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SEXISM, SURNAMES, AND SOCIAL PROGRESS: THE CONFLICT OF INDIVIDUAL AUTONOMY AND GOVERNMENT PREFERENCES IN LAWS REGARDING NAME CHANGES AT MARRIAGE

*Heather MacClintock**

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I. INTRODUCTION

Names can be a powerful indicator of ethnicity, family connections, religion, or social status. People may change their names to indicate closeness to one group,¹ to distance themselves from another,² for professional purposes,³ or for any number of other reasons. The psychological effects of changing one's name may be profound or negligible,⁴ evidenced by the extensive scholarship on the topic.⁵

Arguably, the most common reason for changing one's surname is marriage, after which one spouse renounces her (or less commonly, his) prenuptial surname in order to adopt and share the other spouse's surname.⁶ While much has been written on the subject of marital name-changing, current legal scholarship tends to address a person's effective lack of choice despite a variety of legal options available,⁷ describe problems posed by traditional patrilineal naming practices by posing solutions in the form of new legal default rules,⁸ or decry laws that are gender-discriminatory.⁹

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1. For example, Sikh men are known by the surname Singh, and women are known by the surname Kaur. All About Sikhs, Sikh Naming Practices, <http://www.allaboutsikhs.com/sikh-names/sikh-naming-practices.html> (last visited Feb. 15, 2010). Adoption of these particular names upon conversion to the Hindu religion is an essential way of indicating one's faith. *Id.*

2. See, e.g., MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 216-17 (Ballantine Books 1992) (1965) (Malcolm X stated that, "[f]or me my 'X' replaced the white slavemaster name of 'Little' which some blue eyed devil named Little had imposed on my paternal forebears.").

3. This is particularly common among people whose professions bring them into the public eye, such as actors and other performing artists. Names that do not flow well, are too difficult to pronounce, or are too dull, are usually seen as adversely affecting an actor or performing artist's career.

4. Darrel W. Drury & John D. McCarthy, *The Social Psychology of Name Change: Reflections on a Serendipitous Discovery*, 43 SOC. PSYCHOL. Q. 310, 310-20 (1980).

5. For some sociological perspectives on name changing, see, e.g., Michael Aceto, *Ethnic Personal Names and Multiple Identities in Anglophone Caribbean Speech Communities in Latin America*, 31 LANGUAGE IN SOC'Y 577 (Sept. 2002); David R. Johnson & Laurie K. Scheuble, *Marital Name Change: Plans and Attitudes of College Students*, 55 J. MARRIAGE & FAMILY 747 (Aug. 1993); David R. Johnson & Laurie K. Scheuble, *Women's Marital Naming in Two Generations: A National Study*, 57 J. MARRIAGE & FAMILY 724 (Aug. 1995).

6. The name that a person held before marriage will be referred to as the prenuptial surname in all feasible contexts. The term "maiden name" is inherently sexist and therefore irrelevant to the concerns of men who wish to adopt a new surname at marriage. Furthermore, the surname held by a person prior to the marriage in question may not be a birth surname but instead the name of a former spouse or a name legally adopted for some other purpose.

7. See, e.g., Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 764 (2007); Claudia Goldin & Maria Shim, *Women's Surnames at Marriage and Beyond*, 18 J. ECON. PERSPECTIVES 143, 143-60 (Spring 2004).

8. See, e.g., Omi Morgenstern Leissner, *The Name of the Maiden*, 12 WIS. WOMEN'S L.J. 253 (1997) [hereinafter, Morgenstern Leissner, *The Name*]; Omi Morgenstern Leissner, *The Problem That Has No Name*, 4 CARDOZO WOMEN'S L.J. 321 (1998) [hereinafter, Morgenstern

There is a gap, however, in the discussion. Marital surnames remain subject to government regulation.¹⁰ Scholarship does not address the question of why marital surnames are subjected to government regulation, and whether a government's interest in this area is sufficient to justify its intrusion on the autonomy of its citizens. This paper attempts to address that gap by exploring three distinct legal approaches to marital surname changes: mandatory change, permissive change, and prohibition on change. It will examine government justifications for policies on marital name-changing, and the relevance of these justifications in the current cultural and legal atmosphere.

Part II presents a general history of naming and name-changing in several countries, and discusses the current state of the law in each country. The differences between the three broad approaches to marital name-changing, as well as the differences between jurisdictions within each category, will be clarified. At first glance, the differences may seem arbitrary, but in reality they are a complex mixture of the history, customs, and legal systems that have arisen in each place.

Issues of gender inequality are inextricably tied to many of these regulations, which can be seen as legalized discrimination. Women have customarily borne the burden of changing their prenuptial surnames at marriage, and bear the same burden at law in most jurisdictions where change is mandated. Historically, it has also been women who have initiated litigation against their governments for forcing them to give up their prenuptial surnames.¹¹ In the latter part of the 20th century, however, several lawsuits have also been brought by men who were prohibited from taking their wives' surnames, or hindered in their legal efforts to do so.¹²

Leissner, *The Problem*]; Esther Suarez, *A Woman's Freedom to Choose Her Surname: Is it Really a Matter of Choice?*, 18 WOMEN'S RTS. L. REP. 233 (1997).

9. See, e.g., Fionnuala Girard, *Human Rights Law – Obliging Married Women to Change their Surname is Sex Discrimination – Ünal Tekeli v. Turkey*, 29865/96 Eur. Ct. H.R. (2004), 30 SUFFOLK TRANSNAT'L L. REV. 245 (2006); Yury Kolesnikov, *Chapter 567: Saying "I Do" to Name Changes by Husbands and Domestic Partners*, 39 MCGEORGE L. REV. 429, 437-44 (2008); Michael Rosensaft, *The Right of Men to Change Their Names Upon Marriage*, 5 U. PA. J. CONST. L. 186, 210-18 (2002).

10. See Rosensaft, *supra* note 9, at 192-93 (describing a number of state statutory procedures for name changes as a result of entering or leaving a marriage).

11. See, e.g., *Ball v. Brown*, 450 F. Supp. 4, 7 (N.D. Ohio 1977); *State v. Taylor*, 415 So. 2d 1043, 1043 (Ala. 1982); *Malone v. Sullivan*, 605 P.2d 447, 447 (Ariz. 1980); *Davis v. Roos*, 326 So.2d 226, 227 (Fla. App. 1 Dist. 1976); *Stuart v. Board of Sup'rs of Elections for Howard County*, 295 A.2d 223, 224 (Md. 1972); *Application of Lawrence*, 337 A.2d 49, 50 (N.J. Super. A.D. 1975); *Dunn v. Palermo*, 522 S.W.2d 679, 679-80 (Tenn. 1975); *Kruzel v. Podell*, 226 N.W.2d 458, 459 (Wis. 1971); *Ünal Tekeli v. Turkey*, 2004-X Eur. Ct. H.R. 239. These cases will be explored in more depth *infra* 28-29.

12. See, e.g., *Buday v. Cal. Dep't of Health and Serv., et al.*, No. CV06-08008 FMC (JWJx), (C.D. Cal. filed Dec. 15, 2006); *Burghartz v. Switzerland*, 18 Eur. Ct. H.R. 101, 118 (1994).

Part III examines commonly-cited governmental justifications for maintaining unequal practices, such as family unity and administrative convenience.¹³ Although these justifications may have been valid in bygone eras, the realities of modern life—computerized databases, increased tracking and monitoring of citizens, changing concepts of “family” and “unity”—have displaced this policy and convenience-based reasoning. The legitimacy of government interest in the marital name will be compared to and balanced against the rights of the individual to autonomy and privacy.

Part IV will detail significant cases in which citizens have challenged surname change laws in their countries or states. These cases form a broader picture of a gradual international shift toward greater autonomy in marital naming laws and, consequently, greater gender equality in the law. The European Court of Human Rights, in particular, has been a driving force on this issue, while at the same time struggling to find common ground between its member states, which fall across the entire spectrum of legal schemes.

Regardless of the reason, name changing falls at a particularly delicate intersection of personal autonomy and the government’s arguable right to regulate its citizens’ names. Surname changes based on marriage add yet another layer of sensitivity because the change is prompted by social, cultural, and sometimes legal expectations, rather than an independent decision to change.¹⁴ Over the past

13. See Lawrence G. Albrecht et. al., *International Human Rights*, 39 INT’L LAW. 517, 548 (2005) (stating that Turkey justified forcing women to adopt their husband’s surname because “there was a link between family unity and a family name, family unity was a public policy consideration, and an individual’s private life ceased when entering into contract with public life. . . . Turkey pointed to the administrative difficulties in maintaining birth, marriage and death records that might be caused by allowing for spouses to have different surnames.”); Kif Augustine-Adams, *The Beginning of Wisdom is to Call Things By Their Right Names*, 7 S. CAL. REV. L. & WOMEN’S STUD. 1, 17-21 (1997) (discussing the importance given by American courts to the idea of a family unified by a common name); Yury Kolesnikov, *supra* note 9, at 438-39 (addressing the arguments of opponents of California’s Chapter 567, two of which were family unity and administrative convenience); Fritz Snyder, *The Fundamental Human Rights*, 14 INT’L LEGAL PERSP. 30, 46 (2004) (Japan requires all married couples to assume the surname of either the husband or the wife upon marriage because “the sense of togetherness is enhanced by having the husband and wife have the same family name . . .”).

14. Indeed, the concept of marriage itself is subject to social, cultural, and legal construction. While the discussion of marital name changing in this paper is framed in heterosexual terms, this is largely because same-sex marriage is not legally recognized in the majority of the countries discussed here. Only Canada allows same-sex couples to formally marry, while Great Britain, France, and Switzerland permit civil unions. In the United States, Massachusetts allows same-sex marriage, there has been a legislative and judicial divide over the issue in Connecticut and California, and nine other jurisdictions allow civil unions; however, no same-sex couples united in these states are eligible for federal marriage benefits. Because of the relatively new status of same-sex marriage in the countries discussed herein, fewer traditions and expectations have attached. While same-sex couples may decide that one or both partners will change names, most of the legal mandates or restrictions discussed herein are inapplicable to these situations. For an up to date list of U.S. jurisdictions’ treatment of same-sex marriage see NCSL.org, *Same Sex Marriage, Civil Unions and Domestic Partnerships*, <http://www.ncsl.org/default.aspx?tabid=16430>. For a list of international jurisdictions that permit same sex marriage see International Gay & Lesbian Human Rights Commission, *Information by*

century, however, there has been a significant shift in both cultural and legal views on marital surnames worldwide, which can be observed in North America, Europe, and other developed nations such as Japan. Citizens, courts, and legislatures have gradually begun to promote autonomy over regulation, and all indications suggest that this trend will continue as a more equal system of marital naming laws evolves.

II. BACKGROUND: HISTORY AND CURRENT LAWS IN VARIOUS COUNTRIES AND POLITICAL SUB-DIVISIONS

Three basic systems of marital naming regulation exist: those in which change is mandated, those in which change is permitted but not required, and those in which change is forbidden. Generally, the jurisdictions with restrictive regulations on name changing—whether they mandate or forbid it—are governed by civil law.¹⁵ The jurisdictions with more flexible regulations are rooted in common law.¹⁶

A. Mandated Change

In some countries, a surname change is mandatory upon marriage. However, not all countries require their citizens to follow the same procedures, and the details of marital name changes vary greatly between these countries.¹⁷ Notably each of these countries has adopted laws that make birth names virtually unchangeable, except at marriage.¹⁸ It is not clear, though, whether this is incidental or whether marriage is given a higher priority than the individual name and a person's ability to change that name for reasons other than marriage.

1. Japan

The Japanese Civil Code requires married couples to adopt one spouse's name as the family surname, but does not prescribe which name should be chosen.¹⁹ The Japanese Constitution requires that all marriage laws provide for

Country, <http://www.iglhc.org/cgi-bin/iowa/content/bycountry/index.html>.

15. The civil law jurisdictions discussed herein are Switzerland, Turkey, Japan, France, and Quebec.

16. The common law jurisdictions discussed herein are Great Britain, Canada (excepting Quebec), and the United States of America.

