

REFLECTIONS ON PENAL IMPLICATIONS OF THE PERSON'S RIGHT TO IDENTITY

Ion IFRIM*
Roxana Oana IFRIM**

ABSTRACT: *The author debates over the issue of crime against person's private life . The special importance of this constitutional right justifies the legal guarantees, as acknowledged for the ensurance of its unlimited compliance. Person's right to privacy is mainly established by the first paragraph from the 8th article of the European Convention, which protects private and family life, home and correspondence. As a corollary of these guarantees, the Romanian legislation incriminated as crimes several actions by which it is brought a touch to the right of person's privacy , as foreseen by the 1st Part from the Criminal Code. The person's right to identity is part from person's intimate sphere.*

KEYWORDS: *person's private life; person's intimate sphere; crimes against person's intimate life; means of protection of person's intimate life; right to identity .*

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1. The intimate area of the personal relations is protected by the Romanian law, as an expression of the concern for the human being and for the preoccupations related to this. For example, the Romanian Constitution within the category of the essential rights, it regulates the right to intimate, family and private life, thus mentioning that these rights may be opposed to any kind of person, including the public authorities which are obliged to respect and protect them.

2. With reference to the aspects characterizing the intimate life of the person, some authors¹ underlined that these could be classified into four categories, namely: those regarding the behavior of the person, the anonymous person, the social relations and life, the identity of the person.

*Ion Ifrim, researcher. st.III, drd. At the Legal Research Institut „Acad. Andrei Rădulescu” of the Romanian Academy, e-mail, ionut_ifrim24@yahoo.com, Romania. The project: Optimizing the implementation capacities of the communitarian juridical order into national juridicalorder“ PN II „IDEL” ; ID_1211.

** Oana Roxana Ifrim, lect.univ.drd. at the Spiru Haret University, Bucharest, Romania.

¹ Ion Dogaru, Dan Claudiu Dănisor, Drepturile omului și libertățile publice, Vol.I Editura Dacia Nova, Lugoj, 1997, p.161.

Other authors² ascertained that the right to intimacy makes part of the broader area of the private life and it encompasses, besides the manifestations related to the solitude of the person, as an element of the intimate area and all the activities which a person may develop on intimate places, together with his/her closest friends, to whom this person may reveal his/her thoughts and preoccupations.

The area of the intimate life also encompasses the sexual life of the person, the activities carried on related to health care and physical development of his/her own person, the privacy during travels, during leisure time, the secrecy of the businesses, the right to personal image, the right to identity, a.s.o. The extensive comprehension of the right to the intimate life guard also characterizes the US legislation and it results from “the human rights to be let alone (*let me alone*)³” in all ways where this expression could be admitted, the legal dispositions having only the purpose to guarantee this right to a person, in respect with other persons.

3. A large number of the dispositions from the Criminal Code protect the intimate life of the person, imposing on all other persons to observe the obligation everything in relation to the individual intimacy by limiting any kind of interferences with its individual life (as for example, in case of domicile, correspondence and professional secrecy violations).

From the intimate area of the person also makes part the right to one's identity. From a more general point of view, one of the undisputable function of the State is that of the protection of the identity of the persons, by means of the Criminal Law, against any attacks towards this individual and social value. Also, the Romanian legislator incriminated several deeds by which the area of the intimate life of the person is violated in connection with sexual relations and the right of the person to have the sexual life he/she wishes in accordance to his/her personality (for example it was incriminated the sexual rape-article 197 from Criminal Code-, the sexual intercourse with an underage child –article 198-, the sexual seduction (art.199) and others, taking into account that the sexual tolerance, which is specific to a democratic country may not lead to abuses of such a nature that could disturb the social life. It is well-known that any individual freedom is ending to that point where it begins the freedom of the others, it means that also within our intimate life we must admit the existence of some limits, as for example, there are limits in what concerns the imposing by coercion of sexual relations or the obtaining by fraud of sexual intercourse, or by abuse of power, a.s.o..Also, there are limits about the deeds of sexual perversion (they may not be made in public, or in state to produce a public scandal, or with an underage child younger than 15 years; it is also forbidden the sexual corruption, incest and sexual harrasing.

4. By identity we understand the capacity of a person to manifest his/her individuality during time and within space, to be himself/herself, by his/her essential features, relatively unchangeable, which makes him/her different from the others, determining to rest himself/herself on the whole duration of his/her existence.

