RSP • No. 46 • 2015: 356-364

ORIGINAL PAPER

Unpacking the Right to a Name: A Diachronical Legal Analysis of the Administrative System and Regulations

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Abstract

The purpose of this article is to provide the first comprehensive legal analysis of the relation between the right to a name and the administrative authorities. In order to individualize the personality of an individual in relation to another individual, the name of the physical person (surname and forename) must be used. Although the name is a complex notion whose birth, historically speaking, represents primarily the result of a long usage, as any element related to language, it becomes a legal concept, its structure and rules of assigning are the subject of the regulations, and not the name itself. The right to a name is one of those personality rights which are simultaneously identification attributes of an individual. The name, as an element or means of identifying physical persons in civil right, contributes to determining the status of the individual holder of rights and obligations in a legal relation. Changes in civil status of a person such as: changes in filiation, changes arising from adoption, changes caused by the institution of marriage, determine the change of the surname which is not at all the same with the administrative procedure of changing the name. This last procedure consists in the replacement of the name on request, through administrative decision. This administrative procedure is due to different causes unrelated to civil status but included in special provisions.

Keywords: *right to a name, administrative procedure, name changing, reasonable grounds.*

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From "name" to the "right to a name"

Roman jurists believed that for a man to be a *person*, he was required to have legal capacity under its two aspects: of use and exercise. The capacity of use was held by the one who had *status libertatis*, *status civitatis*, and *status familiae*, therefore he was a free man, citizen (*quirit, cives romanum*) and was not in the power of a *pater familias*. The capacity of exercise belonged to those who, in terms of sex, age or mental status, were able (presumed *iuris tantum*) to appreciate the significance and consequences of their actions in legal terms (Hanga, 1971: 102).

Legal personality, according to old Romanian Law, begins at birth and ends with death, applying the Roman rule *infans conceptus pro nato habetur quontis de commodis ejus agitur*. According to article 34 of the Code Calimah: "laws care for those conceived, since the time of their conception, because they are considered as newborn babies when the cause is reached by themselves, and not the third person" and article 986 applies this rule in successions matter. It was required for the newborn "to be alive and viable and have human appearance", solution taken also by the current legislation, except for the requirement of viability. The moment of birth is particularly important to establish legal personality and the appearance of birth records marked the beginning of the era of Augustus. Therefore they imposed the obligation to declare a birth within 30 days and the obligation to give a name to the newborn – the name being assigned on the eighth day of life for girls and on the ninth day for boys. That day was called the name day, which was preceded by various ceremonies, including purification by fire (Dogaru, Cercel, Dănișor, Popa, 2008: 505-507). Constituent of the language of every people, every person's name is in fact a sound sequence used constantly in the community to designate a person. The appearance of names is conditioned by the existence of a human group, of peoples as a social being. On the other hand, the name is an emblem of the family. Visible sign of belonging to a particular family, a sign of relationship to a house, the name implies a family connection, and applies only to those who descend from a common author (Ionescu, 1975: 8-19). The name can be refered as "that attribute of the physical person who consists in the human right to be individualized, within the family and society, by the words set out in the law, in this meaning" (Beleiu, 2005: 381). Such a definition presents the failure to not reveal the essential quality of the name that of being a personal non-patrimonial right, from the class of identification attributes.

At the beginning, in Romania, there was the unique and non-transferable name system, people simply called John, Peter. Later, the people's individualization became more difficult among those who wore the same name, so they started to use phrases such as John, the son of George. The first law governing the whole name issue is the "special" Law from March 1895, which offers concrete solutions for different situations, not containing "scattered provisions" (Hamangiu, Rossetti-Bălănescu, Băicoianu, 2002: 139) like the Code. Due to legislative provisions that were void until then it draged in serious problems. There were some foreigners who carried on a trade in a corner of the country, they went bankrupt, therefore they went to another corner of the country and Romanized theirs names, changing it completely, because there was no relative formality to change the name. So Rosenfeld changed into Rosetti, Rosenzweing into Roznoveanu and Braustein in Brateanu. Although this law was fought with great talent by Delavrancea Barbu it was, however, adopted to meet the needs of those times (Titulescu, 2004: 133).