17. Compare, e.g., Taimie L. Bryant, *For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan*, 39 UCLA L. REV. 109 (1991) (An individual is not legally married until registered with the government and must use one of the couple's surnames upon registering) with Barbara Graham-Siegenthaler, *International Marriage and Divorce Regulation in Switzerland*, 29 FAM. L. Q. 685 (1995) (discussing the legal application process and requirements in Switzerland).

18. These laws will be discussed in context throughout the sections in Part A.

19. MINPŌ, art. 750. Esther Suarez claims that Japanese law has been revised so that couples may choose on their wedding day to have the same name or different names, but cites only a newspaper article. Suarez, *supra* note 8, at 241 n.105. However, Suarez's claims were premature, since the bill referred to in the newspaper article has still not been enacted. Indeed, in an interview that took place in 2009, Seiko Noda, Japan's state minister in charge of science and

individual dignity and equality between the sexes,²⁰ thus mandating the adoption of one partner's surname would be unconstitutional. In practice, though, the husband's surname is almost always used²¹ unless the wife has no brothers to carry on the family name.²² Furthermore, since the law does not allow for social or professional use of anything other than the legal name, adopting a new surname is not a mere formality, but has immediate and wide-ranging effects on a person's daily life.²³

The restrictiveness of Japan's marital name laws has fluctuated throughout Japan's history. During the *Josei* period, which existed before the current monarchy was instituted in the 1600s, women kept their own family names after marriage.²⁴ Early in the current monarchical period, names were a matter of custom rather than law, and surnames were used only by upper-class Japanese.²⁵ This changed when a system of family registration was implemented in 1872, which drove the use of family surnames.²⁶ Women initially retained their own family name to make genealogical tracking easier, but when the Civil Code was adopted in 1898, it prescribed that women should take their husbands' surnames to indicate their position as members of his family.²⁷

While allowing women to take their husbands' surnames was seen as progressive in 1898, Japanese legal scholars, the Tokyo Bar Association, and many other groups now advocate reform to legally allow spouses to maintain separate surnames.²⁸ The rationale is based less on history and family structure than on personal autonomy and professional considerations. While marriage advocates in most countries are unlikely to support reforms that loosen the traditional family structure,²⁹ some Japanese groups support reform of marital name laws because a significant number of Japanese couples refuse to marry if one partner is forced to

technology policy, food safety, consumer affairs and space policy, described the reason she and her partner have an unofficial marriage as "simple: We both wanted to keep our last names, and that was—and is—still not allowed by our archaic legal system. One of us must change his or her last name to the other person's. Since we are both politicians and already had careers, that was not an option for us." Judit Kawaguci, *State Minister Seiko Noda*, JAPAN TIMES, Feb. 12, 2009, <http://search.japantimes.co.jp/print/fi20090212jk.html>.

20. KENPŌ, art. 24, para. 2.

21. In 1990, statistics showed that 97.8% of couples chose the husband's surname. Yukiko Matsushima, *Japan: Continuing Reform in Family Law*, 33 U. LOUISVILLE J. FAM. L. 417, 419 n.3 (1994-95). This percentage remained steady a decade later. Emens, *supra* note 7, at 800 n.144.

22. Matsushima, *supra* note 21 at 419 n.3; Emens, *supra* note 7, at 800 n.144.

23. Bryant, *supra* note 17, at 151-52 n.134.

24. M. Christina Luera, *No More Waiting for Revolution: Japan Should Take Positive Action to Implement the Convention on the Elimination of All Forms of Discrimination Against Women*, 13 PAC. RIM L. & POL'Y J. 611, 637 (2004).

25. Bryant, *supra* note 17, at 150.

26. *Id.*

27. *Id.*

28. *Id.* at 152.

29. See generally, Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905, 907-08 (2001); Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 HOFSTRA L. REV. 379, 379 (2003).

change his or her surname.³⁰ National concerns over declining birthrates—in part due to young Japanese choosing to marry later in life, or not at all³¹—may ultimately provide additional incentives for reform, since these concerns may prove stronger than tradition.

2. Switzerland

Surnames came into use in Switzerland as a result of cultural trends that swept through medieval Western Europe.³² Until recently, Swiss law required married couples to share the husband's surname.³³ This law was revised in 1985 and went into effect in 1988.³⁴ Swiss couples must now choose either the husband's or wife's name as the family name.³⁵ However, if a couple chooses to use the wife's surname as the family name, the government requires them to file a substantiated application of name change, which can then be denied by the government officials who review these applications.³⁶

There is no option for both parties to retain only their prenuptial surnames, though a woman does have the option of retaining her prenuptial name as a prefix to her husband's name.³⁷ However, this option must be chosen prior to marriage; upon marriage, couples are locked into the decisions they have made and cannot change their minds later.³⁸ There is no corresponding option for men,³⁹ which inspired litigation that is discussed in Part IV, *infra*. Swiss couples residing abroad are subject to the regulations set forth by their country of residence, but may file a

30. Yasuhide Kawashima, *Marriage and Name Change in Japanese Family Law*, 26 U. BRIT. COLUM. L. REV. 87, 90 (1992); Kawaguci, *supra* note 19; Suarez, *supra* note 8, at 241, n.105.

31. James M. Raymo, *Later Marriages or Fewer? Changes in the Marital Behavior of Japanese Women*, 60 J. OF MARRIAGE AND THE FAM. 1023, 1023 (1998).

32. This historical phenomenon is discussed in greater detail in Part II. B, *infra*.

33. See Code civil suisse [Cc] [Civil Code], Jan. 1, 1988, art. 160, para. 1 (Switz.) translated in THE SWISS CIVIL CODE: ENGLISH VERSION 49 (Ivy Williams trans., Oxford Univ. Press 1925) (1987) (stating that “[t]he husband's name is the surname of the husband and the wife.”) [hereinafter THE SWISS CIVIL CODE]; Augustine-Adams, *supra* note 13, at 17-21; Graham-Siegenthaler, *supra* note 17, at 686.

34. *Id.* at 12, art. 30, para. 2 (noting that “[w]here an engaged couple requests that the wife's surname should be the surname of the family after the wedding, the request is to be granted if there are grounds worthy of consideration.”).

35. *Id.*

36. *Id.* Cantons have the power to declare that an engaged couple's reasons for wanting to take the bride's surname are not worthy of consideration, an action impliedly authorized by the statute. *Id.* at 12, art. 30.

37. *Id.* at 50, art. 160, para. 2 (stating that “[t]he bride is entitled to declare in the presence of the registrar that she wants her former name to be placed in front of the husband's surname”).

38. Office Fédéral De L'État Civil, *Fact Sheet on Married Names*, <http://www.bj.admin.ch/etc/medialib/data/gesellschaft/eazw/merkblaetter.Par.0010.File.tmp/ehe-name-e.pdf>

(last visited Feb. 19, 2010) [hereinafter Fact Sheet on Married Names].

39. *Id.*

declaration with their local consulate to be governed by the Swiss law on names.⁴⁰ If one party to the marriage is not a Swiss national, the couple may also choose to be governed by the laws of the non-Swiss party's country.⁴¹ Thus, the only effective way a married couple can reside in Switzerland and legally bear different surnames is if at least one party is from a country where name changes at marriage are not mandatory.

While the Swiss government has been chastised for maintaining sexist marital naming laws,⁴² name changes in general are difficult to accomplish in Switzerland. The Civil Code gives every person the right to change his or her name,⁴³ but this right is largely illusory because elective name changes must be approved by the local Cantons and can only be requested for "acceptable" reasons.⁴⁴ The petitioner must show that his or her current name causes humiliation or suffering; petitions for reasons short of this standard are nearly always dismissed.⁴⁵

3. Turkey

Another method of mandating change is to prescribe by law the exact form of a name change at marriage. Turkey, for instance, requires that all women take their husbands' surnames upon marriage.⁴⁶ In 1997, Turkish women won the right to keep their prenuptial surname in front of their husbands' surname if they wanted, but this is the only legal alternative for married couples.⁴⁷

Historically, the Ottoman Empire's central government did not concern itself with marriage and other family matters, but left them under local control.⁴⁸ After Mustafa Kemal Ataturk and the Kemalist Grand National Assembly of the Turkish

40. *Id.*

41. Fact Sheet on Married Names, *supra* note 38.

42. See *Burghartz v. Switzerland*, 8 Eur. Ct. H.R. 101 (1994); United Nations Committee on the Elimination of All Forms of Discrimination Against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women*, 125, U.N. Doc. CEDAW/C/CHE/3 (Apr. 23, 2008) available at <http://www.unhcr.org/refworld/docid/48ea14df2.html>.

43. THE SWISS CIVIL CODE, *supra* note 33, at 12, art. 30, para. 1.

44. *Id.*

45. *Id.*

46. TÜRK MEDENİ KANUNU [TMK] [Civil Code] Nov. 22, 2001, Kanun 4721, bk. 2, ch. 4, §3, art. 187 (formerly 153) (stating that "[a] married woman shall take the surname of her husband; however, she may apply to the person performing the marriage or the Public Registration office to use her former name in front, as well. However, if the woman already has two surnames, she may only retain one of them."), available at <http://www.tbmm.gov.tr/kanunlar/k4721.html> [hereinafter TMK].

47. See *id.* But see John Dwight Ingram, *The First "First Gentleman": The Role of President Jane Doe's Husband*, 7 AM. U.J. GENDER SOC. POL'Y & L. 523, 538 (1998-99) (noting that the husband of Tansu Çiller, the first female Prime Minister of Turkey, did take her surname when they married, probably for political gain; however, such an occurrence is extremely rare, and the details of how Çiller managed to skirt the law to accomplish this are, as of now, undiscoverable).

48. June Starr, *The Role of Turkish Secular in Changing the Lives of Rural Muslim Women, 1950-1970*, 23 LAW & SOC'Y REV. 497, 498 (1989).

Republic came into power in the 1920s, however, Turkey adopted a Civil Code, which was originally a near-replica of the Swiss Civil Code.⁴⁹ Just as in Switzerland, general name changes may only be obtained from a judge.⁵⁰ The Turkish Civil Code conflicts with the Turkish Constitution, however, in its treatment of women's issues. While the Constitution guarantees gender equality,⁵¹ the Civil Code originally stated that the husband was head of the household, with corresponding rights not enjoyed by women.⁵² It also required that women take their husbands' surnames.⁵³

Turkey has recently amended both its Constitution and Civil Code, and some of the reforms promise greater gender equality.⁵⁴ Husbands are no longer the legal head of the household, and now share rights and responsibilities equally with their wives.⁵⁵ Spouses have equal authority over their children, and equal rights to property acquired during the marriage.⁵⁶ Women no longer have to obtain their husbands' permission to work outside the home.⁵⁷ The provision regarding marital surnames has proven to be a sticking point though, despite litigation, which is discussed *infra*.

The Turkish government's emphasis on surnames is somewhat curious, given the history of names in Turkish culture. Under the Ottomans, the use of surnames was uncommon, and hereditary titles were borne mainly by the elite.⁵⁸ Most Turks were simply given a name at birth, and were further distinguished by nicknames, appellations indicating "son of" or "daughter of," or other descriptors that were quite fluid throughout a person's lifetime.⁵⁹

Dramatic westernization during the Kemalist period, however, led to the Family Name Act, which was passed on June 21, 1934 and came into force on

49. *Id.*

50. TMK., Kanun 4721, bk. 1, ch. 1, §1, art. 27 ("A person can only change his name by the order of a judge.").

51. TÜRKİYE CUMHURİYETİ ANAYASASI [TCA] [Constitution of Turkey], May 22, 2004, Law No. 5170, pt. 1, art. 10, available at http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf [hereinafter TCA].

52. TMK, Feb. 17, 1926, art. 153 (amend. 2001).

53. *Id.*

54. See Jill Parker, *West Meets East: A Discussion of European Union Enlargement and Human Rights*, 11 TULSA J. COMP. & INT'L L. 603, 633 (2004); Basin-Yayın ve Enformasyon Genel Müdürlüğü, *The Amendments to the Turkish Civil Code*, <http://www.byegm.gov.tr/on-sayfa/new-civil-code.htm>.

