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Preventive methods to protect the civil name: A comparative study

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Abstract

The name may be subjected to attack, and this attack may inflict irreparable damage on the victim, but only be compensated for, but the effect remains part or all, so the law has established ways to prevent the damage caused by the attack on the nameThese methods are precautionary means that remove the damage from its foundation, such as amending the publication, deleting it, or publishing an apology to the injured for the damage incurred.

Keywords: Civil name, moral damage, preventive measures, reparation

1. Introduction

1. 1 The research subject

The topic of "preventive methods of protection of civil name" and other personal rights refers to those procedures that are used to prevent the infringement of personal rights. These measures are the best way to protect those rights as it is known that prevention is better than cure. in addition, these procedures represent the real protection of personal rights.

The name is one of the personal rights that can be violated, which is often confused with human rights. The topic of preventive methods means that there are several means mentioned in the name in order to provide legal protection for it in accordance with civil legislation.

1.2 Research problem.

Preventive measures represent the real protection of personal rights, because when these rights are violated, the role of the law is limited to trying to redress and repair the damage that has occurred. This is of limited feasibility within the scope of personal rights, where it is better to protect them from abuse before it occurs. This is because, unlike other rights, it is difficult to erase the effects of such an abuse no matter how much compensation is gained.

1.3 The importance of the research topic

There must be a specific legal system that protects the name in accordance with the values and principles prevailing in society, so clarifying civil protection must include all that enables the name to perform its basic function of distinguishing the personality of the human being from others.

1.4 Research Methodology

In this study, we rely on the comparative approach between Iraqi and French law, referring to Egyptian law, Jordanian law and Islamic jurisprudence whenever possible, based on Islamic jurisprudence. The current also study relied on the analysis and discussion of the opinions of jurists through the adoption of the analytical and comparative approaches.

1.5 Research Plan:

The study of the preventive methods pertaining to the name necessitated that the research plan be divided into two main sections. The first includes the restrictions on the name while the second includes the means to push back the infringement of the name. We will also present a conclusion in which we summarize the most important results and recommendations of the study.

2. Restrictions on the name

Consent is the only restriction on the right to name and surname. Although they are personal rights and are the result of their disposal, this is no longer contrary to an agreement on their use. For example, a decision by the French Commercial Court on 12 March 1985 referred to in Code Des Societe.

To clarify this, it is necessary to stand on two assumptions: the question of the name and surname or one of them being the name of a shop, and the second assumption is the use of the name and surname or one of them for a purpose other than discrimination between persons, which we will consider in this section.

2.1 The name belongs to a shop

The name and surname can be used in a commercial store, as the label may be used to denote the commercial store, which gives it a special identity that distinguishes it from other stores that run a similar business. This lab has a financial value and is considered one of the industrial and commercial property rights of commercial shops (Nasser, 2002, p. 25). The shop is the business tool and consists of a total of both material and immaterial elements dedicated to pursuing a business, and may be called a shop or factory, depending on whether it is intended to trade in the narrow sense or to engage in industry. It is also called 'establishment' in the application of tax and labour laws (Taha, 1990, p. 545). The rule is that the shop and the trade name may be disposed of together or that the shop alone may be disposed of without the trade name, where the seller retains ownership of the name. This is stipulated in Article (9) of the Iraqi Trade Names System No. (6) of 1985 and the second paragraph of Article (4) of the Iraqi Trade Law No. (30) of 1984, and Article (8) of the Egyptian Trade Names Law No. (55) of 1951 as amended. This means that the sales contract does not include the brand name unless expressly stated in the sales contract, or that it is implicitly used from the terms of the contract towards the implied will of the parties to do so. If the sales contract does not explicitly or implicitly indicate the inclusion of the trade name, it will not replace the sales contract (Nasser, 2002, pp. 142-143). The disposal of the shop may include the trade name, although this is not provided for in the sales contract if the trade name is of importance to the shop (sale) so that it is an essential element of the shop.

It affects the attraction of customers to the shop so that the exclusion of the trade name from the contract results in the absence of the status of the shop from the sale, in which case the disposal of the shop must include the trade name even if the contract does not expressly state it (Younis, 1992, pp. 51-52).

