DE LEGE FERENDA**

Introduction

Nomen est omen. This famous Latin dictum teaches that personal name is indeed the first and the most distinctive identification marks of every individual. One's name is closely associated with self-identity and serves the practical function of identification by friends, family, businesses, and the government.¹ The subjective importance of the personal name issue is indicated by the fact that even the persons who have the same name and/or surname (namesake) share the personal perception that the particular name/surname is exclusively his/her distinctive identification mark. The personal name is usually expected to remain unaltered during one's entire lifetime, except when an individual, as the "owner" of personal name, wants to modify it, by making some marital or family status changes or regardless of any of them. Although *prima facie* it seems to be entirely a private law issue, this matter is also permeated by the influence of public law to a certain extent. Hence, in the modern globalized society, it is not always easy for a personal name to withstand cross-border challenges due to differences in the substantive and private international law of every national legal system. Therefore, this paper provides a general overview of the Serbian legal system on the issue of determining and changing the personal name as it was presented during the 4th Balkan Conference in 2016.² For that reason, the

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1 K. Snyder, *All Names Are Not Equal: Choice of Marital Surname and Equal Protection*, Washington University Journal of Law & Policy, Vol. 30, 2009, p. 561.

2 The 4th Balkan Conference was held on 14th April 2016, at the Faculty of Law, University of Niš, Serbia.

rulings of the *ECtHR* and the *CJEU* on this subject matter will remain outside this paper.

Before getting into a more detailed discussion on the provisions regarding personal name in Serbian legislation, we have to make a few general remarks. At the *substantive law* level, the personal name matter is not regulated by a subject-specific legislative act but, rather, by respective provisions of the 2005 Family Act.³ This approach of a national legislator suggests that this issue is considered to be part of family relations, even in cases when the change of a personal name does not depend on any marital or family status changes. When it comes to the Serbian *Private International Law* system, the issue of personal name is not regulated at all, given the fact that the Private International Law Act (1982)⁴ remains silent on this matter. Therefore, in the quest for the light at the end of the tunnel, we were left with the need to fill in the legal gaps. Meanwhile, the work on the new Serbian Draft PIL Act has been finished. The subject matter of personal name has been minutely regulated in a separate chapter of the Draft.

In that respect, the author of this paper first aims to critically examine the rules on the personal name at both substantive and procedural law level, particularly in terms of their effectiveness which in certain cases leaves room for improvement (1). Then, the author turns to the PIL aspects of the personal name *lege lata* (2). Afterwards, she analyzes the current challenges of the Serbian PIL in terms of personal name (3) and gives the summarized overview of the solutions which could resolve *de lege ferenda* all the problems (4). In the end, the author expresses her opinion on the current state of affairs in the Serbian PIL (5).

1. Personal Name in Serbian Family Law

In Serbian family law, the personal name matter is regulated *sed materiae* by the Family Act. In addition, the Civil Registries Act⁵ contains certain territorial jurisdiction criteria for the inscription of a personal name, including the time-limits and the rules on the records in the civil registries kept in diplomatic and

3 Porodični zakon (Family Act), *Službeni glasnik RS* (Official Gazette of the RS) 18/2005, 72/2011, 6/2015.

4 Zakon o rešavanju sukoba zakona sa propisima drugih zemalja (Act on Resolution of Conflict of Laws with Regulations of Other Countries), *Službeni list SFRJ* (Official Gazette of the SFRY) 43/82, 72/82 43/82, 72/82), *Službeni list SRJ* (Official Gazette of the SRY) 46/96, *Službeni glasnik RS* 46/2006.

5 Zakon o matičnim knjigama (Civil Registries Act), *Službeni glasnik RS* 20/2009, 145/2014.

consular offices as well as the rules governing the entries on the basis of foreign extracts from civil status records.⁶

As Serbian legal theory has already noted, the personal name can be defined as a immaterial and personal right of every citizen which is acquired by birth and protected from the moment of entry into the civil register. Although it can be changed, everyone has a duty to use his/her registered personal name.⁷ Since different legal rules apply depending on the circumstances of the case, we can discuss the determination of the child's personal name and, on the other hand, all the changes which subsequently may ensue as the consequence of marital and family status changes or irrespective of these alterations.

1.1. Determination of the child's name and surname

In Serbian law, the parents are entitled to choose the name and surname for their child jointly (Art. 344 para. 1 of the Family Act) within 30 days following his birth (Art. 54 para. 1 of the Civil Registries Act). When only one parent is alive, or if the other parent is not in a position to exercise parental responsibility, or is unknown,⁸ the other parent is free to decide on the child's name and surname within the same time-limit.

The parents usually consider their child's *name* very carefully, mostly guided by its meaning. Sometimes they are inspired by their family or national tradition or they are driven by the uniqueness of the name. While choosing the child's name, the *public policy clause* is the only limitation of their party autonomy. In that regard, a child cannot have a defamatory name, a name that insults the morality, or a name that is contrary to the customs and opinions of the community (Art. 344 para 3 of the Family Act). However, the assessment whether the name of

6 It should be noted that there are several bylaws regulating the keeping of the civil registries and the forms of civil registries (Uputstvo o vođenju matičnih knjiga i obrascima matičnih knjiga - Instruction on keeping the civil registries and the forms of civil registries, *Službeni glasnik RS* 109/2009, 10/2010, 25/2011, 5/2013); the change the content of extracts forms of civil registries (Uputstvo o načinu sprovođenja izmene sadržaja obrazaca izvoda iz matičnih knjiga - Instruction on the change of content of extracts forms of civil registries, *Službeni glasnik RS*, 79/2006) as well as the regulation on uniform methodological principles for keeping the civil registries (Uredba o jedinstvenim metodološkim principima za vođenje matične evidencije - Regulation on uniform methodological principles for keeping the civil registries, *Službeni glasnik RS* 6/2007, 11/2007, 51/2008, 38/2010, 54/2010) but their provisions are not crucial for this paper. Therefore, these bylaws will not be considered here.

7 M. Draškić, *Porodično pravo i prava deteta* (Family Law and the Rights of the Child), Belgrade, 2009, p. 70. *Draškić* also points out that some words may be added optionally to the recorded personal name but only for the purpose of use in everyday life (e.g. a parent's name; pseudonym; academic rank; words "senior" or "junior", etc).

8 *Ibid*, p. 71.

the child is contrary to the public policy is actually carried out on the basis of the civil registrar's discretionary power. Consequently, this appraisal is rather laconic, sometimes leading to the refusal to enter the child's name in the civil registry as a result of arbitrariness.⁹

When the civil registrar refuses to enter the name of the child as being contrary to the public policy, the Social Care Centre will ask the parents to reconsider it. If they fail again to choose an appropriate name, the Centre will determine the child's name. Furthermore, the Centre is entitled to do the same if the parents are not alive, or if they are unknown, or if they did not choose the child's name within the time limit of 30 days, or if they cannot reach an agreement on the child's name (Art. 344 para. 4 of the Family Act).

Concerning the *surname*, the child can acquire the surname of one or both parents, depending on their choice, while the siblings cannot have different surnames (Art. 345 paras. 1 and 2 of the Family Act). The powers of the Social Care Centre in terms of determination the child's surname come to the fore when the parents are not alive, if they are unknown, or if they cannot reach an agreement on that matter (Art. 345 para. 3 of the Family Act).

As for the *moment* when the child's personal name is to be recorded, it has already been noted that the Civil Registries Act imposes the time limit of 30 days following the child's birth. The same time limit applies to the duty of the parents to report to the civil registrar the fact that they have failed to come to an agreement on the child's personal name.¹⁰ In case this time limit has expired, the child's personal name shall be entered into the birth register on the basis of the Social Care Centre's decisions (Art. 25 of the Civil Registries Act). Bearing in

⁹ According to the data of the Municipal registry office in Belgrade (Municipality of Zvezdara), the civil registrars *did not* find that some rather unusual names (such as Sultan, Pahuljica (Snowflake in English), Mašinka (Submachine gun in English) or Tarzan) are contrary to the public policy. The civil registrars in the Municipality of Savski venac in Belgrade shared the same opinion in regard of the names such as Kiša (Rain), Oprolečovana ("a girl made by spring" in English) and Narta (although he was not sure about its meaning, the registrar found that it is not a defamatory name). The civil registrars in the Municipal registry office in Novi Sad also took the liberal approach concerning the entry of the names Kenan and Sulejman (which have foreign origin) given to the children whose parents were Serbian nationals living in Serbia. In the similar circumstances, the civil registrars in Niš approved the entry of the foreign name Bekam in the birth registry. Nevertheless, *a completely opposite position* was taken in the case when the civil registrar in the Municipal registry office of Zvezdara in Belgrade refused to enter the name Alesandro (which also has foreign origin) in the birth registry as being contrary to the public policy because *the parents did not intend to live abroad*. On the ground of that fact, the civil registrar considered that the foreign name would cause problems to the child.

¹⁰ Art. 54 para. 2 of the Civil Registries Act.

mind the fact that the child's birth has to be reported in 15 days after the child's birth,¹¹ the foregoing provision on the time limit to register the child's personal name may give rise to the situation where the child may be left without having his/her personal name officially recorded for 15 days.

The requirements governing the *territorial jurisdiction to record the child's personal name upon birth* are regulated by the Civil Registries Act. Depending on the circumstances of the case, three criteria can be applied. In typical situations when the parent(s) are known, the birth of the child is to be entered into the birth registry kept in the *child's birthplace* (Art. 49 para. 1). Yet, in special circumstances, when the parents are unknown, the entry shall be made in the birth registry kept in place where the child *was found* (Art. 50), while the fact of the birth of a child who is born in a means of transport during mother's travel will be entered in the registry kept in the place *where the mother's journey ended* (Art. 49 para. 2). Fact of the birth in the first case (when parents are known), as well as for the child whose parents are unknown *has to include the child's personal name* (Art. 45 para. 1). What distinguishes these two cases is the circumstance that the record of the child's personal name in the first case is to be made upon the *request* of child's parents, whereas in the second case (when they are unknown), the record can be entered only upon the *decision* of the Social Care Centre. If the child is without parental care, the fact of birth has to be entered into the birth registry kept in the place of *child's residence* at the time of instituting the recording proceeding when the prescribed 30 days time-limit has expired (Art. 51).

1.2. Change of the Surname due to Marriage or Family Status Changes

According to the Family Act, the change of the surname following certain marital or family status changes may entail changing the surname of the *child* and the surname of the *spouses*. As for the jurisdiction to decide on the change, several situations are possible.

The first one involves the change of *child's surname when the adoption was granted*. Pursuant to Art. 325 of the Family Act, the Social Care Centre brings a decision on the new registration of birth of the adoptee which replaces the data on the (biological) parents. The Civil Registries Act envisages that this decision is *as a legal ground* for the adoptee's registration in the birth register. Moreover, it is expressly envisaged that the Centre's decision on the new registration of adoptee's birth *shall contain the information on the name of the child* (Art. 52 of the Civil Registries Act).

11 Art. 48 para. 1 of the Civil Registries Act.

The second case concerns the *entering into marriage* when the *civil registrar who conducts the marriage ceremony is competent* to decide on it and to record the spouses' surnames (Art. 292 para. 1 of the Family Act).¹²

The last situation could refer to *all other cases* giving rise to the change of surname. In that regard, the municipal administrative authority of the *applicant's domicile or residence has territorial jurisdiction* to decide on the change (Art. 350 para. 1 of the Family Act). If the municipal authority accepts the request, it has a duty to inform the competent registrar thereof in order to enter the change of the personal name into the registry of births and marriages. The same authority has the duty to inform the agency keeping the records on citizens' domicile on the approved change. In case the request has been denied, the person who submitted the request for a change of personal name may complain against the municipal authority decision to the Ministry of Labour, Employment, Veteran and Social Affairs (which is responsible for family protection) within 15 days from the day applicant received the decision.¹³

At the *substantive law level*, the *child's surname* can be changed when the maternity or paternity is established or successfully contested,¹⁴ as well as after adoption. In the later case, the adoptee acquires the surname of one or both adoptive

12 This is the civil registrar in the municipality on whose territory they have decided to enter into marriage (by submitting a written or oral request)

13 Art. 350 of the Family Act.

14 In one of the most interesting case brought before the Ombudsman, the mother wanted to change the daughter's surname when the girl was 4 years old. Since the girl's father died and the mother remarried afterwards, the mother took the surname of her new spouse. Then, she wanted to change her daughter's surname so that it corresponds to the mother's new family name. The civil registrar brought the decision allowing the change of the girl's surname, concurrently noting that the mother had the right to file such a request on the basis of the fact that she solely exercised parental responsibility as the girl's father died and considering that she was her daughter's legal representative. The civil registrar concluded that the parents are entitled to change the child's personal name because they have the right to determine it upon the child's birth. In his decision, the Ombudsman took a stand that the civil registry office has harshly breached the *child's right to personal identity* because the competent authority failed to appoint a collision guardian to the girl, ignoring the conflict of interests between the mother and her daughter resulting from the child's right to preserve the identity. Hence, the civil registry office violated the Convention on the Rights of the Child, the Serbian Constitution as well as the Family Act. Further on, the Ombudsman noted that the change of the child's surname acquired upon birth is legally allowed by the Family Act only after maternity or paternity has been established or contested, as well as after adoption. The change of a child's surname for other reasons are not legal but rather unlawful, unjustified and unnecessary discontinuation of the child's family ties with a parent or ancestors and relatives. The recommendation and opinion of the Ombudsman is available at http://www.ombudsman.rs/attachments/1037_Microsoft%20Word%20%20preporuka%20promena%20prezimena%204.pdf (12.06.2016).

parents since the Family Act recognize only adoption establishing a permanent child-parent relationship (Art. 349 paras. 1 and 2). Likewise, the *annulment of adoption* may have reverse effect on the once changed surname of the child (following adoption). According to the Family Act, the former adoptee may in this case decide to take back his/her previous surname.¹⁵ In all the cases when the child who is capable of reasoning has reached the age of ten, his consent to the change of personal name is regarded as the right of the child (Art. 346 para. 2).

When it comes to the *surname of spouses*, the change can occur as a result of entering into marriage or after the termination of marriage. In the first case, the spouses are treated equally; during the marriage ceremony, each of them may declare before the civil registrar that he/she has decided to keep his/her surname or to take the other spouse's surname instead of his/hers, or to add the surname of the other spouse to his/her surname or to add his/her surname to the other spouse's surname (Art. 348 para. 1 of the Family Act).

Nevertheless, *after the termination of marriage*, the spouse who changed his/her surname by entering into marriage may within a period of 60 days take back the surname he/she had before concluding the marriage (Art. 348 para. 2 of the Family Act). Within this time limit of 60 days it is very easy to change the surname since the spouse only has to submit the request along with the judgment on the termination of marriage. Contrary to this simplified procedure, when this time limit expires, the legal ground for the change of surname *alters*. In this situation, the ex-spouse can take back his/her surname only under the *more restrictive conditions* prescribed for the change *irrespective* of any marriage or family status alterations, even though the reason for changing the surname remains the same - *the termination of marriage*. These provisions may be subject to criticism bearing in mind that the termination of marriage is usually a highly stressful period when the change of the surname is not a priority (even in case of divorce by consent). In this respect, the time limit of 60 days, which starts from the moment when the judgment becomes final, is fairly short. Consequently, it should be prolonged to at least six months,¹⁶ or even one year, as it was done in some countries in the region.¹⁷

15 Art. 349 para. 1(3) of the Family Act.

16 Zakon o ličnom imenu Federacije Bosne i Hercegovine (Personal Name Act of the Federation of Bosnia and Herzegovina), *Službene novine Federacije BiH (Official Gazette of the Federation of Bosnia and Herzegovina)* 7/12. This Act prescribes the time limit of six months after the dissolution of marriage (Art. 12 para. 2).

17 Zakon o osobnom imenu Republike Hrvatske (Personal Name Act of the Republic of Croatia), *Narodne novine* (Official Gazette) 118/12. The time limit is one year after the termination of marriage (Art. 5 para. 1). On the other hand, Zakon o ličnom imenu Crne Gore (Personal

1.3. The Change of Personal Name Irrespective of Marriage or Family Status Changes

The change of personal name which does not stem from marriage or family status changes may entail the change of name, or the change of surname, or change of entire personal name. Pursuant to Arts. 346 and 347 of the Family Act, every person who has reached the age of 15 years and who is capable of reasoning has the right to change his/her personal name as long as he/she may provide evidence (*certificates*) that no criminal proceedings are being conducted against him for a criminal offence prosecuted *ex officio*, or if he is not convicted for a criminal offence prosecuted *ex officio*,¹⁸ or if he does not intend to avoid an obligation by changing his/her personal name or if the changed name is not contrary to the public policy.

Concerning the *jurisdiction* to decide upon the request for the change of a personal name in this case, the same criteria of *applicant's place of domicile or residence* apply as well as the same rules on an *appeal*, including *duties* to inform other authorities on the approved change, as in situations of the changes following the termination of marriage and some family status changes (when Art. 350 para. 1 of the Family Act applies).¹⁹

2. Personal Name in Serbian Private International Law

2.1. International jurisdiction to record the personal name and to decide on its change

In terms of international jurisdiction to enter the personal name into civil registries and to decide upon its change, the 1982 PIL Act does not contain any provision whatsoever. According to the general rule, the legal gaps regarding international jurisdiction are to be filled by the provisions on the territorial jurisdiction.²⁰ In the context of personal name, this means that all previously

Name Act of Montenegro), *Službeni list Crne Gore (Official Gazette)* 47/2008 does not envisage the time limit for the change of surname following the termination of marriage (Art. 13).

18 If a person is convicted for a criminal offence prosecuted *ex officio*, he/she does not have the right to change the personal name until the sentence has been executed, or while the legal consequences of the conviction still last (Art. 347 para. 1(2) of the Family Act).