55. TMK, Nov. 22, 2001, Kanun 4721, bk. 1, ch. 1, §1, art. 21; see also *id.* at bk. 2, ch. 4, §3, art. 186.

56. See generally, UNICEF.org, UNICEF in Turkey: Country Profile, http://www.unicef.org/turkey/ut/ut2_2010.html.

57. TMK, Nov. 22, 2001, Kanun 4721, bk. 2, ch. 4, §3, art. 192.

58. Robert F. Spencer, *The Social Context of Modern Turkish Names*, 17 SW. J. ANTHROPOLOGY 205, 206 (1961).

59. *Id.* at 207-09.

January 1, 1935.⁶⁰ Under the Act, all citizens were required to assume a Turkish surname.⁶¹ The government viewed this step as crucial to Turkey's westernization and secularization, both major goals of the young republic.⁶² Mustafa Kemal Pasha⁶³ received the surname Atatürk ("Father of the Turks") from the Legislature.⁶⁴ Urban Turks quickly followed Atatürk's example, although the rural population was slower to comply;⁶⁵ however, most people had adopted surnames within a few years.⁶⁶ Therefore, these surnames are of limited genealogical purpose because lines can only be traced back to the 1930s.

The history of surnames in Turkey may help explain why the government is so resistant to modifications of the Civil Code in furtherance of gender-equal marital naming laws. From the start, names have been highly regulated by the government—first in the imposition of surnames on the general population, then with respect to name changes for any reason.⁶⁷ While understanding the history is helpful, history alone does not explain why different countries follow different practices, since Swiss and Turkish law were at one time nearly identical but have evolved differently throughout the 20th and early 21st centuries.

B. Change Permitted, Not Mandated

Common law has historically taken a flexible position on name changing, reflected in the laws of many countries whose legal systems developed under a common law influence. In England, surnames came into popular use around the time of the Norman Conquest of England in 1066.⁶⁸ Early surnames tended to either describe the bearer's lineage, trade or his place of birth, origin or residence.⁶⁹ These surnames were usually not hereditary; rather, the use of hereditary surnames began after the Norman Conquest.⁷⁰

1. Great Britain

By the end of the Middle Ages, the practice of using a surname was widespread, and had become not only popular but also essential.⁷¹ Legend tells of

60. *Id.* at 206.

61. *Id.*

62. *Id.*

63. *Id.* (pointing out that Atatürk's birth name was simply Mustafa. The name Kemal was bestowed on him by a tutor, and Pasha was his military rank).

64. Spencer, *supra* note 58, at 206. However, this surname would not be inherited intact, and Atatürk's children would bear the surname Atadan, or "of the father."

65. *Id.*

66. *Id.* at 207.

67. See TMK, Nov. 22, 2001, Kanun 4721, bk. 1, ch. 1, § 1, art. 27 (stating that change of name requires judicial approval).

68. EDWARD A. FREEMAN, THE HISTORY OF THE NORMAN CONQUEST OF ENGLAND: ITS CAUSES AND ITS RESULTS, VOL. V, THE EFFECTS OF THE NORMAN CONQUEST 377-78 (Rev'd. Am. Ed. 1876).

69. *Id.* at 377-78.

70. *Id.* at 378-79.

71. See Gabriel W. Lasker, *Surnames in the Study of Human Biology*, 82 AMERICAN

an heiress scorning a suitor who used no surname until his father – who happened to be the King – bestowed one upon him.⁷² Despite these social requirements, English law took a laissez-faire attitude toward names, allowing people to change them at will by “general use and habit.”⁷³ There was also no property right in a name that would prohibit a person from adopting a name already in use by another person.⁷⁴ Essentially, a “man was entitled to adopt a new name for himself as [easily as] one changes a coat.”⁷⁵

The law treated women and men equally in this respect and did not require women to adopt their husbands’ surnames after marriage.⁷⁶ Despite the law, customary practice varied greatly by region, and English women often changed their names when they married.⁷⁷ This tradition had a basis in the legal doctrine of coverture, which subsumed a woman’s legal identity into her husband’s.⁷⁸ It naturally followed that she would be referenced by his surname.⁷⁹ However, names were so lightly regulated that the change occurred simply by assumption rather than by operation of law.⁸⁰

In some cases, women kept their own names or hyphenated their prenuptial and married names.⁸¹ It was also fairly common for men to hyphenate, or even to adopt their wives’ surnames, although this practice was most common when the woman was of higher social status than her husband, or when her father wanted to ensure continuation of his family name.⁸² To this day, a hyphenated surname carries an upper-class or “posh” connotation in Britain as a result of that practice.⁸³

ANTHROPOLOGIST 525, 526 (1980) (mentioning the common use of surnames by the end of the Middle Ages); Emens, *supra* note 7, at 771 (noting that surnames were adopted after the Eleventh Century for functional purposes); Suarez, *supra* note 8, at 233 (stating that surnames came into use after the Tenth Century in order to differentiate individuals in the face of population pressures).

72. FREEMAN, *supra* note 68, at 378.

73. Frederick Dwight, *Proper Names*, 20 YALE L.J. 387, 387-88 (1911) (internal citation omitted).

74. *Id.* at 388 (internal citation omitted).

75. Emens, *supra* note 7, at 771 (quoting Frederick Dwight, *Proper Names*, YALE L.J. 387, 387 (1911)).

76. *Id.* at 770-71; accord Kolesnikov, *supra* note 9, at 431; Morgenstern Leissner, *The Problem*, *supra* note 8, at 350-51; Suarez, *supra* note 8, at 233-34.

77. Emens, *supra* note 7, at 770-71; accord Morgenstern Leissner, *The Problem*, *supra* note 8, at 350-51; Suarez, *supra* note 8, at 233-34.

78. Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 460-61 (2002); accord Emens, *supra* note 7, at 771; Morgenstern Leissner, *The Problem*, *supra* note 8, at 350.

79. Emens, *supra* note 7, at 771; accord Morgenstern Leissner, *The Problem*, *supra* note 8, at 352.

80. Emens, *supra* note 7, at 771; accord Morgenstern Leissner, *The Problem*, *supra* note 8, at 351.

81. See Morgenstern Leissner, *The Problem*, *supra* note 8, at 353 (discussing the marriage of Lucy Stone to Justice Blackwell).

82. Emens, *supra* note 7, at 771 (citing UNA STANNARD, MRS MANN 112-114 (Germain

Scottish women, on the other hand, retained their own surnames until the English tradition began to spread into Scotland in the eighteenth century.⁸⁴ Although it has now become customary for Scottish women to change their names when they marry, Scottish legal documents are still indexed under the individual's birth surname, regardless of sex.⁸⁵ The official government source for genealogical data also recommends searching for female ancestors under both birth surnames and marital surnames, since women often used both names.⁸⁶

While name changes by assumption are still legal in the United Kingdom, they cause administrative difficulties in today's increasingly regulated, computerized society. Indeed, "[i]n eighteenth century England, people did not have to worry about driver's licenses, social security cards, or bank applications," but today, "a change of name is meaningless unless it is accompanied by proof that one's name has actually been changed."⁸⁷

The administrative procedures for marital name changes in the United Kingdom are quite simple. If one spouse wants to formally adopt the other spouse's surname at marriage, only the marriage certificate is necessary as proof of the change.⁸⁸ More complicated changes, such as hyphenating, combining names, changing one's former surname to a middle name when adopting a spouse's surname, or changes for reasons other than marriage, are officially recorded by deed poll or statutory declaration.⁸⁹ Unmarried applicants must submit documentation of identification to enroll a deed poll, while married applicants must also submit proof of their spouse's consent to the name change, or good reason why consent should be waived.⁹⁰

Deed polls, though not strictly necessary for a legal name change, provide official evidence that the change has been made.⁹¹ As the government has explained, "[a]t common law a surname is the name by which a person is generally known, and the effect of changing it by deed poll is only evidential and formal.

Books 1977).

83. *Id.* at 807 n.168.

84. Rab Houston & Manon Van Der Heijden, *Hands Across the Water: The Making and Breaking of Marriage Between Dutch and Scots in the Mid-Eighteenth Century*, 15 LAW & HIST. REV. 215, 226 n.50 (1997).

85. See, e.g., Leah Leneman, "No Unsuitable Match": Defining Rank in Eighteenth and Early Nineteenth-Century Scotland, 33 J. SOC'L HIST. 665, 669 n.21. (2000) (stating that married women's names are still used in Scottish legal documents).

86. Scotlands People, How Do the Surnames of Married Women Appear in the Index?, <http://www.scotlandspeople.gov.uk/content/faqs/questions/index.aspx?75> (last visited Apr. 8, 2010).

87. Rosensaft, *supra* note 9, at 211-12.

88. HER MAJESTY'S COURTS SERVICE, ENROLLING A NAME CHANGE IN THE ROYAL COURTS OF JUSTICE (2008), available at www.hmcourts-service.gov.uk/cms/files/deedpolls_notes_0308.doc.

89. See generally The Enrolment of Deeds (Change of Name) Regulations, 1994 No. 604 (L.3) (U.K.).

90. *Id.* § 3.

91. *Id.* at Explanatory Note.

However, enrollment provides unquestionable proof of the execution of the deed."⁹²

2. Canada

When Britain established colonies in North America, those who emigrated carried with them the tradition of wives adopting their husbands' surnames, as well as the common law system of covertures.⁹³ Although in Canada many people still follow the common law system with respect to social names, procedures for legal name changes have now been codified and are administered by each province individually.⁹⁴ In the interest of national uniformity, the Uniform Law Conference of Canada proposed the Uniform Change of Name Act (UCNA) in 1988.⁹⁵ Unlike the statutes in force in most Canadian provinces, though, the UCNA implies that all name changes require formal approval, since it does not mention common law assumption of a new name in any context.⁹⁶

The UCNA applies to all name changes, not just those occurring at marriage. A person does not need to show that his or her name causes hardship or ridicule, and can adopt virtually any name he or she desires as long as there is no fraud or misrepresentation.⁹⁷ It also allows spouses of either sex a wide variety of surname change options, consisting of the other spouse's current surname, or "a surname consisting of the surname the person had immediately before marriage and the spouse's current surname, hyphenated or combined."⁹⁸ The UCNA does not allow the registrar of names any discretion over whether to formally change the bride or groom's surname provided that the new surname follows one of the prescribed formats.⁹⁹ However, the UNCA does require the registrar to issue a certificate of

92. *Id.*

93. Zaher, *supra* note 78, at 461. Eastern colonies in particular became more culturally British in their gender norms as the frontier moved west and took with it any egalitarian sentiments about gender previously held in the east.

94. Vital Statistics Act, (S.A.), ch. V-4.1, § 22 *et seq.* (2007) (Alta.); Name Act, R.S.B.C., ch. 328 (1996) (B.C.); Change of Name Act, S.M., ch. 13 (1987-88) (Man.); Change of Name Act, R.S.N.B., ch. C-2.001 (1987) (N.B.); Change of Name Act, NFLD. R.S., ch. C-8 (1990) (Nfld.); Change of Name Act, S.N.W.T., ch. 12 (2007) (N.W.T.); Change of Name Act, R.S.O., ch. C.7 (1990) (Ont.); Change of Name Act, ch. 59, 1997 Stats. P.E.I.; Certain Particulars Relating to the Status of Persons, S.Q., ch. 64, sec. 57 (1991) (Que.); Change of Name Act, S.S. ch. C-6.1 (1995) (Sask.); Change of Name Act, R.S.Y.T., ch. 20 (1986) (Yukon).

95. UNIF. CHANGE OF NAME ACT (1988), available at http://www.ulcc.ca/en/us/Changename_En.pdf.

96. See, e.g., Name Act (B.C.), *supra* note 94, §§ 2(2), 3; Change of Name Act (Man.), *supra* note 94, § 10(1); Change of Name Act (N.B.), *supra* note 94, § 3(b); Change of Name Act (Nfld.), *supra* note 94, § 3; Change of Name Act (N.W.T.), *supra* note 94, § 4.2; Change of Name Act (Ont.), *supra* note 94, § 3; Change of Name Act (Sask.), *supra* note 94, §21; Change of Name Act (Yukon), *supra* note 94, § 6.2.

