

THE NAME OF SPOUSES AND CHILDREN IN SWISS LAW

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In order to resolve the problem of the name of spouses and children, the legislature has to seek to reconcile the irreconcilable, namely protection of each spouse's personality, equality between the spouses and family unity, but also, of course, feasibility, as solutions that are too refined often end in technical complications. In Switzerland, the legislature has also to overcome the twofold additional difficulty of satisfying the often conflicting aspirations of the Latin and the Germanic traditions and respecting the historical and sociological link between family names and districts ¹. We are not very far away from squaring the circle and this probably explains the successive amendments that have taken place since 1974, after a lull between 1907 and 1974. Let us try to retrace briefly what is an eventful story.

I. 1907 to 1974

When private law was unified in 1907 (with entry into force on 1.1.1912), the legislature had afforded a distinct preference to the unity of the family. In consequence, the wife bore the name of her husband ²; in the event of divorce, she took back the name she bore before her marriage or, if she had been widowed in a previous marriage, could take back her maiden name ³. As for the children, if they were "legitimate" – that is, born during their mother's marriage or in the 300 days following its dissolution ⁴-, they bore the name of the (presumed!) father ⁵; if they were "illegitimate" but recognised by their father or attributed to a father by a court decision ⁶, they bore his name ⁷; if they were "illegitimate" without paternal filiation, they bore the "maiden" name of their mother (i.e. their mother's family name) ⁸.

This regime was to remain in force for some 60 years.

¹ In Switzerland, every physical person has a family name and a cantonal and district "citizenship" (droit de cite). Both are affected by marriage and filiation. For example, Article 161 para. 1 of the Civil Code (CC) provides: "A wife acquires the cantonal and district 'citizenship' of her husband without losing the 'citizenship' she held when unmarried"; CC, Art. 271 para. 1: "A child of spouses acquires the cantonal and district 'citizenship' of the father".

² Article 161 para. 1 of the former Civil Code (fCC): "A wife bears the name....of her husband".

³ fCC, Art. 149: "A divorced wife is maintained in the condition she had acquired as a result of her marriage, but takes back the family name she bore before celebration of the marriage that has been dissolved.

If she was a widow at the time of the marriage, the judgment of divorce may authorise her to take back her family name."

⁴ fCC, Art. 252: "A child born during the marriage or in the three hundred days following its dissolution has the husband as his father.

A child born after those three hundred days is not presumed to be legitimate."

⁵ fCC, Art. 270: "A legitimate child bears the name... of his father."

⁶ fCC, Art. 302 : « Illegitimate filiation derives, as regards the mother, from the sole fact of birth. As regards the father, it must be established by recognition or a judgment. »

⁷ fCC, Art. 325 para. 1, opening : « A child whose paternal filiation derives from a recognition or a judgment declaring paternity bears the family name of his father... »

⁸ fCC, Art. 324 para. 1, opening : « Natural children who are left with their mother bear the name of her family... »

II. The reforms of the 1970's

In the 1970's, a reforming wind began to blow. Whilst it did not affect the name of an adopted child (who always bears the adopter's family name⁹) notwithstanding an important reform of the law of adoption in 1972 (that entered into force in 1973), it had on the other hand a profound impact on the status of a child related by blood. In the 1974 reform (that entered into force in 1976), equality between the parents and between the children and the principle that the child should, if possible, bear the name of the parent to whose paternal authority he was subject¹⁰ dictated the following solutions which are still current:

A child of spouses (that was the new name for "legitimate" children) bears their family name (at the time this egalitarian formulation meant quite simply that the child bore the father's name, given that the law of marriage had not changed!)¹¹, whereas a child whose mother is not married to the father (that was the new name for "illegitimate" children) always bears the name borne by the mother at birth¹², whatever be his legal relationship with his father¹³. Only the subsequent marriage of his parents or a possible attribution of parental authority to his father, in very special cases, can cause him to acquire – automatically in the first case and on request in the second – the name of his father.