19 *Supra* 1.2.

20 *Zakon o parničnom postupku* (Litigious Proceeding Act), *Službeni glasnik RS* 72/2011, 49/2013, 74/2013 and 55/2014. It should be noted that the Litigious Proceeding Act is the only legislative Act expressly introducing this rule, but only for the jurisdiction of courts (Art. 26 para. 2). However, the civil registry office which has the subject-matter jurisdiction over personal name issue is an administrative authority. Since the General Administrative Proceeding Act (*Zakon o opštem upravnom postupku*, *Službeni glasnik RS* 33/97, 31/2001 and

mentioned criteria regulated by the Civil Registries Act (concerning the *entry* of the personal name) and the Family Act (concerning the decision on its *change*) come to the fore.

From the perspective of *foreign nationals*, some of the Family Act provision on the territorial jurisdiction for the change of the personal name could be rather challenging. As previously mentioned, the municipal administrative authority of the *applicant's* place of *domicile or residence* is competent to rule upon all the changes (except in case of entering into marriage). These two criteria could lead to the conclusion that the foreign nationals also enjoy the right to apply for the change of personal name as long as they have a domicile or residence in Serbia. Yet, this inference could be misleading because, as we have seen, the authority which allowed the change of a personal name *has a duty* to inform *the authority keeping records on domicile of citizens*. The term "citizens" would be understood as referring to Serbian nationals exclusively. Despite the fact that this Family Act *rule* could be considered as rather *protective* and justified when residence is the main jurisdictional criterion, it can be too constraining in cases the key criterion is one's domicile.

In this respect, if a foreigner has an intention to reside in Serbia for more than 24 hours, it shall be considered that he has established his *residence* in Serbia.²¹ Bearing in mind that this provision could leave the door wide open for the evasion of law, the Family Act protective rule is highly appreciated.

Yet, when the major jurisdictional criterion is the applicant's *domicile*, the overall impression is different. The requirements which have to be met for a foreign national to establish his/her domicile in Serbia are very strict. Pursuant to the Foreigners Act,²² the Ministry of Internal Affairs can grant a domicile permit²³ to a foreigner: *a)* who has been living *continuously* in Serbia for more than *five years* on the basis of a temporary stay permit (stay longer than 90 days); or *b)* who has been *married for at least three years* to a national of the Republic of Serbia or to a foreigner who has a domicile permit; or *c)* who is a *minor*, temporary staying in Serbia, if one of his parents is a national of the Republic of Serbia or a foreigner who has a domicile permit, with the consent of the other parent; or *d)* who has his *origins* in Serbia. Exceptionally, a domicile permit may also be

30/2010) as well as the Family Act and the Civil Registries Act do not regulate this problem, the foregoing provision of the Litigious Proceeding Act could be applied by analogy to all legal gaps in the field of international jurisdiction.

21 Art. 74 para. 1 of the Foreigners Act.

22 Zakon o strancima (Foreigners Act), *Službeni glasnik RS* 97/2008.

23 The Foreigners Act uses the notion "permanent residence" (*stalno nastanjenje*), but it actually has the same meaning as a domicile. For the sake of clarity, we use the term „domicile“.

granted to foreigners whose temporary stay has been permitted, but only if it may be justified by humanitarian reasons, or if the interests of the Republic of Serbia prevail (Art. 37 para. 2 of the Foreigners Act).

By far the simplest way of obtaining the domicile permit is afforded to a foreigner who has his origins in Serbia since it is the only case when no additional conditions are stipulated. In all other cases, foreign nationals face difficult legal (cumulative) requirements in order to obtain a domicile permit (and an identity card) in Serbia.²⁴ Hence, despite the fact that they actually live in Serbia for many years, intensively striving to get integrated into the Serbian society, some of them may never file for a domicile permit or they simply do not fulfill the conditions.

The rigidity of the Foreigners Act requirements can be analyzed especially in the situation when the foreigner is required to have been *continuously* living in Serbia for more than *five years* on the basis of a temporary stay permit.²⁵ In that regard, a foreigner is considered to have been living in Serbia continuously *even if he is absent* from the Republic of Serbia for *multiple periods of up to ten months*, or for a one-term absence of up to six months within a period of five years.²⁶ Regarding the possibility to be absent from Serbia for *multiple periods of up to ten months*, let us assume that a foreigner, who has been living in Serbia for *five years*, spends *two months* abroad *every year* visiting his/her family or friends, going on vacation/holiday, or for business purposes (sporadically). If *only on one occasion*, the foreigner extends his/her two month stay abroad for *a single day*, his/her stay in Serbia will not be considered as a continuous stay because the permitted 10 months of absence has been exceeded. Irrespective of the actual reason for the prolonged stay abroad, the foreigner has exceeded the allowed multiple periods of absence within the prescribed five year-period (for a single day over the ten-month limit!) As a result, the domicile permit will not be granted. Thus, although *factually* domiciled in Serbia, the foreigner could be unable to have this circumstance officially recognized.

All of these legal circumstances confirm that a foreign national has to climb the steep stairs of the Foreigners Act provisions in order to officially establish his/her domicile in Serbia. Consequently, in terms of international jurisdiction concerning a change of personal name, it is highly unlikely that a foreigner will take opportunity to evade the law on the basis of his domicile permit in Serbia. All things considered, if we keep in mind that the domicile actually reflects the

24 This holds true even in exceptional cases when the foreigner has to be granted a permit for his temporary stay in Serbia whereas the Ministry has to be driven by humanitarian reasons or by the special interests of the Republic of Serbia.

25 See condition a) above.

26 Article 37 para. 4 of the Foreigners Act.

individual's interest to get integrated in certain society, the Family Act *protective rule* which insists on a Serbian nationality of the applicant could be criticized as redundant. In addition to changes of the personal name arising as a matter of choice (irrespective of any legal relations), this Family Act rule precludes even those changes resulting from the termination of marriage.²⁷ Hence, citizenship alone should not preclude a foreign national to change his/her name in Serbia if the difficult test of the Foreigners Act requirements has been already passed.

Contrary to these cases, the international (territorial) jurisdiction of a civil registrar to decide on the change of spouses' surnames *in the course of marriage ceremony* is laid down in reasonable and flexible terms. Every civil registrar competent to conduct this ceremony also has the jurisdiction to decide on this change, irrespective of whether the prospective spouses have been issued a domicile or residence permit.

2.2. Applicable law

On the issue of the law applicable to personal name, the 1982 PIL Act remains silent. It does not envisage a special conflict rule on this matter, nor does it prescribe provisions regulating the scope of applicable law for any cross-border civil or commercial relation. This matter is addressed only in the Commentary on the Private International and Procedural Law Act²⁸, but merely in *obiter dictum* manner. Relying on the authority of this "Holy Scripture" of the Serbian PIL, the theory of *rattachment accessoire* should be applied in order to determine the law applicable to personal name in most of the cases, although the civil registrars would in practice (mechanically) apply *lex fori*, although they are entitled to determine the content of foreign law.²⁹

27 According to Art. 77 para. 2 of the Civil Registries Act, if a foreigner who is born abroad acquires Serbian nationality, his/her personal data shall be recorded into the civil registry of births and marriages.

28 M. Dika, G. Knežević, S. Stojanović, *Komentar Zakona o međunarodnom privatnom i procesnom pravu* (Commentary on the Private International and Procedural Law Act), Beograd, 1991.

29 M. Živković, *Lično ime u međunarodnom privatnom pravu i rešenja u Nacrtu novog ZMPP Republike Srbije* (Personal Name in Private International Law and the Solutions in the New Draft PIL Act of the Republic of Serbia), Zbornik radova Pravnog fakulteta u Nišu (Collection of Papers of the Law Faculty in Niš), 2014, p. 96. Regarding the determination of the content of foreign law, the civil registrars can seek the information from the Ministry of Foreign Affairs (Art. 153 of the General Administrative Proceeding Act).

2.2.1. Law applicable to determining the child's personal name and its change following family status changes

The applicable law for the *child's personal name* is, according to legal theory, covered by the conflict rule on the legal relations between the child and parents. It implies the application of *lex nationalis communis*, *lex domicilii communi*, *Serbian law* if one of the parents or the child is a Serbian national, or the application of *lex nationalis of the child* as a last resort (Kegel's ladder; Article 40).³⁰ Although the Commentary does not elaborate on the law governing the change of child's personal name following the family status changes (except for adoption), it seems consistent to apply again the same conflict rule (on the legal relations between the child and parents). Still, it should be emphasized that in case of determining the *personal name of a newborn*, the child's nationality has no significance since it is not acquired yet. This means that the applicable law would depend only on the *nationality* or the *domicile of the parents*, unlike the situations when the *change of child's surname follows the family status changes*. Although the same conflict rule provision applies, in the last case, the child has already acquired a Serbian or foreign nationality, which would affect the final outcome in terms of applicable law.

When it comes to the *adoptee and the change of his/her surname*, it should be governed by the law applicable to effects of adoption: *lex nationalis communis*; *lex domicilii communi*; *Serbian law* if one of the adopters or the adoptee is a Serbian national or, finally, *lex nationalis* of the child (Kegel's ladder; Art. 45).³¹

2.2.2. Change of surname following marital status changes

The law applicable to the change of surname following marital status alterations is not clearly specified even in the legal doctrine. If the change is a consequence of *the celebration of marriage*, the civil registrars would most probably apply *lex fori*. Despite the fact that the rules of Serbian Family Act are very liberal in this case,³² it is not always easy to anticipate the prospective recognition of that change in the State of foreign spouse(s) origin.³³ The Family Act provision which envisages the duty of the civil registrar to recommend to future spouses to agree on their surnames³⁴ could be even more helpful if the registrar would

30 M. Dika, G. Knežević, S. Stojanović, *op.cit.*, p.134.

31 *Ibid.*, p. 149.

32 See *supra* 1.2.

33 M. Živković, *op.cit.*, pp. 101-102.

34 Art. 297 para. 2 of the Family Act.

(even unofficially) suggest them to inquire about the possibility of the change being recognized abroad.

Concerning the impact of *termination of marriage* on spouses' surnames,³⁵ the problem may be solved in two ways. The first solution is to apply Article 38 of the PIL Act, which regulates spouses' personal relations after the termination of marriage. Actually, this provision only refers to the application of Art. 36 of the PIL Act governing the relationship between the spouses (Kegel's ladder: *lex nationalis communis; lex domicilii communi; last common domicile; Serbian law*). Still, there is a second standpoint which advocates the applicability of the law governing the capacity of natural persons (Art. 14).³⁶ This theory has found its *ratio* by relying on the interpretation of the notion of personal relationships for the purpose of Arts. 38 and 36. According to the adherents of this approach, the law applicable to relations between the spouses only governs effects that arise for both spouses at the same time and concern both of them.³⁷ Since the change of surname usually concerns only one of them (mostly women), this theory precludes the possibility of applying the law applicable to spousal relations.

However, it should be noted that the same argument has not been pointed out in case of change of child's personal name following family status changes. Regardless whether it appears as a consequence of paternity/maternity issues or an adoption, the change of child's personal name always concerns *only the child*. It does not affect the parent or the adopters. *Mutatis mutandis*, the same conclusion holds true in terms of former spouses, which justifies the applicability of the law governing spouses' personal relationships after the termination of marriage.

2.2.3. Change of personal name irrespective of marital or family status changes

The issue of the law applicable to the change of personal name irrespective of marital or family status changes remains even outside the suggestions of the Serbian PIL theory. According to Art. 2 of the 1982 PIL Act, if there is no provision on the applicable law, the provisions and principles of this Act, the principles of domestic legal system and the principles of Private International Law shall apply by analogy. Considering that nationality is the prevailing connecting factor for

35 The Family Act defines the matrimonial disputes as proceedings for determining the existence or non-existence of marriage, as well as for the annulment and divorce of marriage (Art. 210 para. 1).

36 T. Varadi, B. Bordaš, G. Knežević, V. Pavić, *Međunarodno privatno pravo* (Private International Law), Beograd, 2010, p.126. These authors advocate this approach for the matter of personal name in general.

37 M. Dika, G. Knežević, S. Stojanović, *op.cit.*, p.131.

the status relations in the 1982 PIL Act,³⁸ it would probably fill the legal gap in this situation. However, only the Serbian nationality would be taken into consideration since the territorial jurisdiction criteria (domicile/residence) could be established only in cases involving domestic nationals (as already explained).³⁹

2.3. Inscription and recognition of personal names determined or changed abroad

In general, foreign registrar's acts will be treated as a legal ground for an entry of the data on the birth or marriage into domestic civil registries. Only if the extract from the foreign civil registry cannot be obtained, the entry will be made upon the decision of the competent court (Art. 76 of the Civil Registries Act).⁴⁰ This provision *unduly* departs from the general rule of the Serbian PIL Act on the exclusive subject-matter jurisdiction of Serbian courts on the recognition of foreign court decisions (Art. 86 of the Civil Registries Act). Moreover, when the change of personal name is a consequence of a changed marital or family status which was the subject of a judicial or administrative proceeding, there is a lack of provision which would expressly condition the inscription of a new personal name in a civil registry by the previous judicial recognition of a decision which served as a legal ground for personal name's alteration.

As for a *change of surname in case of entering into marriage abroad*, the inscription is supposed to be made on the basis of the foreign registry's extract. When it is not possible to determine the surname of the spouses in this way, the civil registrar in Serbia shall try to get the information from the foreign authority before which the marriage was entered into or, failing that, on the basis of the spouses' statement (Article 79 of the Civil Registries Act).

The last and the most significant provision concerning the inscription based on the foreign registry's extract refers to *the child's personal name*. In that regard, when the personal name of a child recorded in a foreign birth certificate is not determined in accordance with Serbian substantive law rules, the registrar will ask the parents to make the necessary change pursuant to these rules (Art. 79

38 M. Stanivuković, M. Živković, *Međunarodno privatno pravo: opšti deo* (Private International Law: General Part), Beograd, 2015, p. 67.

39 See *supra* 2.1.

40 Serbia has ratified two CIEC conventions: the Paris Convention on the issue of certain extracts from civil-status records for use abroad (1956), *Službeni list SFRJ-Međunarodni ugovori* (Official Gazette of the SFRY - Supplement International Treaties) 9/1967 and the Vienna Convention on the issue of multilingual extracts from civil status records (1976), *Službeni list SFRJ-Međunarodni ugovori* (Official Gazette of the SFRY - Supplement International Treaties) 8/1991.

of the Civil Registries Act). As a matter of fact, this provision goes beyond the matter of inscription since it represents a *hidden unilateral conflict rule* (!) By making this conflict rule bilateral, we can conclude that the child's personal name is to be regulated by *lex nationalis*.

When the child born in marriage between a Serbian and a foreign national acquires the personal name abroad, the practice of our civil registrars is sometimes hard to understand and vindicate, especially when the parents entered into marriage in Serbia. In 2015, the civil registrar in Niš asked the child's mother to change her surname acquired by entering into marriage, in order to correspond to her minor daughter's surname, so that the daughter could acquire Serbian nationality. Notably, the marriage between the mother (Serbian national) and the father (Greek national) was celebrated in Serbia (Niš), which makes this case even more incomprehensible. During the marriage ceremony, the mother chose to add the spouse's surname to her maiden surname. Her choice was in line with the Serbian Family Act, which means that the registrar applied *lex fori* on the issue of surname. A couple of years later, the daughter was born in Greece (where the family lived after the celebration of marriage) and her surname was determined pursuant to Greek law, as the feminine form of patronymic surname. The daughter was a Greek national. When the application for Serbian nationality was filed, the civil registrars factually overturned the record made in *their own* registry by demanding from the mother to change her surname so that it completely corresponds to her daughter's surname. After the approval of this imposed change of mother's surname (officially explained as her own wish), the daughter acquired Serbian nationality. What went wrong in this case? While striving to apply the Family Act provision which implies that the child must have the surname of one or both of the parents, the civil registrar could not ask from the parents to change the child's surname in accordance with Serbian substantive rules (based on the mentioned *hidden unilateral conflict rule*) since the daughter had only Greek nationality. The daughter's feminine form of patronymic surname did not correspond to the surname of any of the parents. That fact obviously inspired the civil registrar to ask the mother to change her surname. Yet, if the registrar wanted to apply Serbian substantive law rules on the child's surname (on the basis of the *hidden unilateral conflict rule*), he should have demanded the change of the daughter's surname after her acquisition of Serbian nationality. Then, he could have found legal ground in Civil Registries Act and this unilateral conflict rule. Still, if Serbia were an EU member, this would open a problem of the personal name of children who have foreign nationality besides the nationality of the *forum* State. This issue was already perceived in

the famous case of *Garcia Avello*.⁴¹ In the context of Serbia's intensive negotiation process for the EU membership, the impact of the *ECJ* rulings has to be taken into account.

3. Current challenges of the Serbian PIL in terms of personal name

As we have seen, the 1982 PIL Act does not contain any special rules on the personal name. Hence, this subject matter was completely left to be regulated by the technique of filling the legal gaps (the theories of *rattachment accessoire* or *lex nationalis*). In practice, the legal gaps leave plenty of room for the mechanical application of *lex fori*. However, none of these approaches can respond to the current PIL challenges surrounding the issue of personal name.

Considering the lack of *international jurisdiction provisions* (which are replaced by the territorial jurisdiction criteria), due to the legislator's insistence on the term "citizen", foreign nationals domiciled in Serbia have no possibility to request the change of personal name, until they acquire Serbian nationality (except in case of entering into marriage). It applies even when they have fulfilled difficult legal requirements from the Foreigners Act and have already got integrated in the Serbia society to a considerable degree.

