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On Perfecting the Legislation of Right of Name in China

Zhao Qian [α] & Xu Heng[σ]

Abstract - The basic theory of right of name consists of the four aspects of concept, nature, object and content. The legislation of the name right in China has deficiency in systematicness, completeness and technicality. On the basis of comparing with the relevant legislations at home and abroad, we can explore the perfecting path of the legislation of right of name in China from the characters, registration, change and use rules of name.

Keywords : right of name; Ordinance of Name Registration; legislation.

I. Introduction

In 2007, the Ministry of Public Security of People's Republic of China issued the "Ordinance of Name Registration (first draft)", the legislative procedure of this normative document of law has not been completed in almost 5 years. Though it is unfinished, it caused legislation contradiction and applicable disputes typical of "the case of Zhao C". Where is the border of citizens' right to name autonomously on earth? How to perfect the legislation of right of name in China? The solutions to solve these problems can be explored by analyzing the relevant legislations in China under the guidance of the basic theories of the name right.

II. The Basic Theory of Right of Name

a) Concept

Name is the general term that natural persons recognize each other's letter symbol system; the symbol to distinguish a natural person from other natural persons, and the social identification to make natural persons specialized. Name is the combination of a natural person's family name and first name. The family name is the sign of family system, and the first name is "the symbol of an individualized individual". In China, except for some minorities, most of people's names are represented by four forms, that is "one surname, one first name", "one surname, double first names", "compound surname, one first name", "compound surname, double first names". In addition to the autonym, some people also have his pen name or stage name; traditionally Chinese were used to make a literary name or courtesy name. [1] The right of name is the right for a natural person to legally decide, use and change his own name and eliminate others' illegal interference or illegal use. It is one important right of personality of modern natural persons, and now the civil law in all countries stipulates to protect the name right of natural persons.

b) Nature

Name is the social mark to specialize natural persons, and a specific name stands for a specific natural person. Name is the external manifestation for a natural person to become a civil subject, though in some exceptional circumstances several natural persons in the same living field use the same name, they can be specialized through certain ways. Therefore, name is an indispensable element for a natural person to maintain his individuality and the spiritual interests that a natural person must have as a human being. Its significance lies in that name separates a natural person from other natural persons in law and makes him be convenient for participating civil activities, performing various rights and assuming the corresponding obligations given by the law. [2] Hence, the right of name is the right of personality in nature, rather than the right of identity.

c) Object

Except for a natural person's formal name registered in the household registration authority and the name displayed on relevant identity certificates, the object of the name right also include the used name, pen name, stage name, literary name and courtesy name, that is, all of the titles that can explicitly direct at the specific natural person in a certain region. Name first reflects the spiritual interests, and with the development of economy it extends to the property interest. For enterprises, the celebrity effect can achieve transaction opportunities for them and increase transactions; for the celebrities themselves, the property value of their personality is realized and added in commercial activities. Consequently, the interests that the rights of name reflect should be extended to the spiritual as well as the property aspect. [3]

d) Content

The first is the right to establish a name, that is, citizens' right to decide their own name. Citizens have the right to decide to follow their father's or mother's family name, and follow others' surname; have the right to decide their own given name, including alternative name, pen name, stage name, literary name and

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courtesy name, etc. After citizens possess the ability to express their own wishes, they have the right to determine their own name and their supervisors should not interfere with. The second is the right to change a name, namely, citizens have the right to alter their name according to law. Because a name is determined when a baby is born, the right to name is actually performed by his/her supervisors, while he/she is in the passive position. When one has certain ability of will but not complete ability of action, one can exercise the right to change the name with the consent of the supervisors. In principle, citizens can alter their own name at any time and for any reason. However, the person with the name right has already taken part in all kinds of social relations with his/her original name before altering name, and his/her change of name may affect the interest of others and society, hence, altering name needs to abide by a certain legal procedure, that is, dealing with the formalities of changing name at the household registration office. The third is the right to use a name, namely the right for a citizen to use his own name according to law. Citizens can engage in legal activities and set rights and obligations for themselves with their own name. Under the premise of non-breaching the relevant laws, public order and good conventions, the person with the name right can allow others to use his name and get rational pay. [4]

III. The Current Legislation Situation of Right of Name

a) The relevant legislations at home and abroad

The Constitution in most countries does not clearly and specifically stipulate the name right, mainly indirectly regulate it through the protection of human dignity. On the basis of the indirect terms of the right sources provisions, the right to name can be set specifically via the civil law and the ordinary civil laws and regulations. The relevant legislations can be generally divided into a single pattern and a composite pattern.