This act by name and surname is an exception to the rule that personal rights cannot be disposed of. The justification is that the nature of the name and surname has changed as they have been separated from their owner to enter into the elements of the shop and have been established financially (Nasser, 1990, p. 141). This means that they may be adopted. Nevertheless, the disposal of the name and surname is limited to their use as a means of distinguishing the shop. This is in order to attract customers and gain the confidence of the public, so that they are not used in a manner that affects the honour of their owner or arouses confusion with them, nor may the acting person impersonate the trade name in non-commercial matters relating to the shop and is obliged to add what prevents confusion between him/her and the conductor. This can be seen in Article (9) of the Iraqi Trade Names System, corresponding to Article (8) of the Egyptian Trade Names Law.

2.2 Using the name for a private purpose

The use of the name and surname or one of them for a purpose other than distinguishing between people, where a jurisprudential opinion goes that the inadmissibility of using the name and surname is based on the basis that they are the means and the distinguishing mark of the human being and his/her condition, and to separate him/her from the rest of the people and prevent mixing between them. For this purpose, there is nothing to prevent us from disposing of the name and title and assigning them, as in the case of a person allowing a novelist to give his/her name to a fictional character in his/her novel or allowing others to use it as a literary or artistic pseudonym (Abu Al-Saud, 2007, pp. 107-108).

It seems that this opinion should not be taken into account in its entirety. Rather, it should be adopted with some restrictions, such as allowing

the waiver of the name and surname for a specific period and not permanently, and this should be limited to a specific work and not all of them. This is Because the permissibility of the name and title is an exception to the rule of non-disposition. This requires that the exception be not extended as much as possible, and that the provisions of the laws prohibiting the waiver of the name in any form must be taken into account.

3. Cessation of infringement of the name

This is the in-kind implementation of the obligation of all to respect personal rights, and the term "cessation of infringement" must not be understood to allow the abuse to be stopped and not allowed to be prevented in the first place. In other words, it is not necessary to have the infringement begun in order to allow it to be stopped because the prevention of harm is better than curing it after it occurs in all cases. The term "cessation of infringement" is public so that it can include the cessation of the infringement before any prevention begins in the first place (Al-Ahwany, 1978, p. 413).

It seems to us that the term "cessation of infringement" is more understandable than to prevent the infringement, considering that cessation of the infringement is a preventive measure. Prevention requires that the infringement be investigated and avoided rather than waiting until the infringement is verified in order to initiate measures to stop it. For this reason, the laws provided for the protection of personal rights. This is in accordance with Article 6 of the Iraqi Civil Arguments Act No. (83) of 1969 and Article (4) of the Egyptian Civil and Commercial Pleading Act No. (113) of 1968, which did not require damages to the possibility of bringing a cessation-of-the-infringement case, because the existence of the damage is a condition for awarding compensation rather than cessation of the infringement.

The jurisprudence goes to the possibility of resorting to the summary Jurisdiction to stop the abuse of personal rights, including the name (Bahr, 1996, p. 437). It appears that the origin of this idea is comes from the text of article (9) of the French Civil Code, which came in response to the call of the judiciary and jurisprudence in France (Al-Ahwany, 1978, p. 394) under which the emergency judge had the right to resort to preventive measures when the conditions of urgency were met.

The importance of the summary jurisdiction lies in the fact that it helps the opponents by issuing temporary and speedy decisions without prejudice to the origin of the right, which is decided by the competent court. Hence, time-saving and procedures become clear, so that the legislator has reconciled what is necessary for the proper functioning of the judiciary with what is necessary to take into account the interests of the litigants.

The summary ruling of the judiciary may sometimes avoid resorting to the ordinary judiciary to decide the origin of the dispute only as determined by that provision to indicate the right direction in the dispute. In addition, the urgent decision may resolve the dispute if the litigants, after its issuance, become in a situation where the continuation of the litigation before the ordinary court is unproductive as if it were related to the implementation of an obligation to rent a particular theatre on a given night and to implement this obligation under the urgent decision (Abu Al-Wafa, 1986, p. 383).

