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The Personal Identity of the Human Being and the Right to Privacy from the Perspective of Standards of the European Court of Human Rights: Theoretical Legal Reflections

Abstract: This article seeks to present the problem of the personal identity of the human being as an important element of the right to one's private life being respected. The presentation is from the point of view of the guarantees related to the establishment of standards for the protection of human rights by the European Court of Human Rights in Strasbourg. Relevant for this reflection is the theoretical legal approach to this matter, with particular reference to the methods of interpretation of the European Convention on Human Rights. The article discusses the problem of understanding personal and social identity in a cultural context related to group and individual axiology. It presents historical determinants of the ideology of approaching the status of the individual within the state and the general standards of the right to have one's private life respected. Two key methods of interpretation for devising standards of protection, i.e. the evolutionary interpretation and the method of the cultural margin of assessment, are also analysed. Not only do these methods allow for taking changes in European social axiology into account, but they also allow for the distinctiveness of social axiology at the local level. From this perspective, an answer is given to the question, do the ECHR's standards for the protection of the right to respect for private life serve to reinforce the personal identity of a human being?
Keywords: European Court of Human Rights, judicial standards, personal identity, privacy, rules of interpretation, social identity

Introduction

As Pietrzykowski wrote when conducting theoretical reflections on legal subjectivity, '[e]very legal order grows from the image of the world dominating within a given culture' (2015, p. 17). This image of the world, which depends on historical and axiological factors and political and economic circumstances, must be reflected

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in a system of legal provisions and legal order which, by means of decision-making processes, becomes the law in action. The image is characterised by high dynamics often leading to smaller or larger changes which are a reflection of systemic and political transformations, economic processes, globalisation and social change, and which, if permanent and socially and politically acceptable, are subject to legal petrification. Alterations in the law and its institutions are the result of recognition of changes in its paradigms, which is closely correlated with those in the state and society. In this unstable world, surrounded by ever-different legal provisions, the individual functions as a legal entity. From both a social and a legal perspective, human identity is an individualised construct that is permanently engaged in relationships of various systemic complexity and completeness.

The concept of 'identity' was introduced in 1919 by Viktor Tausek, a Croatian psychoanalyst, lawyer, physician and journalist. It was then disseminated and kind of popularised by American human-development psychologist Erik Erikson.[1] Human identity is a matter that is mainly within the domain of psychology and other social sciences; in the understanding of these fields, reflection on identity is of a multidimensional nature. When defining identity, Golka (2012, p. 301) considers it an element of consciousness and a manifestation of the self-determination of humans, as an individual and as a collective. When Wróblewska writes about personal identity, she considers it as a system of two mutually complementary dimensions: the biological-vertical dimension is the temporal construct of a person's connections and who they are, starting from the past, through the present and towards the future. The socio-horizontal dimension, on the other hand, is an analysis of the complex specificity of the personal 'self' at a given moment in time (Wróblewska, 2011, p. 178). From the point of view of the subject of this article, however, the theory of personal and social identity is of utmost relevance (Jarymowicz, 2000, pp. 107–125). Jarymowicz connects the former with the creation of the individual 'self' of a person, equipped with their own goals and standards of operation. On the other hand, social identity is manifested in the category 'we', understood as identifying one's own person with members of a specific social group, which in consequence results in recognition of the values and rules of conduct of the group as also being the person's own values and rules. One can ask the question whether the individual 'self' of a human being is always placed in the category of 'we'. And then, how many categories of 'we' are in place, and are all the categories of 'we', and thus infinitely different 'selves', equally subject to legal protection?