Under the single pattern, the right to name is put in the civil law for unified regulation. The articles of 57, 60, 61, 264, 330, 333, 334, 357 and 363 in French Civil Code set "name" in the "human beings" part of Volume I, and respectively stipulate "the right to name" and the alteration of name in the parts of "natural person", "human beings" or the Kinship Law. The articles of 29 and 160 in Swiss Civil Code give provisions about determining the surname in marriage and the legal remedy of violating the right to name. The articles of 6, 7, 8, 9, 143, 156, 237, 262 and 299 in Italian Civil Code make provisions of the right to name in the Chapter of "Natural Person" in the first volume of "Human beings and family", and Italian Civil Code stipulates the related content involved in name in the part of the Family Law. The articles of 51, 52 and 54 in Quebec Civil Code also respectively make provisions of the solutions to determine and change the names of children and the relevant disputes. The 34th and 38th article of Ethiopia Civil Code mainly provide how to determine the names of children from the perspective of the Kinship Law. The 19th article of Civil Code of the Russian Federation makes a comprehensive stipulation of the composition, determination, alteration and use of a natural person's name. The 29th article of Vietnam Civil Code stipulates the alteration of a name.

Under the composite pattern, the right to name is systematically regulated through the civil codes and the ordinary civil laws and regulations. In Japan, the Civil Code stipulates the children choice of surname in articles of 790 and 810, the 107th article of the Household Registration Law respectively makes the provisions about the alteration of surname and the first name and requires that the names of children should be general and easy to identify, and offers a more clear and specific standardized requests for determining a name. In Chinese Taiwan area, the Civil Code makes a regulation of determining a name respectively from the principled legal remedy and the kinship right. For example, the 19th article stipulates that "The aggrieved person of the right to name can request the court to remove its infringement and claim the compensation for damages." The 1059th article sets that "Children should follow their father's surname. But if a mother does not have any brothers, the agreement that she determines her children to follow her surname should be followed. The children of a man who marries into and lives with his wife's family should follow the surname of their mother. But the agreement that decides the children to follow the surname of their father should be followed." At the same time, the Civil Code also makes further provisions of the specific content through the Name Ordinances and the Implementation Details of the Name Ordinances. Taking standardized naming as the example, the second article of the Name Ordinances stipulates that "The names of household registrations should choose characters from the Chinese Dictionary compiled by the Ministry of Education or from the general dictionaries like Cihai, Ciyuan and Kangxi Dictionary. Indigenous people's traditional names or Han people's names should be paratactically registered with the Roman alphabet of traditional names, and are not subject to the first provision of the preceding article. The names that don't use the characters listed in the general dictionaries set in the first item should not be registered." The third article of the Implementation Details of the Name Ordinances rules that "When nationals set the household registration for the first time, they shall ensure that their autonym is registered in accordance with the law. Indigenous people's names in Taiwan shall be registered with Han people's names or traditional names, and be paratactically registered with the Roman alphabet of traditional names. If foreigners and stateless persons marry nationals in the People's Republic of

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China (hereafter referred to as China), their Chinese surname should be determined in writing for the marriage registration; the surname of their children should be determined according to related laws. While foreigners and stateless persons apply to naturalize our country nationalities, their surname should be decided. For the Chinese name of those who restore their nationality, the name used when they lose the nationality shall prevail."