Concerning the *applicable law*, the hidden unilateral conflict rule of the Civil Registries Act is only one legal ground which we can rely on in the process of determining the child's name, regardless of the PIL theory efforts to find other solutions. In all other cases, these theoretical suggestions could be taken into consideration for bridging the lack of special conflict rules but not without any reservations. In that respect, the *rattachment accessoire* doctrine is not even consistently accepted in the Serbian PIL theory. A more important counterargument could be found in the legal nature of the personal name *as the core* of every individual. By insisting on this theory, we are *denying* the independent legal nature of personal name as a *self-standing right*.⁴² Consequently, the application of *rattachment accessoire* principle would set in motion the double-track mechanism for no good reason. Every time when the personal name has to be determined or is requested to be changed, the civil registrar has to check whether there is a bilateral treaty which envisages the conflict rule governing *parents-child re-*

41 C-148/02, *Carlos Garcia Avello v Belgian State*, Judgment of the Court of 2 October 2003. For comprehensive analysis of this case, see in this Conference Proceedings - S. Vrellis, *Garcia Avello: 13 years after Pretexts and Arbitrariness*, pp. 5-17.

42 M. Mitić, *Pravo na ime* (Right to a Name), *Anali Pravnog fakulteta u Beogradu* (Annals of the Faculty of Law in Belgrade - Belgrade Law Review), Vol. 5-6, 1969, p. 602.

lations (Slovakia,⁴³ Hungary,⁴⁴ Czech Republic,⁴⁵ Mongolia,⁴⁶ Poland,⁴⁷ Greece,⁴⁸ France,⁴⁹ Romania,⁵⁰ Bulgaria,⁵¹ Russia and Ukraine⁵²); *effects of adoption* (France⁵³); *personal relations between (former) spouses* (Czech Republic,⁵⁴ Slovakia,⁵⁵

43 Art. 28 of the Agreement on the Regulation of Legal Relations in Civil, Family and Criminal Matters between the SFR Yugoslavia and Czechoslovakia SR (1964) - (Official Gazette of the SFRY - Supplement International Treaties 13 / 1964).

44 Art. 32 of the Agreement on Mutual Legal Relations between the SFR Yugoslavia and the People's Republic of Hungary (1968), amended (1986) - (Official Gazette of the SFRY - Supplement International Treaties 3 /1968; with amendments - Official Gazette of the SFRY - Supplement International Treaties 1 / 1987).

45 Art. 28 of the Agreement on the Regulation of Legal Relations in Civil, Family and Criminal Matters between the SFR Yugoslavia and Czechoslovakia SR (1964) - (Official Gazette of the SFRY - Supplement International Treaties 13 / 1964).

46 Art. 34 of the Agreement on Legal Assistance in Civil, Family and Criminal Matters between the Socialist Federal Republic of Yugoslavia and the Mongolian People's Republic (1981) - (Official Gazette of the SFRY - Supplement International Treaties, 7 / 1982).

47 Art. 28 of the Agreement on Legal Relations in Civil and Criminal Matters between the FPR Yugoslavia and PR Poland (1960) - (Official Gazette of the FPRY - Supplement International Treaties 5 /1963).

48 Art. 22 para. 1 governs only the relations between an illegitimate child and the father. The Convention on Mutual Legal Relations between the FPR Yugoslavia and the Kingdom of Greece (1959) - (Official Gazette of the FPRY - Supplement International Treaties 7/1960).

49 Art. 10 and 11 para. 2 of the Convention on Jurisdiction and the Applicable Law in the Matters of Personal and Family Law between the SFR Yugoslavia and the Republic of France (1971) - (Official Gazette of the SFRY, Supplement International Treaties 55/72).

50 Art. 26 of the Agreement on Legal Assistance between the FPR Yugoslavia and the Romanian People's Republic (1960) - (Official Gazette of the FPRY - Supplement International Treaties 8 /1961).

51 Art. 38 but only regarding the relations between an illegitimate child and the father. Agreement on Mutual Legal Assistance between the FPR Yugoslavia and the People's Republic of Bulgaria (1956) - (Official Gazette of the SFRY - Supplement International Treaties 1/1957).

52 Art. 27 concerns only the relations between an illegitimate child and the parents. Agreement on Legal Assistance in Civil, Family and Criminal Matters between the FPR Yugoslavia and the USSR (1962) - (Official Gazette of the FPRY, Supplement International Treaties 5/1963).

53 Art. 14 of the Convention on Jurisdiction and the Applicable Law in the Matters of Personal and Family Law between the SFR Yugoslavia and the Republic of France.

54 Art. 24 of the Agreement on the Regulation of Legal Relations in Civil, Family and Criminal Matters between the SFR Yugoslavia and Czechoslovakia SR.

55 Art. 24 of the Agreement on the Regulation of Legal Relations in Civil, Family and Criminal Matters between the SFR Yugoslavia and Czechoslovakia SR.

Mongolia,⁵⁶ Hungary,⁵⁷ Poland,⁵⁸ Romania,⁵⁹ France⁶⁰); if not, they should resort to the 1982 PIL Act conflict rules.

The problem of conflict of laws goes along with the *lack of party autonomy* since none of the relations within which the mentioned theory subsumes the issue of personal name is submitted to the choice of applicable law (legal relations between parents and children; effects of adoption; personal relations between (former) spouses). The fact that party autonomy is *largely recognized at the substantive law level* (limited only by the vague public policy clause) brings the *contradictions of PIL solutions* even more to the fore. The party autonomy at the PIL level cannot be banished simply due to the fact that the matter of personal name interferes with the public law elements. It is a separate status issue of crucial importance as the element of personality.⁶¹ *Insisting on the nationality* as a leading connecting factor for the personal name is not overly tenable. Moreover, the general rules of Serbian PIL which govern the conflict of nationalities are too restrictive.⁶² Thus, there is no room left for a person, possessing the nationality of the *forum* State as well as some other, to seek the application of the law of his national State in which he/she is more integrated. The same *ratio* goes for the applicant's free choice between *nationality* as a connecting factor and *territorial* connecting factors (*lex domicilii* or the law of the State of habitual residence). To keep it simple, we may speculate who is more eligible to decide whether someone's personal name should correlate with one's *interest for stability* (nati-

56 Art. 30 of the Agreement on Legal Assistance in Civil, Family and Criminal Matters between the Socialist Federal Republic of Yugoslavia and the Mongolian People's Republic.

57 Art. 27 of the Agreement on Mutual Legal Relations between the SFR Yugoslavia and the People's Republic of Hungary.

58 Art. 26 of the Agreement on Legal Relations in Civil and Criminal Matters between the FPR Yugoslavia and PR Poland.

59 Art. 23 of the Agreement on Legal Assistance between the FPR Yugoslavia and the Romanian People's Republic

60 Arts. 5 and 8 of the Convention on Jurisdiction and the Applicable Law in the Matters of Personal and Family Law between the SFR Yugoslavia and the Republic of France.

61 A. Bucher, *L'enfant en droit international privé*, Genève-Bâle-Munich, 2003, p. 240.

62 Art. 11 of the 1982 PIL Act envisages the principle of exclusivity of Yugoslav (*sic!*) citizenship. If a person who is not a "Yugoslav" citizen has two or more foreign citizenships, he shall be considered for the purpose of application of this law to have the citizenship of the State of which he is a citizen and in which he is domiciled. If a person referred to in paragraph 2 above is not domiciled in any of the States of which he is a citizen, he shall be considered for the purpose of application of this law to have the citizenship of the State of which he is a citizen and with which he has the closest connection.

onality) or *integration* (domicile/habitual residence)⁶³ than that person oneself. If a person enjoys the party autonomy at the substantive law level, he/she should not be completely deprived of the same right at Private International Law level.

4. The 2014 Draft PIL Act - *de lege ferenda* answers to the current challenges

The true nature of a personal name as a self-standing right was the prevailing standpoint in the decision of the Working Group to dedicate a special chapter to this matter in the 2014 Draft PIL Act. This issue has been systematized according to the idea of logical sequence of PIL legal parts.⁶⁴ First, the Draft deals with the *international jurisdiction* criteria (to enter the personal name of the child; to decide upon the parents' request on the change of the child's personal name/surname; to decide on the change of a surname following marital or family status changes; to decide on the request for the change of personal name irrespective of the marital or family status changes). Then, it regulates the *applicable law* (governing the determination and change of a child's personal name; the change of surname following marital or family status changes; the change of personal name irrespective of marital or family status changes). Further on, the Draft envisages the conditions for the *recognition of foreign decisions* concerning a change of a surname or personal name of a Serbian national, and, finally, it regulates the *protection* of the right to personal name.

The 2014 Draft PIL Act establishes the *jurisdiction* of Serbian civil registrars to enter the *personal name of the child* in the civil registry in the following cases: when the child is born or found in Serbia; when one of the parents is a national of Serbia at the time of instituting the proceeding; when the child is born in a means of transport and the mother's travel ends in Serbia (Art. 57 para. 1). These criteria actually correspond to the previously mentioned territorial jurisdiction criteria envisaged in the Civil Registries Act.

When it comes to the decision *upon the parents' request on the change* of the child's personal name irrespective of his/her family status changes, the jurisdiction lies within Serbian registrars if the child is a national of Serbia or was born in Serbia and is habitually resident in Serbia at the time of the submission of the request (Art. 57 para. 2). As we can see, in this case, the 2014 Draft PIL took quite a liberal approach which introduces the child's habitual residence as

63 On the conflict between these two interests in the EU PIL, see especially: A. Dutta, *Habitual residence versus nationality - In search of the European personal connecting factor in family matters*, in: *Private International Law in the Jurisprudence of European Courts - Family at Focus*, M. Župan (ed), Faculty of Law, Josip Juraj Strossmayer University, Osijek, 2015, p. 322.

64 M. Stanivuković, M. Živković, *op.cit.*, p. 24.

an alternative criterion. It reflects the idea of striking a balance between the interest of stability and the interest of integration (in the matter of international jurisdiction). The habitual residence of a child was chosen as a jurisdictional ground to decide on the *parents' request* because it was assumed that the entire family would be habitually resident in Serbia. However, it should be taken into consideration that the child may have the habitual residence independently of his parent's habitual residence (although such cases are rare). In that respect, this provision may be altered so that it refers to the habitual residence of a child and at least one of the parents (who are actually submitting the request), reducing in that way the chances that the jurisdiction becomes exorbitant.

In case of the *change of a surname following marital or family status changes*, civil registrars shall have jurisdiction if, at the time of the submission of the request or at the time of giving the statement, the person concerned is a national of Serbia or is habitually resident in Serbia, or if the Serbian authority has jurisdiction to conduct the marriage ceremony (Art. 57 para. 3). In this case, the habitual residence of the applicant provides for the opportunity that the foreign national could have his surname changed in Serbia as a result of the termination of marriage or due to the outcome of paternity or maternity issue or an adoption.

The *change of personal name irrespective of the marital or family status changes* shall depend upon the decision of Serbian registrars if the person concerned is a Serbian national or is habitually resident in Serbia for a period of *no less than five years prior to the submission of request* (Art. 57 para. 4). Bearing in mind that the change of personal name not resulting from any marital or family status change is the most challenging case, the habitual residence criterion is conditioned by its duration. Since the five-year period corresponds to one of the domicile requirements envisaged in the Foreigners' Act, the habitual residence criterion allows that even the foreigner who has not been granted the domicile permit can request the change of his personal name if he habitually resides in Serbia for five years (as a reasonable time period for this type of change). Unlike the domicile concept envisaged in the Foreigners' Act, the question whether the interruptions of the applicant's stay in Serbia could lead to the establishment of the habitual residence is a factual matter, which is subject to the civil registrar's free assessment, depending on the circumstances of every case.

As for the *applicable law*, the changes resulting from *adoption* are the only situation in which *rattachement accessoire* theory applies, while the *adoption annulment* effects on the personal name are left to the law of the State where the adoption was granted (Art. 59). In terms of the change of personal name *irrespective of marital and family status changes* Serbian law applies (Art. 60).

Limited party autonomy is introduced in case of determining the *child's personal name* when the choice can be made *with no constraints* between the States of person's nationalities because the principle of exclusivity of Serbian nationality and all other rules on the conflict of nationalities are abolished in this matter (Art. 58). Furthermore, when the changes of personal name *follow marital and family status* alteration, the applicant may choose between the law of his/her national State and the law of Serbia as the State of habitual residence of the spouse (entering into marriage, marital disputes) or the child (paternity/maternity issues). The rules on conflicts of nationalities are in this case also excluded. Although there is a possibility that one's personal name may not be recognized in his/her national State due to the choice of law that was made by a foreign national, the Working group regarded that the risk should be taken by the person himself/herself. What is missing in these provisions is the duty of the civil registrar to inform the parties on the possibility of a choice of law as it was regulated in the Draft for a European Regulation on the law applicable to names of persons.⁶⁵ As far as the 2014 Draft PIL is concerned, the duty of the civil registrar to warn the party about the possibility that his/her personal name may not be recognized in his/her national State could be also taken into consideration. This would not relieve the person of the risk but the party has to be informed as much as possible. Since this Draft introduces the new provision on determining the content of foreign law which allows that even a party may request information on foreign law from the Ministry of Justice or seek an expert opinion, it could be presumed that the party will obtain the relevant information timely (Art. 40 para. 4 of the Draft PIL Act).

In the matter of *recognition of foreign decisions* concerning a change of a surname or personal name, the 2014 Draft PIL Act regulates this matter only if the decision concerns a Serbian national. If the change of a surname *follows the change of a marital or family status*, it shall be recognized in Serbia if the foreign decision on the basis of which the change was made is recognized and if the decision on the change of personal name is not manifestly contrary to the Serbian public policy. On the other hand, the change of personal name of a Serbian national, made abroad *irrespective of the marital or family status* changes, shall be recognized in Serbia if the person concerned, at the time when the personal name was changed, was a habitually resident in the State where the change was made for a period no less than five years, provided that the conditions for such a change as envisaged under Serbian law have been met (Art. 61). The requirements of Serbian law which have to be met refer only to the applicant's age and to certain

⁶⁵ Art. 5 para. 6 of the Draft. Working Group of the Federal Association of German Civil Status Registrars, *One name throughout Europe - Draft for a European Regulation on the law applicable to names*, Yearbook of Private International Law, Vol. 15 (2013/2014), p. 35.

certificates (as previously explained).⁶⁶ Hence, the conditions for the recognition in this case are not too restrictive.⁶⁷

5. Conclusion

As we can see, the Serbian PIL system is currently on the crossroads. The 1982 PIL Act is still in force, while the new Draft PIL Act has been waiting to see the daylight since 2014, when the Working Group of the Serbian Ministry of Justice sent the final version to the Minister. The differences between their provisions in terms of governing ideas may actually be perceived on the issue of personal name. While the 2014 Draft PIL is striving towards a more intensive *international cooperation* by introducing the general principle of equal protection of all persons habitually resident in Serbia as well as adapting its provisions to the EU PIL, the 1982 PIL Act is much more tuned to *protect Serbian nationals*, regardless of whether they live in the country or abroad. In respect of the personal name matter, the legal solutions of the 2014 Draft PIL sometimes go ahead of their time, but it is considered to be proof of its quality rather than an objection. Besides, the 2014 Draft PIL provisions are far more reliable for the competent authorities and the parties, as the principle of legal certainty is finally introduced into this gray area (which remained outside the scope of the 1982 PIL Act). In order to make the much needed modernization of the Serbian PIL system, it is necessary to take the 2014 Draft PIL from the drawer and put it on the table for the last public consideration.

⁶⁶ See *supra* 1.3.

⁶⁷ The Working Group's leading idea was to harmonize the issue of recognition of personal name of Serbian national changed or determined abroad to the Judgment of the *ECJ* in the case *Grunkin-Paul* (Case C-353/06 Stefan Grunkin and Dorothee Regina Paul, Judgment of the Court (Grand Chamber) of 14 October 2008). About this case see M. Lehmann, *What's in a Name? Grunkin-Paul and Beyond*, Yearbook of Private International Law, Vol. 10, 2008, pp. 135-164.

PERSONAL NAME UNDER ALBANIAN LAW

I. The Right to a name under Albanian Legislation

Traditionally, the name is considered as an essential mean for the identification of persons in relation with other subjects of law and in relation with family, ethnic and national group of people. As a consequence the name (name and surname) is not only an element of personal identity, but also an element of social and family identity of individuals¹. The right to a name is characterised by both public and private elements. From one side, it is the need of the state to identify and individualise all its citizens, and from the other side, it is the interest of the individuals to be identified vis-a vis the other individuals in the society². According to the Albanian legislation, the name and the surname are elements of the civil status of a person, and they play an important role in the legal relations with other persons being it family members or outside family members³.

The right to a name is included under the personality rights. In that sense the name is considered as attached to personal identity. It enjoys the same characteristics as the personality rights, which means that it has a non-material personal content, it is not convertible with legal action, "*inter vivos*" and "*mortis causa*", and it cannot be prescribed. Moreover it enjoys "*erga omnes*" protection from everyone that tries to infringe the rights holder. By being closely linked with the person as part of its identity, the name cannot be change or lost "*ope legis*", against the will of the right holder, except in cases and based on the procedures explicitly foreseen in the law (eg: the case of change of surname "*ope legis*" after the dissolution of marriage).

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1 Giulia Rossolill "Personal name at the cross road, between private international law, international protection of human rights and EU law, Yearbook of Private International Law, Volum 11 (2009), pp 143-156.

2 According to French and Italian doctrine on the right to a name see: Tamburrino, Giuseppe, "Le persone fisiche", UTET, Torino, 1992, pp. 98-99.

3 Omari, Sonila, "Family Law", Tiranë, 2008, pp. 88.

The Albanian law contains some specific rules on the legal criteria and the procedures for the determination and the change of name and surname. The legal framework for the name and surname is provided by Civil Code⁴ (article 5), Family Code⁵ and the Law “On Civil Status⁶”.