As for the requirements of the jurisdiction of the summary jurisdiction, it is mentioned in the first paragraph of article (141) of the Iraqi Civil Arguments Act, which states that "the Court of First Instance is competent to consider urgent matters that are feared to be too late, provided that the origin of the right is not compromised". This means that there are two conditions for the jurisdiction of the summary jurisdiction: urgency and non-infringement of the origin of the right (Al Mashhadani, 2000, p. 44).

.As for urgency, it is defined as "the threat to the rights and interests to be preserved, and whenever there is a situation where it is too late, there is irreparable or irreversible damage.

By introducing urgency, it is clear that there is no impediment to the urgent use of the judiciary to stop the abuse of personal rights. This is because the importance of these rights, which come from being related to the human self, makes them at the forefront of the rights that need to be maintained, and the damage caused by the infringement of these rights is often difficult to repair and remedy (Jamei, 1996, p. 135).

The second requirement of the jurisdiction of the summary jurisdiction holds that the origin of the right is not compromised, and there are differing opinions on what is meant by this requirement (Al Mashhadani, 2000, pp. 55-56). The most likely view is that the meaning of this requirement is that everything relating to the right cannot be subjected to existence and that the effects arranged or intended by the law cannot be changed. The same applies to the legal reason that determines the obligations of each party before the other, as it may also not be subject to it because it is contrary to the origin of the right. As a result of this requirement, the urgency judge shall not swing one side to another so that the judgement of the trial court shall not be preceded by the judgement of the trial court. Moreover, the requirement that the origin of the right is not prejudiced shall result in the application to the summary jurisdiction having to be temporary and the temporary application is intended to "arrange a particular situation until the origin of the right is determined" (Al Aboudi, 2015, pp. 327-328).

As for the impact of this requirement on personal rights, the emergency judge is not subject to the question of whether or not the right of personality exists, nor does it interfere in the determination that there is an infringement of the right or not, or that the alleged right holder deserves compensation or not. It is not his/her prerogative to ascertain the validity or existence of consent under which personal rights have been allowed to be infringed and the extent to which they are compatible with the nature of these rights. As a result of this, the summary decision must be temporary and useful in arranging the situation and maintaining it until the dispute is decided by the competent court.

With regard to the position of comparative civil laws on the issue of cessation of the infringement of personal rights, including the name as a preventive means of protecting these rights, it can be said that the best legislative treatment in this regard was stated by the Egyptian legislator in article (50) of the Civil Code which gives protection to all personal rights. On the other hand, the treatment of French and Iraqi legislators is deficient as the former limited protection to the right to privacy in article 9 of the Civil Code, while the latter merely decided to stop the infringement of the title in article (41) of the Civil Code.

As for the position of Islamic law on cessation of the infringement of personal rights, it can be said that this is legitimate on the basis of one of the forensic evidences, "bridging pretexts", and can be defined as "anything that was a means and a way to do something" (Al-Hakim, 1963, p. 407). In other words, "the link to the forbidden thing that contains an evil", such as looking at a foreign awrah, leads to the evil of adultery. Preventing consideration is called blocking the pretext, which is also "the connector to the legitimate thing that contains an interest", such as seeking the Holy House of God. It is legitimate to lead to another legitimate order, Hajj, which contains many interests, so that the pursuit of the Holy House is the door to opening the pretext (Zidan, 1998, p. 245).

Based on the above, the infringement of personal rights is a pretext because it leads to the blight of compromising these rights, which are recognized by Islamic law and prohibited from being infringed upon so that the infringement of these rights is blocking of that pretext. As for the restrictions on personal rights, they are pretexts because they reach a legitimate interest.

If the pretext is forbidden, it means prohibiting the infringement of personal rights because it leads to a prohibited act (*ibid*), which is to harm these rights and their owners.

It must be noted that the question of cessation and accounting for the infringement is closer to the Penal Code of civil law because criminal liability is based on the "wrong" act whether or not it constitutes a crime, or it results in harm or not (Surour, 1981, p. 437). Civil liability is based on the element of damage that may result from that act. The amount of punishment in the Penal Code is commensurate with the degree of error, while the penalty in civil law is commensurate with the amount of damage (Al-Hakim & Al-Sanhouri, 2019, p. 224). However, comparative civil laws have departed from this rule by giving them the right to stop and prevent infringements on personal rights even if there is no harm.