Under this law any person must have a surname. No one was allowed to use a patronymic name other than the one that was registered in the register of civil status. If they did not had such a surname, they were forced to give a statement to the mayor of the

place of origin. Thereby demonstrating that they agree to have as a surname the father's Christian name plus one of the endings "-escu" or "-eanu", being designed to differentiate name by surname. For example, if the father had the first name as "Ștefan", his son was to be called "Ștefănescu". These names are the result, in principle, of the development of culture in schools and churches (Val Popa, 2006: 393). So, most of the villagers who did not have a patronymic name formed one, thus the name acquired was written down on the birth certificate of the person.

In these latter days, the name structure is established by article 83 of the new Civil Code which provides: "the name consists of a surname and forename". In addition, article 1, paragraph (1) of Government Decree no. 41/2003 (published in Official Gazette no. 68 of February 2, 2003) repeats the same idea and develops it in the provisions regarding the acquisition and change of individuals' names administratively (Chelaru, 2003: 9-11). Family connections are the ones that determine that part of the name called "surname", often used in everyday speech as the expression "family name". It is acquired according to the law, without possibility of any manifestations of voluntary choice. As an exception, a limited manifestation of voluntarism is allowed when the child's parents do not share the same name. In this case, the child will bear the name agreed by the parents that may be the surname of one of them or their surnames combined. If parents cannot agree, the court of guardianship will decide according to article 18, paragraph (3) of Law no. 119/1996 on civil status papers, republished in in the Official Gazette no. 339 of 18 May, 2012 (Chelaru, 2012). Voluntarism is manifested as far as assigning the forename by the parents is concerned, designated in common speech as "Christian name". Assigning the forename is voluntary, meaning that the parents are the ones who choose their child's forename (Chelaru, 2012). However, the law allows, under certain conditions, limited intervention of the public authority in this area. Thus, according to article 84 paragraph (2) second sentence of the new Civil Code, "the registrar must prohibit the registration of indecent, ridiculous forenames which are likely to affect the public order and the morality or interests of the child, as appropriate".

The binary structure of the name was also provided by article 12 paragraph (2) of Decree no. 31/1954, which had the same wording as that of article 83 of the new Civil Code. Therefore, from the perspective of civil law, the name represents the reunion of two non-patrimonial civil subjective rights of an individual, the right to a surname and the right to a forename. Thus, unjustifiably, the component elements of the only right recognized as such by law, the right to a name, reached the status of independent rights. The wording of the provisions of article 82 of the new Civil Code (text with the same wording as that of article 12 paragraph (2) of Decree no. 31/1954, published in the Official Gazette no. 8 of January, 1954, which states that "everyone has the right to an established name or to a name acquired according to the law") in conjunction with those of the article 83 of the new Civil Code, allows no other interpretation than the one according to which the surname and forename are just components of a single right: the right to a name (Chelaru, 2012).

The name is a subjective civil right from the point of view of its legal nature, since article 81of the new Civil Code speaks of "the right to a name". The same legal nature of the name results from article 7 point 1 of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989 and ratified by Romania by Law no. 18/1990, published in the Official Gazette no.109 of September 28, 1990, which provides: "the child shall be registered immediately after birth and shall have the right to a name from this point forward". This principle is reinforced

by article 9 of Law no. 272/2004, republished in the Official Gazette no. 159 of March 5, 2014, according to which the child has a right to a name, as part of its right to identity. "Individual attributes are by definition attributed, whereas personality rights are, by excellence, assumed" (Gheorghe, Popescu, 1992: 59-60).

The prerogative of name, residence and marital status are attributed to the person outside his manifestation of will, not referring to the fact that at birth, a person acquires a default name by law. In addition, a person with full capacity, in principle, can choose a name or another, a home or another, a civil status. What is essential is that throughout its existence a person must have a name, a home and a civil status. The conclusion reached by the authors, Mihai Gheorghe and Popescu Gabriel is that individual attributes are both rights and duties for the holder. This duality is explained by the fact that the assigning of the elements exceeds the individual's will, depending on the will of the law, and their bearing exceeds the individual interest, belonging to the interest of the society. In the case of personality rights, the will is not presumed but left to the choice of the holder. Other personality rights such as the right to privacy, the right to physical and mental integrity, not being used for individualization of the person within the family or society, they are not identification attributes.