97. UNIF. CHANGE OF NAME ACT, *supra* note 95, § 6.2.

98. *Id.* §8.

99. *Id.* §9.

name change and to note the name change on records governed by the Uniform Vital Statistics Act.¹⁰⁰

By contrast, most provinces allow the assumption of a spouse's surname without a formal record change.¹⁰¹ Marital name changes where the parties wish to adopt a surname other than the prescribed formats are not covered by the spousal election, and require formal applications.¹⁰² Generally, all that a person using the spousal election must do to obtain new identification cards is to show the marriage certificate or, if resuming their former surname, their birth certificate.¹⁰³

Legal changes of name consume greater time and resources than assumptions of name, and result in the issuance of a new birth certificate in the applicant's chosen name.¹⁰⁴ With respect to marital name changes, the information that provincial governments provide to their residents appears to favor assumption of the new name over legal applications, which consume more government resources. This is true in Alberta,¹⁰⁵ New Brunswick,¹⁰⁶ the Northwest Territories,¹⁰⁷ Ontario,¹⁰⁸ Prince Edward Island,¹⁰⁹ and Saskatchewan.¹¹⁰ Indeed, Ontario's informational website states that, "[o]nce you are married . . . you may apply to change all your identification with your marriage certificate . . . If you wish to use your legal name again, you simply revert back by presenting your birth certificate as proof of your legal name."¹¹¹ However, the application process for a legal name change seems unduly burdensome, with warnings in bold and italicized type about the issuance of amended birth certificates and the inability to reverse the name change without another formal application.¹¹²

100. *Id.* §§ 8(2), 9.

101. *See* Canadian provincial acts and statutes, *supra* note 94.

102. UNIF. CHANGE OF NAME ACT, *supra* note 95, §§ 5-7.

103. *See, e.g.,* Government of Ontario, Assuming/Unassuming a Spouse's or Partner's Name, http://www.ontario.ca/en/information_bundle/individuals/119599 (last visited Feb. 12, 2010).

104. *Id.* (stating that one benefit of assuming a spouse's name, rather than completing a legal name change, is that the name on one's birth certificate does not change).

105. Government of Alberta, Common Questions – Vital Statistics, <http://www.servicealberta.gov.ab.ca/774.cfm#Legal%20Change%20of%20Name> (follow link for "Marriage > Do I have to change my last name when I get married?").

106. Service New Brunswick, Vital Statistics, <http://www.snb.ca/e/1000/1000-01/pdf/P09-07064-B-Name-Nom.pdf> (last visited Feb. 17, 2010).

107. Northwest Territories Health and Social Services, Change of Name: What You Need to Know, http://www.hltss.gov.nt.ca/pdf/brochures_and_fact_sheets/vital_statistics/2008/english/change_of_name.pdf.

108. Assuming/Unassuming a Spouse's or Partner's Name, *supra* note 103.

109. Change of Name Act (P.E.I.), *supra* note 94.

110. Public Legal Education Association of Saskatchewan (PLEA), Names and Name Changes, <http://www.plea.org/freepubs/ncn/ncnpdf.pdf>.

111. Assuming/Unassuming a Spouse's or Partner's Name, *supra* note 103.

112. *Id.*

3. The United States of America

Marital name changes in the United States have a more complicated history. Under federalist principles, name changes are the province of the states, not the federal government, which means that procedures can and do vary widely from state to state.¹¹³ Though American states initially followed English common law and allowed name changes at will, states soon began heavily regulating such changes. For all practical purposes, the United States now falls somewhere between the markedly permissive common law approach found in England and the Commonwealth countries,¹¹⁴ and the more restrictive approach found in countries whose legal systems are derived from civil codes.¹¹⁵

The custom of women adopting their husbands' names at marriage was eventually integrated into the laws of many states. Judges declared that even when a woman was known after marriage by her prenuptial name, her legal name consisted of her given first name and her husband's surname.¹¹⁶ These decisions were based on a mistaken understanding of the precedents set by English law, which many judges believed required the change.¹¹⁷ As a result, women were denied the right to vote,¹¹⁸ to obtain driver's licenses,¹¹⁹ or to become naturalized citizens¹²⁰ using their prenuptial surnames. One state, Hawaii, required the change by statute, though this statute has since been superseded.¹²¹

Starting in the late nineteenth century, and increasing as the feminist movement swept the country in the 1960s and 1970s, women sued to retain their prenuptial surnames.¹²² Most of the earliest lawsuits were unsuccessful,¹²³ but by

113. See Emens, *supra* note 7, at 764.

114. See *supra* Part II.B.

115. See *infra* Part II.C.

116. Augustine-Adams, *supra* note 13, at 4; see also Emens, *supra* note 7, at 772 n.30 (listing cases and rulings requiring women to adopt their husbands' surnames).

117. See Charles E. Savage, Jr., *Proper Designation of Married Women in Legal Proceedings*, 4 VA. L. REG. 721, 721 (1919) (noting that common law naming traditions date back to the time of William the Conqueror). In an article devoted to determining the proper name under which to sue a married woman, Savage stated that "[t]he law confers upon a wife the surname of her husband. A married woman should be impleaded by her own Christian name followed by her husband's surname." *Id.* (citation omitted). He further discussed the use of the title "Mrs.," asserting that it was not technically proper but was "harmless as surplusage" unless used to replace the woman's first name. *Id.* at 721-22.

118. See, e.g., *State ex rel. Rago v. Lipsky*, 327 Ill. App. 63, 69 (Ill. App. Ct. 1945) (denying Rago the right to vote under her maiden name because of the "clearly and fully established" principle that a woman takes her husband's surname upon marriage).

119. See, e.g., *Forbush v. Wallace*, 341 F. Supp. 217, 221-22 (M.D. Ala. 1971) (denying women the right to apply for driver's licenses under their maiden names because their legal surnames were those of their husbands).

120. See, e.g., *In re Kayaloff*, 9 F. Supp. 176 (S.D.N.Y. 1934) (denying plaintiff the opportunity to be naturalized under her maiden name in a one-page decision).

121. Augustine-Adams, *supra* note 13, at 4; Emens, *supra* note 7, at 772 n.31.

122. Morgenstern Leissner, *The Name*, *supra* note 8, at 257-59.

123. Morgenstern Leissner, *The Problem*, *supra* note 8, at 353-55.

the mid-1980s, women in the United States were able to freely choose—legally, if not socially—the surname they would bear after marriage. Today, all fifty states allow women the choice between retaining their surname or taking their husband's when they marry.¹²⁴

Even so, as in Great Britain and Canada, the flexibility of common law name changes has yielded to the necessity of tracing a person through records and databases. Though each state has its own procedure for recording name changes, a person can generally change his or her legal name by petitioning the state court and receiving approval from a judge.¹²⁵ A valid court order is necessary to change one's name on state issued identification, such as driver's licenses, and with federal entities such as the Internal Revenue Service and the Social Security Administration.¹²⁶ Background checks and publication in local newspapers may also be required.¹²⁷ In the majority of states a woman does not have to petition the courts for a name change upon marriage; she may simply use the marriage license in lieu of a court order to obtain new identification in her married surname.¹²⁸

American men enjoy a comparable ease of name change at marriage in only eight states.¹²⁹ Aside from these few exceptions, an American man cannot use the marriage license to obtain new identification under his wife's surname, but must instead file a formal application for legal name change.¹³⁰ While nothing prevents a man from applying for this name change, success is anything but guaranteed. Many states grant judges great discretion over whether to grant or deny name changes, and even in states that provide statutory guidance, judges can deny petitions of this sort for fairly broad reasons, such as public policy concerns.¹³¹ Furthermore, the process is significantly more expensive for men, since it involves application fees, court fees, and an appearance in court that may require the petitioner to miss work.¹³² In this respect, the United States differs greatly from

124. Morgenstern Leissner, *The Name*, *supra* note 8, at 266.

125. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-601 (2008); CAL. CIV. PROC. CODE § 1276 (West 2008); DEL. CODE ANN. tit. 10, § 5901 (2008); FLA. STAT. ANN. § 68.07 (West 2008); IDAHO CODE ANN. § 7-802 (2008); 735 ILL. COMP. STAT. ANN. 5/21-102 (West 2008); KY. REV. STAT. ANN. § 401.010 (West 2008); LA. REV. STAT. ANN. § 13:4751 (2008); MICH. COMP. LAWS ANN. § 3.613 (West 2008); N.H. REV. STAT. ANN. § 547:3-i (2008).

126. Suarez, *supra* note 8, at 238.

127. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-602 (2008); CAL. CIV. PROC. CODE § 1277 (West 2008); DEL. CODE ANN. tit. 10, § 5903 (2008); FLA. STAT. ANN. § 68.07 (West 2008); IDAHO CODE ANN. § 7-802 (2008); 735 ILL. COMP. STAT. ANN. 5/21-103 (West 2008).

128. Rosensaft, *supra* note 9, at 187.

129. Rosensaft, *supra* note 9, at 191-95. Georgia, Hawaii, Iowa, Louisiana, Massachusetts, New York, and North Dakota have gender-neutral statutes regarding name change rights upon marriage. *Id.* California allows married persons and registered domestic partners of either gender to adopt the name of either spouse or partner, or to each keep his or her current surname. Equality California, Fact Sheet: Name Equality Act (AB 102), <http://www.eqca.org/atf/cf/%7B687DF34F-6480-4BCD-9C2B-1F33FD8E1294%7D/AB%20102%20FACT%20SHEET.PDF> (last visited Feb. 10, 2010).

130. Rosensaft, *supra* note 9, at 192.

131. *Id.* at 193-94.

132. *Id.* at 207-08.

Canada and the United Kingdom, where either spouse can simply use the marriage certificate to obtain new identification.

C. *Change Prohibited*

1. France

A few countries and other jurisdictions permit surname changes only upon a showing of legitimate cause or lawful interest,¹³³ and do not consider marriage an appropriate reason for requesting such a change. In France, for instance, the State Council interprets what “legitimate reasons” are, and usually grants name changes only when it deems the applicant’s name ridiculous or when the applicant wishes to give up a foreign surname in favor of a French one.¹³⁴ Applications made for personal or emotional reasons are generally denied.¹³⁵

Under the French Civil Code, a citizen’s legal name is his or her birth name unless the State Council has approved a surname change.¹³⁶ Thus, marriage has no legal effect on the name of either a husband or wife.¹³⁷ This law traces its origins to civil registry ordinances issued in 1667, which restricted the changing of names by “requir[ing] proof of age, marriage, and death” to be recorded in the civil register.¹³⁸ Later, during the French Revolution, the emphasis on equality among citizens included the right of women to retain their prenuptial surnames rather than be forced into adopting their husbands’ surnames.¹³⁹ The combination of procedural and social restrictions on name changing meant that few citizens attempted to alter their listing in the civil registry, and legally retained the same name from birth until death.¹⁴⁰

Despite this law, the vast majority of French women still use their husbands’ surnames socially.¹⁴¹ This has caused some confusion among legal scholars, including Andre Tunc, who railed against proposals to change Civil Code provisions on marriage law in a 1956 law review article.¹⁴² Tunc felt that proposed

133. See, e.g., CODE CIVIL [C. CIV.] art. 61 (Fr.), available at http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm.

134. Catherine de Guibert-Lantoine, *Changing Surnames in France*, 367 POPULATION ET SOCIÉTÉS 4 (Apr. 2001).

135. *Id.*

136. CODE CIVIL [C. CIV.] art. 61 (Fr.).

137. *Id.*

138. Audrey Guinchard, *Is the Name Property? Comparing the English and the French Evolution*, 1 J. CIV. L. STUD. 21, 50 (2008), available at http://www.law.lsu.edu/globals/sitelibraries/jcls/home/Guinchard_Final_12_05_08.pdf.

139. *Id.* at 51-52.

140. *Id.* at 51-55.

141. Marie-France Valetis, *The Surname of Married Women in the European Union*, 367 POPULATION ET SOCIÉTÉS 1 (Apr. 2001).