The right of name legislation in China is first reflected in the 38th indirect provision in the Constitution of the People's Republic of China: "The personal dignity of citizens in China must not be violated. Any means used to insult, slander, falsely accuse and frame up citizens shall be forbidden." Based on the indirect terms of the right sources provisions, the right to name is mainly set as the composite pattern via the civil laws and regulations. For instance, the first item of the 99th article in the "General Principles of the Civil Law of the People's Republic of China" stipulates that " Citizens have the right to name, and the right to determine, use and alter their own name in the light of provisions, and other people are forbidden to interfere with, pirate and forge their name." The 22th article of "Marriage Law of the People's Republic of China" stipulates that "Children can follow the surname of their father or their mother." The 24th article of "Adoption Law the People's Republic of China" provides that "Adopted children can follow the surname of their foster father or foster mother, and can also retain their original surname with the consensus of the persons concerned." The first item of the 4th article in "The Law of the People's Republic of China on Resident Identity Cards" sets " Resident identity cards should use Chinese characters and figures in line with national standard." The 18th article of "The Household Registration Ordinances of the People's Republic of China" stipulates "If citizens want to alter their name, the following provisions shall be observed: (i) When people under the age of 18 need to change the name, they themselves or, their parents and adopters shall apply for altering registration to the household registration office; (ii) When people above the age of 18 need to change the name, they themselves shall apply for altering registration the household registration office."

b) The legislation deficiency of right of name in china

Firstly, in terms of systematicness, because the relevant legislations are formulated in succession and the formulated legislation purposes are different from the social relations which are wanted to be adjusted, the provisions of citizens' right to name are multi-perspective, and even the condition that as to the same problem legal provisions are incompletely consistent like in the "the case of Zhao C". "The case of Zhao C" is mainly spread around the controversy between the related provisions of the foregoing "General Principles of the Civil Law of the People's Republic of China" and "The Law of the People's Republic of China on Resident Identity Cards" and the provision of "Name may not use, or contain foreign language and Chinese phonetic alphabet" in the "Ordinance of Name Registration (first draft)". The former is the legal ground of the first instance judgment for supporting Zhao C's lawsuit request made by the People Court of Yuehu District in the city of Yingtan of Jiangxi Province in China on June 6 in 2008. Though the legislation of the latter is unfinished, But the public security departments have established the household registration system according to it, resulting in that Zhao C can't be recorded in the household registration system and then he can not get his ID card of the second generation. This controversial provision caused different understandings of lawmaking of the residence registration authority and citizens. Incorrect registration and application made the awkward phenomenon that Zhao C had been "legally using" foreign letters as his name for over 20 years but had to "legally alter his name" occur.

Secondly, in the light of completeness, related legislations do not provide the scope of name characters, that is, not stipulating that which characters and words appear in name should not be registered according to law. In accordance with the 22th article of "Marriage Law", if the case that taking the surname instead of the parents happens, how should the residence registration authority make its choice? Besides, owing the same name, one party's misconduct makes inroads on the other party, should the court sentence the citizen to change name? For the solutions to such kind of disputes, there is not clear legal provision or judicial explanation at present.

Lastly, for the technicality, certain defects exist in the legislative technology of related legislations; therefore, ambiguity easily occurs in the application. For instance, the 22th article of "Marriage Law of the People's Republic of China" rules "may" other than "must" or "should". In line with the principle of "freedom means the law does not forbid" in private law, it may be inferred: children can neither follow the father's surname nor the mother's, but adopt other surnames. The 24th article of the "Adoption Law of the People's Republic of China" also stipulates that with "may", namely, once the adoption relation is established, the surname of the adopted children should be determined under the situation of consistent consultation, but the will of both parties must be respected. Consequently, as long as both parties agree, it may naturally consider that adopted children can use the surname of the adoptive parents and the original surname. The provision of "numeric character" in the fourth article of "The Law of the People's Republic of China on Resident Identity Cards" is too broad, and also becomes the legal ground of "Zhao left half-moon shape" frequently appears in the lawsuit of "the case of Zhao C". The 18th article of "The Household Registration Ordinances of the People's Republic of China" only stipulates the applicant and the

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acceptance organ, but not the the application requirements, procedures and times for altering a name, the ground whether the household registration authority agrees or not, or the time limit for alteration of the household registration authority, hence, there is not the provision of the name itself.