Human identity is also an interdisciplinary issue, because the concept can also be studied in its political, cultural and religious dimensions or from the perspective of legal sciences. In the context of the latter, identity has a special reference to human

1 The most influential works by Erikson include *Identity: Youth and crisis* (1968), *Identity and the life cycle* (1994), and *Dzieciństwo i społeczeństwo* (P. Hejmej, Trans.) (1997).

rights. It involves respect for the rights to privacy, family life, freedom of religion or freedom of expression. It should be borne in mind that postmodern society is subject to cultural and functional diversification processes:[2] it ceases to be homogeneous and becomes heterogeneous. A previously relatively heterogeneous social group becomes fragmented, and many social groups with different interests are formed as a result of this multiplication. This diverse society is incapable of developing a single cultural model (Goodman, 1997, p. 46), because there are many patterns and values in a heterogeneous society that should be mutually accepted and should not be approached in a confrontational manner. It is the legislature's task to reconcile conflicting interests. In such a 'world of far-reaching diversity (of cultures, societies, values, roles and attitudes) and hardly manageable variability (of fashions and models of interpersonal, professional and physical attractiveness), the question of one's identity becomes not only important, but also urgent' (Batory et al., 2016, p. 13). In legal terms, the importance of this issue entails the question of whether human identity is subject to effective legal protection.

From a theoretical point of view, we are witnessing processes that should counterbalance the scale and dimension of the changes taking place in society and law. Of course, the postmodern world has created a paradigm of diversity in social groups, cultural patterns and legal systems. At the same time, however, globalisation and integration processes strive to alleviate the effect of these divisions. Despite doubts about the meaning of the term 'globalisation', the socio-economic roots of the concept are indubitable; it means social and economic changes based on the intensification of connections between people from all over the world. Jan Aart Scholte takes the view that modern concepts of globalisation are cognitively futile. The author states that many, if not most, available analyses of globalisation have one disadvantage: they are cognitively empty, redundant, that is, they add nothing new to what is otherwise known. He adds that all four main definitions, depicting globalisation as internationalisation, liberalisation, universalisation and westernisation, have waded into this blind alley. He proposes a defining concept that allows globalisation to function as a process of spreading relationships between people across the planet, and writes that the ability of people to engage with each other, in physical, legal, linguistic, cultural and psychological terms, regardless of their location, grows with globalisation (Scholte, 2006, pp. 55–81). Globalisation is closely linked to cultural unification and the processes of building transnational integration structures. This, in turn, means an attempt to reverse processes of division in favour of integrating different elements into a single whole (states, values, cultures, legal systems). Is this balancing possible? It probably is – or perhaps it is better to say that it is possible to some extent, but in many cases it will still prove to be unattainable. With regard to human identity,

2 It is usually stated in the literature on legal philosophy and sociology that the era of modernism ended in the mid-20th century.

the effect, according to some experts in the field, is sometimes the opposite. According to Golka, '[p]aradoxically, globalisation and mass culture have caused a demand for various local and individual identities on an unprecedented scale' (2012, p. 77). The question arises of whether, in such a situation, the human right to respect for one's identity is sufficiently and effectively protected.

1. The ideology of the approach to the status of the individual within the state and the personal identity of the human being

From the philosophical point of view, our understanding of human rights was formed by the ideology of the Enlightenment, which was then adopted and accepted in the 17th century by the political doctrine of liberalism. Individual rights and natural rights became the pillars of modern concepts of human rights. In the global dimension, however, there is no universal consensus concerning the adoption of a universal concept of human rights and thus the construction of a definition of the status of the individual within the state. This is prevented by cultural, political and also legal considerations. There is also no doubt that the western cultural model of interpreting the world dominated the post-war debate, and consequently the normative concept of human rights developed in the forum of the United Nations. The concept of human rights, 'built on the inherent dignity of every human being, is based on universalist claims' (Górski, 2012, p. 77). This means that human rights are meant to be universal and these rights are vested in all human beings. One has to agree with Jagielski, who writes that '[t]he concept of human rights, after all, was formed in the turmoil of ideological struggle for liberating individuals from the omnipotence of the state' (2015, pp. 140–141). Humans have gained autonomy because human rights have a legal-natural origin and are inherent and inalienable, but also because of the right to demand that the state respects and protects these rights.

