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Sunnqvist, Martin

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LUND UNIVERSITY

PO Box 117
221 00 Lund
+46 46-222 00 00

Mr. Martin Sunnqvist, LL.M.
Lund, Sweden

**Succession of names and arms: agnatic or not?
– Some comments to the historical and present, German and Swedish law**

I.

It should be noted at the outset, that under both Swedish and German law, every citizen may assume arms, provided that he or she does not assume arms which someone already bears. In both countries granted arms exist, but arms are no longer granted to private persons. This article will deal with questions concerning succession of arms: which descendants of the grantee, respectively of the person who assumed the arms, are entitled to bear the arms?

The principle, that armigers take up their fathers' but not their mothers' arms, has its roots in Roman law. The Roman concept *gens* meant the group of persons who descended from the same male ancestor in the agnatic line of succession. This definition has – through the spread of the Roman law over Europe – formed the principle of the European succession of names and arms.

Also Bartolus de Saxoferrato – who wrote the famous *Tractatus de Insigniis et Armis* (or rather, probably, wrote the first, legal, part of it) in the 1350's – considered arms to follow the agnatic line. He wrote that cognates, and also males married to daughters of the family, had no right to the arms of the family.

Roman law is the foundation of much European private law, particularly the German private law of the *Bürgerliches Gesetzbuch*. On the other hand, the spread of Roman law to England and Sweden was less significant. In England, there were civil law courts; among them the High Court of Chivalry, which applied a Roman law procedure but an English law of arms. In Sweden, some Roman law came into the practice of the King's administration in the 16th century through German influences. In the practice of the Courts of Appeal, the application of Roman law increased in the 17th century, but that tendency was diminished by legal reforms in the 1680's. In the legal literature, however, German-Roman law continued to have influence.

II.

According to the *gens* concept of Roman law mentioned above, the German succession of arms was agnatic. In *Allgemeines Landrecht für die Preußischen Staaten* of 1794, the principle was retained. The fact that many grants of nobility and grants of arms do not mention this restriction does not mean that it does not apply.

The *Bürgerliches Gesetzbuch*, hereinafter BGB, was adopted in 1896 and is applied since 1900. In BGB, the agnatic succession of names was originally retained, but BGB has been changed during the last thirty years to meet the requirements of the constitution.

Article 3 in *Grundgesetz*, the German constitution, states that "*Männer und Frauen sind gleichberechtigt.*" This principle – that men and women are equal – has led to changes in the law of names. In 1976, it was made possible for parents to give their children the mother's surname. The legal presumption was, however, that the married couple's common name was the name of the husband. In 1991, the *Bundesverfassungsgericht* declared that this presumption violated the constitution. Nowadays, the married couple can choose to keep their surnames respectively or both use either one of them. If they have a common surname, the children will have that name. If they have different surnames, they can decide which one of them the children will have.

A certain complication in German law is the fact that noble titles since 1919 are not legally seen as titles, but as parts of the name. Thereto comes, that the state cannot grant noble dignities and titles. The recent changes in the law of names will lead to, that persons who in the stricter sense do not belong to a noble family, will bear noble names including the titles. These persons cannot, of course, be said to have been granted nobility through the effects of the law of names, but they are legally

entitled to bear the title as part of the name. Who – in the historical sense – *is* Graf von X, and who only bears the name Graf von X, will be difficult to tell...

What relevance does this have for the succession of arms? We can at first establish, that the entire legal protection of arms is an analogy with BGB § 12. This analogy is a result of several law court precedents. It states, that the righteous bearer of the name (arms) has the right to stop persons who *unbefugt, i.e.* without right, use the same name (arms). The rule applies to arms of both noble and non-noble families.

It has been submitted, that the succession of arms follows customary law, which cannot be changed unless through statute law or new customs. However, it cannot prevail in opposition to the constitution. It would be interesting to see a case, where someone, who in the agnatic line of succession has a right to certain arms, starts a trial against someone who uses the same arms but derives the arms from his or her mother. The court would then have to decide whether that is done *unbefugt* or not. Until then, the law seems to be unclear on this point.

III.

In medieval Sweden, the succession of arms does not seem to have taken place strictly agnatically, although the agnatic principle cannot be said to have been unimportant. During the 16th century, the German influence on the King's administration lead to a reinforcement of the agnatic principle. Jacob Teitt was in 1555 sent by the King to Finland to hold a visitation of the nobility there. He criticised some nobles for the fact that they used arms derived from the maternal sides of their ancestries. When the House of Nobility was established by the King in 1626, the agnatic principle prevailed. Succession of nobility in Sweden thus follows the agnatic line.

Also, the succession of names and arms in Sweden has since the 16th, or at least the 17th, century followed the agnatic principle, *i.e.* for those who used arms and family names. This was confirmed through legislation in 1963 – the presumption was that a married couple used the name of the husband, and that the children used the father's name. In 1982, new legislation was instituted. The married couple can now choose to keep their surnames respectively or both use either one of them. If they have a common surname, the children will have that name. If they have different surnames, they can decide which one of them the children will have.

In Sweden, noble titles are not connected to the names. The House of Nobility is a corporation under public law and keeps records of the members of the noble families. The government is planning to detach the House of Nobility from the state, but such a measure will not affect its perpetual record-keeping. Thus, although non-noble persons as an effect of the legislation of 1982 can bear noble names, there is no confusion as to who bears noble titles and dignities.

The noble families' arms are granted together with the dignity and the name. Although the name follows the law of 1982, the succession of the dignity follows what was once granted. There are strong reasons to believe, that the arms follow the dignities rather than the names.

Arms of non-noble families are not granted, but assumed on one time or another. It is not certain that they are legally protected, unless they have become established as signs of a person or a family. In many cases, they have not been used consequently over generations. It is therefore somewhat difficult to speak of legal rules concerning the succession of arms of non-nobles.

IV.

There is an important distinction to be made between names and arms in Germany and Sweden: the state registers the name of every citizen, but arms are not registered by the state. The succession of a certain name can be followed over the generations in the register books – or computer files.

The succession of arms is not registered, and therefore it would be convenient with a simple and foreseeable principle such as the agnatic principle of the Romans. However, it must be said, that a general, obligatory agnatic succession understandably can be seen as discriminatory.

I submit, that there is a rather simple solution to the problem where there is a grant of arms: The succession then necessarily follows what is said in the grant, or, if nothing specific is said there, what was the meaning of the law when the arms were granted. Admittedly, this in most cases leads to agnatic succession. This is an effect of the fact that the grant defines the right that is granted.

The question is much more difficult to answer when one looks at assumed arms. Sometimes, something was said at the assumption. The first bearer of the arms might have declared, that his descendants in the agnatic line may bear the arms, that those of his descendants who bear his surname may bear the arms, that all his descendants may bear the arms... *etc.*

It seems reasonable to follow what was said at the at the assumption. Then, the person who assumes the arms can define the circle of bearers. In Germany, this can be tried in court according to the analogy with BGB § 12. Under Swedish law, the extent of the legal protection of assumed, non-noble, arms is much more unclear.

An important and interesting question concerns which rules are legal rules and which rules are customary rules. The customs may be, and are in most cases, more detailed than the legal rules, but are also more difficult to define. In both Sweden and Germany, the heraldists must find the new paths, and eventually, new customs will evolve.

A question for the future is: What happens in German and Swedish heraldry, when someone derives rights to many arms? He or she may have a right to some arms in the agnatic line, and to some arms from someone who assumed arms and decided that all his descendants should have the right to bear the arms. Should he or she choose one of them? Or quarter them all? Or simply assume new arms?

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