Being a part of the personality, the name is not a patrimonial value and is therefore a personal non-patrimonial right (Cornu, 1991: 276). However, there is controversy over the legal nature of the name, some authors in foreign legal literature, as well F. Zenati-Castaing, believes that this is a good that can be acquired by long possession (Zenati-Castaing, Revet, 2006: 57, 62). The name can gain some economic meanings when it's used to identify a merchant, natural or legal person (Malaurie, Aynés, 2003: 45-46) or natural persons exercising a liberal profession, such as those of lawyer, notary, doctor, architect, and judicial executor (Cercel, Olteanu, 2009: 41-54). The forename has the same legal characters as the surname, but only when it is associated with the latter. Viewed in isolation, the forename has a lower legal force; for example, it has no legal effect the signature consisting only of the first name (Ungureanu, 2013: 297).

Administrative System and the Right to a Name

It is the principle that an individual should not be able to change family name (or Christian name) arbitrarily but only by its will. Just because the name is an attribute for identifying individuals in social relations and in the family, it is clear that the social interest requires that the name should be constant and not necessarily unchangeable (Dogaru and Cercel, 2007: 132). In addition, the legality of the name requires that any change in the family name (or first name) can be carried out only when and as provided by law (Dogaru et al., 2008: 625). In Roman law, the name change was possible unless the change would have been fraudulent. This possibility was preserved in the Middle Ages, with some restrictions: craftsmen they could not change the name when it served as trademarks; notaries could not change neither their name nor their normal signiture without an authorization. Gradually monarchy has increased control in this matter, tending to turn a social institution into a police one. Thus, in the old France there were settled laws like this: no citizen will carry a different forename or surname than that the one established by his act of birth, and those who forsake them will be held to retake them (Capitant, Terre, Lequette, 2007: 106).

The first "special" law from our legislation that regulated issues concerning one's name, the Law from March 1895, stated in article 1 that it is not possible any voluntary change of name, being illegal; but sets no penalty for changing the name. Furthermore,

the same article states that the name can be changed only for "cause blessed", leaving the court the freedom to appreciate what are these causes and how they can be determined. In general, it is considered as accepted a request to change the name where this was "ridiculous, obscene or immoral". The request for changing the name was addressed to the Ministry of Justice, following to be published in the Official Gazette and in newspapers. If in a certain time there was not any opposition, it had to be approved by the Council of Ministers. This change fully operate upon the wife and minor children, if necessary (Hamangiu et al., 2002: 140). Furthermore, according to article 1 paragraph 4 of the earlier said law, anyone could take any name, the only condition being that you had no right to take a historical name. But what is a historical name? Nicolae Titulescu stated that historical names are not boyar's names, but it must have done something in history, not being enough to have exercised only the title of a boyar. Following the researches undertaken, Barbu Delavrancea said once with the name law debate, that there were only 130 historical names for Moldavia and Muntenia, the other names being boyar's names. While nobility was considered just a function, aristocracy sprang from an ancestral right, based on historical facts (Titulescu, 2004: 135). According to article 85 of the new Civil Code, "Romanian citizens may obtain, under the law, the administrative change of surname and forenames or only one of them". Changing family name or forename is that operation of replacing them or only one of them at the request of the interested person with another one through an administrative decision (Boroi, 2010: 375; Beleiu, 2005: 410; Dogaru, Cercel, 2007: 133; Lupan, Sabău-Pop, 2007: 79). So, unlike the name modification, which leads only to last name change, administrative change of the name can see both the last name and the first name (Ungureanu, Munteanu, 2011: 185). The administrative change of the name, unlike the family name modification, is not supposed to replace it as a result of changes in the status of the person (Irinescu, Afrăsinie, 2012: 129), but its replacement is based on solid grounds expressly regulated. The administrative replacement of the name occurs only on request, once again marking a limit between the change of the surname and the modification of the surname. In the case of name modification, its replacement is not conditioned by any expression of will of that person in such a direction (Boroi, 2010: 375).

Regulation of name change is in Government Ordinance no. 41/2003 on acquiring and changing the names of individuals administratively, which expressly repealed Decree no. 975/1968 concerning the name. The right to request the change of name of the individual is recognized by article 3 of O.G. No.41 /2003, which provides that: the name can be changed administratively. The statement used in the art. 3 is similar to that used in article 85 of the new Civil Code. Article 4 to 21 of O.G. No.41 / 2003 regulates uniformly both the change of last name and of first name. Moreover, through the application, the person concerned may request either a change of surname and forename, or only the change of one of the two. In the following we are going to relate the change of the name generally, taking into consideration, especially, changes of the last name.