The one-sided approach to human rights in terms of personal rights is not actually questioned in European culture. These rights have no complement, as is the case in the philosophy of the Far East (Kosmala-Kozłowska, 2013, p. 503), according to which rights must be complemented by duties. Human rights, understood as *yang*, are coupled with *yin* duties. As Stępień writes, '[t]he relationship between them may vary, but it is impossible to talk about one without taking the other into account' (2012, p. 54). In this eastern way of thinking, the foundations of cultural relativism materialise. Universalism is questioned by Asian countries, perhaps for the sake of defending their regional values and not just to taunt the praise of Eurocentrism. Nonetheless, I believe that the norm, prominent in western culture, which prohibits discrimination for any reason, is an objective argument for the systematic acceptance of cultural differences. In the culture of the Far East, every person first fulfils their

duties towards their family, local community and ultimately the state, and only from this perspective may the issue of one's rights be considered.

In the European formula that shapes the status of the individual within the state, the formulation and dissemination of the concept of individual rights turned out to be a crucial turning point. This is particularly evident when we look at legal-historical findings. In this context, the work of Sójka-Zielińska seem to be of particular interest; when analysing the status of the individual in the Middle Ages, she argues (2000, p. 102) that people were not independent but were integrated within the mechanisms of collective life, and the individual interest was completely subordinated to the common good. As a result:

> legal relationships were not so much about someone's right in the sense of a claim against another, but the obligation for others to comply with the order established by law, customs, tradition and religion. For example, the need to pay the debt was not due to the creditor's claim but to the fact that the debtor undertook, in solemn forms and gestures, to pay the debt. (Sójka-Zielińska, 2000, p. 102)

In these circumstances, the focus was undoubtedly shifted from rights to duties. This way of thinking seems to have continuously dominated the philosophy of the Far East for centuries. Even if the concept of individual rights was not known in the historical, pre-modern, European approach, Enlightenment thought did not develop in complete isolation from previous philosophical achievements. For example, according to Merkwa (2018, p. 327), one can equate the Enlightenment project of human rights with the concept of natural rights. The notion of a person as an individual being not only arose in the Enlightenment; by devising religious concepts of the law of nature, the Church recognised the divine order of the universe, in which the qualities of the individual were 'the inner freedom and natural equality of all people' (Sójka-Zielińska, 2000, p. 104). It can therefore be said that concepts and ideas have been developed over many centuries in European culture, and ultimately became the basis of the modern concept of human rights. This is culturally determined by universalism and is based on attributing natural and innate character, universality, inalienability and indivisibility to human rights. This set of five determinants of human rights, supported by the attribute of dignity, delimits the modern concept. If we classify human rights as individually understood rights of the individual, then humans are the subject in whom these rights are vested – and while they are the ones who are entitled, there must also be someone who is obliged. International human rights acts leave no room for doubt: the obliged entity is the state. This formula is prejudged by Article 2 of the International Convention on Civil and Political Rights, which states in paragraph 1: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race,

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (United Nations, 1966, p. 171).

Undoubtedly, the concept of human rights adopted in the European legal space and, above all, its dimension of an individualistic approach to the status of a person within the state is conducive, at least theoretically, to the realisation of human personal identity. At the same time, personal identity that is closely linked and integrated with an individual is so diverse that it seems reasonable to ask whether it is sufficiently protected in the legal dimension of the European Convention on Human Rights and the case law standards of the Strasbourg Court.

2. The right to privacy and the personal identity of humans

The right to have one's private life respected is often referred to in common but also legal language as privacy or the right to privacy. As compared to other human rights, this is a special right because it concerns the area of human life that is essentially taken out of the state's regulatory omnipotence. The essence of privacy is to limit any external interference in the *privatus* (personal) sphere. It may be stated that the right to privacy is understood in an axiomatic, contextual and individualised manner, because it is largely based on an individual level of human sensitivity, which results in different assessments and perceptions of similar situations; it is therefore difficult to define. The first to attempt to exemplify this concept were Brandeis and Warren in 1890. The American professors regarded privacy as a right to exclusivity, distinctiveness, secrecy and to be let alone (Brandeis & Warren, 1890; Tokarczyk, 2003, p. 93). These four components of privacy determine the strictly personal nature of this right. Today, the attributes of privacy include, among other things, the identity of a person, their physical integrity and sexual life, the secrecy of correspondence (now mostly electronic), medical data and information, as well as the right to establish and maintain relations with other people. It is therefore a very broad sphere of human autonomy.