IV. The Perfecting Path of the Legislation of Right of Name in China

If the foregoing defects of the legislation of the name right in China are revised or explained by relevant legislations one by one, the legislation cost is too high, but the unification and systematic regulation can be realized through perfecting the name characters, registration, alteration and use rules of "Ordinance of Name Registration".

a) The rules of name characters

The "broad and narrow" problems of the scope of name characters in reality shall be corrected. Chinese is one of the most developed languages in the world, and the Grand Chinese Dictionary takes down more than 56,000 single characters, infinitely broadening the choosing range of name characters. For a long time as no relevant laws can be followed, name characters become more and more immoderate and the amount of characters is expanded limitlessly, particularly the phenomenon that using uncommon and nonstandard characters and even individually created Chinese characters is increasing. At the same time, China as a large nation with a population of over one billion has only four or five thousand optional characters, making tautonym a common occurrence. The two aspects have brought inconvenience to Chinese citizens in household registration management, personnel management, personal financial information management, transfer of registered residence, attending school, obtaining employment, post and telecommunication, social security, medical insurance, the computer terminal handling, etc. Meanwhile, they also provide the opportunity for a series of infringement actions, such as going to school and writing accusation letter under somebody else's name, cheating and bluffing by assuming the name of national staff. For this reason, "The Table of Name Characters" can be established in the "Ordinance of Name Registration" in the form of appendix, so as to set the form, tone, quantity and sequence of name characters. A name must use the standard simplified Chinese characters published by our country. But, it is a rather difficult work to stipulate the scope of name characters in more than fifty thousand Chinese characters, therefore reverse prohibitive rules can be made to determine the range of Chinese characters which are not allowed to appear in names. Firstly, those single characters with the meaning of insult, degradation and immorality can be forbidden to use, such as "bandit", "rape" and "obscene". Generally, people do not use such kind of Chinese characters, but because the naming right of juveniles is often exercised by others; the possibility to use such kind of Chinese characters in extreme conditions should not be eliminated. The second is uncommon characters. Uncommon characters (can also be called complicated characters) in the study of Chinese characters fall into four categories: the first is the characters with incomplete tone and meaning, they are mostly caused by horizontal combination when compiling them in dictionaries, or incomplete reorganization of historical inheritance, or in the copying process and false dissemination; the second refers to the ancient Chinese character stereotyped by Li handwriting or transition glyph replaced by modern regular script; the third is not general isomeric characters and characters of different writing; the fourth points at dialect characters. It is not easy to identify the four types of Chinese characters; naturally they should be excluded from the name characters. [5]

b) Rules of name registration

The "Ordinance of Name Registration" should firstly make explicit provisions of choosing the surname, and allow citizens to decide their own surname by freely choosing the surname of the father or the mother or the third surname. The characters which are not forbidden by the law can be the surname of citizens. In allusion to the feature of "one character with many meaning" of Chinese characters, the general Chinese dictionary of certain authoritative version established like in the "Ordinance of Name" in Taiwan may be stipulated to prevail, forbidding adopting anti-national, anti-social and immoral words for a name. Citizens of Han nationality must use Chinese characters for the household registration of names, while minority citizens are given special provisions for the registration of names. Currently, in consideration of the need of minority names, the Ministry of Public Security provides that over 10 Chinese characters can be input in the column of "name" in the population information management system. But if citizens are allowed to do whatever they want and take no account of national consistency, social stability and order will be affected. "Freedom of spirit and meaning is a broad interpretation of liberty; some scholars believe it has reached the limit of civil law "freedom" and should be paid special attention to." [6] Hence, the "Ordinance of Name Registration" shall make special provisions: when minority people use the characters of their nationality, they should register the transliteration of Chinese characters or minority Roman letter of minority names. Besides, with regard to the names when foreign citizens join the Chinese nationality, it may be possible to refer to the first provision in the "Ordinance of Name" of Taiwan: "if a Chinese with nationality marries a foreigner or a stateless person, for

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the registration, the Chinese family name of his or her spouse shall accord with the Chinese custom of using names. If a Chinese without nationality marries a foreigner or a stateless person, the Chinese family name of his or her children born in Taiwan, or the Chinese family name of foreigners and stateless persons who have applied for naturalization of Chinese nationality, can apply the former provision." The "Ordinance of Name Registration" shall also specifically stipulated: natural persons who apply for joining the Chinese nationality should determine the Chinese transliteration of their foreign name or Chinese name while submitting the naturalization application; for people who restore the Chinese nationality, their Chinese name shall accord with the one while losing the nationality.