142. André Tunc, *Husband and Wife Under French Law*, 104 U. PA. L. REV. 1064, 1076-77 (1956).

changes to the Civil Code in the interest of gender equality in marriage, including a spouse's right to petition a judge to prohibit the other spouse's use of his or her surname, would be detrimental to French family structure.¹⁴³ Nonetheless, Tunc failed to explain that one spouse's use of the other's surname was done only for social purposes, and was not the result of a legal name change, nor did he present any objective proof of detriment to society or the family.¹⁴⁴

2. Quebec

The province of Quebec, unlike the rest of Canada, follows the same procedures as France. Surname changes must be approved by the courts or the registrar, and will only be granted for serious reasons.¹⁴⁵ In 1980, Quebec revised its Civil Code to state that "[i]n marriage, each spouse retains his surname and given names, and exercises his civil rights under this surname and these given names."¹⁴⁶ The legislature gave two reasons for the revision: ensuring equality between spouses and the immutability of original names.¹⁴⁷ Prior to the revision, women could formally adopt their husbands' surnames, and such changes were grandfathered under the revised law.¹⁴⁸ Under the new law, it is still technically possible for a man or woman who has adopted his or her spouse's name and used it for five years or more to apply for a legal change. In practice, however, it is difficult to prove sufficient consistency of use, especially if the applicant signed any papers under his or her legal name during that time period.¹⁴⁹

143. *Id.*

144. *Id.*

145. Le Directeur de l'état civil, *Change of Name*, <http://www.etatcivil.gouv.qc.ca/publications/DEP-40-change-name.pdf>. The publication provides "some examples of serious reasons[,] including:

- [1] You are now using, and have been continuously using for a minimum of five years, a surname or given name that is not the same as that appearing on your act of birth. It must be a surname or given name that you use in all your personal, professional and social activities.
- [2] Your name is of foreign origin or is too difficult to pronounce or write in its original form.
- [3] Your name lends itself to ridicule or has become infamous.

Id. (emphasis in original). In addition, "[t]he registrar may . . . examine a name change application for any other serious reason that you present. The registrar also has jurisdiction in cases where you apply to add a part of your surname to the surname of your minor child." *Id.*

146. Claire L'Heureux-Dube, *The Quebec Experience: Codification of Family Law and a Proposal for the Creation of a Family Court System*, 44 LA. L. REV. 1575, 1596 (1984) (quoting CIVIL CODE art. 442 (1980) (Quebec)).

147. *Id.*

148. *Id.*

149. Since a person's use of the name he or she wishes to adopt must be consistent, signing one's legal name during the five-year period could indicate lack of consistency.

3. Louisiana

Louisiana, another jurisdiction that followed French civil law, also adopted a provision on the immutability of names in its own Civil Code.¹⁵⁰ Legally, marriage in Louisiana does not change a person's surname, but merely permits a spouse to use the other spouse's surname.¹⁵¹ Initially, this law made Louisiana as different from other American states as Quebec is from other Canadian provinces. However, as the other American states abandoned the practice of forcing women to legally bear their husbands' surnames, the gap has narrowed to the point that, for all practical purposes, Louisiana is not much different than anywhere else in the United States.

III. LEGITIMACY OF THE GOVERNMENT INTEREST IN MARITAL NAME CHANGES

Governments have an arguable interest in the tracking and identification of their citizens, and of non-citizens who visit or reside within their borders.¹⁵² However, this government interest may be in direct conflict with an individual's interest in his or her own name. Some individuals—and, historically, some legal doctrines—treat one's name as property, subject to the same legal doctrines and statutes that govern real and personal property rights.¹⁵³ Other individuals and governments may treat the name as a personality right, which can be alienated and transferred, but not protected against intrusion.¹⁵⁴ The property analogy has dissipated in law, and the focus has generally shifted to the individual's relationship with his or her name, and limitation on the government's right to interfere with that private relationship.¹⁵⁵ Still, conceptualizing one's name as property is useful in illustrating the tension between an individual's desire for autonomy over his or her name clashes with the government's desire for control over its citizens' name-changing practices.

A. *The Interest in an Individual's Name as a Matter of Social Benefit*

No government studied herein has put forth satisfying reasons why its interference in the marital name changing process is justified as a matter of social benefit.¹⁵⁶ Traditional beliefs and values, rather than scientific studies or objective

150. Morgenstern Leissner, *The Name*, *supra* note 8, at 261 n.53.

151. LA. CIV. CODE ANN. art. 100 (West 1988) (stating that "[m]arriage does not change the name of either spouse. However, a married person may use the surname of either or both spouses as a surname.").

152. See generally Renee C. Redman, *National Identification Cards: Powerful Tools For Defining and Identifying Who Belongs in the United States*, 71 ALB. L. REV. 907 (2008); Richard Sobel, *The Degradation of Political Identity Under a National Identification System*, 8 B.U. J. SCI. & TECH. L. 37, 38 (2002).

153. See generally Guinchard, *supra* note 138, at 23 (noting that French courts adopted this stance until the late nineteenth century).

154. *Id.* at 23-24.

155. *Id.* at 57-59.

156. Augustine-Adams, *supra* note 13, at 17-32. (positing that the social or moral

anecdotal evidence, form the basis for most arguments about the value of a shared marital surname.¹⁵⁷ While governments may claim a legitimate interest in promoting marriage and family structure, the absence of any proven correlation between a shared surname and happiness or success in a marriage is particularly damaging to these governments' positions.

B. The Interest in an Individual's Name as Part of a Broader Identification Scheme

Names are undeniably one means of identification, but are not unique identifiers in themselves; various types of identification numbers, and increasingly biometric data, are used to supplement an individual's unique profile.¹⁵⁸ Each piece of data may have independent significance to the agency that issued or collected it, but it is the combination of forms that gives the government an effective way of tracking its citizens.

While proposals for a standardized national identification number have been strongly resisted in the United Kingdom and the United States,¹⁵⁹ other countries have already enacted such a system. Turkey completed its Central Population Management System on October 28, 2000, and all Turkish citizens are now assigned a Turkish Republic Identification Number, which is displayed on a national identification card.¹⁶⁰ In France, each citizen is issued a national

justifications tend to be expansive and non-specific: marital unity, family togetherness, and society's knowledge that the couple is married because they share a surname are among them).

157. See, e.g., *Burghartz v. Switzerland*, App. No. 16213/90, 12 Eur. H.R. Rep. 101 (1994); *Ünal Tekeli v. Turkey*, 2004-X Eur. Ct. H.R. 239 (2004); *Chapman v. Phoenix Nat'l Bank of N.Y.*, 85 N.Y. 437, 442 (1881).

158. Sobel, *supra* note 152, at 41-45.

159. See Jennifer Morris, Comment, *Big Success or "Big Brother?": Great Britain's National Identification Scheme Before the European Court of Human Rights*, 36 GA. J. INT'L & COMP. L. 443 (2008) (tracing the history of national identification numbers in Great Britain from World War I to the present, as the Identity Cards Act of 2006 faces challenges in the European Court of Human Rights); Michael J. Allen, *A Choice That Leaves No Choice: Unconstitutional Coercion Under Real ID*, 32 SEATTLE U. L. REV. 231 (2008) (discussing the opposition of individual states to the United States Real ID Act of 2005 based on issues of federalism and individual privacy).

160. Republic of Turkey, Ministry of Internal Affairs, The Central Civil Registration System (MERNIS), http://www.nvi.gov.tr/English/Mernis_EN,Mernis_En.html (last visited Apr. 1, 2010). This number is used by public and private institutions for all purposes, including but not limited to educational records, taxation and social security, military service records, banking and investments, health services, voting, and justice system records. The stated reasons for undertaking such a project are "[r]esolv[ing] problems arising from identical names[,][p]rovid[ing] fast and efficient identification[,][r]egister[ing] all civil status events from the moment of birth[, and] [p]rovid[ing] fast and efficient services to the users of public services by ensuring efficient exchange of identity information among public institutions and agencies." Republic of Turkey, Ministry of Internal Affairs TR Identity Number, http://www.nvi.gov.tr/English/Mernis_EN,Mernis_En.html?pageindex=1 (last visited Apr. 1, 2010).

identification number, called an INSEE number, indicating that the citizen has been registered in the National Identification Repository.¹⁶¹

Even in countries where no official national identification scheme exists, a de facto system is often in place. In the United States, the Social Security Administration issues numbers to each citizen.¹⁶² Although these numbers were originally limited to use within the Social Security system, they are now used for identification purposes throughout the government and its agencies and by private companies.¹⁶³ Other identification numbers issued by federal and local government entities are contained on passports, state-issued identification such as driver's licenses, and military identification cards. In the United States, however, the agencies that issue these documents require applicants to provide their Social Security numbers before applications are processed.¹⁶⁴ In this way, the de facto national identification number is tied into state identification numbers.

Other countries have similar systems. The United Kingdom has issued identification numbers during several wars, but abandoned them in times of peace.¹⁶⁵ British subjects were still tracked by identification numbers in various branches of government, but no standard number was used across agencies.¹⁶⁶ However, the United Kingdom is now attempting to move toward a standardized national scheme.¹⁶⁷ The Swiss system, in which a national insurance number has become a de facto national identification number, is functionally equivalent to the American system.¹⁶⁸ Canada's system is similar but more limited in scope, since

161. Michel Isnard, *Statistics and Individual Liberties: Recent Changes in French Law*, 12 COURRIER DES STATISTIQUES, ENGLISH SERIES (2006), available at http://www.insee.fr/en/ffc/docs_ffc/cs113d.pdf.

162. Social Security Act, 42 U.S.C. § 301 *et seq.* (2006); Sobel, *supra* note 152, at 55-57.

163. Social Security Act, 42 U.S.C.A. § 301 *et seq.*; Sobel, *supra* note 152, at 55-57.

164. See, e.g., United States Department of State, *Form DS-11: Application for U.S. Passport* (Feb. 2008), available at http://travel.state.gov/passport/forms/ds11/ds11_842.html. The application states:

Section 6039E of the Internal Revenue Code (26 U.S.C. 6039E) requires you to provide your Social Security Number (SSN), if you have one, when you apply for a U.S. passport or renewal of a U.S. passport. If you have not been issued a SSN, enter zeros in box #5 of this form. . . If you fail to provide the information, you are subject to a \$500 penalty enforced by the IRS.

Id. In addition, the application provides that "31 U.S.C. 7701 requires persons 'doing business' with a federal agency to provide their Social Security Numbers to that agency. Because the Department of State collects fees for the provision of passport services to you, you are considered a person 'doing business' with the Department." *Id.* States also require individuals applying for state-issued identification to present Social Security cards, and will not issue the identification cards without these cards. See, e.g., Pa. Dep't Transp., *Form DL-54A*; N.Y. Dep't Motor Vehicles, *Form CCRP-1*; Ca. Dep't Motor Vehicles, *Form DL 44*.

165. Morris, *supra* note 159, at 456-57.

166. See *id.* at 457 (noting failed efforts to re-establish national identification cards "by the tax administration, immigration services, and the issuers of driver's licenses").

167. *Id.* at 464-70.

168. Sobel, *supra* note 152, at 45.

the government issues each citizen a Social Insurance Number that is used mainly by the government rather than by private companies.¹⁶⁹

Regardless of the exact methods used, each of these governments tracks and identifies its citizens using a variety of methods, most of which are numerical in nature. While records of population and genealogy were historically kept by local governments, or some by non-governmental entities such as religious organizations, this data became increasingly centralized during the past century. The use of names as the primary method of identification has given way to a combination of names and numbers, in part because names are not unique identifiers. Many different people may share the same combination of first, middle, and last names, while identification numbers are unique by design. Furthermore, the fact that people change their names makes tracking them difficult without a different, constant factor in their records.

This is not to say that the government's interest in an individual's name has waned entirely. Since an individual's legal name and his or her identification number are nearly always used in combination, the government must still be able to match them.¹⁷⁰ It does mean that the government's interest in the *actual* name a person bears, and that person's reasons for choosing that name—whether by default, as with birth names, or by choice, as with a legally changed name—is significantly diminished.