The normative formula of the right to privacy adopted in international human rights instruments is very terse. It is not just the domain of regulation of this particular right, but a conscious regulatory method adopted in international law based on the assumption of the participation of international courts in the specification of the meaning of privacy. In other words, international courts will detail the general regulations by creating jurisprudential standards. This assumed regulatory economy is particularly evident in the regulation of the right to have one's private life respected. Privacy itself is not subject to definition. The acts only state that a person has the right to have their privacy respected and link the right to privacy (usually in a single provision) to respect for family life, home and correspondence (Article 8(1) European Convention on Human Rights (ECHR), or Article 7 Charter of Fundamental Rights

(CFR)[3]), as well as to the right to marry and start a family (Article 12 ECHR, Article 9 CFR), the right to protection of personal data (Article 8 CFR), the right of access to documents (Article 42 CFR), or freedom of movement and residence (Article 45 CFR).

Failure to define privacy in international law acts, and also in Polish law (Article 47 of the Polish Constitution), should be regarded not only as intentional but also as pragmatically necessary. Human privacy is a sphere of extremely dynamic and often truly revolutionary transformations. Cultural change, correlated with generational change, results in a modified understanding of the concept of privacy. The role of courts and tribunals should not only be to develop and clarify the concept, but also to ensure that it is adequately protected.

Every human right is rooted in the privacy of the human being and their subjectivity (Leszczyński & Liżewski, 2008, p. 90). Privacy is a very 'capacious' right, because it can be contextually related not only to the strictly personal sphere, but also to economic or political interests, and it can even go beyond the individual dimension, e.g. in the case of minority rights. At the same time, the right to privacy is susceptible to limitation. This may result from technological progress enabling both other individuals and the state to interfere with privacy, even unlawfully, for example through surveillance of individuals (e.g. through Pegasus spyware, software for electronic surveillance of a smartphone or computer which is capable of intercepting virtually any content of the infected device). Interference with privacy may also be legally justified, for example to counteract terrorist activities. Therefore, the basic European Court of Human Rights (ECtHR) standard creates the right of every person to freedom from interference, which nonetheless is not absolute (restrictive clauses). On a positive note, respect for privacy includes the protection of the physical and mental integrity of the person. The ECtHR concluded in the case of *Botta v. Italy* (Judgment of the ECtHR, 1998) that the physical and mental integrity of a person includes the right to live in a manner consistent with one's own preference and without the control of others. It is the right to establish and maintain contacts with other people (also in the intimate sphere) in order to develop one's own personality. ECtHR standards cover, inter alia, specific issues, such as limitation on the possibility of choosing a child's forename (Judgment of the ECtHR, 1996), the problem of changing surname (Judgment of the ECtHR, 1994), recognition by the state of the current gender identity of transsexuals after surgery (Judgment of the ECtHR, 1997), collection of personal data by state intelligence services (Judgment of the ECtHR, 2000) and permission for press publications disseminating photos of a child without consent (Judgment of the ECtHR, 2004).

3 The Charter of Fundamental Rights was adopted on 7 December 2000 in Nice. It was given binding force by the Treaty of Lisbon, signed on 13 December 2007, which entered into force on 1 December 2009.

Identity is the sphere of a person's self-definition as an individual, closely linked to a sense of one's own separateness and uniqueness (personal identity) and the identification and belonging of the individual to a particular social group (social identity). Identity thus understood is, of course, part of the right to have one's private life respected and the general standards of this right as formulated by the ECtHR. Privacy and identity are not synonymous but overlap semantically to a large extent. In the ECtHR's judicial practice, the Court has repeatedly addressed the issue of identity and its determinants (ethnicity, nationality, religion, sexual orientation and physical appearance), taking a position on matters that are obvious and also on those that can be described as hard cases. In most of these cases, it has placed identities within the sphere of Article 8 ECHR, i.e. the right to respect for private and family life, sometimes in conjunction with Article 9 (freedom of thought, conscience and religion) or with Article 14 (providing for the prohibition of discrimination).