According to Article 5 of the Family Code, every person (natural person) enjoys the right to a name and surname, which is protected “*erga omnes*”. The same right is guaranteed for the assumed name of a natural person.

The name is a crucial element for exercising other rights and for legal relation with other individuals. The Albanian Law (Family Code and the Law on Civil Status) provides the modalities for the determination of the name and the surname, the legal criteria, and the procedure of their initial registration in the birth certificate, its changes and correction, as well as the limitation of the rights of the individuals to choose, change and correct their own name.

Based on Articles 2 and 6 of the law “On civil status” the name and the surname (together with the personal identity number, sex, fatherhood and motherhood, civil status, domicile, residence, death, declare of absence and other facts⁷) are components of civil status⁸, that are used for the identification of the Albanian citizens, foreign citizens, or persons without citizenship with permanent or temporary domicile in the Republic of Albania. These elements of the civil status (legal facts) are equally important for the individuals and the state: individuals can use them to protect their subjective rights against state and other individuals; while state institutions can use them to efficiently exercise their powers (eg: tax and tariff collections)⁹. According to article 8 of the civil status law, name, surname, sex, motherhood, and fatherhood can be changed, extinguished, or transfer to the others only in cases and according to the procedures foreseen in this law and other special laws.

The right of every individual (person) to be identified by a name is guaranteed also by international convention ratified by the Republic of Albania. The Convention “On rights of the child”, approved by the General Assembly of the UN

4 Law Number 7850, date 29.07.1994 “On the Civil Code of the Republic of Albania” as amended.

5 Law Number 9062 date 8.5.2003 “The Family Code” as amended.

6 Law Number 10 129, date 11.5.2009 “On Civil Status” as amended.

7 Ethnicity is not required during the registration of the person. See the Constitutional Court Decision no.52, date 01.12.2011 on article 8 of Civil Status Act and the amendments made in 2013 in this respect.

8 The civil status imply the existance of those facts (circumstances foreseen by the law) that determine the status of the natural person as subject of law. With regard to civil status issue see: Nuni Ardian, “Civil law, General Part”, Tirana, 2011, pp. 123-124.

9 Ibid, p. 123.

in 20 November 1989, ratified by Albania in February in 1992, guarantees the right of every child to have a name and birth registration (article 7 of Conviction). Member states have the obligation to respect the right of child to preserve its identity, including nationality, name and family relations (article 8 of the Conviction). Moreover "*The International Pact on Civil and Political Rights*" act, approved by the General Assembly of the UN in 16 December 1966, also guarantees the right of every child to be registered immediately after his/her birth and to have a name (article 24/2 of the Pact). This Pact is ratified from the Republic of Albania in July 1991.

II. Acquiring and changing the name under Albanian law

According to the Albanian legislation, the name of individual is composed of name and surname which have to be expressed with single words.

a) The *name* represents the element of individuality and identification of the natural person against family members. As a rule, the name is determined by an agreement between parents. Traditionally, the last letter of the name distinguishes names according to their gender. As a rule, in the Albanian tradition, the names of females are finished with vowels different from the names of males. Names that are composed from two or more words are not allowed.

b) *Surname* represents the element that shows the identity of individual within the family group.

Usually the identification of individuals against other individuals is ensured through the use of name and surname at the same time. The acquisition of name and surname is determined according to the procedures foreseen by the law (Family Code and the Law on "Civil Status" in Albania").

Assumed Name (Nickname): Individuals have also the right to a nickname. While the former law on copyright and related rights"¹⁰, (article 4/26) define the nickname as "*fake name, chosen from the author when he/she does not like to be identified*", the new Act "On copyright and related rights"¹¹ does not provide for a definition. The nickname is more often used in literacy and artistic field. Nickname is chosen by the individual in order to be identified in a given social, cultural, artistic and professional environment. Unlike the name, which is not only a right but also an obligation for every individual and as a rule is acquired according to the criteria determined by the law, the selection and use of nickname is left with the person will. The nickname can only be used only in private relations, while in the relation with state, the use of name is obligatory. The right

10 Law no 9380 of 28.04.2005 "On copyright and related rights".

11 Law no 35/2016 of 31.03.2016 "On copyright and related rights".

of nickname enjoy the same legal protection as the right of name and it has the same characteristics as name.

A. The acquisition of name

The law on Civil Status obliges the parents or an authorised person to give name to the child at the moment of his birth and to register it at the birth certificate. The preparation the birth certificate and the registration of the name of the child will be done by the civil status employee based on the declaration of the parents (or the authorised person) on the birth of the child.

According to article 56 of Civil Status Law and the provision of Family Code, the name of child is determined based on the agreement of the parents. The law guarantees the right of the parents to be ones who can chose the child's name. In the decision Guillot against France (1996), the European Court of Human Rights considered the right of parents to choose the name of the child as "*personal and emotional aspect, of their private life*"¹². The right of parents to choose children's name is not limited. The Civil Status law provisions set the limits of the parent rights to choose the name of the children. Parents are not allowed to use any name that is part of "inappropriate names" list. A certain category of names that have bad connotation (discriminatory, immoral, and insulted), or are not easy to be pronounced are part of this list. The non-exhaustive list is approved with the Instructions of Minister of Interior based on the proposal of General Director of Civil Status (article 2/7 CSL). The civil status employee can refuse the parents' choice if it is part of this list. Such refusal can be challenged by the parents in the court (article 56/2 CSL).

In case of disagreement between parents on child's name, each of them has the right to address the court (article 221 of FC)¹³. If the court fails to reach an amicable solution between them, the court takes the decision based on the best interest of the child. The court plays the role of an intermedator between the parents and its intervention is justified by the need of protecting the best interest of the child.

In cases when only one of the parents is recognised or is legally capable for exercising the parenthood¹⁴, in this case the parental responsibility will be exercised

12 European Court of Human Rights, case Guillot v. France (52/1995/558/644), prg 40.

13 See article 221 of Law Number 9062 date 8.5.2003 "The Family Code" as amended.

14 One of the parents is incapable of carrying out their parental responsibility if he/she had died, is considered died by a court decision, does not have legal incapacity, is cases of absence ect. When a parent abuses their parental responsibility or shows grave negligence in its exercise, or by their actions create a harmful effect on the education of the child (article no. 228 of FC) or has lose their parental rights through a conviction for committing

by the parent that is legally recognised and has the right to take decision for the child including choosing his/her name.

In exceptional situation when none of the parents is present, in case of death, or in cases when they are not mentally capable, the name of the child is chosen by family members and other relatives. In both cases the name has to be registered in the birth certificate.

In case of an abandoned child where the identity of his/her biological parents cannot be found, the name and the surname of the child is chosen by the employee of the civil statues office in the place where the child is found (article 39/3 CSL). The name and the surname can be changed with the request of the child when he/she has the legal right to do so, or in cases when the parents are legally recognised.

Based on article 260/2 of FC, the adoptive child or the adoptees have the right to ask the court to change the name of the adoptive child. Changing the name of the child remains with court interpretation and evaluation. The obligation of court to change the name is questionable, as long as the law says that the court may change it". In this case the court is obliged to evaluate the request based on the best interest of the child. There is a general obligation deriving from article 2 of FC that equally applies to every one (including parents, state authority and courts) that in in any situation, in their decision they have to take into consideration the best interest of the child.

B. Initial determination (acquisition) of surname

Unlike the name the accusation of the surname cannot be done with an agreement/declaration but it is usually determined "*ope legis*" based on the family relation of the parents.

The FC set the modalities for the surname of children born during marriage (article 52 of FC) and children born outside wedlock (article 171). In both cases the surname is set based on the same principles: common agreement between parents and in case of disagreement, the child takes the surname of the father.

Surname of children born during marriage. Article 52 of FC foresees two possible scenarios for children born of a marriage: a) the situation when parents have common surname and b) situation when they have different surnames. The first scenario is the easiest one; the child takes automatically the common surname of the parents. The second scenario requires that based on equality

or collaborating in a criminal act towards their child, as collaborators in a criminal act performed by their child, or if they have been convicted of family abandonment, (article no. 223 of FC) etc. In these circumstances the parental responsibility is exercised by one parent.

of parties, the surname has to be set based upon their agreement. In this case the child might have either the surname of the father or of the mother. The only condition is that the same surname has to be applied to all their born children. In case of disagreement the law stipulates that the child will bear the father's surname. *In our view this automatic solution provided by the law does not rely completely with the provisions of article 220/1 of FC that highlight the joint exercise of parental responsibility.*

The surname of child born outside of wedlock. Article 171 of FC regulates the modalities of the surname given to child born outside the wedlock. The surname of the child born outside the wedlock will be determined after that maternity and paternity are determined according to the FC criteria. In the category of children born outside the wedlock we can distinguish three possible situations: a) the maternity and paternity is determined at the same time; b) only one of them is determined; c) one is determined later than the other, paternity is determined later than maternity.

Determination of both maternity and paternity at the same moment. In this case, the determination of the surname will be done based on the same modalities as in the case of child born of a marriage. The parents can decide by an agreement and in case of disagreement the surname of the father is given.

Recognition of one parent. In cases when only the maternity or paternity is determined, the child takes the surname of the one that is recognised the first to be the mother or the father. In most of the cases the maternity is determined the first. In case when the paternity is not decided, the child takes the surname of the mother. The question that arises in this situation is which surname of the mother he/she can have when the mother has one or more surname: family surname, surname of the current husband, ex-husband? The Family code does not give answer to this question, it does not say which surname to be used when the mother is married and has changed her family surname, or keeps the surname of her dead husband. In this case we suggest that the child takes the family surname of the mother (the surname she used when she was not married). The same solution is offered by Law On civil status of 2002¹⁵.

Late determination of paternity. As stated above, in cases when only the maternity is decided, the child takes the mother surname. If in a later stage the paternity is identified according to the filiation status foreseen in FC (voluntary recognition or legal recognition through court decisions), the question that arises is which surname will keep the child? In this case, there is possibility for agreement between parents, and in case of disagreement the surname of the father will be used. The Albanian court practice shows during the court hearing from the

15 See law on Civil Status 2002.

recognition of paternity, the issue of surname is brought as well. Once the court decides on favour of the recognition of paternity it can also accept the request for changing of the surname of the child and giving his/her father surname.

Surname of the adoptee. The child surname can also be changed because of the adoption. According to article 260/1 of FC, when the court decision on adoption becomes final, the surname of the adoptee will change as the adoptive parents' surname. In case the child is adopted by two parents, the modalities of article 52 of FC for child born during marriage will be applicable. The adoptee can have the parent's common surname, the surname chosen by an agreement, and in case of disagreement the father surname.

The surname of abandonat child. As in the case of name, the surname is set by the employees of civil status office located in the territory when the child was found. If in a later case the maternity of paternity is determined, based on article 39/3 of Law on Civil Status, the surname can be changed by the court based on modalities foreseen in article 171 of FC.

C. Surname of the Spouse

The marriage, its dissolution or the death of one of the spouse affect the surname of the spouse.

Enter into marriage. At the moment of the entering into marriage the spouse have to decide on the surname they will keep during the marriage. Article 51 of FC two alternative solutions for the spouses:

a) Keep as common surname, the surname of one of the spouse. The spouses based on their agreement have the right to choose as a common surname one of their surnames. In order to equally respect husband and wife, the law allows one of the surnames can be chosen, being it the husband or the wife surname. Having said that, not only the women can have the husband surname but also the vice versa. As consequence, using one common surname, lead into the situation that one of the spouse losses its original family name and he/she acquires a new surname. Keeping one surname is a solution that is based on the family unity principle of the family which derives from the marriage. The provision of the FC does not determine which surname has to be used in cases when one the spouse has used more than one surname before being married (in different period of time). Therefore, the hypothesis that the spouses before marriage might have more than one surname, arises discussion about the surname they can choose as a common surname, surname that each of the spouses has at the time of marriage, which might be also the surname that they have gained from a previous marriage (which may have terminated by death of one spouse; by

divorce), or the original family surname. Since the provisions of Family Code do not provide limitations in this regard, we might conclude that, theoretically, the spouses may choose as the common surname also the surname that one of them has retained from a previous marriage.

b) Each spouse has the right to keep his/her surname. Based on the individual freedom of each spouse¹⁶ and for ensuring the protection and continuation of the name, as part of individual intent the FC foresee also as the second option the right of each spouse to keep their own surname. In this case the entering into marriage does not change the surname of each of them. This second solution of the FC does not really rely on the principle of family unity; at least one of the spouses will have a different surname from the one of the children born during marriage¹⁷.

In the family Code of 1982, articles 26 and 27 included the same solutions as the ones foreseen in the current code with regard to the determination of surname of the spouse. While the family code of 1965 in addition to the solutions offered in the current code, foresaw a third solution, giving the spouse the right to add to their family name the surname of the other spouse (article 43/2 of FC of 1965). This solution gives the possibility of the spouse to keep the family surname and not to lose the identity after the entering into marriage and at the same time to keep the other spouse surname and preserve the family unity.

The third solution guarantee a fair balance between the need for family unity which is guaranteed by the possibility of having one surname for the whole family including the children born during marriage, and it also preserve the personal identity of the spouses especially the personal identity of women by providing the possibility of continuation of the name. This solution should have been included also in the current family code.

In addition to the entering into marriage, also the dissolution of marriage affects the surname of the spouse. The change of the surname of spouses at the end of marriage can happen only when the spouses had the common surname. This does not apply when spouses have has their personal surname.

The death of one of the spouses. The death of one spouse does not bring the automaticall change of the surname for the surviving spouse (see FC and CSL). As consequence, the surviving spouse has the right to keep the surname of the dead spouse providing that such surname was used during the marriage. In theory the surname of the survived spouse can also be transferred to the new spouse, if she or he decide to marry and the couple with agreement decide

16 Omari, Sonila, "E drejtë familjare", Tiranë, 2008, pp. 88.

17 Omari, Sonila, "E drejtë familjare", Tiranë, 2008, pp. 88.

to have the common surname being it the surname acquired during the first marriage. Some legislation in order to prevent this potential situation, have excluded the right to transfer the surname acquired in the first marriage to the second marriage, meaning that the surname of the first marriage is automatically excluded, when entering into a new marriage. This is also a questionable solution given the fact that the name is part of personal identity and as a result cannot be interrupted. The automatic change of surname without the will of the individual can infringe such the right of a name. In the case *Burghartz against Switzerland* (1994) the European court of human rights has said that name is a mean of identification and of family connection, part of the private and family life of the person guaranteed *by article 8 of the convention, even is not explicitly foreseen by the said article*".

This is a situation when on one hand the right of continuation of the name for the survived spouse, and on the other hand the infringement of the rights of the family member of the dead spouse are put in balance. Member states have different opinion in this matter. The German jurisprudence has opted for the right of the continuation of the name as prevailing right.

Dissolution of marriage. One of the consequences of the dissolution of marriage is the change of the surname. Based on article 146/1 of FC, the spouse who changed his/her surname at the time of marriage conclusion, after the dissolution of marriage shall be returned to the original family surname they had before marriage. As exception to the rule, the court may allow the continuation of the surname upon the request of the interested spouse when two conditions are fulfilled¹⁸:

- a) The interested spouse used to have the surname during marriage.
- b) He or she has to have a personal legitimate interest or for the children.

The interested spouse has to prove in the court trial that such change will cause personal moral or material damage or it will affect the life of their children in terms of their education and other rights. The spouse who requires the continuation of the surname should prove in court that the change of surname could bring to him or to the children who are left in the growth and education, moral or material damage. Regarding the protection of personal interests (moral or material ones) of the spouse, when he/she is recognized and identified largely with the surname of the former spouse, because of his artistic activity, sport, politic, academic profile, scientific publications or commercial activity¹⁹. Among the case of protecting the interests of minor children, who are left to raise and

18 Omari, Sonila, "E drejtë familjare", Tiranë, 2008, pp. 318-319.

19 Omari, Sonila, "E drejtë familjare", Tiranë, 2008, fq. 319.

education to the spouse required continuity of keeping the surname, the goal is to maintain of a common surname between parent and the children entrusted to him growing and educating.

In its decision the court should find a balance between two competing interests: the interests that may be affected by one former –spouse by the change of surname after the marriage and, on the other hand, the violation of the right to the name as a strictly personal right that can be caused to the other ex-spouse.

D. The change of name and surname

According to the legal doctrine, in the framework of *“right to a name”*, it is included also the right of the continuation of the name, in other words the right of individual not to lose and change the name *“ipso jure”*, against his will²⁰. As a general rule the name of the natural person cannot be changed *“ipso jure”* (automatically) against the will of the person, with the exception of changing the surname because of dissolution of marriage. The change of the name in any case is done based on the will of the person and according to the criteria and procedures foreseen in the law.

The legal criteria and procedures for changing the name and surname of the natural person, have been amended with the law no. 130/2013, “On some amendments and addenda on the law no. 10 129, dated 11.5.2009 “On civil status”, as amended”. These amendments have set limits to the right of the individuals to change the name and the surname, making the procedures more complicated and including strict criteria when this can be done. Before the 2013 amendments individuals could easily change name and surname, based on a simple request submitted to the office of civil status located in the territory where they were living.

Article 57 of CS Law, as amended, foresees the cases of amending the name and the surname²¹.

The cases of changing the family names:

a) Automatic change of surname. *The family code* foresees the change of the family name as a result of marriage, dissolution of marriage and adoption.

20 [https://it.wikipedia.org/wiki/Nome_\(diritto\)](https://it.wikipedia.org/wiki/Nome_(diritto)). Accessed on 30 March 2016.