The legal body, proceeding to the identification of a person, isolates and individualizes him/her, according to some identity data, from an extremely large number of possible

² Ion Ifrim, *Viața socială a persoanei și alte noțiuni conexe cu aceasta*, Analele Universității „Valahia”, nr. 4-5, 2009, p.136.

³ Vicent I. Samar, *The right to privacy, Gays, Lesbians and the Constitution*, Temple, University Press, Philadelphia, 1991, p.53-57.

individuals, it establishes his/her unique features by means of the received data, these features make impossible the confusion of one person with another person. For example, in practice it is considered as identification data (being then used by the legal bodies during the trial activity) the following data: surname, given names, nickname, date and place of birth, surname and given names of parents, nationality, education, military service, place of work, occupation, address, criminal record, as well as any other data in what concerns the personal situation. The more the personal situation of two persons is closer one to the other, the more identification data must be more numerous and varied, in such a manner that the identification could be done with the exclusion of any possibility of error.

5. Following some authors⁴, the acquisition of an identity was associated with self-esteem and self-acceptance. It is well-known that the self-esteem represents the evaluation of the own person: any action or achievement that enlarges the social identity of the person will implicitly improve the self-image of the person, namely his/her individual image.

Identity makes part of the self-conception of the individual emerging from the self-consciousness of his/her belonging to some group of individuals together with the emotional meaning and value attached to it⁵. The answers to the question: “*Who are you?*” cover some significations, they are both individual and social ones. Within the social action, that person is manifesting his/her personal identity, too (that means the whole of the biological, mental features which make this person unique in relation with the other persons, and thus he/she is fit to achieve on a specific manner, his/her tasks). The way on which the person observes and fulfills his obligations as a social being, depends on his/her strictly personal features, these features confer him/her a certain social statute and it makes him/her different from the others. With other words, all dimensions of biological nature (by belonging of one person to the human species), of mental nature (by hereditary patrimony) and social-cultural dimensions (by the elements that confer him/her a certain specificity as a consequence of the specific of the people/ethnicity where the person is integrated); all these are contributing to the creation of some unique structure, which can be identified for his/her rights, which, besides elements in common, belonging to all human beings, or as a member of one group, there are also features emerging from the different nature of each person, own features, conferring him/her an own personality. We could say there is a personal identity and on the other hand a different, social identity, which define themselves both by their acquisitions conferring them a certain specificity and by the forms of manifestation of the obligations encumbered on him/her from the variety of play-parts which he/she has to perform within the social life.

6. From another vision⁶, the identity couldn't be a sum of mental or cultural features, and it couldn't be constituted only as a result of direct influences and causes. From this perspective, the identity would encompass an assembly of meanings, varying following the social situations where the persons are found.

7. From another point of view, the individual identity expresses the mutual relationships between the person and the society. From this point of view, the identity is

⁴H. Blumer, *Symbolic Interactionism: Perspective and Method*. Englewood Cliffs, NJ: Prentice-Hall, 1969, p.17.

⁵H. Tajfel, *Human Groups and Social Categories: Studies*. In *Social Psychology*. Cambridge, Cambridge University Press, 1981, p. 251.

⁶A. Mucchielli, *L'identité. Que sais-je?* 5e édition. Paris, Presses Universitaires de France, 1986, p. 5-12.

associated with the interactionist-symbolistic perspective, according to which, the society is determining the behaviour of the person, by the influence exerting on him/her⁷.

Therefore, the identity may be analysed in relation with the behaviour play-parts that the persons perform within society. One may assert that within the moulding of the identity an important play part has the social life as well as the other forms of existence of the person, such as: private life, intimate life, biological life, with its hereditary patrimonium, all these being formed by the education received during the first years of life, by the educational influence of family, school, environment, etc.

8. Following some authors⁸, the identities are projects and they are built within the relational field. Therefore, the individual identity supposes a process of permanent communication: (my) putting in common (with the being of other people). "I am who I am (myself) only by difference from other person and only by reflection I become an individual⁹.

From this perspective, we could remark the importance of the difference between self-identification (what a person thinks about himself/herself and in relation with another standards with which he/she identifies himself/herself) and hetero-identification (the way from the outside in which an individual is identified). Some time there are no differences between self-identification and hetero-identification (as it is identified a person from outside). Sometimes, there are no differences between self-identification and hetero-identification: I am Romanian, a woman or a teacher, to that extent that I recognize myself as having these characteristics, and in the same time the others recognize me, too. That doesn't exclude that at an analytic level of my own person, I will allocate myself an identity which others do not know it, do not recognize it and maybe not even legitimate it.