It is difficult to analyse the whole sphere of the personal identity of the individual and the aspects discussed by the Strasbourg Court. One of the many important features is the standard concerning the gender identity of an individual. Respect for gender identity as a standard of jurisprudence has been established in the case of *Goodwin v. UK* (Judgment of the ECtHR, 2002). In that ruling, the Court held that the person's request for legal recognition of their gender reassignment by public authorities was fully justified. The ECtHR found that this request falls within the scope of Article 8 and, according to the second paragraph, a person may be deprived of this right only in justified and proportionate cases. This position has been confirmed in the judgments in *Van Kück v. Germany* (Judgment of the ECtHR, 2003), *Grant v. the United Kingdom* (Judgment of the ECtHR, 2006) and *L. v. Lithuania* (Judgment of the ECtHR, 2007). The case of *Hämäläinen v. Finland* (Judgment of the ECtHR, 2014) seems particularly interesting and complex at the same time. The core of the problem in this case was a conflict in the sphere of values: a married man had changed gender and therefore demanded a new ID number indicating that he was a woman. A negative decision was issued under national law; the legal recognition of the surgical gender reassignment was refused by the Finnish authorities on the grounds that the condition of non-marriage was not met. If such consent were given, a marriage between two women would be accepted, although same-sex marriage is not provided for in Finnish law. This was therefore a collision between the right to respect for the private life of a transsexual person and the right to marry exclusively between opposite sexes, which is recognised by law in Finland. Based on this case, the Court decided that there is no consensus within the European legal area as to the possibility or the definition of the legal grounds for gender reassignment. This issue is still not perceived in a similar way in all European societies, which means that it does not fit into the canon of generally recognised moral and ethical norms. The Grand Chamber observed in their judgment that the parties did not challenge the infringement of the applicant's right to respect for private life by the refusal of a new identification num-

ber indicating the applicant as female (Judgment of the ECtHR, 2014, paragraph 64). However, that infringement, due to the margin of discretion enjoyed by states, does not amount to a positive obligation on the part of the state to provide for a genuine and accessible procedure enabling the applicant to validate their new gender legally while remaining in their previous marriage.

3. Do the ECtHR protection standards serve to strengthen the personal identity of a human being?

The standards of human rights protection formulated by the Strasbourg Court have two dimensions. The first is to ensure a minimum level of human rights protection in the European legal space of the countries in the Council of Europe (CoE). This dimension is definitely based on what we could call the identity of the community of European countries. This type of identity is based on the acceptance of common values, awareness of common qualities and a sense of unity within the countries of the European cultural circle. The ECtHR, with regard to rights that have a social dimension (the right to privacy, respect for family life, freedom of assembly and respect for freedom of thought, conscience and religion), formulates standards of protection using certain generalisations. As regards privacy, it notes that privacy is the right of the individual to self-fulfilment without interference from third parties and the right to establish and maintain contacts with other people, both those based on intimate relationships and those based on relationships of friendship and acquaintance. The second dimension is an individual assessment of whether those standards of protection have been breached in a specific case, identified on the basis of features that are uniquely attributable to it. It can be said that the general standards of protection become the basis for applying a specific factual situation to them. The relationship between these two dimensions correlates with the relationship between social identity and personal identity referred to by Steven Hitlin. According to this sociologist, the element that binds these two types of identities are values, which have a social origin, but as a result of internalisation acquire a deeply personal meaning and become a determinant of personal identity (Hitlin, 2003). The question arises, however, of what happens when this internalisation does not occur in certain people.

When attempting to determine whether the ECtHR, when ruling on a violation of rights under the ECHR, protects human personal identity, it is necessary to consider what the interpretative determinant for the creation of standards of human rights protection is, since these rights are formulated in the Convention in a very general manner. This general nature of the provisions on human rights is kind of inherent in the method of normative formulation of these rights in international law instruments. It is the responsibility of international human rights courts to make the general regulations more specific by creating case law standards. The methods for

interpretating the ECHR developed by the Strasbourg Court differ fundamentally from those intended for the implementation of national law. They are supposed to take into account the dynamics of social change in Europe, with the broadest possible acceptance of the distinctions that exist at the macro level, i.e. in the CoE Member States.