The cases for the administrative change of the name are expressly provided in O.G. no. 41 / 2003. While article 4 of Decree no. 975/1968, was only content to provide that the name change could be obtained for solid reasons, without providing further explanation in this regard, the Government Ordinance no. 41/2003 considers solid the grounds that are provided by article 4 which containes an illustrative list in paragraph (2) letter a) to j) and paragraph 3. That we are in the presence of an illustrative list it results from the elaboration of article 4 paragraph (2) letter m), which refers to "other similar justified reasons" (Chelaru, 2012).

The persons entitled to apply for administrative name change

The administrative procedure of the name change is regulated by articles 5 to 19 of O.G. no. 41/2003 and articles 106 to 114 of the Methodology on the implementation of the provisions on civil status, approved by H.G. no. 64/2011. Romanian citizens, whether they have or not their residence in Romania can obtain the administrative name change (article 4 paragraph (1) of O.G. no. 41/2003 and article 87 paragraph (3) of the Methodology for implementation of the provisions on civil status), but also stateless persons which have their residence in Romania (article 5 of the O.G. no. 41/2003). *Per a contrario*, stateless persons not having their residence in Romania and foreign nationals would not have this right even if the latter have their residence in Romania (Chelaru, 2003: 30). From article 7 results that, for the minor, the application form for the name change is made by his parents. When the application for the name change is made by one parent, it is required the consent of the other one, in duly certified form. If parents cannot agree on changing the name of the child, the guardianship court will decide. The agreement of the other parent is not required if this one is laid under an interdiction, deprived of parental rights or legally declared missing.

For the minor protected under guardianship, as for the person placed under judicial interdiction, the demand will be made by the guardian, with the consent of the family council. According to article 136 of the new Civil Code, this notice is required for any action concerning the protected person, except those who have a current character (Chelaru, 2012). If the child's parents are deceased, unknown, laid under interdiction, declared judicially dead or missing and deprived of parental rights and guardianship has not been established, where the child was declared abandoned by a final court decision, and if the court decided not to entrust the child to a family or an individual, under the law, a minor name change request is made by the specialized public service for child protection subordinated to the county council or, where appropriate, the local council (article 7, paragraph (5) of the O.G. no. 41/2003). If we are talking about changing the name of a minor over the age of 14, the application shall be signed by him. The surname change of a minor may be required once with his parents' change of surname or separately, but only for solid reasons (article 8, paragraph (1) of the O.G. no. 41/2003).

If the spouses have agreed to wear during the marriage a common family name, for the change of surname it is also necessary the consent of the other spouse (article 9 paragraph (1) of the O.G. no. 41/2003]. *Per a contrario*, if the spouses at marriage have agreed to keep each of them their previous name, any of them can change his names without needing the consent of the another (Ungureanu and Munteanu, 2015: 265). Changing the surname of one of them has no effect on the other spouse's surname (article 9 paragraph (1) and (2) of the O.G. no. 41/2003). Therefore, changing the name of one spouse does not lead to the name change of the other spouse or to the child's family name change (Lupan, Sztranyiczki, 2012: 129).

The administrative procedure

The applicant must justify the request by one of the cases provided by article 4 paragraph (2) and (3) of the O.G. no. 41/2003. Therefore, the request is submitted to the public service community for persons' record, subordinated to the local council of the village, town, city or sector of Bucharest, in whose jurisdiction the applicant is having his residence (article 6 of the O.G. no. 41/2003). The application must be submitted personally or by private attorny and by proxy or power of attorney (Ungureanu, Munteanu, 2015:

265).