III. The reform of the law of marriage in the 1980's

Since as early as the end of the 1950's, the law of marriage has been the subject of careful consideration on the part of expert committees. The name of the spouses was naturally one of the issues, amongst other things. A preliminary draft, in 1976, proposed two alternatives; either retention of the principle that the name of the husband was to serve as the name of the spouses, or the possibility for the future spouses to choose the name of one of them, and failing any such choice, to bear the name of the husband¹⁴. The alternative offering a choice met with scarcely any approval during the consultation procedure¹⁵ and the draft submitted to Parliament in 1979 contained a completely different solution.

⁹ fCC, Art. 268 para. 1, opening : «An adopted person bears the family name of the adopter...» ; current CC, Art. 267 para. 1 : «The child acquires the legal status of a child of his adoptive parents.»

¹⁰ See the Federal Council's Message of 5 June 1974 to the Federal Assembly concerning the modification of the Swiss Civil Code (Filiation), published in the Feuille Fédérale (FF) 1974 II, pp. 1 et seq., especially pp. 50 and 51, nos. 321.11 and 321.12.

¹¹ 1974 CC, Art. 270 para. 1 : «A child of spouses bears their family name.» ; see also FF 1974 II, p. 50 no. 321.11 and Cyril Hegnauer, *Droit suisse de la filiation et de la famille* (CCS, Art. 328-359), 4th edition revised and supplemented, French version prepared and up-dated by Philippe Meier, Bern, 1998, p. 94 nos. 16.03 and 16.04.

¹² 1974 CC, Art. 270 para. 2 : «A child whose mother is not married to the father acquires the family name of the mother.» This provision was to be adapted to the new 1984 law on marriage by the addition of the following clarification (current CC, Art. 270 para. 2) : « or, when the latter bears a double name following a previously contracted marriage, the first of those two names», but the principle that the child bears the name borne by his mother at birth has not been modified for all that. On this point see FF 1974 II, p. 51 no. 321.12 and Cyril Hegnauer, *op. cit.*, p. 95, no. 16.06.

¹³ See Cyril Hegnauer, *loc. cit.* in the preceding note.

¹⁴ Art. 160 of the 1976 preliminary draft: Alternative 1: «The future spouses choose the name of one of them as the family name.» "Failing a choice, the name of the future husband serves as the family name." Alternative 2: «A wife bears the family name of her husband.»

¹⁵ Message of 11 July 1979 concerning the reform of the Swiss Civil Code (General effects of marriage, matrimonial regimes and inheritance), published in FF 1979 II, pp. 1179 et seq., especially p. 1227 no. 212.1.

The principle that the name of the husband was to serve as the spouses' name remained, but the wife was entitled to have the name of her husband followed or preceded by the name she had borne until then or before a previous marriage, provided always that the family name remained recognisable. In order to avoid lengthy transcriptions occasioned by this liberty allowed to women, it was even provided that, "if necessary", only the wife's family name would appear in the official registers and on supporting documents¹⁶.

There is not time to summarise the debates in each of the two Federal Chambers. But to give some idea of the atmosphere, it suffices to say that they lasted for several hours in the *Chambre du peuple* (i.e. the National Council, with 200 deputies)¹⁷, that is almost as long as the discussions in the same Chamber on the thorny issues – and thorny they were! – of the matrimonial regime and innovations in the law of inheritance¹⁸. A difficult « shuttle » (i.e. to and fro) between the two Chambers (Council of the States or Chamber of the Cantons and National Council), whose approaches were very divergent¹⁹, was required in order to arrive at last, on 5 October 1984²⁰, at the following compromise solution (that entered into force on 1.1.1988) which is still current: the spouses have as their family name the name of the husband²¹, but the wife can have that name preceded by the name she bore until then²². For example, if Miss White marries Mr Black, the family name of the spouses, and hence the name of their common children, is Black; Miss White can, for her part, decide to call herself Mrs Black, or Mrs White Black (without a hyphen between the two names). If the marriage is dissolved by divorce or is annulled, the wife can keep her name of Black or of White Black, but she can, within six months, declare to the civil status official that she is taking back her name of White²³. If, after divorce – or being widowed –, Mrs Black marries Mr Grey, she can call herself Mrs Grey or Mrs Black Grey; if, again after divorce or widowhood, Mrs White Black marries Mr Grey, she can call herself Mrs Grey or Mrs White Grey, but she cannot then keep the name of Black. This is because, if she wishes to use a double name, she can keep only the first of the two names she bore before the second marriage²⁴.