21 Apart from the conditions provided in LCS change of name / surname is realized against payment of a fee. Fees are determined by joint order of the minister responsible for civil status (Minister of Internal Affairs) and the Minister of Finance and deposit prepaid by the applicant with the application. (Article 57/4 parag.1 LCS).

b) Based upon the will if the individuals. In this case the change of surname can be done only once and when it is inappropriate, according to the criteria set in CSL (article 57/1, parag.2 CSL). In any case the individuals cannot ask for surnames that belong to important historical figures of the country that can put him in an unpleasant situation against his community ²² (article 57/1, parag.3 LGJC).

Cases of changing the name:

a) The case of adoption, according to the FC. It is important to underline what have clarified above that the court based on the request of the parents can change the name of the adoptee (article 260 of FC).

b) Based upon the will of individuals. In this case the name can be changed within 1 year from the moment the person reaches adult age and only once (article 57/2 CSL);

c) In case of the filling the data for the birth certificate, according to the criteria foreseen in article 45 of CSL. According to article 45 of the CSL, when in the birth certificate is given a temporary name, this name should be determined at any time based on the common declaration of the parents or by a court decision when the child is a minor, or at the request of the subject, when it becomes adult.

Also the CSL (Article 57/3) provides some circumstances that inhibit the subject to change his name or surname, despite fulfilment of the requirements provided by law. So it can't change the name / surname of a subject that is on trial or has not yet finished prosecution and a subject to whom the injunction is obtained or deportation from another country.

The legal procedure for changing the name is the same as that of the change of the surname. The procedure begins with a request of the entity concerned to make this change. The request, which shall contain the reasons for the change of name / surname and the new proposed name / surname by the entity itself, must be submitted personally by the interested party at the civil state office of his residence (Article 57/1, paragraph.1 CSL). Once the civil registry office verifies the completion of the documentation required by law and the reasons for the change of name / surname, forwards the request within 60 days to the

22 Under paragraph 4 of Article 57/1 of CSL "Minister responsible for civil status provides instruction for setting rules regarding the names / surnames that is considered unsuitable, and the list of names and surnames of people who have historical significance, prominent families nationally or known in the district / municipality where the applicant has his residence, along with a list after obtaining the opinion of the specialized institutions. This instruction is mandatory for implementation by civil registry offices, as well as any other state body".

Prefect under whose jurisdiction is the office of civil state. County Prefect, after verifying the fulfilment of the conditions provided by law, require public posting of demand for change of name / surname in the civil registry office where the claim is filed and in two newspapers, for a period of 15 days. Public display is intended to third persons whose interests could be affected by this change, to implement the relevant objections. After completion of the period of public display, County Prefect forwards the request to change the name / surname in the National Commission for final assessment requirements to change name and surname, along with his proposal to grant or refuse the request. National Commission is the competent body that finally decides to grant or refuse the request of change of name / surname.

Besides the possibility of changing the name and surname the legislation foresees the possibility of their material correction, when the name or surname represents a proven material error during transcription of civil state acts.

The name and surname changed are reflected in the National Registry of Civil Status, along with the reason for the change. In the hypothesis of a change of surname, for this change to have legal effects for the other adult family members who bear the same surname, has to be approved by them by signing in the record kept by the Civil Registrar, for this purpose (Article 57/10 CSL).

E. Protection of the right to a name under Albanian legislation

The name (name and surname) is considered as personal non material right, closely connected with person²³ and as consequence it enjoys an “*erga omnes*” protection. Article 5 of the civil code, foresees the right to have judicial protection of the name in two situations:

- a) When use of the right to a name is denied or;
- b) Adversaly affected by illegimately use of name or surname.

The person, whom their use is denied or adversely affected by the illegitimate use made of his name by others, may demand in a court the use of his name and surname or the end of adverse affection. In any case the right holder may require the compensation of the damage caused”. In addition to the protection offered by Article 5 of Civil Code, the legal doctrine suggests that the right to a name can be also protected by a court certification of the fact “*padia e vërtetimit të faktit juridik*”, a claim aiming to clarify the existence of the contents of the rights²⁴.

23 Kondili, Valentina, “E drejtë civile. Pjesa e Përgjithshme”, Geer, Tiranë 2008, pp. 124.

24 Tamburrino, Giuseppe, “Le persone fisiche”, UTET, Torino, 1992, pp. 113.

The same demand may also be submitted from other persons, not bearing the name or surname which is adversely affected or illegitimately used, have familiar interests worthy of protection. Their interests are different from the interests of the right holder. The third parties enjoy “*jure proprio*” the protection of right to a name, because of the protection of family interests and not in their capacity as heirs of the right’s holder²⁵. In this framework it is interesting to understand what kinds of “family interest” are worthy to be protected. Given the fact that the surname serves for the identification and individualisation of a family group, it is understandable that its illegitimate use by one of the family members, affect the interest of other family members that have interest in the protection of the family surname. In this context we are talking about “autonomous interest” in relation with interest of the right holder. It has to be determined from the judicial practice and the legal doctrine what kinds of persons are included in the category of persons that have family interests²⁶.

When the court accepts the complaint it orders the publication of the decision in the Official Journal. Upon request of the plaintiff, the court may order the publication of its decision in the other journals as well. Nicknames (assumed names) used by natural persons enjoy the same protection.

III. Personal name under Private International Law

A. Applicable law for acquisition and change of name under Albanian Private International Act (PILA)

Unlike the old law on “On enjoyment of civil rights of foreigners and stateless person” of 1964, that did not contain any provision on the right of name for individuals²⁷, the current law “On private International Law” regulate the law applicable to the personal name.

The connecting factor used by the Albanian legislation with regard to the determination and change of name is “*lex nationalis*”. According to 13/1 of PILA, the name, midname and surname of the person, as well as their change, are regulated by the law of the state, whose citizen he is.

25 According to Albanian doctrine, in the category of entities that have “family interests” are included subjects of Articles 10 and 11 of the Family Code. For more see: Skrame, Olti, “Komentari i Kodit Civil të Republikës së Shqipërisë”, Vol. I, Onufri, Tiranë, 2011, fq. 16.

26 According to Albanian doctrinal opinion, in the category of entities that have “family interests” are included subjects of Articles 10 and 11 of the Family Code. For more see: Skrame, Olti, “Komentari i Kodit Civil të Republikës së Shqipërisë”, Vol. I, Onufri, Tiranë, 2011, fq. 16.

27 Ardian Kalia “E drejta ndërkombëtare private”, 2011.

The determination of name, middle name and surname is regulated by “albanian legislation” not only for the Albanian citizens, but also for the foreigners and stateless persons that have their habitual residence in Albania, if the application of the albanian law is required from the interested person (second paragraph of Article 13 of PILA). From a careful reading of the second paragraph of Article 13 of PILA, another question can be asked whether albanian law will be applied for the foreign citizen or the stateless persons having their habitual residence in Albania, regardless the fact that they are registered or not in the Register of the Civil status.

B. Continuation of name in the cross border situations

Giving the fact that the name is an element closely linked with the personal identity, it is necessary to guarantee the continuation of the name in cross border situations without the need to change or modify it. The existence of different substantive legal rules regarding names in different legal systems can lead to consequences that the individual is not given the same name in every state. Especially, difficulties are faced in cases when names and surnames have more than one component. This problem can be found in individuals with double citizenship, in case of entering into marriage of two persons with different nationalities, or in case of the registration in the Civil Status Registrar of the state different from the one of the origin.

Example 1: An Albanian (male) and a French (female) citizen enter into marriage in the Republic of Albania. According to the french legislation, that is applicable for the determination of surname, the spouse chose to add after her family name the surname of the husband. The Albanian Civil Status office refuses the registration of spouse’s new surname (which is composed by two surnames) because under the Family Code and the Albanian Law on Civil status, spouses must keep only one surname.

Example 2: An American citizen, the name of which is made of two components first name and middle name and two surnames (the surname of the mother and the father) acquire the Albanian citizenship and want to be registered in the Albanian Civil Registry. The authorities ask him to choose one name and surname according to the Albanian legislation.

Example 3: Two parents with Albanian nationality, emigrants in Greece gave birth to a child. The name that parents give to their child is composed with two components. When they decided to register their child in Albania, they were

asked to choose one of the names of the child or to merge them into one single word²⁸.

The above mentioned example envisages the problems of the Albanian legislation with regard to the acquiring and changing of the name for persons with double nationality or in cases of marriage with foreign elements. The civil registry has forced individuals to change and adjust names in compliance with Albanian legislation, while the judicial practice is almost inexistent.

The judicial practice of ECHR and CJ EU protect the right of name of the individuals for the continuation of name, as an important element of personal identity.

The jurisprudence of European states (Italy, France, Germany); when putting into balance from one side the personal interest of individuals for the protection of their identity in the cross border situations, and from the other side the interest of the state for the existence of an uniformity in the identification of individuals (such uniformity is important for the exercise of the state competences with efficacy) the jurisprudence have opted for the protection of the continuation of name as part of personality rights.

The jurisprudence of ECHR has supported the protection of continuation of name with the argument that *“the name is a mean of personal identification and relation with the family and should be considered as part of private and family life, in the framework of art 8 of the convention and should be enjoyed without any gender discrimination”* (Case Burghartz v. Zvicerland, 1994)²⁹.

While the CJ EU in its jurisprudence has protected the continuation of name of the European citizen, in their movement from one Member State to the other, based on the principle of *“free movement of citizens”* and on the principle of *“non-discrimination on grounds of nationality”* (art 18 and 21 TFEU). In the Garcia Avello (C-148/02) and Grunkin-Paul (C-353/06) decisions, the court have argued that *“to be obliged to have one surname determined in one member state and another surname taken in another member state, hamper the free movement of European citizen”*.

With the view of avoiding any problem with regard to the continuation of name and in the framework of the free movement of citizens, the European commission has drafted a *“Proposal of a European Regulation on the law applicable to names”*.

28 The first two examples are hypothetical cases that are invented to show the practice of the Albanian Civil Status Registrar, while the third one is a real case.

29 Case of Burghartz v. Switzerland (49/1992/394/472) ECHR.

IV. Final Remarks

Social relations have undergone a considerable evolution, consequently the family relations too. The Albanian law on right to a name has changed and improved during the last decades. In many of its aspects it has followed the tradition of other legal system by guaranteeing the right of the person to change the name in case of entering into a marriage or desolution of marriage. It respects the equality of man and women with regard to their surname but it does not rely on the same principle when it comes to the children. In addition the contitution of name is not really protected by the Albanian legislation. This apply not only to the marriage of the Albanian citizens, (i.e on of the spouses is obliged to give up from this family name once accepted the other spouse surname) but also to other persons being it Albanian nationals or not who want to register their name in Albania and latter does not comply with Albanian law modalities (single words for name and surmane). The problems of the material law affect the rules of private international law. Once Albanian private international law rules will lead to the application of the Albanian material law on the right to name, the above mentioned constraines will immediately pop up. These impediments will put individuals in difficult situation and at the same time the free movement of person will be hampered. This is particularly the case of acquiring and changing the name for persons with double personality or marriage with foreign elements.

PERSONAL NAME: THE GAP IN THE PIL ACTS OF REPUBLIC OF SRPSKA AND FEDERATION OF BOSNIA AND HERZEGOVINA**

Abstract: *The paper deals with the analysis of personal name in the internal and the private international law of the Republic of Srpska, Federation of Bosnia and Herzegovina and Brcko District of Bosnia and Herzegovina. Among the other things, the author considers the provisions concerning the determination of a personal name during child birth and equitable adoption, by authorized persons. Thereafter, author discuss the issue of change of the personal name, as a result of the ascertainment, acknowledgment or denying of paternity and maternity, termination of adoption, conclusion and termination of marriage, and the procedure of changing of personal name. After that, the author presents solutions to this issue in the presence of a foreign element. Also, the paper handing with the applicable law for determination and the change of personal name in different circumstances and then with the jurisdiction of the BiH authorities. In addition, author looks back to the solutions in comparative law, and provides specific recommendations for better regulation of this issue.*

Key words: *personal name, determination, the applicable law, jurisdiction.*

1. Introduction

The name is often defined as the permanent name of the natural person which, at the some time, act as instrument of distinction one person from other in legal relations. It is an absolute, non-transferable, imprescriptible right of non-proprietary nature, which stops at the same time with its holder¹.

The name has multiple purposes. First, it is the basis of our identity, the surname determines the integration into specific family, the name serve as means of

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1 (Stojanović, Antić, 2004: 153)

identification and, finally, the name represents a visible sign of socialization in a society².

The issue of personal names appears in a purely internal relations of one country and also in relations with foreign element.

Legal doctrine, at least until now, has not deal specific with this matter only. Mainly, this subject is located as part of textbooks of Civil law. In this way, even a bachelor of law, meet with this issue most often for the first time at the marriage ceremony, and afterwards, when family gets baby born, and so they have to determine the name of the new family member.

In order to give a little clearer picture on this issue, in the article that follows, we will try to clarify the doubts related to personal name in the material and the private international law of Bosnia and Herzegovina, ie. its territorial units.

2. The personal name in the internal law of Bosnia and Herzegovina

Bosnia and Herzegovina is a confederal organized state consisting of two entities, Republic of Srpska and Federation of Bosnia and Herzegovina, and Brcko District. Matter, that is not strictly within the jurisdiction of Bosnia and Herzegovina by BiH Constitution, is within jurisdiction of its entities and Brcko District. All private law relations are regulated at the entity level, therefore, the matter of private international law and personal name.

Bosnia and Herzegovina is one of the few countries which regulate matter of personal name with a special law.

Personal name is individual right of a citizen, and citizen is obliged to use the personal name as entered in the Register³. Personal name consists of first name and surname, and all three legislators allow a possibility that first name or surname, or both of them, consist of several words, not limiting the number of words at the same time⁴. However, in this case person is required to use the same name which is registered in the registers, in his legal relations⁵. About that, there is obligation for parents to make a statement which name a child will use in the legal traffic⁶. This option does not exist in Brcko District.

2 (Lehmann, 2008: 136-137)

3 Article 1. Personal Name Law Act, Official Gazette RS, 27/93, 15/00, (further: PNLA RS), Article 2. Personal Name Law Act, Official Gazette FBH, 7/12, (further: PNLA FBiH), Article 1. Personal Name Law Act, Official Gazette BDBiH, 08/02, 29/05, (further: PNLA BDBiH)

4 Article 2. PNLA RS, Article 4. PNLA FBiH, Article 1. PNLA BDBiH

5 Article 2. PNLA RS, Article 5. PNLA FBiH, Article 1. PNLA BDBiH

6 Article 17. Registers Law Act, Official Gazette RS, 111/09, 43/13, (further: RLA RS), Article 17. Registers Law Act, Official Gazette FBH, 37/12, (further: RLA FBiH)

In general, we can distinguish two situations related to personal name in domestic law. Those are:

1. Determining personal name, by parents and adoptive parents and
2. Change of personal name, within we can make distinction of changing of personal name by ascertainment and acknowledgment of paternity and maternity, termination of adoption, marriage, dissolution of marriage and change of personal name upon request without family status change. Well, first things first.

2.1. Determining of personal name

Personal name of a child, if everything is as it should be, is mutually agreed by parents. Legislators of Republic of Srpska and the Brcko District of BiH do not explicitly indicate how it can be established is there an agreement between the parents, which means that it must be verbally confirmed by both parents. This requires the presence of both parents during of registration of personal name of the child in the registers. However, Registers Law Act of the Republic of Srpska is determined, that parents can make a statement about child personal name by proxy⁷. Such an option is not given in the Brcko District of BiH, regarding that in this situation is competent Personal name Law Act Brcko District BiH only, which does not provide something like that. Keeping that in mind, we believe that, at least in the Republic of Srpska, there are no obstacles for registration of personal name of child in registers, only by one parent, with the authorization of the other one.

In the Federation of Bosnia and Herzegovina, the situation is much more clearer, so it should be considered that there is an agreement of both parents regarding of personal name of their child, even though registration is done only by one parent, with other parent's identity document⁸. Personal name can be also registered by proxy⁹.

Registration of personal name of child can be made within 30 days¹⁰, i.e. two months¹¹, from day of birth.

7 Article 16. RLA RS

8 Article 6. Paragraph 2. PNLA FBiH

9 Article 6. Paragraph 3. PNLA FBiH

10 Article 16. RLA RS, Article 16. RLA FBiH

11 Article 3. Paragraph 7. PNLA BDBiH

When parents cannot agree about personal name of their common child, child's personal name shall be determined by the guardianship authority¹².

The surname of a child¹³ shall be determined according to the surname of one or both parents¹⁴ or a different surname¹⁵.

When only one parent has parental rights, that parent determines child's name and surname¹⁶. If the parents are not alive or do not perform the parental rights for some reason, the personal name of a child shall be determined by the child's guardian with consent of the competent body for guardianship¹⁷. The personal name of child whose parents are unknown will be determined by the guardianship authority¹⁸.

In the case of determining the personal name of adopted child, all three Personal name Law acts refer to Family Law acts.

Family law RS only states that the same rights and obligations shall be established between the adoptee and adoptive parents as between children and parents¹⁹, so we can conclude that the same is applicable to the personal name of the adoptee. In Federation of BiH and Brcko District the situation is much clearer. The adoptive parents agreeably determine the personal name of the adoptee who acquires the surname of his/her adoptive parents. If parents have different surnames they agreeably determine the surname to be given to the adoptee²⁰.