IV. LITIGATION

A. *Litigation in the United States of America*

In 1881, the New York Court of Appeals stridently proclaimed in *Chapman v. Phoenix National Bank* that:

For several centuries, by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby.¹⁷¹

169. Flavio L. Komuves, *We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529, 533 n.14 (1998).

170. This in itself causes many problems when people change their names. The Social Security Administration issues "no-match" letters when it discovers that the name an individual is using for employment does not match the Social Security number assigned to that person. Although some of these "no-match" incidents involve undocumented workers, many more involve people who fail to notify the Social Security Administration when they legally change their names, thus breaking the trail of official identification. Michael Newman & Shane Crase, *Challenges to the No-Match Rule*, 55 FED. LAW. 16 (2008). This is a particular risk with semi-centralized systems, where name changes are legally granted by a state or regional government but must also be tracked in the federal system.

171. *Chapman v. Phoenix Nat'l Bank of N.Y.*, 85 N.Y. 437, 449 (1881). In this case, the plaintiff purchased stock in the Phoenix National Bank before her marriage, using her own name.

The court cited no statutory or case law precedent for such a statement, but these words were cited with approval many times over in other decisions as women attempted to gain control over their own names.¹⁷²

Not until the 1960s and 1970s did courts begin to acknowledge that the *Chapman* assertion regarding married women's surnames had no legal basis. Ohio was among the first, holding that "[i]t is only *by custom*, in English speaking countries, that a woman, upon marriage, adopts the surname of her husband in place of the surname of her father. The State of Ohio follows this custom but there exists no law compelling it."¹⁷³ This view, which does have its roots in English and American common law, gradually took hold throughout the United States,¹⁷⁴ but as late as 1975, some judges still preferred the *Chapman* holding.¹⁷⁵ Even the well-respected legal resource *American Jurisprudence* conveyed incorrect information in its 1971 edition, stating that women were legally required to adopt their husbands' surnames.¹⁷⁶

One particular case inspired a great deal of subsequent litigation. In 1971, *Forbush v. Wallace* was decided in Alabama federal court,¹⁷⁷ and was affirmed without a separate opinion by the Supreme Court the following year.¹⁷⁸ *Forbush* was a class action suit filed on behalf of married women who wished to be known by a prenuptial surname, but were prohibited from obtaining drivers' licenses

Id. at 445. Sometime after she married, the property was seized by United States marshalls in accordance with an 1861 Act of Congress, since it was alleged to belong to a Confederate rebel. *Id.* at 445-46. Notice was published only in an abbreviated form of her maiden name, and after the seizure she sued to recoup her investment, alleging insufficient notice. *Id.* The court agreed, holding that women could only be sued in their legal name, which changed upon marriage. *Id.* at 449-50. This is one of the few cases in which the female plaintiff actually benefitted from the court's construction of her "legal name."

172. *In re Kayaloff*, 9 F. Supp. 176 (S.D.N.Y. 1934) (petitioner for naturalization was required to file using her husband's surname, even though she did not use it); *Baumann v. Baumann*, 250 N.Y. 382, 387 (1929) (husband did not divorce his first wife but purported to remarry; legal wife retained the right to bear his surname and illegitimate wife was enjoined from using it); *People ex rel. Rago v. Lipsky*, 63 N.E.2d 642 (Ill. App. 1 Dist. 1945) (reversing a lower court's decision allowing plaintiff to vote using her prenuptial surname); *Blanc v. Blanc*, 21 Misc. 268 (N.Y. Sup. 1897) (husband sued to punish ex-wife for continuing to use his surname in disobedience of their divorce decree).

173. *State ex rel. Krupa v. Green*, 177 N.E. 2d 616, 619 (Ohio App. 8 Dist. 1961).

174. *E.g. Ball v. Brown*, 450 F. Supp. 4 (N.D. Ohio 1977); *State v. Taylor*, 415 So. 2d 1043 (Ala. 1982); *Malone v. Sullivan*, 605 P.2d 447 (Ariz. 1980); *Stuart v. Bd. of Sup'rs of Elections for Howard County*, 295 A.2d 223, 226 (Md. 1972); *Kruzel v. Podell*, 226 N.W.2d 458, 461 (Wis. 1971); *Davis v. Roos*, 326 So.2d 226, 227 (Fla.App. 1 Dist. 1976); *Application of Lawrence*, 337 A.2d 49, 51 (N.J. Super. App. Div. 1975); *Dunn v. Palermo*, 522 S.W.2d 679, 683 (Tenn. 1975). For a comprehensive listing of these cases, see Augustine-Adams, *supra* note 12, at n.18.

175. *See In re Reben*, 342 A.2d 688 (Me. 1975) (Dufresne, C.J., dissenting).

176. Patricia J. Gorence, *Women's Name Rights*, 59 MARQ. L. REV. 876, 877 (1976) (citing AM. JUR. 2d., *Name*, § 9 (1971)).

177. *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971).

178. *Forbush v. Wallace*, *aff'd* 405 U.S. 970 (1972).

under any surname other than their husbands'.¹⁷⁹ The District Court for the Middle District of Alabama stated that administrative costs and inconveniences to the state outweighed any harm the plaintiffs suffered in being summarily deprived of their prenuptial surnames, declaring that the state had a rational basis for its requirement.¹⁸⁰ The Court added that if women wanted to regain their prenuptial surname, they could do so by making a formal application to the courts.¹⁸¹ The decision was widely published and its immediate effect was to make it difficult for married women throughout the country to use their prenuptial surnames.¹⁸²

In another important case, *In re Petition of Kruzel*, the Wisconsin Supreme Court in 1976 reached the opposite conclusion.¹⁸³ In *Kruzel*, a married woman had always been known by her birth surname, Harney, and had never used her husband's surname.¹⁸⁴ She was told by her employer that she needed to either start using her husband's name or "legally change" to her prenuptial surname.¹⁸⁵ Harney petitioned the court to change her name legally to her birth name, but her petition was denied by a judge who opined that if two married people did not want to share a surname, they should not be married at all.¹⁸⁶ Ironically, the petitioner expended a great deal of time and energy on her case, but her name never legally changed at all; her petition only resulted in judicial acceptance of the law's current trend.¹⁸⁷

In recent years, couples have sought to break with tradition in ways other than simply retaining both of their prenuptial surnames. American men are increasingly willing to change their surnames upon marriage,¹⁸⁸ either by taking their wives' surnames, by hyphenating, or by creating new last names (often comprised of pieces of each spouse's former surname, but sometimes entirely different).¹⁸⁹ Similarly, women who would like to share a name with their spouse but do not want to take their husband's surname have embraced the creation of new, shared names.¹⁹⁰ Though only allowed to legally marry in a handful of states¹⁹¹ and countries,¹⁹² some same-sex couples also wish to express their commitment through a shared name.¹⁹³

179. *Id.* at 219-20.

180. *Id.* at 222.

181. *Id.*

182. Morgenstern Leissner, *The Name*, *supra* note 8, at 269 (citing Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 LAW & INEQ. J. 91, 94 (1985)).

183. *In re Petition of Kruzel*, 67 Wis. 2d 138 (1976).

184. *Id.* at 142-43.

185. *Id.* at 140.

186. Gorence, *supra* note 176, at 877.

187. *Id.* at 879.

188. Rosensaft, *supra* note 9, at 187.

189. Emens, *supra* note 7, at 799-803.

190. *Id.*

191. Augustine-Adams, *supra* note 13, at 4 n.8; Emens, *supra* note 7, at 772 n.31. Six states currently issue marriage licenses to same-sex couples: Massachusetts, Connecticut, California (until the passage of Proposition 8, which limited marriage to one man and one woman), Iowa, Vermont, and New Hampshire. Same Sex Marriage, National Conference of State Legislatures, (February, 2010), <http://www.ncsl.org/default.aspx?tabid=16430>.

192. See Hope Lozano-Bielat, David Masci, Michelle Raston, *Same-Sex Marriage*:

Men often face administrative difficulties when they attempt to change their surnames at marriage, as discussed in Part II, *supra*. Most American states still maintain discriminatory laws with respect to marital surnames, seemingly in violation of the constitutional ban on disparate treatment based on gender. An equal protection challenge would likely receive an intermediate standard of judicial review, forcing the state to articulate why the law is substantially related to an important government purpose.¹⁹⁴ While surprisingly few challenges have been filed, one recent case suggests that states would find it more advantageous to revise their laws than to engage in constitutional litigation.

In 2005, a newly married California couple, Diana and Michael (Buday) Bijou, decided to use the wife's surname after their marriage.¹⁹⁵ They balked at the difference in both monetary costs and effort for men to change their names rather than women, and the American Civil Liberties Union assisted them in filing suit against the State of California because of this discriminatory practice.¹⁹⁶ In response to the lawsuit, Assembly member Fiona Ma introduced a bill in the California legislature to amend Section 355 of the Family Code and Sections 103175 and 103180 of the Health and Safety Code in the interest of gender equality.¹⁹⁷ The bill passed both the House and Senate, was signed by Governor Arnold Schwarzenegger, and took effect on January 1, 2008.¹⁹⁸ Spouses and domestic partners can now adopt each other's surnames upon marriage or registration of the partnership with relative ease.¹⁹⁹

Redefining Marriage Around the World, The Pew Forum on Religion and Public Life, Jan. 22, 2009, <http://pewforum.org/docs/?DocID=235> (last visited Apr. 8, 2010) (stating that the Netherlands, Belgium, Spain, Canada, South Africa, and Norway allow same-sex marriages).

193. Emens, *supra* note 7, at 783.

194. See *United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

195. Martin Kasindorf, *L.A. Man Sues to Take Wife's Last Name*, USA TODAY, Jan. 11, 2007, available at http://www.usatoday.com/news/nation/2007-01-11-man-sues-name-change_x.htm.

196. *Buday v. California Dept. of Health and Services, et al.*, No. CV06-08008 FMC (JWJx) (C.D. Cal. filed Dec. 15, 2006).

197. Name Equality Act, AB 102 – 2007 (Ca. H.R. 2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0101-0150/ab_102_bill_20071012_chaptered.html [hereinafter Name Equality Act]. See generally, Official California Legislative Information, *Bill Documents*, http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_102&sess=PREV&house=B&author=ma (last visited Feb. 17, 2010); Equality California, *Name Equality Act Summary*, <http://www.eqca.org/site/apps/s/content.asp?c=kuLRJ9MRKrH&b=4096757&ct=5195883> (last visited Feb. 17, 2010).

198. Name Equality Act, *supra* note 197.

199. Interestingly, this became not strictly an issue of law, but also a political hot button. The only votes against the bill on the Assembly floor came from Republican members, while Democrats and three Republicans provided the votes to pass it on to the state Senate. Opposition from the Campaign for Children and Families, a conservative and religiously affiliated group, was blamed, although none of the lawmakers who voted against the bill spoke while it was on the floor for debate. See Frank D. Russo, California Progress Report, *Why did 26 of 32 California Assembly Republicans Vote Against the Name Equality Act?*, May 9, 2007,

Kentucky, on the other hand, explicitly states that the “[c]ounty court clerk has no authority to change the name of the groom as indicated in the marriage license records, but the affected groom can petition the local circuit court for such marriage records change of name.”²⁰⁰ No reason for the practice is articulated—on its face, the law is simply a clear instance of gender discrimination.²⁰¹ After the extensive coverage of the California lawsuit and subsequent statutory amendments, it still remains to be seen whether other couples will challenge baseless and restrictive laws such as the Kentucky statute.

B. Litigation in European Countries, the European Commission of Human Rights, and the European Court of Human Rights

The European Court of Human Rights (ECHR) replaced the European Commission on Human Rights (“the Commission”) in 1998 as the judicial arm protecting human rights in the member states of the Council of Europe.²⁰² Member states agree to be bound by the decisions of the Council of Europe’s courts, including the ECHR, though these courts lack any real power to enforce the decisions.²⁰³ The Commission and the ECHR have heard numerous cases involving disputes between citizens and their governments over marital surname laws, and have long struggled with how to best resolve the conflicting practices of its member states that follow each of the legal schemes described above.