In the event of a further divorce, Mrs Grey can, within six months, decide to call herself Mrs Black or Mrs White, and Mrs White Grey can, within the same time-limit, decide to call herself Mrs White Black or Mrs White.

¹⁶ Art. 160 of the draft: «The name of the husband serves as the family name of the spouses.» "A wife is entitled to have the family name followed by the name she bore until then or before a previous marriage, or to have it preceded by her former name, on condition that the family name remains recognisable as such." "If necessary, only the family name of the wife will appear in official registers and on supporting documents" (see FF 1979 II, p. 1379).

¹⁷ See the Official Bulletin of the Federal Assembly, National Council (OBNC) 1983, pp. 624 to 640.

¹⁸ See OBNC 1983, pp. 662 to 693.

¹⁹ Official Bulletin of the Federal Assembly, Council of the States (OBSC) 1981, pp. 69-71 and 76, OBNC 1983, pp. 624-640, OBSC 1984, pp. 124-126, OBNC 1984, pp. 1040-1044.

²⁰ OBSC 1984, p. 591, OBNC 1984, p. 1458.

²¹ CC, Art. 160 para. 1: «The name of the husband serves as the family name of the spouses.»

²² CC, Art. 160 para. 2: «However, the future wife may declare to the civil status official that she wishes to keep the name she bore until then, followed by the family name.»

²³ CC, Art. 149 para. 2: «The spouse who changed name keeps the family name acquired on marriage unless, within six months from the date on which the judgment became final, he or she declares to the civil status official a wish to take back his or her unmarried name or the name he or she bore before the marriage.» The time-limit of six months was to be increased to one year following a further modification of the Civil Code adopted by Parliament on 26 June 1998 (FF 1998, pp. 3077 et seq., especially p. 3086, Art. 119 new para. 1) which will enter into force on 1 January 2000.

²⁴ CC, Art. 160 para. 3: «When she [the wife] already bears a double name of that kind, she can have the family name preceded only by the first of those two names.»

And, in all this, what about the husband ? He can only keep his name, unless before the marriage the future spouses seek, for legitimate reasons, authorisation to use the future wife's name as the family name²⁵. In such a situation (for example, Miss White and Mr Black would be called White, as would their common children), Parliament decided to forego the possibility, for the husband, to have his wife's name preceded by his own name (i.e. to call himself Mr Black White). In doing so, it adopted the argument put forward by the Committee's rapporteur, Professor Petitpierre, a professor of civil law, to the effect that there was no reason to allow the husband to keep his name as a first name when he had expressly agreed to renounce use of his name²⁶. It should be noted, in addition, that this was a means of limiting somewhat the number of double names, the complications of which were already arousing the wrath of civil status officials²⁷.

It is clear that the solution adopted by Parliament, and then by the population in a referendum, is not ideal. It does not really ensure either equality between the spouses or the unity of the family, but it was the only compromise that was reached.

Since the entry into force of this new law, popular initiatives have sought on two occasions to put the matter back on the drawing-board, in such a way as to achieve equality between the spouses. They have never succeeded²⁸, either because the subject did not interest the population, or because everyone was only too well aware of the « prickly » sociological problems that would be raised.

However, the delicate balance achieved by the legislature's solution was to be upset by a judgment from Strasbourg.

IV. The "1994 catastrophe"

On 22 February 1994, following an application by a Swiss couple who had been authorised, by a special procedure and before the entry into force of the new law, to bear the name of the wife, but without the husband being authorised to keep his unmarried name and put it before the name of the spouses²⁹, the Strasbourg Court³⁰ held, by 5 votes to 4, that there was discrimination within the meaning of Article 14 of the European Convention on Human Rights. The Court had, by 6 votes to 3, swept aside the reservation made by Switzerland, on ratifying Protocol No. 7, in favour of the 1984 Act on the name of spouses. It ordered Switzerland to pay to the applicants 20,000 francs for costs and expenses.