c) Rules of name alteration

Name alteration includes changing the family name, first name and name. Name alteration shall perform the legal procedure, that is, applying for the local police station of the permanent residence, filling in the application form of name alteration, and if necessary providing relevant certification material according to law. After receiving the application form of citizens' name alteration, the local police station shall make the decision to approve or disapprove within the prescribed time. For the disapproved, reasons and legal ground shall be provided to the applicants. If the applicants are not satisfied with the outcome, they can ask for administrative reconsideration or administrative proceedings within the statutory period. The "Ordinance of Name Registration" should adopt the mode of principle plus exception to determine related rules about changing names. Generally, as to the name alteration requests in accordance with relevant legal regulations, social public order and good morals, the registration organ only audits them as a procedure. However, under special cases, and there is clear evidence that this application may cause right violation, this request should be refused.

d) Using rules of names

Chinese citizens should use the only formal name in the activities with legal effect which are enough to affect the rights and obligations of related subjects. The formal name is the name of household registration, among two to five Chinese characters, one should be the limit. Other names are all fake names and can not have related legal effect. The "Ordinance of Name Registration" shall clearly stipulate the using range of formal name, for instance, in the following conditions, a formal name should be adopted: certificates that can prove identity like ID card, passport, driver license and employee's card; affairs involved with citizens' vital interest like property matters and social insurance; when there is a need to use the name in all of affairs related to law. Regarding relevant legal relief, the "Ordinance of Name Registration" shall also rule that the one who takes advantage of the same name as other people' to intentionally conduct actions against other users of this name, if severe outcome happens, the court has right to sentence the responsible person to change name within a definite time, and the household registration authority shall be responsible for this matter, and give appropriate punishment for those who refuse to change name.

Tautonym protection of general limit is given to names of ordinary people, namely, through household registration management, one name is forbidden to reuse in the county-level administrative regions. Particularly, using the name same as other people's for improper purpose should be banned. When citizens apply for name registration, through the check of citizen ID card management system, if tautonym exists in the provincial administrative region, citizens can be advised to change a name, but this suggestion does not have a binding force. Political celebrities should be given special protection of the name right. They are leaders who have made outstanding contributions to the motherland and human progress and the excellent representatives of the society, and obtain people's respect and love. Therefore, their name should be specially protected, that is, in the national scope the names same as political celebrities are forbidden to use, for those which are using, the users shall be suggested to change a name voluntarily in order to ensure the specificity of political celebrities' name right, but this suggestion does not have a binding force. If one wants to use a name as a brand, the applicant must be the owner of the name or the authorized person of the name owner. In case the name is the same as that of political celebrities, even if this name is the applicant's name, based on the principle of specially protecting celebrities and for preventing malicious use of celebrities' name, the application should not be allowed before celebrities agree. Furthermore, there is clear provision that political celebrities' name should not be used as a brand. One must get registered and approved by the administrative department for industry and commerce while using a name as a brand, and enjoy the sole right of use in the approved scope. This brand can be transferred legally after being permitted by the name owner, and simultaneously statutory procedures must be strictly performed, otherwise that can be infringement.

The "Ordinance of Name Registration" shall clearly stipulate kindly protecting and rationally using principles. With regard to those who have the same name as other people, to judge whether they violate the name right, the difference that whether they have subjective faults should be made. Tautonym out of goodwill should not be dealt with as an infringement. If someone has got the same name before the celebrity, he shall not be requested to change his name on the ground of infringement. In terms of the wanted note by the judiciary, service by public announcement, declared missing, declared dead, or about the marriage-seeking,

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recruitment and people-searching notice published by the mass media, conflicts owing to tautonym should not be punished as infringement. Protecting the name right does not mean forbidding other people to use it, one has the right to use his/her name and others does have, but the principle of reasonable use must be complied with. Taking news report as the example, including in the critical report, pointing out someone's name belongs to reasonable use and should not be investigated due to violating the name right. Other kinds of use can be set as reasonable except the using way banned by the law.

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