12 Article 3. Paragraph 3. PNLA RS, Article 6. Paragraph 4. PNLA FBiH, Article 3. Paragraph 3. PNLA BDBiH

13 Analyzing Comparative Law, we met interesting stipulations. Thus, for example, in the law of Costa Rica, the child receives father's and the mother's surname compulsory. The father's surname goes first, and the mother's goes second. If, however, the father is unknown, then the child inherits both surnames of mother. More about that see: (Obando Peralta, 2013: 57)

14 Article 3. Paragraph 2. PNLA RS, Article 6. Paragraph 1. PNLA FBiH, Article 3. Paragraph 2. PNLA BDBiH

15 Article 6. Paragraph 1. PNLA FBiH, Article 3. Paragraph 2. PNLA BDBiH

16 Article 3. Paragraph 4. PNLA RS, Article 6. Paragraph 5. PNLA FBiH, Article 3. Paragraph 4. PNLA BDBiH

17 Article 3. Paragraph 5. PNLA RS, Article 6. Paragraph 7. PNLA FBiH, Article 3. Paragraph 5. PNLA BDBiH

18 Article 4. PNA RS, Article 6. Paragraph 8. PNA FBiH, Article 3. Paragraph 6. PNA BDBiH

19 Article 156. Family Law Act, Official Gazette RS, 54/02, 41/08, 63/14, (further: FLA RS)

20 Article 115. Family Law Act, Official Gazette FBiH, 25/05, 41/05, (further: FLA FBiH), Article 98. Family Law Act, Official Gazette BDBiH, 66/07, (further: FLA BDBiH)

2.2. Change of personal name

As we mentioned above, there are four situations in which change of personal name arises as a direct result of changes in family status, whether it is an ascertainment and acknowledgment of paternity and maternity, termination of adoption, marriage or termination of marriage, and one situation where a change of personal name follows the personal request of a natural person, without any change in family status.

2.2.1. Change of personal name upon the ascertainment, acknowledgment or denying of paternity and maternity

A child that has been determined a personal name can, after the process of ascertainment, acknowledgment or denying of paternity or maternity, be determined a new name within a time period of two years, or six months, from the date of paternity ascertainment, or validity of the decision on acknowledgment or denying of paternity or maternity. Children over 10 years of age must agree to a change of the personal name²¹.

2.2.2. Change of personal name upon the termination of adoption

Unfortunately, sometimes our lives overtake unexpected and totally undesirable situations. One of them is the termination of already based adoption. Of course, in this case it's de facto adoption, given that full adoption can not be terminated. After the termination of adoption, the adoptee can acquire a personal name that he had before the adoption, upon his own request, if he is major, or upon the request of guardians or guardianship authority, if he is juvenile. In case the child is over 10 years of age his agreement is necessary. Personal name due termination of adoption, can be changed within six months from the day of irrevocability of decision on termination of adoption²².

2.2.3. Change of surname upon marriage

Marriage is the most common reason for change of surname because of the changes in family status. Comparative law provides us a lot of varied picture in terms of options for future selection of family names of spouses, especially

21 Article 5. PNLA RS, Article 10. PNLA FBiH, Article 4. PNLA BDBiH. Although only Federation of BiH explicitly permits the change of personal name for this reason, by 18 years of child, we think that this limitation applies to the rest of Bosnia and Herzegovina. This because full civil capacity shall be obtained upon reaching majority, at the age of 18 years, whereby stops the legal representation of parents.

22 Article 7. PNLA RS, Article 8. PNLA FBiH, Article 6. PNLA BDBiH

women surnames. There are some countries in which the woman required the last name of her husband, elected last name of one of them, or such a choice can be made only with the prior consent of the husband, or, in turn, marriage is possible without any change of surname²³.

Bosnia and Herzegovina belongs to the group of liberal countries that allow all possible options when it comes to common surname of spouses²⁴. Nevertheless, the legal formulation leads us to the conclusion that none of them isn't free to choose independently his/her future surname - quite the opposite, he or she will need consent of the other one²⁵. So, spouses can agree, during matrimonial ceremony, to acquire a surname of one or the other spouse, or to each keep their surname, or to each add a surname of their spouse, or that one spouse acquire a surname of the other and to add his/her surname to it²⁶.

2.2.4. Change of surname upon the termination of marriage

The spouse who has changed the surname during the marriage ceremony, upon the dissolution of marriage, annulment of marriage or divorce, may take again the previous surname²⁷. It must be done within six months after the termination of marriage, otherwise, it is necessary to implement the procedure in the case of a request for change of the name without a change in family status, which means it will take longer and cost more.

The second option is that the spouse who has changed his surname, keep the new surname, even after termination of marriage. Given that marriage may be ended for several reasons - the death of one of the spouses or declaration of death, by divorce and annulment of marriage, the question is whether in all situations, the spouse who has changed his surname, can keep it after termination of marriage. According to the Personal name Law Act of the Federation of BiH, in case of annulment of marriage, the spouse who wants to retain the surname taken at marriage ceremony, need the consent of the spouse who is not guilty for annulment of marriage²⁸. The same provision is contained in the Family Law Act

23 (Živković, 2014: 85-104)

24 On the other hand, for example, in the law of Costa Rica, the woman retains her surname, so she can not take the surname of her husband. If she is foreign citizen, she must prove that her personal law permits the change of surname, otherwise her application will be denied. (Obando Peralta, 2013: 57)

25 „During the marriage ceremony, spouses can agree to take the surname....“, Article. 8. Paragraph 1. PNLA RS, Article 11. PNLA FBiH, Article 7. Paragraph 1. PNLA BDBiH

26 Article 8. Paragraph 1. PNLA RS, Article 11. PNLA FBiH, Article 7. Paragraph 1. PNLA BDBiH

27 Article 8. Paragraph 2. PNLA RS, Article 12. PNLA FBiH, Article 7. Paragraph 2. PNLA BDBiH

28 Article 12. PNLA FBiH

of the Federation of BiH²⁹. As for the Republic of Srpska and the Brcko District of BiH, Personal name Law Acts do not contain such a restriction, while Family law Acts give the option of retaining the surname taken during the marriage after divorce³⁰. In the case of annulment of marriage, there is a legal gap, but we consider there is no obstacles for spouse who has changed his surname during the marriage ceremony, to keep it after annulment. This because of the way of formulation of Article 2. of Personal name Law Act of Republic of Srpska, which refers to a change of surname after termination of marriage³¹. The same thing is in Brcko District of BiH³². Regarding the termination of marriage upon death or declaration of death of one of the spouses, there is no doubt that the surviving spouse, may keep the surname he had at the time of termination of marriage³³. It is like that in the whole Bosnia and Herzegovina.

2.2.5. Change of personal name upon request without family status change

Citizens of Bosnia and Herzegovina can also change personal names upon their own request, for no particular reason, beside personal preferences. Thereto, they may decide to change their personal name, only the first name or only surname. If a person is a juvenile, a personal name can be changed upon the request of parents or adoptive parents or guardians with consent of the competent body for guardianship, and in case the child is over 10 years of age her/his agreement is necessary. However, a change of the personal name of a child whose parents are not married or do not live in the same household, requires the consent of both parents, otherwise decision about name change will be made by the guardianship authority³⁴.

29 Article 33. FLA FBiH

30 Article 56. FLA RS, Article 41. FLA BDBiH

31 „The spouse who has changed the surname during the marriage ceremony, upon the dissolution of marriage, annulment of marriage or divorce, may take again the previous surname by his/her statement“, Article 8. Paragraph 2. PNLA RS. By interpretation *a contrario*, we can come to the conclusion that the spouse does not have to, in these situations, take the name that he had prior marriage, which means he/she can keep the surname that he/she had at the time of termination of marriage.

32 Article 7. Paragraph 2. PNLA BDBiH

33 None of the laws governing this matter, do not put a restriction regarding the retention of new surname due to termination of marriage by death of one of the spouses or the declaration of death.

34 Article 9. PNLA RS, Article 13. PNLA FBiH, Article 8. PNLA BDBiH

2.2.6. The procedure for changing personal name

The request for change of the personal name shall be submitted to the competent municipal authority in whose area the applicant has a permanent residence³⁵, Cantonal Ministry of Internal Affairs of the place of residence of the applicant³⁶, Department of Public Registry of Brcko District³⁷. The appropriate documentation must be attached to the request³⁸ and it should be resolved within 60 days. Then, decision on change of the personal name shall be submitted to the competent registrar and all relevant offices that keep records of citizens.

Unfortunately, only the legislator of the Federation of Bosnia and Herzegovina has recognized the need to limit the possibility of change of personal name in a time context³⁹, while such a restriction does not exist in the Republic of Srpska, either in the Brcko District of BiH⁴⁰.

The competent Ministry of Local Government of the Republic of Srpska, Federal Ministry of Internal Affairs of the Federation of Bosnia and Herzegovina and the Appellate Commission of Brcko District of BiH have jurisdiction in appeal proceedings.

2.2.7. Refusal of the request for change of personal name

In certain situations, the request for change of personal name will be rejected, no matter which reason was for his submission. So, a person against whom a criminal procedure is conducted for a crime prosecuted *ex officio*, or a person convicted of such a crime until the sentence is executed, or a person who requested for change in order to avoid legally determined obligations⁴¹, or a person

35 Article 11. PNLA RS

36 Article 15 PNLA FBiH

37 Article 10. PNLA BDBiH

38 With the application of personal name change is necessary to submit: a birth certificate, a certificate of citizenship, a certificate which has an information about fact which is subject of change in the process, photocopy of ID card, a certificate of residence, a certificate of the competent court that person who required a change is not under the criminal proceedings, a certificate issued by the tax authority that the applicant has no outstanding tax and customs duties, and proof of payment of a fee.

39 Article 17. PNLA FBiH

40 For example, in Israel, the request can be repeated every seven years, while for the frequent change is needed the license of the Ministry of Internal Affairs. More about this see: (Einhorn, 2009: 76)

41 Article 10. PNLA RS, Article 16. PNLA FBiH, Article 9. PNLA BDBiH

against whom an international wanted person alert is issued⁴², shall not be allowed to change his/her personal name, first name or surname.

2.3. About the language and alphabets

Use of language in the personal name is regulated by the Personal name Law Act only in Federation of BiH. Personal name is written in one of the official languages (Bosnian, Croatian, and Serbian) and alphabets of Federation of BiH (Latin, Cyrillic). The registry of a personal name of a person belonging to a national minority can be written in language and alphabet of that national minority, unless chosen differently, that is in language and alphabet of a Country whose citizenship a person had before acquiring a citizenship of Bosnia and Herzegovina⁴³. If in the procedure of changing personal name some letters in the copy of birth certificate of a foreign body are not found in the official languages and alphabets of Federation of BiH⁴⁴, a person can request his/her first name and surname to be written according to language rules in Federation of BiH⁴⁵.

3. Personal name with foreign element in Bosnia and Herzegovina

Private International Law in Bosnia and Herzegovina is regulated by the Law taken from former Yugoslavia legal system and that way it is identical in both Entities and Brcko District of BiH, except the different legal bases, and the following decisions are valid for entire Bosnia and Herzegovina.

Unfortunately, the personal name is not specifically regulated by PIL Act⁴⁶. Therefore, this is issue to be dealt with by BiH legislators, when and if they decide

42 Article 16. PNLA FBiH

43 Article 3. PNLA FBiH

44 For example, letters like: ć, č, dž, š, ž, đ

45 Article 14. PNLA FBiH

46 The situation is similar in comparative law. Some states have specific choice of law rule for a matter of personal name, others do not. In the absence of specific collision norm, courts have to interpret the law. Thus, the Court of Costa Rica decided to apply *lex nationalis* of the child, like applicable law, in this case the law of Nicaragua, because in this way is provided the closest connection with some law. The Court specifically took into account that children's parents also have Nicaraguan citizenship. (Obando Peralta, 2013: 58). On the other hand, the law applicable for the change of personal name in the law of Sweden, which at the same time does not include the change of the surname by marriage, for Swedish citizens who have their habitual residence in Sweden, is *lex nationalis*. The same law will be applicable, in the case of persons who have their habitual residence abroad. Persons who are Swedish citizens, but their habitual residence is in Denmark, Finland or Norway, are exception, because for them will be apply *lex residentie habitualis*. (Michael, 2015: 55-56). In Belarus, the law applicable to the matter of personal name is a personal right, in this case, the *lex nationalis*

to do the reform of PIL Act. We can say that there is a gap in this matter, which domestic practice completes by the principle “upon registration or change of personal name domestic law is applied”. The author has tried to find a case study, but we could only manage to find the above mentioned principle.

So, in the absence of a specific collision norm on personal name, we could come up with the some solutions. Although the legal doctrine so far advocated for family attachment, according which applicable law on personal name is law applicable for family relationships between parents and children⁴⁷, or for individual attachment, according which applicable law is law applicable for legal and civil capacity of natural person⁴⁸, we believe that should not be so strict, but instead of that, it should be taken a combined approach. This would imply, the use of family attachment in some situations, or individual attachment in others. Well, first things first.

3.1. Determining personal name of child

In the absence of a specific norm of PIL Act, we consider that only Article 40 of PIL Act can be applied to the procedure of changing personal name of a child which concerns the relations between parents and children⁴⁹. Therefore, it should be apply a common *lex nationalis* of parents and child. However, if they do not have a common citizenship, then it would be relevant their common *lex domicilii*, with no thought to the common residence in the same place, but more within the same country. In the case when we can not apply the common *lex domicilii*, domestic law should be applied, i.e. *lex fori*. In this case, additional condition is required, which is that a child or one of parents must have domestic citizenship. Finally, as a last resort, we are left to apply *lex nationalis* of child. As we can notice, *lex nationalis* is dominant.

persons concerned. (Danilevich, 2012: 59). For determining or change of personal name of the persons who are Israel’s citizens or have permanent residence in Israel, applicable law is the law of Israel. The applicable law for a matter of personal name of individuals who do not have Israel’s citizenship, and thereby have a domicile in another country, will be the law applicable by the conflict of laws rules of the state of domicile. (Einhorn, 2009: 76-77)

47 (Dika, Knežević, Stojanović, 1991: 134)

48 (Varadi, Bordaš, Knežević, Pavić, 2007: 162)

49 Article 40. Law on resolving conflicts of laws with the regulations of other countries in certain relations, Official gazette of SFRJ, 43/82, 72/82-1645, Official Gazette of RS, 21/92, (further: PILA RS), Article 40. Law on resolving conflicts of laws with the regulations of other countries in certain relations, Official gazette of SFRJ, 43/82, 72/82-1645, Official Gazette of RBiH 2/92, (further: PILA FBiH), Article 40. Law on resolving conflicts of laws with the regulations of other countries in certain relations, Official gazette of SFRJ, 43/82, 72/82-1645, Official Gazette of BDBiH, 1/00, 24/05,17/08, 39/09, (further: PILA BDBiH),

3.2. Determining personal name of an adoptee in case of a full adoption

In case of a full adoption, we believe that the collision norm concerning the effect of adoption should be applied, just like in previous case⁵⁰. Practically, these are the same points of attachment, so first should be applied common *lex nationalis* of adoptive parents and adoptee, than common *lex domicilii* of adoptive parents and adoptee, *lex fori*, if one of them is domestic citizen and, on the end, *lex nationalis* of an adoptee.

However, in the event of termination of de facto adoption, it makes no sense to apply anything else, beside *lex nationalis* of an adoptee, regardless of whether the request is submitted personally by an adoptee or by the other authorized person on his behalf. Therefore, it should be applied the law applicable on status issues⁵¹.

3.3. Change of personal name during matrimonial ceremony

Thinking about a solution for the change of name during matrimonial ceremony, with foreign element, we find ourselves in a big dilemma. Opinions on this issue are also different, at least as far as the ex-yu legal theory. Namely, some authors advocate for the application of Article 36. of the PIL Act, which normally regulates the personal and legal property relations of spouses⁵². On the other hand, there is an opinion that this article can be applied just for those relations which occur for both of spouses at the same time, by marriage. Therefore it is questionable whether the change of surname can be subsumed under this statute⁵³, or it should be applied Article 32. concerning the conditions for entering into marriage⁵⁴.

According to article 36. of PIL Act which concerns personal and legal property relations of spouses⁵⁵, for change of personal name by marriage, applicable law would be common *lex nationalis* of spouses, than their common *lex domicilii*, last common *lex domicilii*, and at the end, it would be governed by domestic law, i.e. *lex fori*. However, the fact is that in the moment of matrimonial ceremony, when it comes to changing of surname, in the most cases the union still does not exist. Two people who want to married are not „spouses“ yet, they are still „fiances“, so there is no need to have common residence in that specific moment. That means that, at least, two options can be strikethrough immediately - common

50 Article 40. PILA RS, article. 40. PILA FBiH, Article 40. PILA BDBiH

51 Article 14.Paragraph 1. PILA RS, Article 14.Paragraph 1. PILA FBiH, Article 14.Paragraph 1. PILA BDBiH

52 (Jakšić, 2008: 368)

53 (Dika *et al.* 1991: 126)

54 (Dika *et al.* 1991: 121,131)

55 Article 36. PILA RS, Article 36. PILA FBiH, Article 36. PILA BDBiH

lex domicilii and the last common *lex domicilii*, which leaves us application of *lex nationalis* or *lex fori*.

On the other hand, if we applied a collision norm which is used to interpret the conditions for the conclusion of marriage⁵⁶, we would come to similar solutions: application of *lex nationalis* and *lex fori*.

In the internal law of Bosnia and Herzegovina, change of surname, by marriage, dealt within personal effects of marriage⁵⁷. Nevertheless, if we used qualification *lex fori*, the solution should be found in Article 36., which concerns personal and legal property relations of spouses, even if we must apply domestic law, as a last option.

3.4. Change of personal name after the divorce

As for the conflict of laws when it comes to changing of surname after divorce, the situation is much clearer, so there is no doubt that it should be applied collision norm which regulate the personal and legal property relations of spouses, given the reference made by the Article 38. of PIL Act. Therefore, it should be applied common *lex nationalis* of spouses, common *lex domicilii*, last common *lex domicilii* and at the end *lex fori*⁵⁸.