²⁵ CC, Art. 30 para. 2 : « The future spouses should, at their request and if they advance legitimate reasons, be authorised to bear, as from the celebration of the marriage, the name of the wife as the family name. »

²⁶ OBNC 1983, p. 639, Mr Petitpierre, rapporteur (of the National Council Committee), foot of the right-hand column.

²⁷ See the Revue de l'état civil 1984, pp. 137 et seq., where the text sent jointly by the Swiss Association of Civil Status Officials and the Conference of the Cantonal Supervisory Civil Status Authorities to all the members of the Council of the States is reproduced and where one can read (p. 140) : « die Voranstellungs-Variante ist kaum eine echte Lösung » (Eingabe an alle Mitglieder des Ständerats vom 12 März 1984, signed : Schweizerischer Verband der Zivilstandsbeamten, der Präsident Dr. Mario Gervasoni, Konferenz der kantonalen Aufsichtsbehörden im Zivilstandswesen, der Präsident Dr. Bernardo Lardi, Regierungsrat).

²⁸ Federal popular initiative for the equality of spouses when choosing the family name (initiative in favour of the transmission of the wife's name), the lack of success whereof was recorded in FF 1991 I, 1496 ; Federal popular initiative for equality of rights between women and men when choosing the family name (initiative concerning the family name), the lack of success whereof was recorded in FF 1992 VI, 341.

²⁹ Federal Court judgment of 8 June 1989 (ATF 115 II 193).

³⁰ Case of Burghartz v. Switzerland (49/1992/394/472).

From a political point of view, this judgment could have entailed one of two reactions: either the Federal Council (i.e. the executive, in other words the Government), which has the power to initiate legislation, could have set in train a reform of the Civil Code provisions concerning names, with the risk of another interminable socio-political «battle»; or, alternatively, it could have taken the view, bearing in mind the small number of cases where the spouses take the name of the future wife and the absence of problems since entry into force of the new Act³¹, that it would do nothing and that in fact it ran very little risk of there being «recidivists». However, the Government chose a third course. On 25 May 1994 (with effect from 1 July 1994), by means of an Order on Civil Status (ranking below the Civil Code in the hierarchy of norms), it modified unilaterally the solution contained in the Code and introduced what Parliament had avoided in 1984, namely an option, for the husband, to have the wife's family name that has been chosen by the future spouses as the spouses' family name preceded by his name³². In order to achieve the maximum equality, the Order also introduced the possibility, until 30 June 1995, for any man who since 1 January 1988 had taken his wife's name as the family name to ask for it to be preceded by his own name³³.

V. The current further reform concerning the name of spouses and children

My Parliamentarian's heart –I was then a Deputy in the National Council– leapt into my mouth, for the Government was violating the rules of democracy. If equality between spouses was to be achieved – with inevitable consequences for the children –, it was for Parliament to determine, subject to the possibility of a referendum, what solution should be adopted on so sensitive a subject.

On 14 December 1994, we therefore set in motion the Parliamentary procedure³⁴ – which, it should be said in passing, does not suspend application of the Order ! – with a view to having the law on the family name reformed. In this procedure, which is now still in progress, it has so far been possible to prepare a draft that has been submitted for consultation and modified in the light of the results thereof, notably by the addition of provisions on cantonal and district «citizenship» (droit de cité). The draft, the fruit of the work of the National Council's Legal Affairs Committee, has now been submitted to the Federal Council for its opinion before the debate in the plenary National Council. Once the latter Council has debated the issue, the draft will be transmitted to the Legal Affairs Committee of the second Chamber (the Council of the States), which will be able to make such modifications as it wishes and will submit them to its plenary assembly. If there are differences of opinion between the two Chambers, there will be a «shuttle» until an agreement is reached.

³¹ It should be remembered that the Burghartz case in fact pre-dated the new law and that the procedure which had enabled the spouses to bear the wife's name had nothing to do with the law of marriage !

³² Art. 177a of the Order on Civil Status (OCS) : «The future wife may declare to the civil status official that she wishes to keep, after the marriage, the name she bore until then, followed by the family name (CC, Art. 160 paras. 2 and 3). **The future husband has the same possibility if the future spouses submit a request to be authorised to bear, as from the celebration of the marriage, the name of the wife as the family name (CC, Art. 30 para. 2).**» (the 1994 innovation appears in bold type).