The request for the change of the name is subdued to publicity in 30 days from its publication, so that any person interested may be in a position to know and ask for an injunction, if necessary. The request shall be published in excerpt in the Official Gazette of Romania, 3-rd Part, by the applicant's care and expense (article 10 paragraph (1) of the O.G. no. 41/2003). It is excluded of the publication the name change request that consists in indecent, ridiculous expressions, or of names transformed by translation or otherwise, if it was obtained the approval of the person that runs the county civil service or the public service of the municipality of Bucharest, by case (article 11 paragraph (1)) of the G. O. no. 41/2003. It is stated that the opposition must be grounded, without being expressly provided what circumstances might justify it. The right to wear a name legitimately is closely related to the idea of family and filiation (Dogaru, Cercel, 2007: 139), therefore the honorable and glorious name cannot be taken by anyone (Hamangiu, Rossetti-Bălănescu, Băicoianu, 2002: 142). Eugen Chelaru considers unjustified the establishment of the above exception, at least when the opposition seeks to defend a right or a legitimate interest in the name of the holder of the application wants to wear due to the change of his actual name. Furthermore, all the conditions provided by law are checked out and after analyzing the thoroughness of the request and the oppositions made, the president of the county council or the mayor of Bucharest proposes, reasoned, the issuing of the disposition by which whether accepts or rejects the request for name change within 60 days of receiving it (article 12 and article 13 of the G. O. no. 41/2003). The provision granting the request is communicated to the public service to which the application was filed. Then, after the payment of fees, public service would deliver a copy of the disposal of admission of the name change. The name change is written, by reference, on the birth certificate, as well as on that of marriage, where it is the case (article 15 paragraph (1) of the G. O. no. 41/2003). To this effect the public service to which application was first registered will send to the public services (General Direction of Passports, Directorate for Statistics, Judicial and Operative Records within IGRP, etc.) that dealt with acts of civil status, a copy on the disposal of name change. According to article 16 paragraph (1) of G. O. no. 41/2003, the disposal of name change has legal effect only from the date of registration of the corresponding indication on the birth certificate. Proof of the change is made with the provision for admission of the name change or the certificate issued by the civil service on the basis of the admission of the name change (Lupan, Sztranyiczki, 2012: 130). The effects of the administrative change of a person's name do not extend to other family members.

The disposal for rejecting the request for the name change can be challenged under Law no. 554/2004 (article 18 paragraph (2) of the G. O. no. 41/2003). The person who was dismissed by the name change can make a new application if in its support appeared new reasons. If the name change request was denied due to the admission of an opposition, the person concerned can make a new application, if the same name is requested only after the cessation of the causes that conducted to the admission of the opposition (article 19 of the G. o. no. 41/2003). A person whose rights or legitimate interests recognized by law were injured by accepting the application of the name change may bring an administrative action under Law no. 554/2004, which may require the cancellation of the disposal regarding the name change (Chelaru, 2012). This legal action that may be brought within 6 months from the date of the request for the name change is subsidiary, the applicant must prove that, for objective reasons, out of his power, could not form the opposition (article 21 of the G. O. no. 41/2003).

Public authorities with competence in the field of the right to name

Powers to the public authorities for the name change by administrative means have been established in accordance to the provisions of Government Emergency Ordinance no. 84/2001 on the establishment, organization and functioning of public services for people. Government Emergency Ordinance no. 84/2001 was published in the Official Gazette of Romania, Part I, no. 544 of 1 September 2001 and was approved by Law no. 372/2002, published in Official Gazette of Romania, Part I, no. 447 of 26 June 2002. Subsequently the regulatory document in question suffered several changes, the last by Law no. 329/05.11.2009. This legislation has set up communitarian public services for people. Therefore, the reorganization of the departments of civil status from the local councils and local entities of the registry office from the structure of the Ministry of the Interior were set up local communitarian public services for people in local councils of villages, towns and cities, and in the local councils of Bucharest, and by the reorganization of the civil service within the county councils and offices of population registration and driving licenses and registration certificates from the county services computerized record of the person, from the Ministry of the Interior were set up county communitarian public services for people subordinated to county councils. At central level, the National Inspectorate for Persons' Record was set up as a specialized body of the central public administration, with legal personality, into the Ministry of Public Administration, through the reorganization of the General Directorate for Personal Data Records – Population Registry Department and the Central Service scheme driving licenses and registration certificates from the structure of the Interior Ministry.

Conclusions

The function of a name as a means to individualize a person has resulted in that private law and public law aspects are inter-twined. The relation between authorities of public administration and the right to a name meet together once with the opportunity given by the law to change this attribute that individualises a person in society by a couple of words that are not chosen by him but by his parents or even by public authorities in certain cases. While there may be real reasons that persuade an individual to want to change his name, the public interest can justify some legal restrictions on such possibilities (ECHR, Strejnic case against Finland, 25 November 1994).

Acknowledgement

This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013.

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Article Info

Received: April 2 2015
Accepted: May 26 2015