3.5. Change of personal name without family status change

As we noted above, we believe that there is no need to be limited only by family or just individual attachment in finding solutions for such diverse matters as personal name in the presence of a foreign element. Nevertheless, it should go with combined approach, so we could come to the best possible solutions. Considering that personal name is within personal and status relations, and that the legislator has chosen the *lex nationalis* for the status relations of person involved, we find *lex nationalis* of a person that requested the change of personal name only

56 Article 32. PILA RS, Article 32. PILA FBiH, Article 32. PILA BDBiH

57 Article 43. FLA RS, Article 31. FLA FBiH, Article 30. FLA BDBiH

58 The opposite see (Dika *et al.* 1991: 121,131). The authors believe that for the change of surname should be applied the law applicable to the conditions for conclusion of marriage, again starting from the premise that under the personal relations of spouses may be considered only those relations that occur for both spouses, at the same time. Given that, according to internal law, spouses will decide about their future surname, by mutual agreement, we can not claim that it concerns only one of them. Finally, it is possible that the both spouses change a surname, which would satisfy the requirement of "simultaneous occurrence" of the consequences of marriage for the both spouses.

applicable⁵⁹. This solution is fully in the spirit of the PIL Act, given the position that the *lex nationalis* has as a point of attachment, especially in personal and status relations. Beside this, the competent authority should carefully consider Article 4. of PIL Act, which concerns the protection of domestic public order (concerning derogatory name etc).

4. The jurisdiction of local authorities

PIL Act does not have a special rule concerning the jurisdiction of the local authorities in the process of determining or changing of personal name, and that's another thing that all three legislators in Bosnia and Herzegovina must be addressed when it comes to the agenda of reform legislation in the field of private international law.

However, we can not say that this issue is completely unregulated, at least when it comes to the competence of local authorities in the case of determining the child's name after his birth. Specifically, the local authorities will have the jurisdiction, if a child was born or found on the territory of BiH, or if the child was born in a transport vehicle and mother's journey ended at the national territory⁶⁰.

As far as a question of determining of personal name of a child in case of full adoption, we consider that the jurisdiction of local authorities is justified if a decision with statutory effect was made by domestic authority⁶¹.

Also, there is a jurisdiction of the authorities of Bosnia and Herzegovina, in the case of change of surname, through conclusion of marriage in front of the national authorities⁶².

Regarding the remaining cases of change of personal names, the situation is quite unclear and there is a complete legal gap. Using targeted and systematic interpretation all of three regulations on personal names in Bosnia and Herzegovina, we could only come to one conclusion, and that is that the jurisdiction of the local authorities for sure exists, when a person that requested the change of personal name has national citizenship, whatever the reason of changing personal name is. However, it remains unclear whether there is jurisdiction of the local authorities in other situations, when the request for changing name

59 Article 14. Paragraph 1. PILA RS, Article 14. Paragraph 1. PILA FBiH, Article 14. Paragraph 1. PILA BDBiH

60 Article 13. and Article 18. RLA RS, Article. 13. and Article 18. RLA FBiH, Article 9. RLA BDBiH. Application of PILA is derogated in those relationships which are governed by other regulations, on the basis of Article 3. of PILA itself.

61 Article 19. RLA RS, Article 19. RLA FBiH, Article 14. RLA BDBiH

62 Article 23. RLA RS, Article 23. RLA FBiH, Article 15. RLA BDBiH

is not submitted by domestic citizen. Our opinion is that the domestic authority has jurisdiction, in those situations where the claimant resides in the territory of Bosnia and Herzegovina⁶³.

5. Conclusion

In the end, we salute all three legislators in BiH for the material sources and for their decision to regulate the personal name matter as separated law. We find it best possible solution.

On the other hand, we witness that the situation regarding foreign element in a name is not so great and that in practice it is difficult to determine the applicable law because the personal name is not regulated by specific collision norm, and therefore it seems not regulated by PIL Act. But with Article 2. of PIL Act, by which legal gaps are filled according to provisions and principles of this law, principles of public order and principles of private international law, we have presented some solutions which we obtained by logical and targeted interpretation of the law itself.

However, we think that the only long-term solution is to start the reform of PIL Act, at the same time in all BiH, where the separated Article would be on personal name, with the respective of regional and EU trends in choice of law.

In what way we should regulate personal name is a topic that deserves special work. Nevertheless, we will use this opportunity to briefly suggest some possible solutions.

First, we believe that, following a Draft version of a PIL Act of the Republic of Serbia⁶⁴, in addition to the regulation of the applicable law on personal name, we also need to regulate the jurisdiction of the local authorities and the recognition of foreign decisions on changing the personal name of domestic citizens⁶⁵.

63 An international jurisdiction of a domestic court exists if it is expressly provided by the domestic law or international agreement, or, in the absence of such a provision, if the court's jurisdiction derives from the rules on territorial jurisdiction. By broad interpretation of this rules i.e. by their extension on the competence of other national authorities, we came to the conclusion mentioned above. Article 26. Code of Civil Procedure, Official Gazette of RS, 58/03, 85/03, 74/05, 63/07, Article 26. . Code of Civil Procedure, Official Gazette of FBiH, 53/03, 73/05, 19/06, 98/15, Article 21. Code of Civil Procedure, Official Gazette of BDBiH, 08/09, 52/10.

64 Draft of Law on Private International Law of the Republic of Serbia is available at: <http://arhiva.mpravde.gov.rs/cr/news/vesti/zakon-o-medjunarodnom-privatnom-pravu-radnavorzija.html>, 15.08.2016.

65 Unlike the draft of PILA of the Republic of Serbia, PILA of Montenegro does not contain a norm on the recognition of foreign decisions on changing of personal name, while contains a

Regarding the choice of the applicable law, there are two options, either to keep the *lex nationalis* as the main point of attachment, as did the legislator in Montenegro or to follow the development of European Union, and accept the law of habitual residence as main rule, and then, maybe allow selection of national law⁶⁶, as it stands in the Draft of Regulation on the law applicable to the personal name of the European Union. A compromise version would be to determine *lex nationalis* as the applicable law and to allow selection of a law of the habitual residence.

Either way, expert discussions still ahead, and, therefore, we believe it is too early to take a final position on this issue, at this time.

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special rules concerning applicable law and jurisdiction. Article 17. and Article 116. Law on Private International Law of the Montenegro, Official Gazette of Montenegro, 1/14

66 (Dutta, Frank, Freitag, Helms, Krömer, Pintens, 2014: 32-33)

PERSONAL NAME AND GREEK LAW

INTRODUCTION

In the Greek legal order, every citizen is obliged to carry a name consisting of the forename and the surname¹. However, so far there has not been a serious debate as to how personal name should be characterized. As in most European legal systems, personal name is mainly considered a personality element and is protected accordingly. The surname additionally defines integration to a specific family. At the same time, personal name is still regarded as an essential factor of national identity, too.

This paper aims to provide a succinct description of the provisions of Greek law regulating personal name for the purposes of the IVth Balkan Conference (Faculty of Law of the University of Nis, 14 April 2016), leaving aside issues about the potential impact of the case law of the Court of Justice of the European Union. It is divided into two parts: the first part examines private international law aspects, while the second part examines substantive law aspects. In the Annexe, one can find the text of the applicable provisions translated in the English language.

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1 *I. Androulidakis-Dimitriadis*, Greece, in: *R. Blanpain/W. Pintens* (eds), *International Encyclopaedia of Laws: Family and Succession Law*, Kluwer, Suppl. 51 (October 2010), para. 54; *I. Karakostas*, Article 58, in: *A. Georgiades/M. Stathopoulos* (eds), *Civil Code. Vol. IA: General Principles (Articles 1-126)*, Law & Economy P.N. Sakkoulas, Athens 2016² [in Greek]. Pseudonyms are also recognised and protected.

I. PERSONAL NAME AND GREEK PRIVATE INTERNATIONAL LAW

A. Applicable law to personal name

Greek law does not contain specific choice-of-law rules determining the applicable law to personal name when a situation has an international dimension. Remarkably, legal doctrine and case law have barely dealt with the subject.

According to the prevailing view, the acquisition and change of personal name is submitted to the law regulating the family relationship on which the name itself depends².

Therefore, for example, the acquisition of forename at birth as is determined by Articles 18-20 of the Greek Civil Code, which govern the relationships between parents and child. The acquisition of surname at birth as regards legitimate children is determined by Article 18 of the Greek Civil Code, which governs the relationships between parents and such child. The issue whether a child born out of wedlock shall acquire at birth the surname of the mother is determined by Article 19 of the Greek Civil Code, which governs the relationships between mother and such child. The issue whether a child born out of wedlock shall acquire the surname of the father at birth or after recognition is determined by Article 20 of the Greek Civil Code, which governs the relationships between father and such child. The issue whether an adopted child shall acquire the surname of the adoptive parent and whether the child shall add his own surname is determined by Article 23 para. 2 of the Greek Civil Code, which governs applicable law to adoption; however, the issues whether despite the adoption the adopted child shall maintain his own surname and whether in case of dissolution of the adoption the child shall recover the surname he had prior to the adoption are determined by the law governing the relationship by virtue of which he acquired this surname according to Articles 18-20 of the Greek Civil Code. The issue whether the change of the father's surname entails the change of the child's surname is determined by Article 18 and 19 of the Greek Civil Code, which govern the relationship between father and child. The issue whether marriage affects the surname of the spouses is determined by Article 14 of the Greek Civil Code, which governs personal relationships between parents. The issues whether despite marriage one or both spouses shall maintain their own surname and whether in case of marriage dissolution they recover the surname they had prior to marriage are determined by the law governing the relationship

2 *S. Metallinos*, *Le nom en droit international privé hellénique*, *Revue hellénique de droit international* 1975, 165 et seq.; *S. Vrellis*, *Private International Law*, *Nomiki Bibliothiki*, Athens 2006⁸, 142 [in Greek]; *idem*, Greece, in: *R. Blanpain/B. Verschraegen* (eds), *International Encyclopaedia of Laws: Private International Law*, Kluwer, Suppl. 27 (July 2011), para. 109.

by virtue of which each spouse acquired such surname, i.e. according to Articles 18-20 and 23 para. 2 or Article 14 of the Greek Civil Code, in case of celebration of a new marriage by a divorced or widowed spouse³.

At the same time, the issue whether a public authority shall assign a name to a nameless person or an abandoned child shall be determined by the law of the State to which the said public authority belongs. The issue whether the change of personal name by virtue of an act of public authority is determined by the law of the State to which said public authority belongs⁴.

As to the protection of personal name, it had been equally supported by legal doctrine that this shall fall within the scope of a person's nationality (*lex patriae*) or the law governing the acquisition of the name or the *lex delicti*⁵. The prevailing view nowadays opts for the *lex delicti*. In this case, the acquisition of personal name shall constitute a preliminary question set by substantive law⁶.

B. Recognition of foreign established personal names and foreign judgments on personal name

1. Recognition of foreign established personal names

The recognition of foreign established personal names falls within the scope of Article 41 of Law 344/1976 on registrar acts. According to this provision, registrar acts drawn up by foreign authorities are valid as evidence in Greece when they fulfill the formal requirements of the law of the place where they were drafted.

2. Recognition of foreign judgments on personal name

Greek law does not contain special provisions regulating the recognition of foreign judgments on personal name issues.

In general, recognition and enforcement of foreign judgments are governed by the Greek Code of Civil Procedure. Foreign judgments may be either only recognized, meaning that they are given *res judicata* effect in domestic proceedings, or also rendered directly enforceable by being invested with a local *exequatur*.

3 *Metallinos*, *supra* note 2, 165-168.

4 *Ibid.*, 168-169.

5 *Ibid.*, 169. *Lex delicti* is now governed by Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, 40.

6 *Vrellis* (2006), *supra* note 2, 142; *idem* (2011), para. 110.

No reciprocity is required and recognition and enforcement take place without re-examination of the merits⁷.

The recognition of the judgments of a foreign civil court rendered in contentious proceedings is regulated by Article 323 of the Greek Code of Civil Procedure, which provides five requirements: (a) the judgment must have the claimed *res judicata* effect under the law of the country of origin; (b) the court must have had international jurisdiction according to Greek law, which is tested under the rules regulating the jurisdiction of the Greek courts themselves; (c) the defeated party must have been given an opportunity to defend not less favourable than that available to nationals of the country of origin; (d) the judgment must not be inconsistent with a Greek judgment on the same matter binding the same parties, and (e) the judgment should not be contrary to good morals or Greek public policy⁸.

The recognition of judgments or orders rendered *ex parte* (voluntary or non-contentious jurisdiction) is regulated by Article 780 of the Greek Code of Civil Procedure. Such judgments are recognized as long as the foreign court had jurisdiction under the applicable substantive law and that the decision is not contrary to good morals or Greek public policy in general. The court must also have chosen the applicable law consistently with the Greek conflict rules⁹. Under this specific procedure, foreign administrative decisions regarding change of personal name are recognised in Greece¹⁰.

Greece is of course subject to Brussels I Regulation¹¹ which prevails over any inconsistent domestic law as concerns judgments from Member States. The provisions of the Regulation are generally similar to those of Greek law except

7 Ph. Kozyris, Conflict of Laws, International Jurisdiction, and Recognition and Enforcement of Judgments and Awards, in: K. Kerameus/Ph. Kozyris (eds), Introduction to Greek Law, Kluwer Law International/Ant. N. Sakkoulas Publishers, Alphen aan den Rijn/Athens 2008³, 379 et seq., 399.

8 *Ibid.*, 400.

9 *Ibid.*.

10 In case of foreign judgments ordering the execution of an act or the payment of money, an *exequatur* must also be obtained. In this respect, Article 905 of the Greek Code of Civil Procedure requires that the foreign document is judicially enforceable under the law of the country of origin and not contrary to good morals and to Greek public policy in general and, in addition, the recognition requirements of Article 323 are met.

11 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, 1, which replaced as of 10 January 2015 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, 1.

that it is not necessary that the court of rendition had international jurisdiction under the Greek rules¹².

II. PERSONAL NAME AND GREEK SUBSTANTIVE LAW

A. Acquisition of personal name

Personal name is in principle determined by law. Personal name carrier is not free to select his own personal name. The parents exercising the parental care have broad freedom in determining the first name of the child. In the case of the surname, however, from the outset there is no such free choice –there is probably a certain degree of choice, but only within a defined legal framework. Specifically:

1. Forename

The giving of the forename of a child is regulated by Article 25 of Law 344/1976. It constitutes a duty and right of the persons entrusted with the parental care of the child. This means that in case that both parents are entrusted with the parental care but only one of them has the current custody of the child –for instance, in case of separation or divorce– the latter cannot proceed with the giving of the forename unilaterally¹³. In the event of disagreement between the parents, the name is decided by the court.

According to the law, the forename is given through a declaration before the Registrar at the same time as the declaration of the child's birth. In practice, nevertheless, the first name is traditionally given later, during baptism, when also a delayed declaration takes place before the Registrar. Yet, it should be borne in mind that from a legal point of view the giving of the forename is not part of the mystery of baptism, but clearly a judicial act¹⁴. Such declaration is characterized as irrevocable in principle; therefore, first name can only be changed under specific conditions¹⁵.

12 *Kozyris, supra* note 7, 401-402.

13 For an analysis, see *S. Tsantinis*, Substantive and procedural issues concerning the giving and the change of the forename, *Helliniki Dikaïosyni* (Ελληνική Δικαιοσύνη) 1997, 996 et seq., particularly at 1001-1007 [in Greek]; *K. Pantelidou*, Personal name in family, *Efarmoges Astikou Dikaiou* (Εφαρμογές Αστικού Δικαίου) 2012, 2 et seq., particularly at 4-5 [in Greek].

14 *Androulidakis-Dimitriadis, supra* note 1, para. 57.

15 *Infra*, II.B.1.

Despite the prevailing habit, the first name has not to be that of a saint of the Greek Orthodox Church; any name is considered appropriate as long as it is not contrary to good morals and does not offend the personality of the child¹⁶.

2. Surname

The acquisition of the surname is regulated by the Greek Civil Code and Law 3917/2008 on civil partnerships. This legal framework distinguishes two cases of acquisition according to the attribute of a child as born inside marriage or civil partnership or born out of wedlock:

Article 1505 of the Greek Civil Code refers to children born in a marriage and states that the parents have the right to determine the surname of their children by a joint irrevocable declaration. Such declaration is made before marriage, either in the presence of a notary or before the official who performs the celebration of the marriage. The latter is obliged to ask for this declaration. The surname determined by the parents has to be common for all their children. It can be formed by the surname of one of the parents or of both their surnames. Yet, it cannot consist of more than two surnames. In case the parents omit to make such declaration, the children shall receive the surname of their father¹⁷.

A specific provision outside the Civil Code, namely Article 9 of Law 3917/2008 on civil partnerships, regulates the surname of the children in case of civil partnership of their parents in a similar manner, with the exception of the case where the crucial declaration is omitted: in this case the child shall have a compound surname composed of the surnames of both parents. Obviously, the provision of the Civil Code that in lack of declaration, children born inside marriage shall receive the surname of the father gives rise to serious constitutional law concerns as infringing the principle of equality of parents. A part of legal doctrine, however, still accepts such regulation as consistent with the principle of simplicity¹⁸; in our view, this approach definitely appears to be outdated given the current legislative developments, i.e. the enactment of Law 3917/2008 on civil partnerships¹⁹.

16 *Androulidakis-Dimitriadis, supra* note 1, para. 57.

17 For an analysis, see *M. Stathopoulos*, Article 1505, in: *A. Georgiades/M. Stathopoulos* (eds), Civil Code. Volume VIII: Family Law (Articles 1505-1694), Law & Economy P.N. Sakkoulas, Athens 2003² [in Greek]; *E. Giannakopoulos*, Article 1505, in: *I. Karakostas* (ed.), Civil Code. Volume 8B: Family Law, Nomiki Bibliothiki, Athens 2012 [in Greek]; *Karakostas*, Article 58, *supra* note 1, with further references to case law.