³³ OCS, Art. 188i : «If the future spouses were authorised, before 1 July 1994, to bear, as from the celebration of the marriage, the name of the wife as the family name (CC, Art. 30 para. 2 in the 5 October 1984 version), the man may, until 30 June 1995, declare to the civil status official that he wishes to have the family name preceded by the name he bore before the marriage.» ; this provision was meant to ensure equality in relation to the transitional provision in the Civil Code (Art. 8a of the Final Chapter) which reads : «Within one year from the entry into force of the new Act, the wife who married under the former law may declare to the civil status official that she wishes to have the family name preceded by the name she bore before the marriage» ; this provision could have produced effects until 31 December 1988.

³⁴ OBNC 1995, pp. 2181 et seq.

Will such an agreement be reached ? The draft prepared by the National Council's Committee³⁵ is fairly « revolutionary », in that it envisages the right, for the future spouses, to bear as the common name, at their option, the current or unmarried name of one of them, or for each of them to bear his or her current or unmarried name. Failing a choice, each will keep his or her current name (a minority proposes that in that case, the husband's name be imposed).

If the spouses have chosen different names, they will, at their marriage or at the time of birth or adoption of their first common child, have to decide the name to be borne by that child (and all the others). A minority of the Committee proposes that, if the parents make no choice, the child should bear the mother's name.

VI. Conclusion

It is difficult today to know what will come out of the Parliamentary debates and when they will be concluded. Only one thing is certain : in a matter that is so marked by traditions, cultures and different sensitivities as the name of spouses and children, it cannot be claimed that equality between men and women is the panacea. From this point of view, the Strasbourg judgment was an error³⁶.

³⁵ Text of the draft :

Art. 160 : The future spouses shall declare to the civil status official :

That they will bear as the common family name the current or the unmarried name of the future husband or of the future wife ;

That each of them will keep his or her current name or will take back his or her unmarried name.

Failing a declaration by the future spouses, each of them retains his or her current name (Proposal of a minority of the Committee : Failing a declaration by the future spouses, the current name of the future husband serves as the family name of the spouses).

Spouses who have kept the names they bore before the marriage may declare at the time of birth or adoption of their first common child that they wish to bear henceforth the name of the wife or the name of the husband as the common family name.

Art. 160a (new): *If the marriage is dissolved, the spouse who changed name keeps the family name he or she had acquired at the time of the marriage, provided that he or she has not made a declaration with a view to taking back his or her unmarried name or the name he or she bore before the marriage.*

The declaration must be made before the civil status official within one year from the date of the death of one of the spouses, of the entry into effect of the judgment of divorce, of the declaration of nullity or of the dissolution of the marriage on account of the absence of one of the spouses.

Art 270 : *A child of spouses bears their family name. If the parents bear different family names, the child acquires the family name chosen by them for their common children at the time of the marriage or at the birth or adoption of the first child.*

A child whose mother is not married to the father bears the name of the mother.

(Proposal of a minority of the Committee : para. 1 bis, Failing a choice by the parents, the child bears the name of the mother).

Art. 270a (new): *The name of a child aged more than 16 at the time of his or her parents' marriage can be modified only with his or her express consent.*

Transitional provisions (modification of Art. 8a of the Final Chapter of CC)

Within two years from the entry into force of the Act of..., the spouse who, pursuant to the former law, changed name when he or she married may declare to the civil status official that he or she wishes to take back the name borne before the marriage or his or her unmarried name.

The name of any common children born before receipt of this declaration remains unchanged. Any children born later bear the same family name as their elder siblings.

If a double name has been adopted following a marriage celebrated before the entry into force of the Act of..., only the first name can be borne as the spouses' family name or chosen as the name of the child.

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³⁶ On this point see the critical article by Professor Heinz Hausheer, *Der Fall Burghartz oder Vom bisweilen garstigen Geschäft der richterlichen Rechtsharmonisierung in internationalen Verhältnissen, in Familie et Droit, Mélanges Bernhard Schnyder, Fribourg, 1995, pp. 407 to 419.*

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