It is no secret that this strengthens the protection of these rights and emphasizes that the prevention of abuse is the best way to effectively apply the protection of the rights of the person. The cessation of infringement of personal rights is linked to the way in which such an infringement is carried out, and since the forms

of abuse of these rights are numerous and difficult to account for, this has been reflected in the cessation of the infringement, which cannot be limited to specific cases.

For infringements on the integrity of the body, jurisprudence argues that they must be prevented by various means (Al-Ahwany, 1978, p. 54) whatever the form of such an infringement. For example, a person may not be forced to take a blood sample for the purpose of obtaining evidence in the case before the judiciary, as such acts must be prevented. This is because they are carried out by individuals and without the permission of the competent authorities, a significant waste of the right to body safety. However, if the evidence is confirmed by DDN,it means eliminating this issue in order not to harm the human body that way.

This statement also applies when any medical work is carried out in the event that all or some of the conditions required for the legality of such acts are left behind. An end to the infringement of the name and surname may be called upon and the summary jurisdiction may be used to halt the infringement of the reported rights if the conditions of urgency are met. This is stipulated in Article (41) of Iraqi law and article (51) of the Egyptian Civil Code.

It is clear from the foregoing that the infringement of the right to the integrity of the body and the right to name and surname can be halted by the judiciary, which is concerned with assessing the means by which this is done in accordance with the requirements of each case, and that summary jurisdiction can be resorted to and in all cases where urgent circumstances are available.

As for the infringement of both the right to privacy and honour as well as the right to image, it is often done through publications and is halted by many procedures (Al-Ahwany, 1978, p. 384), the most prominent of which will be presented in the following section.

3.1 Banning or deleting publications

Abusing publications can be prevented by two actions, which are either to ban publications or cease their circulation, or to delete the offense or modify the publications.

As for the prohibition of publishing publications or suspension of their circulation, this procedure is intended to prevent any act that would bring the publications to the public's reach (Bahr, 1996, p. 439). Therefore, the publication ban is a prevention of an infringement of the rights of the person in question, while the suspension of circulation is a cessation of the infringement that is carried out through it.

The importance of this procedure in cases of infringement of those rights that take place through publication made it the focus of the press and publications laws (Al-Ahwany, 1978, p. 385). For example, paragraph (11) of Article sixteen of the Iraqi Publications Law No. (206) of 1968 prohibited it from being published in the periodical publication, everything that includes exposure to others that is considered defamation of their own persons. However, this procedure, as a decisive tool in preventing some personal rights from being infringed, does not mean the end of the issue. It contradicts the right to the media, which requires balancing and comparison between them in the matter under dispute. It also sometimes contradicts the freedom of the press if the publication to be banned was done through a newspaper, which necessitates a suspension of its circulation.

The French legislator resolved this matter by issuing Article (9) of the Civil Code, which gave the right to privacy priority if it conflicts with the right to information or freedom of the press (Al-Ahwany, 1978, p. 385).

It seems to us that it is possible to give this priority to the right of honour as well because it is no less important than the right to privacy.

As for deleting or modifying parts of the publications, this procedure is used if the publications contain statements that may not be tolerated. However, the effectiveness of this procedure is not complete unless all copies are included. The difficulty lies in the case of the circulation of publications the phrases of which are required to be removed in the market and spread in such a way that it is difficult to seize all those copies (Bahr, 1996, p. 441).

The question arises as to the authority of the summary judge to order the deletion or amendment of what affects personal rights in a way that does not affect those rights. In this way, it violates the origin of the right and this is contrary to the nature of the summary judiciary,

because deletion or amendment will leave nothing to the judge of the subject. This is because it is the point of contention and therefore a chapter in the subject matter of the dispute. The issue arises further when the judge orders the introduction of many amendments covering the majority of the publication. This question is answered by the fact that the authorization of the summary judge to order the issuing of publications or to cease their circulation primarily gives him/her the authority to remove part of the publication because whoever owns the whole, owns the part. The jurisprudence of the arguments does not deny the possibility of resolving the dispute by urgent decision if its issuance results in placing the litigants in a situation where the continuation of the litigant before the ordinary judiciary is unproductive (Abu Al-Wafa, 1986, p. 434) This applies to the issue of deletion or amendment.