Burghartz v. Switzerland was among the early cases involving marital surnames to come before the Commission.²⁰⁴ This case involved a couple who decided to use the wife’s surname as the family name, but the husband wanted to keep his prenuptial surname in front of his new family surname.²⁰⁵ The couple had married in Germany, where this practice was allowed.²⁰⁶ Upon their return to Switzerland, however, the government recorded their family name as Schnyder, the husband’s prenuptial surname.²⁰⁷ The couple’s application to reverse the government’s decision was denied because they had not presented evidence that using Schnyder as a surname caused any inconvenience.²⁰⁸ They appealed to the federal courts and were allowed to use Burghartz as their family name because their ages, occupations, and Mrs. Burghartz’s dual citizenship in Germany presented adequate reasons to support the application.²⁰⁹

<http://www.californiaprogressreport.com/site/?q=node/4519>.

200. KENT. REV. STAT § 402.230, N. 2 (West 2008), Notes of Decisions, OAG 74-65.

201. *Id.*

202. European Court of Human Rights, *Information Document on the Court* 4 (1996), available at http://www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85/0/ENG_Infodoc.pdf (last visited Feb. 17, 2010).

203. *Id.* at 7.

204. *Burghartz v. Switzerland*, 12 Eur. H.R. Rep. 101 (1994).

205. *Id.*

206. Bürgerliches Gesetzbuch [BGB] [Civil Code], Aug. 18, 1896, Reichsgesetzblatt [RGBl] art. 1355.

207. *Burghartz*, 12 Eur. H.R. Rep. at 103.

208. *Id.*

209. *Id.* 103-04.

However, Mr. Burghartz's request to use "Schnyder Burghartz" as his surname was still denied.²¹⁰ The Swiss government stated that tradition and family unity were overriding concerns in the decision.²¹¹ Moreover, the court believed that the legislature deliberately allowed only women the right to keep a prenuptial surname before the family name, since it "had never agreed to introduce absolute equality between spouses in the choice of name."²¹²

The Burghartzes then brought the case before the Commission, alleging that Switzerland was violating the guarantees of right to privacy in family life and gender equality found in the European Convention on Human Rights.²¹³ The Commission was not persuaded by the government's arguments, dismissing the "tradition" because women had only been allowed to keep their birth surname in front of their husband's surname since 1984.²¹⁴ Furthermore, the Commission dismissed the argument that the government deliberately created inequality between the sexes with respect to marital names was incompatible with the goals of the Council of Europe.²¹⁵ Specifically the Court reiterated that:

[T]he advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe; [meaning] that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.²¹⁶

The Commission found that Switzerland had violated Articles 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").²¹⁷ Article 8 forbids governmental interference with private and family life except in situations involving, for example, national security, public health, and the economy.²¹⁸ Article 14 forbids discrimination on the basis of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. . . ."²¹⁹ Although neither provision specifically mentions names, the Court found that names fall within the sphere of private and family life as defined in Article 8, and that the prohibition on sex discrimination contained in Article 14 applied to laws governing that sphere.²²⁰ Therefore, Switzerland's discriminatory practices

210. *Id.* at 104.

211. *Id.*

212. *Id.* at 105-06.

213. *Burghartz*, 12 Eur. H.R. Rep. at 105-06.

214. *Id.* at 115.

215. *Id.* at 107-08.

216. *Id.*

217. *Id.* at 110.

218. *Id.* at 106 (quoting Art. 8 of the Convention).

219. *Id.* (quoting Art. 14 of the Convention).

220. *Id.* at 101.

violated the protocol of the Convention.²²¹ The Court awarded the couple only monetary damages, dismissing their request for just satisfaction.²²²

Burghartz was the first case in which the Commission found against a government on the issue of unequal marital name laws. An earlier case that dealt with this issue had been dismissed, so *Burghartz* was hailed as an indication that the Commission's interpretation of the Convention protocol was shifting as attitudes and cultural practices also changed.²²³

Ten years later, the European Court of Human Rights heard the case of *Ünal Tekeli v. Turkey*, in which a married Turkish woman sued for the right to use her birth surname as her legal name.²²⁴ The plaintiff was a trainee lawyer at the time of her marriage in 1990, and adopted her husband's surname according to Turkish law.²²⁵ For several years, she continued to use her birth name in front of her married surname, although this was not legally allowed until 1997.²²⁶ In 1998, she sued in the Turkish courts to be able to use her birth name alone but this request was denied on the grounds that the Civil Code required married women to use their husbands' surnames.²²⁷ The court did not examine the constitutionality of the Civil Code provision, or whether it violated international agreements such as the European Convention on Human Rights. *Ünal Tekeli* appealed the decision to a higher court, and was again denied on the same grounds.²²⁸

Unable to obtain relief in Turkey, *Ünal Tekeli* brought the issue before the ECHR, claiming that Turkey had violated Articles 8 and 14, the same two Convention provisions that the *Burghartzes* had relied on as a basis of their suit in 1994.²²⁹ She alleged that Turkey's laws constituted sex discrimination, since only women were required to change their names, focusing on the professional harm women suffer when forced to renounce their prenuptial surnames.²³⁰

Turkey presented several justifications for its policy on marital surnames. First, it declared that it merely codified "certain social realities" and "certain customs that have formed over centuries in Turkish society."²³¹ This argument—that common practice should become law—is akin to the reasoning of some

221. *Id.* at 100.

222. *Id.* at 101. The court essentially split the difference between the couple's demand for 31,000 Swiss francs (CHF), and the government's concession of 10,000 CHF, and awarded the *Burghartzes* 20,000 CHF. It gave no reasons for its decision to dismiss the *Burghartzes'* demand for just satisfaction. *Id.* at 117.

223. *Id.* at 118 (Pettiti, J. & Valticos, J., dissenting) (stating that "the principle of the equality of the sexes admittedly is today 'a major goal in the Member States of the Council of Europe' and while the Court cannot ignore changes of views in this field, it does not follow that an extension of the scope of Article 8 of the Convention is justified, as the Court considers.").

224. *Ünal Tekeli v. Turkey*, 2004-X Eur. Ct. H.R. 239.

225. *Id.* at 244.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Ünal Tekeli*, 2004-X Eur. Ct. H.R. at 250-52.

231. *Ünal Tekeli*, 2004-X Eur. Ct. H.R. at 246.

American courts during the major period of litigation regarding women's surnames,²³² and conveniently neglects the short history of surnames in Turkey. While it is undoubtedly true that husbands were heads of their households for many centuries, the Western custom of patronymic surnames was a scant sixty years old at the time Ünal Tekeli brought her lawsuit.²³³

Turkey also advanced the idea that family unity depends on a shared surname, and that "[c]onsiderations of public interest and policy have been decisive" in indicating that the man's name must be used.²³⁴ Finally, the agents for the Turkish government defended the constitutionality of the law, despite guarantees of gender equality in the Turkish constitution, by proposing that not every group of people was subject to the same applications of law.²³⁵ Notwithstanding the fact that equality is constitutionally guaranteed, the Turkish government argued that the law only had to treat people equally when those people were deemed subjectively equal by the government.²³⁶

The Turkish government also argued that Article 8 was inapplicable to the case, since a person's name is not a matter of private interest.²³⁷ The ECHR quickly dismissed this argument, reasoning that despite a public interest in the regulation and use of names, the choice and use of a name still falls squarely within the bounds of private family life and has an effect on private relationships.

In ruling for Ünal Tekeli, the ECHR strongly reaffirmed the importance of gender equality in signatory nations.²³⁸ It found that Turkey's marital name change laws were discriminatory because they gave men preferential treatment, and that the government's arguments did not constitute "objective and reasonable

232. See *In re Reben*, *supra* note 175, at 699 (Dufresne, C.J., dissenting) (stating that "principles and rules of organized society prevalent at the time became part of their common law. They had the force of law. Common practice has always made common law.").

233. Teresa Scassa, *National Identity, Ethnic Surnames and the State*, 11 CAN. J.L. & SOC'Y 167, 178 (Fall 1996).

234. Ünal Tekeli, 2004-X Eur. Ct. H.R. at 246.

235. *Id.*

236. Compare this to the language in *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), which states that "the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution." While the state bears a heavy burden to prove it is justified in applying laws differently among different groups, it is questionable whether the court would have viewed the right of a woman to choose her surname as a "precious freedom" to be preserved at all costs – especially in light of the *Forbush* decision, which came four years after *Williams*. So, while Turkey had international precedent for its argument, its precedent was recognized as fundamentally flawed by the ECHR.

237. Ünal Tekeli, 2004-X Eur. Ct. H.R. at 252.

238. *Id.* at 257. Turkey's constitution provides that international treaties and agreements are binding in certain contexts, but must be ratified by the Legislature when they involve the rights of private individuals. TCA, *supra* note 51, pt. 3, art. 90. Turkey had signed but not ratified the European Convention on Human Rights, is a member state of the Council of Europe, and participates fully in the ECHR, which allowed Ünal Tekeli to bring suit in this particular forum but meant that Turkey could decide whether or not to accept the decision.

justification[s]" for the discrimination.²³⁹ The court granted Ünal Tekeli monetary damages but dismissed the remainder of her claim for just satisfaction without providing any reason.²⁴⁰

In both *Burghartz* and *Ünal Tekeli*, the ECHR's failure to order just satisfaction essentially rendered the decisions toothless; neither country has yet instituted changes that the plaintiffs sought. Some evidence of the ECHR's struggle to establish precedents that can apply in member states that strictly regulate surname changes, as well as those that do not, is found in its most recent decision on marital surnames, *Daroczy v. Hungary*.²⁴¹ This case was quite different than *Burghartz* or *Ünal Tekeli*, since it did not involve a person suing for the use of his or her own surname in some form after marriage. Instead, the petitioner had changed her name upon her marriage in 1950, but the name was incorrectly recorded.²⁴² The mistake was not discovered until 1984, and the petitioner was not notified of the error.²⁴³ After her husband died in 1996, she was informed that her legal name had to include all of her late husband's legal names, rather than only the two she had been using for nearly fifty years.²⁴⁴ The ECHR found that the government could not maintain its claims of inconvenience, since they had been referring to the plaintiff by her desired name for such a long time.²⁴⁵ Nor was there any legitimate reason for Hungary to prevent her from using that name.²⁴⁶

More importantly, though, the ECHR made a valiant attempt to please a variety of its member states in this opinion, acknowledging that:

[N]ames retain a crucial role in a person's identification. However, even if there may exist genuine reasons prompting an individual to wish to change his or her name, the Court has accepted that legal restrictions on such a possibility may be justified in the public interest; for example in order to ensure accurate population registration or to safeguard the means of personal identification and of linking the bearers of a given name to a family.²⁴⁷

This opinion allows member states to continue using tradition and familial continuity as justifications for their laws without penalty from the ECHR, as long as the laws themselves are not applied in a discriminatory fashion.

The Court also stated that its "task is not to substitute itself for the competent authorities in determining the most appropriate policy for regulating changes of names, but rather to review under the Convention the decisions that those

239. Ünal Tekeli, 2004-X Eur. Ct. H.R. at 254-55. Turkey is the only member state of the Council of Europe to impose the husband's surname on a married couple, regardless of the couple's preference. *Id.* at 255.

240. *Id.* at 258.

241. *Daroczy v. Hungary*, App. No. 44378/05, Eur. Ct. H.R. 1 (2008).

242. *Id.* at 2, 3.

243. *Id.*

244. *Id.*

245. *Id.* at 6.

246. *Id.*

247. *Daroczy*, App. No. 44378/05, Eur. Ct. H.R. at 5-6.

authorities have taken in the exercise of their power of appreciation.”²⁴⁸ This is simply a reiteration of the ECHR’s role.²⁴⁹ Although its decisions are binding on the signatory states of the Convention, it does not prescribe the laws for them, but merely decides whether particular laws promulgated by a country are against protocols of the Convention.²⁵⁰

Even so, the ECHR made clear its authority over member states, admonishing that “they cannot disregard its importance in the lives of private individuals: names are central elements of self-identification and self-definition.”²⁵¹ The protection of a citizen’s right to exercise “self-determination and personal development” cannot be infringed upon without violating his or her rights, absent “justified and relevant reasons.”²⁵² Here, the ECHR is attempting to find middle ground by balancing the rights and demands of individuals, with the rights of governments to track their citizens and others residing within their borders.