Within the specialized doctrine, it is made a difference between the identity of the individual and the social one. One may say that social identity gathers the assembly of criteria allowing a social definition of the individual or of the group, with other words it's what put the individual into a determined social frame. For example, the name, the gender, nationality, the mental attributes, abilities and disabilities, age, religion, musical tastes, the feasts, clothes, style and much others tell us about who we are in relation with the others, underlining our social identity. Modifications occurring within social identity of a person suppose continual and intricate processes for re-definition of the dimensions concerning: race, social class, gender, property, religious affiliation, etc. We may say that, the social identity is a characteristic of a feature of the people as social beings, with reference to certain meanings.

9. From functional point of view, the social identity may be considered as a self-assigned quality with purpose of obtaining social prestige, or hetero-assigned with the purpose of social difference. In this case, the identity becomes obvious when a concrete social situation imposes a condition of differentiation and by default, it claims for an evaluation of the concerned persons, with the occasion of each social interference¹⁰.

⁷ G. H. Mead, *Mind, Self and Society*. Chicago: University of Chicago Press, 1934; H. Blumer, *Symbolic Interactionism: Perspective and Method*. Englewood Cliffs, NJ: Prentice-Hall, 1969.

⁸ G. Ritzer, B. Smart, *Handbook of Social Theory*. London, Sage Publications, 2001, p. 478.

⁹ C. Mircea, *Etica tragica sau despre nebunia colectiva*. Bucuresti, Editura Cartea Româneasca, 1995, p. 70.

¹⁰ L. Vlasceanu, C. Zamfir (Coord.), *Dictionar de sociologie*. Bucuresti, Babel, 1998, p. 304.

10. The right to one's identity is closely related with the one of difference, recognizing that each person is an entity. We know that people who are not different have nothing to communicate, they can not mutually enrich themselves. As subjects of the Criminal Law, people appear with what they do have in common, not in their personality. The Criminal Code protects the individuals no matter what the colour of their skin is, if they are rich or poor, women or men, grown-ups or children, all are considered human beings needing protection, enjoying the same essential rights. Therefore, the rights give identity to a person, and the totality of the rights and expectations of the person from the others is defining his/her status¹¹. From such a perspective, between the individual and the society will be established a relationship of rights and obligations, these being the levers by which everyone is manifesting himself: the individual as a human being with his rights, and the society, by its institutions, as a body ensuring their observance, protection of the individual, the sanctioning of those who are guilty for the non-observance of both rights and obligations.

11. Another matter arisen by the identity of a person, is that concerning the distinction between identity and identification. It is well-known that we must not confuse the notion of identity of a person with the notion of *identification*, the last one being the action by which it's established the identity of the human beings, according to their features and particularities, known beforehand.

The identification is an activity by which are established both the common qualities of the human beings and the qualities differentiating them ones, from the others for their classification into types, groups and under-groups, and then viewing their differentiation of everyone separately from the rest with which they have some resemblance.

12. Within the identification, an important part plays the criminality. Forensics is important for the gathering and verification of the evidences necessary for the solution of the criminal trial, mostly referring to the discovery or the establishing without doubts of a person who committed the misdeed, or of the objects constituting material of evidence.

The absence of the identity of the person may constitute item of evidence of great significance by which the person is removed from the criminal field, cancelling his/her link to the misdeed. For example, according to article 200, from Code of Criminal Procedure (C.c.p.), the criminal investigation has as purpose, among others, the collection of the evidence necessary for the identification of the criminal, and for the establishing of his responsibility. Taking into account that most of the criminal deeds are committed on a hidden manner, the main task of the body for criminal investigation, after its notification, is to disclose the criminal. That could be achieved by using all means and procedures of criminal identification. At the moment of collection of the evidences demonstrating the identity between the person who committed the crime and the person against which a legal procedure was started, this person may be involved within the criminal suit as a defendant or accused. The identity is the result obtained at the end of the process of identification.

13. The feeling of identity creates safety, mental comfort, intimacy but also responsibilities related to the temporary tasks towards the broader social evolution of the

¹¹ STÁTUS, statusuri, s.n. Statut. – Din lat. status. státus s. n., pl. státusuri STÁTUS s.n. 1. Loc pe care îl ocupă un individ oarecare într-un sistem și la un moment dat. 2. Comportament la care un individ poate să se aștepte din partea celorlalți. [< lat. status]. STÁTUS s. n. 1. poziție a unui individ sau a unui corp într-un sistem dat; statul social. 2. comportament la care un individ poate să se aștepte din partea celorlalți. (< lat. status).

structures for material and mental security and membership of the identity. The identity becomes valid by the capacity of social integration, by the attitude towards himself and towards people, by its concerns, by the level of awareness and opening to the world of social values.