3.2 Right to reply and rectification

This right is a preventive measure that gives a person the right to respond to what is attributed to him/her or to consider an infringement of his or her personal rights or to correct the information that has such a character (Bahr, 1996, p. 443) For the right to privacy, the importance of such a procedure arises if the alleged claim to the person is incorrect, a response or rectification would clarify the truth of the matter and determine the person's position.

However, if what has been published is true and does not offend the person, there will be no benefit from this procedure. This is because the violation of the right to privacy has been achieved as soon as it was disclosed. Therefore, there will be no subject to respond, but the effectiveness of this procedure is when the publication includes what infringes the honour and image of a person in which there is nothing that is considered private, i.e. to attribute to him/her what is bad or what raises suspicion and accusation around him/her. As for the right to privacy, the matter is not to offend and raise suspicions, but rather to publish what is not permissible to publish. The person concerned had the right to take response and rectification procedures without resorting to the judiciary. This recourse is only sought after the request to publish the response or rectification that was rejected, or there was a dispute about the availability of legal conditions for the right of reply and rectification. This right is not envisaged to be implemented in accordance with the provisions of the laws of publications and the press except when the publication is periodical. This is so that the reply can be published in subsequent issues of the publication. As for the non-periodic publication, since it is issued once, there will be no place to publish the reply because the publication has been definitively completed. However, the judge may order the publication of a reply by the victim and require the publisher to add it to the non-periodic publication, whether at the beginning or end of the report. The judge also has the power to determine the size and content of the reply (Al-Ahwany, 1978, p. 426). The Iraqi Publications Act obliges the owner of the periodic publication to publish free of charge the reply received by those to whom the publication included an infringement of their personal rights.

The response is published at the same place where the act of abuse was investigated and in the first issue issued after the response arrives if this is not possible in the next number provided that the response does not occupy more than twice the space occupied by the attack in article (15) paragraphs (a, c).

Another means that can contribute to some extent to the protection of personal rights such as name is that the judge has the power to discard evidence obtained as a result of the infringement of these rights and their lack of retrospect in the proceedings brought against him/her. Personal rights are often infringed for the purpose of obtaining evidence to support the position of an adversary.

And what was mentioned, even if it is not consistent with civil proof, requires preparing evidence in advance and informing its parties of what is to be proven through this evidence with the direction of their will to establish that. This is what called for the requirement of proof with specific evidence identified by the legislator in advance to be counted. However, it has a major role in the field Criminal proof, which is based on free evidence that does not require specific evidence in proof, nor is it required to prepare evidence in advance and with the knowledge of the concerned parties.

If individuals are allowed to resort to various means of proof and recourse by the judiciary, this is a reason for the increasing infringement of personal rights in order to obtain evidence to bring it to justice. However, if evidence derived from the infringement of illicit personal rights is wasted, this will result in such evidence not being sought because there is no justification for doing so, thereby contributing to the protection of personal rights. To ensure this, we call on the Iraqi legislator to issue a text in addition to the Proof Act, which contains the waste of evidence obtained as a result of the infringement of personal rights, as stated in some laws. For example, the text of article (217) of the Lebanese Civil Due Process Act No. (217) of 1983 and as the case in the judiciary in some States as in the decision of the Administrative Court of Egypt on 10 March 1956 and supported by the majority of jurisprudence (Hamim, 1981, p. 235).

4. Conclusion

Our research sought to study the preventive protection of the civil name, which is one of the distinguishing characteristics of the human personality. Several results emerged from our research:

1- Iraqi law has required every person to take a civil name, and this name should consist of the person's name and surname, but some people use it more widely than that.

2- The name is one of the personal rights and it is one of the moral rights that cannot be evaluated with money, as it is outside the circle of financial transactions.

Through our research, we reached several conclusions:

- We hope to enact an integrated law entitled: (The Legal System of the Civil Name) regulating the issues related to the name instead of spreading it among the different laws.
- The necessity of repealing the (dissolved) Revolutionary Command Council Resolution No. 42 of 4/24/1995 and returning to the original Civil Status Law No. 65 of 1972 amended, which gave the authority of correcting and changing data, including name and surname to the judicial authorities.

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