C. *Litigation in Japan*

Reiko Sekiguchi filed the most important Japanese case that involved the country’s mandated change of name at marriage in 1988.²⁵³ Ms. Sekiguchi, a university professor who had elected to take her husband’s name at marriage, had published several works under her prenuptial name and wanted to continue using that name professionally.²⁵⁴ The university where she taught at the time of her marriage allowed this, but when she moved to a different university sixteen years later, she was required to use her legal surname.²⁵⁵ Ms. Sekiguchi filed suit, claiming that Japanese law placed an unfair burden on married professionals, since one partner’s career would be negatively affected regardless of whose surname the couple chose.²⁵⁶ Ms. Sekiguchi lost her initial case and appealed; this appeal was denied by a three-judge panel in November 1993.²⁵⁷ Despite her vow to appeal the denial,²⁵⁸ no further legal proceedings seem to have been filed in her case.

In another lawsuit filed in 1989, a family court judge denied a couple’s request to maintain separate surnames after marriage because it deemed the appearance of marital unity, conveyed by a common surname, as more important

248. *Id.* at 6.

249. *Id.*; see also *Information Document on the Court*, *supra* note 202, at 5.

250. *Information Document on the Court*, *supra* note 202, at 5.

251. *Daroczy*, App. No. 44378/05, Eur. Ct. H.R. at 6.

252. *Id.*

253. *Bryant*, *supra* note 17, at 114-15. See also Judgment of Nov. 19, 1993, Tokyo District Court; 1486 Hanrei Jiho 21-55 (May 11, 1994).

254. *Id.*

255. *Id.*

256. *Id.* This was also a factor in the decision of Minister Seiko Noda and her partner to have an unofficial marriage rather than an official one. *Kawaguci*, *supra* note 19.

257. *Maiden Name Ruling*, PITTSBURGH POST-GAZETTE, Nov. 20, 1993, at A-3; *Tokyo Court Says Professor Can’t Use Maiden Name*, SAN JOSE MERCURY NEWS, Nov. 20, 1993 at 2A; *Woman Not Allowed to Use Maiden Name*, ST. LOUIS POST-DISPATCH, Nov. 20, 1993, at 9A.

258. *Kawaguci*, *supra* note 19.

than individual autonomy or administrative ease.²⁵⁹ The court rejected the claim that Civil Code Article 750²⁶⁰ violates the Japanese Constitution, which requires respect for the individual,²⁶¹ and that the only requirement for marriage is consent of the parties to the marriage.²⁶² However, due to the restrictions in Article 750, a couple's freedom to marry hinges on their ability to agree on a common surname.²⁶³ Thus, a couple who consents to marriage, but either cannot agree on a common surname or wants to retain separate surnames, may not enter into an official marriage.²⁶⁴

Article 750 clearly interferes with not only respect for the individual, if the individual's choice of name conflicts with the government's wishes, but also the desire and ability of Japanese people to enter into marriage if they disagree with the government's position. The appearance of marital unity is a justification based on social policy, with highly questionable legal underpinnings. The Constitution indicates a clear preference for individual autonomy, leaving it up to Japanese citizens to either maintain traditional practices or to choose their own path. It seems, though, that for the time being the Japanese government has succeeded in retaining its restrictive laws regarding marital names.

V. ANALYSIS

Governments have many legitimate reasons to know the names of their citizens and residents. A few of these reasons include national security, taxation, various forms of licensing, and medical care (in countries with socialized healthcare systems). However, governments have little valid justification for imposing or denying name changes on citizens as a result of marital status, since it serves no administrative purpose and does not further any social or moral goals in which the government can legitimately claim an interest.

The administrative convenience argument is quite disingenuous.²⁶⁵ Name changes are far from convenient in the administrative context, since they place a burden on not only the government and its agencies, but also private companies. Tax, health and driving records must be updated, along with passports, credit histories, banking information, employment records, and other data. Identification cards must be changed and reissued.²⁶⁶ The potential for mistake is quite high, especially in less centralized systems, since individuals may not know or follow proper procedures, and agencies and companies often fail to communicate with one another regarding these changes.

259. Bryant, *supra* note 17, at 152-53.

260. MINPŌ, art. 750.

261. KENPŌ, art. 13.

262. KENPŌ, art. 24.

263. MINPŌ, art. 750.

264. Kawashima, *supra* note 30, at 94.

265. Emens, *supra* note 7, at 817-18.

266. *Id.*

For this reason, the French-Québécois model, in which legal names rarely change, is on its face the most efficient model.²⁶⁷ The individual's decision to marry does not burden the government and private companies with the costs of updating and linking records, yet individuals may use their spouses' surnames in social contexts if they choose to do so.²⁶⁸ Except in the rare occasions where legal name changes are granted, the government has the information necessary to track and identify a citizen from the moment his or her birth is registered in the central database.

On the other hand, this may raise the problem of people using names in an improper context, for example a married woman signing a deed using her social name (husband's surname) rather than her legal name (birth surname). This can, of course, have the potential to create both legal complications and future administrative inconveniences. It may also feel unsatisfactory to individuals who want their social and legal names to match, or who place heavy emphasis on the emotional and psychological aspects of a marital name change.²⁶⁹

From a legal perspective, the French-Quebecois system undoubtedly places government interest in individual names above personal autonomy. The vast majority of people are unable to decide for themselves what their legal name will be, for the name given to them at birth follows them for their entire lives.²⁷⁰ Nevertheless, individuals have almost complete autonomy over the name they are actually known by in everyday life, and although there may be occasional disquiet over the French and Quebecois governments' policies of immutable surnames, there appears to be no major litigation over the issue. Thus, it is not only administratively efficient, but is efficient for the legal system as a whole.

When analyzed for their efficiency, Enforced marital name change policies fall in the middle. They impose a greater burden on the government and private companies than systems in which name change is forbidden, but benefit from clarity and procedural standardization. The limited number of options—in the Turkish example, a woman must either take her husband's surname alone or place it after her prenuptial surname²⁷¹—creates fewer opportunities for procedural errors by either government officials or the individuals themselves. Even in the Swiss system, where there are a greater number of options,²⁷² such options are still limited in comparison to the common law systems.²⁷³ Essentially, a couple “checks

267. See discussion *supra* Part II.C.1.

268. L'Heureux-Dube, *supra* note 146.

269. E.g., *Quebec newlywed furious she can't take her husband's name*, CANADA.COM, Aug. 8, 2007, <http://www.canada.com/topics/news/national/story.html?id=72ddc06b-4660-4b92-8b92-3a26ae24b377>.

270. *Id.*

271. See discussion *supra*, Part II.A.3.

272. See *supra* text accompanying notes 37-38.

273. See discussion *supra*, Part II.B.

a box" at the time of marriage to indicate their naming preference, and the chosen name change is affected.²⁷⁴

However, this procedural certainty comes at great expense to personal autonomy, and the argument for such a repressive system is neither clear nor convincing. These systems are premised on nothing more than government preference for tradition and keeping up appearances.²⁷⁵ While arguing that it is important for married couples to broadcast their status to the outside world by sharing a name, the governments have not put forth any evidence that forcing married couples to share a surname leads to happier unions or lower divorce rates.²⁷⁶ Furthermore, while relatively few Japanese couples refuse to marry due to the surname change requirement, it is still evident that the requirement works at cross-purposes with the government's goal of promoting marriage and family unity.²⁷⁷

Another serious concern with the Turkish and Swiss systems is that they are a codified form of gender discrimination. In Turkey, women are forced to change their names and men are not allowed to, regardless of preference or potential adverse consequences to the name change.²⁷⁸ Despite the Ünal Tekeli decision, Turkey has made no attempt to correct this problem, which violates both its own Constitution and international treaties.²⁷⁹ Swiss law discriminates against both men and women in different ways; in the vast majority of marriages, women are forced to change their names, yet if the couple wants to adopt the wife's name, an administrative hearing is required and the application may still be denied.²⁸⁰ Furthermore, even when these applications are approved, the husband does not have the same options as the wife for his name change. The Japanese system is egalitarian on its face, but in practice it still disproportionately affects women, who change their name in the vast majority of Japanese marriages. Even so, the main problem in Japan is class discrimination rather than gender discrimination, since a marital name change more adversely affects couples where both partners are in licensed or public professions in which name recognition is vital.

VI. CONCLUSION

Labeling a group of individuals as a family unit only works on a superficial level, and without more objective proof of its value, it does not justify the government's imposition on constitutionally-guaranteed rights to privacy, respect,

274. *Fact Sheet on Married Names*, *supra* note 38.

275. *See supra* text accompanying note 232.

276. *See* discussion, *supra* Part III.A.

277. Kawashima, *supra* note 30.

278. While Tansu and Özer Çiller did succeed in adopting her prenuptial surname as their family name, this paper only addresses the law as it currently stands. The Çillers are an extremely rare exception to the rule, and the fact that no information is available on how they managed to evade this law indicates that it is both procedurally irregular and not a favored practice. Ingram, *supra* note 47.

279. *See supra* text accompanying note 228.

280. *See supra* text accompanying note 36.

and personal autonomy. The fact that these name changes happen with greater procedural efficiency does not outweigh the fact that the governments discussed herein have not demonstrated legitimate state interests in dictating the marital names of their citizens. Furthermore, citizens of each of these countries have litigated against the government, or against private companies that enforced the government's policy of enforced name changes upon marriage.²⁸¹ The limited reach of each court case, all of which were appealed within the originating country's court systems, and two of which were brought before an international court, indicates a fundamental flaw in the system.

A consequence of greater freedom of choice and personal autonomy in the common-law approach followed in Great Britain, Canada, and the United States is administrative inefficiency.²⁸² Originally, name changes at common law scarcely involved the government, and allowed almost unrestricted personal autonomy.²⁸³ The practicalities of modern life would place the government and private companies at a severe disadvantage if they had no way of tracking and identifying citizens, which makes the imposition of formal name change procedures necessary. In these systems, the individual bears the burden of notifying the proper authorities,²⁸⁴ which poses a problem because people are often unfamiliar with the process, resulting in mistakes and uncertainty.

To maintain some degree of efficiency, these jurisdictions may be justified in privileging marital name changes above other types of name changes. If all newly married people who wanted to adopt their spouse's surname were required to file applications and undergo hearings, the system would quickly be overwhelmed. For the same reason, though, denying some married people equality of process on the basis of gender is inefficient as well as discriminatory. Great Britain and Canada have addressed this issue by making their laws on marital name changing gender-neutral, but few American states have followed their example.²⁸⁵ The remaining American states would be well served in adopting a gender-neutral position, since it could improve administrative efficiency within the state without affecting the relationship between the states and the federal government, and because no major cases involving this issue have been litigated in jurisdictions with gender-neutral laws since those laws were enacted.

Governments do have an interest in the individual's name, but only to the extent that it furthers a legitimate government purpose. When a government cannot show that it possesses such an interest—whether the claim is administrative

281. *Burghartz v. Switzerland*, App. No. 16213/90, 18 Eur. Ct. H.R. 101, 118 (1994); *Ünal Tekeli*, 2004-X Eur. Ct. H.R. 239; Judgment of Nov. 19, 1993, Tokyo District Court; 1486 Hanrei Jiho 21-55 (May 11, 1994).

282. See *supra* text accompanying notes 68-70.

283. See Freeman, *supra* note 68, at 377-78.

284. Morgenstern Leissner, *The Problem*, *supra* note 8, at 353-55; The Enrolment of Deeds (Change of Name) Regulations, *supra* note 89; Unif. Law Conf. of Canada, UNIF. CHANGE OF NAME ACT, 1988.

285. See *supra* text accompanying note 132.

efficiency or social policy—and has guaranteed its citizens the right to privacy or equality in marriage, the government's desire to control its citizens' marital surnames should yield to individual autonomy. Discrimination in this context not only conflicts with national and international policies, but encourages litigation that, while immensely important to the individuals involved, is frivolous at best when viewed in light of government policy. Until a legitimate governmental interest can be proven, jurisdictions that enforce marital name changes or whose statutes discriminate on the basis of gender should put an end to such practices; the practical impact on government policy would be minimal, while the effect on the citizens of each jurisdiction cannot be measured.