Regarding the fact that the observance of the private life of a person also involves the respect of his identity and that the State must accomplish two sorts of actions in order to ensure this respect: a negative one, in the sense of refraining itself from abusive intervention and a positive one, in the sense of acting in order to ensure a normal intimate life. Therefore, the State must act in order to recognize the new identity of a transsexual, for example, the non-observance of this obligation representing a violation of the person's rights to recognize his identity with all its alterations during his existence. This obligation also involves the necessity of updating legislation in order to solve such situations.

It is well-known that, facts by which was touched the identity of a person, were incriminated since oldest times. The criminal laws from all ages and from all social systems, incriminated the misdeeds such as: killing people, hurting the body integrity, rape, the violation of the secrecy of the correspondence, etc. sanctioning with penalties varying with the gravity of the consequences.

14. The area of the intimate life is also protected by sanctions with extra-criminal feature, by the obligation of the guilty ones to civil compensations, or by applying penalties of contravention. Jurisprudence goes even further, admitting that the right for the observance of the intimate life is a subjective right whose simple violation may arise an action by which one may ask for material compensations, even in the absence of any evidence of a damage¹².

15. The Universal Declaration of Human Rights by its article 3, guarantees the right of any human being to the life, and in case of euthanasia they speak also about a human right to death. A question is arisen: What right has a person who is not dead, but still he/she is not alive, to what essential right may appeal that person? This question refers to the right that could be invoked in case of brain death. Can we talk in this case about the protection of the identity when the person is found in the situation of brain death? The personal identity was defined from two perspectives, or after two criteria: physical continuation (same body, same brain) and the mental continuation (same memories, same character). The author J.Locke declares that the second element as being necessary, considering that memory, the consciousness is that making the man, and another author, Bernard Williams sustains the idea that the body identity is a necessary condition of the identity. It becomes obvious that these theories could not be applied in case of brain death because following the criteria of body identity, the brain of the patient is dead, thus indicating a change of the body identity, but the body of the person rests unaltered in case of brain death, and in case of consciousness, although the medical men declare that the interruption of brain activity leads to the loss of consciousness and memory, it could not be scientifically demonstrated that the irreversible loss of consciousness could not be followed by a moment of recovery of that person. From a medical point of view the idea of consciousness extinction could be accepted and respectively the loss of the identity, following the Bernard Williams's theory, but actually, that human being finds itself in a passive state of mind, the same with that of a normal person when sleeping.

¹² Ion Dogaru, Dan Claudiu Dănișor, Drepturile omului și libertățile publice, Vol.I, Editura Dacia Nova, Lugoj, 1997, p.162.

We may say that during sleep we give up to our identity¹³? Of course, not. The problem becomes even more complicated.

In order to give person right to identity it is necessary that on the moment of the declaration of the brain death to be also declared the death of that person, of course with the condition there is no prior deed where the patient agreed that his/her internal organs will be elevated and the body will be sustained by apparati until the moment of donation, in these situations the brain death may produce juridical effects. In this way we avoid that persons different from the identity of that person take decisions concerning the property of that person, that is the body of that person, and that because those persons with power of decision, even the relatives of the concerned person may not have control over the body in question and therefore they do not have possession over that body, the patient being the sole master of his body, as it was said by J. St. Mill: "Under those aspects which concern himself, his freedom is rightly, absolute. Over himself, of his own body and mind, the individual is a sovereign¹⁴."

Here it could be invoked a moral argument concerning the dignity of human being, dignity which has to be observed and that has to be protected within the right to one's identity. After the human being has lost its defining functions, such as: feelings, consciousness, memory, etc., it is moral to respect his/her dignity, if not for what the person is on that moment, at least for what the person was beforehand. We could say that the identity of a person exists from the moment of the birth of the person and even after his/her death, the criminal law protects the identity of the person from the moment of birth and even after the biological death of the person.

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¹³ Michael B. Green and Daniel Wikler, *Brain Death and Personal Identity, Philosophy and Public Affairs*, Vol. 9, No. 2, (Winter, 1980), p. 105-133.

¹⁴ Doina-Olga Ștefănescu, Adrian Miroiu, *Manual de filosofie*, Editura Humanitas, 2003, p.58.