18 See *Pantelidou, supra* note 13, 4.

19 See also in this respect *Th. Papachristou*, The omission of future spouses to declare the surname of their children, in: *M. Stathopoulos/K. Beys/F. Doris/I. Karakostas* (eds), Essays

Children born out of wedlock receive the surname of their mother, as stipulated in Article 1506 of the Greek Civil Code. The husband of the mother may give his surname to the child if both child and mother agree. In case of a minor child, the appointment of a guardian is necessary. The relevant declaration is made by means of a notarial deed and, as a result, the husband's surname shall take the place of the mother's surname. The same applies also when the parents were married after the child's birth, if the child is underage. If an acknowledgment of a child born out of wedlock takes place, it is possible to add the father's surname to the child's surname within one year from the completion of the acknowledgment. Such declaration is made to the registry of civil status. If both parents make the declaration, they can give the child both their surnames²⁰.

Abandoned children, falling outside the scope of the previous provisions, acquire a surname by an administrative act of the Registrar, according to Article 24 of Law 344/1976.

B. Change of personal name

In order to protect one's personality and provide safety of transactions, the principle of preserving one's initial name prevails under Greek law²¹. Nevertheless, a change of personal name is possible under specific legal conditions. The change of surname is regulated under Greek law by a special legislative decree. The change of forename, however, is not directly provided by legislation, so it is founded on the correction of registrar entries foreseen by the law on registrar acts. Specifically:

1. Forename

Although the declaration of the parents before the Registrar regarding the giving of a child's forename is characterized as irrevocable, the forename can be changed by court decision, according to Article 13 of Law 344/1976. The relevant request, which is adjudicated under the non-contentious proceedings, is submitted by the persons exercising parental care, in case of minor children, or by the interested person himself, if he is adult. The requested change can be about the addition or the deletion of a forename or the replacement of the forename by a nickname. The change must be founded on legal grounds, for example the

in honour of Apostolos Georgiades, Ant. N. Sakkoulas Publishers, Athens 2006, 707 et seq. [in Greek].

20 For an analysis, see *Stathopoulos*, Article 1506, *supra* note 17; *Giannakopoulos*, Article 1506, *supra* note 17; *Karakostas*, Article 58, *supra* note 1, with further references to case law.

21 *I. Karakostas*, *The law of Personality*, Nomiki Vivliothiki, Athens, 2012, 119 [in Greek]; *idem*, Article 58, *supra* note 1, no. 12 with references to case law.

existing forename is dissonant or unusual or the individual has become generally known by a name he has assumed in addition to or in place of his forename. A gender reassignment or the accession to a new religion constitutes reasonable grounds for altering one's forename²². A change of forename can also be requested, if the declaration before the Registrar regarding the giving of the child's forename is void²³ or voidable²⁴. In the latter case the said declaration should first be annulled through a judicial decision under contentious proceedings; the change of forename through a judicial decision under non-contentious proceedings will subsequently follow²⁵.

In case of adoption of a minor child, the court can allow the adoptive parents to add a forename to the one the adopted child already bears. In this case the adoptive parents can further request, within a year from the completion of the adoption, the deletion of the forename that the child had before the adoption, if the higher interest of the child is thus served. If the child has attained twelve years of age, his consent to any change of forename is necessary.

2. Surname

At first we will examine how the establishment or the dissolution of family relationships may affect the surname, and then we will contemplate the change of surname at an individual's request.

In the past wives obligatorily bore the surname of their husband. This regulation was of course opposed to the constitutional principle of gender equality; subsequently it was abolished in 1983.

Respectively, marriage does no longer constitute a reason for alteration of the surname of the spouses in respect of their legal relationships. In social relationships each spouse may use the other spouse's surname or add it to his own, as long as the other spouse agrees. The same applies in case of civil partnership. By joint declaration before the registry of the civil status each spouse may add to his surname that of the other spouse²⁶. This declaration is at any time revocable by

22 *Karakostas*, Article 58, *supra* note 1, no 12; *Androulidakis-Dimitriadis*, *supra* note 1, para. 57; *Pantelidou*, *supra* note 13, 6, with references to case law.

23 The declaration is void if it is made by a person who did not dispose of the said right (Article 239 Greek Civil Code), for example by the parent who did not have custody of the child. See *Tsantinis*, *supra* note 13, 1008.

24 The declaration is voidable if it is made in error (Article 140 Greek Civil Code), by deception (Article 147 Greek Civil Code) or under threat (Article 150 Greek Civil Code).

25 *Karakostas*, Article 58, *supra* note 1, no 10; *Tsantinis*, *supra* note 13, 1007-1008.

26 This provision is relatively new, added as a third paragraph to Article 1388 Greek Civil Code by law 3719/2008.

joint declaration of the spouses or by unilateral declaration of one spouse, and it is considered revoked in case of divorce. The death of the spouse does not *per se* bring upon revocation of the above declaration, unless the surviving spouse remarries or proceeds to revocation before the registry²⁷.

Adoption is another reason for change of surname. Adopted minors assume the adoptive parents' surname. However, when they attain majority, they are entitled to add their original surname to that of their adoptive parents. If one of these surnames is compound, the first surname is used in the formation of the new surname. The same applies in case of adoption of majors.

In case adoption is dissolved, the adopted child has no longer the right to bear the surname of the adoptive parents, unless the court decides differently in order to protect the child's best interest²⁸.

Surname is considered a constitutive element of the individual's personality; nevertheless it does not solely affect the private sphere but it is also a public order issue: subsequently its change cannot strictly pertain to private autonomy. Indeed, change of surname upon a person's request, regulated according to a special Legislative Decree, is effected through decision of the competent prefect. The decision of the prefect constitutes an administrative act and, like all administrative acts under Greek law, must be founded on legal, clear, specific and adequate grounds, in order not to be annulled, if it is challenged. Legal ground may constitute the fact that one's surname is foreign or dissonant. In contrary, if the requested change of name is deemed to circumvent the relevant provisions of the Greek Civil Code on the formation of surnames, it should not be allowed: for example the change of the surname of a child born out of wedlock, whose paternity has not been acknowledged, to the surname of his alleged biological father is deemed illegal. The same stands if the sole ground for the requested change of the surname of a child is that his parents omitted the joint declaration on the determination of their children's surname provided by the Greek Civil Code²⁹.

If the surname of a parent is changed by the prefect's decision or through acknowledgment of paternity, the surname of his minor children is subsequently changed. The same applies in case of adoption of adults, but only for the children born after the completion of adoption. If the children have attained

27 For an analysis, see *M. Stathopoulos/D. Papadopoulou-Klamari*, Article 1388, in: *A. Georgiades/M. Stathopoulos* (eds), *Civil Code. Volume VII: Family Law (Articles 1346-1504)*, Law & Economy P.N. Sakkoulas, Athens 2007² [in Greek]; *S. Therapou*, Article 1388, in: *I. Karakostas* (ed.), *Civil Code. Volume 8A: Family Law, Nomiki Bibliothiki*, Athens 2011 [in Greek];

28 See *Th.. Papachristou*, Articles 1563-1565, in: *Georgiades/Stathopoulos*, *supra* note 17; *K. Hatzikonstanti*, Articles 1563-1565, in: *Karakostas*, *supra* note 17.

29 *Pantelidou*, *supra* note 13, 6-8, with a case-law analysis.

majority, the change of their surname is also effectuated through the prefect's decision upon their request.

C. Protection of personal name

The name, as a constitutive element of personality, is protected by the general provisions of the Greek Civil Code on the protection of personality. Article 58 of the Greek Civil Code on the individual's right to a name is applied not only to forenames and surnames but also to nicknames and pseudonyms. When the right of an individual to bear a name is infringed or if anyone makes unlawful use of a personal name, the person entitled to that name or any person, suffering prejudice from this unlawful behavior, may request the cessation of the offence, its future omission, as well as damages in case tortuous liability arises.³⁰

CONCLUSIONS

Equality of genders is generally guaranteed by the relevant provisions on the formation of name, with minor exceptions. Greek law does not provide for a common family name. The principle of private autonomy clearly prevails over the principle of family unit, which requires a common family name. In contrary, change of name is not considered as a pure issue of private autonomy but a matter of public order as well; it is thus subject to specific legal conditions. A balance between identity determination, family integration, respect of autonomy and protection of public interest seems to be the scope of the existing legal framework.

30 *Karakostas, supra* note 21, 118-120; *idem*, Article 58, *supra* note 1, nos 14-25; *K. Fountedaki*, *Natural Person and Personality in the Civil Code*, Sakkoulas Publications, Athens-Thessaloniki, 2012, 451-465.

ANNEXE

APPLICABLE PROVISIONS

A. Greek Civil Code

Article 14. Personal relationships between spouses. Personal relationships between spouses shall be governed in the following order of priority: 1. by the law of their last common nationality during marriage provided that one of them still preserves it; 2. by the law of their last common habitual residence during marriage; 3. by the law to which the spouses are more closely connected.

Article 18. Relationships between parents and child. Relationships between parents and child shall be governed in the following order of priority: 1. by the law of their last common nationality; 2. by the law of their last common habitual residence; 3. by the law of nationality of the child.

Article 19. Child born out of wedlock. Relationships between mother and child born out of wedlock shall be governed in the following order of priority: 1. by the law of their last common nationality; 2. by the law of their last common habitual residence; 3. by the law of nationality of the mother.

Article 20. Relationships between father and child born out of wedlock shall be governed in the following order of priority: 1. by the law of their last common nationality; 2. by the law of their last common habitual residence; 3. by the law of nationality of the father.

Article 23. Adoption. The substantive requirements for the establishment and dissolution of adoption shall be governed by the law of nationality of each party. Relationships between adoptive parent or parents and adopted child shall be governed in the following order of priority: 1. by the law of their last common nationality during adoption; 2. by the law of their last common habitual residence during adoption; 3. by the law of nationality of the parent at the time of adoption and, in case of adoption by spouses, by the law governing personal relationships between spouse.

Article 30. Lack of nationality and habitual residence. Unless the law provides otherwise, in the event that a person has no nationality, the law of habitual residence shall apply in the place of the law of nationality, and in the event that the person has no habitual residence, the law of simple residence shall apply in the place of the law of habitual residence.

Article 31. Multiple nationality. Where a person has the Greek nationality and a foreign nationality, Greek law shall apply as the law of nationality. Where a person has multiple foreign nationality, the law of the country with which the person is more closely connected shall apply.

Article 33. Public policy reservation. A foreign law provision shall not apply if it contravenes morality or, generally, public policy.

Article 58. Right to the name. If the right of a person to bear a name is disputed, or if a person makes unlawful use of a certain name, the person entitled to that name or the prejudiced person, may request the cessation of the offence and its omission in the future. A claim for damages based on tortuous liability cannot be excluded.

Article 1388. Surname of the spouses. Marriage does not alter the surname of the spouses, in respect of their legal relationships.

In social relationships each spouse may use, as long as the other spouse agrees, the latter's surname or he may add it to his own.

By spouses' agreement each spouse may add to his surname the surname of the other spouse. The addition is executed by joint declaration before the registry of the civil status and it stands in force until its revocation before the registry of the civil status by joint declaration of the spouses or by unilateral declaration of the spouse, served to the other spouse. In case of divorce, the declaration is deemed revoked. In case of death, the addition remains in force, unless the surviving spouse remarries or proceeds to revocation before the registry of the civil status.

Article 1505. Children surname. Parents are obliged to determine the surname of their children by a joint irrevocable declaration. The declaration takes place before the marriage either in the presence of a notary or before the official who performed the celebration of the marriage. The official is obliged to ask for such declaration. The so determined surname, which shall be the same to all children, may be either the surname of one of the parents or a combination of their surnames, but shall not contain more than two surnames. In case the parents omit to declare the surname of their children in conformity with the conditions set out in the previous paragraphs, the children shall have as surname the surname of their father.

Article 1506. Surname of child born out of wedlock. A child born out of wedlock shall assume the surname of its mother. The husband of the mother can give the child, by means of notarial deed, his surname instead of the surname hitherto attributed to the child or in addition to this, provided that the mother and the child consent in the same form. If the parents were married after the child's birth and the child is underage, the provisions of the previous article apply as regards its surname. If a voluntary or judicial acknowledgment of a child born out of wedlock takes place, the adult child or, in case it is underage, its parents or one of them or its guardian shall have the right, within one year

from the completion of the acknowledgment, to add the father's surname to the surname of the child by means of a declaration made to the registry of civil status. If both parents jointly make such declaration, they can determine the new surname of the child according to the second paragraph of the previous article.

Article 1563. Surname of adopted child. The adopted child shall assume the surname of the adoptive parent. He is entitled, however, upon majority, to add the surname he bore before the adoption. If that surname or the surname of the adoptive parent is compound, the first surname is used in the formation of the new surname.

Article 1564. In case of joint adoption by spouses or adoption of the other spouse's child, the declaration that the spouses may have made concerning their children's surname, in accordance to the provisions set out in the first two paragraphs of Article 1505, shall also apply to the adopted child. If such declaration has not been made, it may be effectuated before the registry of the civil status simultaneously with the entry of the adoption to the registry.

Article 1565. Addition or deletion of forename. The court may, with its decision on the adoption, allow the applicant adoptive parent, upon his request, to add to the forename of the adopted child another forename. In that case the court may, upon request of the adoptive parent, submitted within one year after the completion of the adoption, allow the deletion of the forename that the child bore before the adoption, if that is dictated by the child's best interest.

If the adopted child has attained twelve years of age, his consent is in any case necessary for the grant of the court's permission.

[...]

Article 1577. Surname after dissolution [of adoption]. By dissolution of adoption for any of the reasons set out in the preceding articles, the adopted child has no longer the right to bear the surname of the adoptive parent, unless the court, evaluating the existence of reasonable interest of the child, decides differently, upon the child's request.

Article 1588. Surname of adopted [adult] child. The adopted child shall assume the surname of the adoptive parent, to which he is entitled to add the surname he bore before the adoption. If that surname or the surname of the adoptive parent is compound, the first surname is used in the formation of the compound surname of the adopted child.

B. Greek Code of Civil Procedure.

Article 323. Without prejudice of the provisions of international conventions, a judgment of a foreign civil court shall be valid and have *res judicata* effect wit-

hout further process if 1) it has *res judicata* effect under the law of the country of origin, 2) the case according to the provisions of Greek law should fall in the jurisdiction of the issuing court, 3) the defeated party was not denied the right of defence and participation in the trial in general, unless the deprivation took place according to provisions applying to nationals of the county of origin, 4) it is not contrary to a judgment of a Greek court on the same matter having *res judicata* effect with regard to the parties of the foreign judgment, and 5) it is not contrary to good morals or the public policy.

Article 780. Without prejudice of the provisions of international conventions, a judgment of a foreign court shall be valid in Greece having the same effect as is recognised under the law of the issuing state without further process if 1) the judgment applied the substantive law that is applicable under Greek law and was issued by a court having jurisdiction under the law of the state whose substantive law applied, and 2) it is not contrary to good morals or the public policy.

C. Law 3719/2008. Reforms on the family, the child, the society and other provisions (Government Gazette A 241)

Article 5. Surname. Civil partnership does not affect the partners' surname. Each one may, as long as the other agrees, to use in social relationships the other's surname or add it to his own.

Article 9. Children surname. The child born during the civil partnership or within three hundred days from the dissolution or the recognition of its invalidity shall bear the surname chosen by the parents by means of joint and irrevocable declaration contained in the cohabitation pact or in a subsequent notarial document before the birth of the first child. The surname chosen shall be the same for all children and mandatorily consists in the surname of one of the parents or a combination of the surnames of both parents. In no event can this contain more than two surnames. If the declaration is omitted, the child shall have a compound surname composed of the surnames of both parents. If the surname of one or both parents is complex, the child's surname shall be formed by the first of the two surnames.

D. Law 344/1976. On registrar acts (Government Gazette A 143)

Article 13. Correction of entries in registrar acts. (1) A registrar act is corrected through final court decision. [...].

Article 14. Certificate of birth of an abandoned child. [...] 4. The Registrar, on drafting such certificate, gives the abandoned child a surname, paternal name and maternal name.

Article 25. Giving of the forename. The infant's forename is registered on the birth certificate after declaration of both parents exercising the parental care or of one of them, on the condition that such parent carries a written authorization of the other parent, countersigned by a public, municipal or communal authority certifying the authenticity of his signature. If one of the parents does not exist or is not entrusted with parental care, the other parent effectuates the declaration of the forename. If both parents do not exist or are not entrusted with parental care, the forename is registered after declaration of the guardian of the child. The declaration of the name described above shall be irrevocable.

Article 41. Effect of a registrar act issued by foreign authority. Registrar acts concerning birth, marriage or death of Greek citizens drawn up abroad by foreign authorities are valid as evidence in Greece if they fulfill the formal requirements provided by the law of the place where they were drafted.

E. Legislative Decree 2573/1953. Change of surname and acquisition of surname, paternal name, maternal name (Government Gazette A 241)

Sole Article

1. Acquisition and change of surname and acquisition of paternal and maternal name for children born out of wedlock or of unknown parents is effectuated through the Prefect's decision.

Respectively, the insertion of data omitted in the entries of the registrars of the military service or of the municipalities, as well as their correction, with the exception of [the entries concerning] age, to which special provisions apply, is effectuated, upon request of the interested parties or ex officio, by the Prefect's decision.

2. In the case of: a) Greek citizens domiciled abroad, b) persons of Greek origin who acquire Greek citizenship and c) repatriated persons of Greek origin and Greek citizenship, the Prefect, with the aim of hellenization of their name, may issue a decision, according to the previous paragraph's process, concerning the change of surname and of forename as well.

The Prefect's decisions are served to the competent municipality and the recruitment office.

3. The Minister of Internal Affairs, by decisions published in the Government Gazette, may determine the details on the conditions and the procedure of acquire and change of surname and acquire of paternal and maternal name.

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