The approach to methods of interpreting the ECHR, which result in the development of case law standards for human rights protection, is conducive, at least in theoretical terms and at least at first glance, to the acceptance of human personal identity and, consequently, the granting of legal protection. The ECtHR has developed its own distinctive methods for interpreting the Convention, which are intended to meet European perceptions of the values on which human rights are based. Particularly important in the context of this problem is that the ECtHR employs the methods of evolutionary interpretation (Liżewski, 2015, pp. 252–260) and of the cultural margin of appreciation (Wiśniewski, 2008, p. 482). The former is based on the assumption that the Convention should be regarded as a 'living instrument', to be interpreted in the light of current circumstances. This method is based on linking the interpretation of the Convention to social changes and the evolution of values. The ECtHR is becoming a 'benchmark of the morality of European countries' (Liżewski, 2015, p. 255); it is therefore the Court's responsibility to rule according to contemporary social values. The Court is therefore a body which first needs to establish current social values, and only in this context does it construct a standard of protection, on the basis of which it adjudicates on infringements of human rights under the Convention. The assumption of evolutionary interpretation requires the ECtHR to monitor social values on a regular basis. This means that if these values change, the standard of protection should also be modified. In this context, any change in identity within the community of European states should be reflected by the Court in the human rights standards.

The care about human rights standards being up to date throughout Europe is strengthened by the use of the concept of margin of appreciation. This is based on the assumption that the Court takes into account the specificity of local values when deciding on an infringement of human rights. It is therefore a method that allows for a modification of the level of standards of protection of a particular human right adopted in the CoE, if in a given country certain values are perceived differently than in most European countries. Golka writes that 'we often see Europe in cultural terms as unity in diversity and diversity in unity' (2005, p. 10). Despite the common axiological foundations of European civilisation, the societies of individual European countries perceive some values in a way that is characteristic for them. The development and application of this method by the ECtHR allows, as Garlicki (2008, p. 4) puts it, the drawing of a demarcation line between what should be left to local communities and what should, without exception, apply to all state parties as a common standard of protection. It must be concluded that the doctrine of margin of appreciation un-

doubtedly reinforces the ECtHR taking community identity into account, but only at the state level. However, is it possible, at least in theory, to claim that this method also fully protects the personal identity of an individual? It seems that if this identity falls within the accepted values of the community, it does; however, if personal identity goes beyond the accepted values, then the matter is much more complicated. The above-mentioned ECtHR judgment in the case of *Hämäläinen* (Judgment of the ECtHR, 2014) may be the basis to explain this problem. It turns out that the juxtaposition of the facts with the applicable standard of protection leads to a collision in the sphere of values. When some values are guaranteed, other are prevented from being realised.

Conclusions

Despite the fact that the European legal space has adopted the concept of an individualistic approach to the status of a person within the state, it is difficult to fully guarantee that all individuals are treated with the full realisation of their personal identities in terms of the right to privacy. Both every human being and entire communities can take different attitudes towards the global cultural reality. Krzysztofik distinguishes five variants in attitudes; two extremes are the full acceptance of global culture and the total rejection of this culture. In addition, there are three intermediate attitudes: selective acceptance means partial approval of certain cultural standards and values, with rejection of some others; hybridisation involves the co-adaptation of cultures and is expressed in an attempt to combine universal values with local ones; finally, an attitude of cultural dualism is an attitude of participation in both global and national cultures (Krzysztofik, 2000, pp. 73–75).

Such a diverse typology of attitudes in postmodern and globalised Europe, linked to what we might call the 'diversity' of values, ideals, cultures, styles or consumption, affects both human identity and the process of its reconstruction, as well as the richness of identity formulas, especially in the individual dimension. To a large extent, this identity, in legal terms, falls under the right to respect for private life. This right has a specific range of meanings and is covered by legal standards generally appropriate to the cultural pattern adopted in a given legal order.

From the point of view of the method of developing standards of protection by the European Court of Human Rights, it is much easier to guarantee social identity at the local, community level within the framework of the right to respect for private life, because the concept of the cultural margin of appreciation requires the acceptance and protection of a different understanding of local (national) values. The specificity of local conditions is able to justify, at the level of protection standards, respect for the values of the regional community, understood somewhat differently from those resulting from a Europe-wide standard. However, the matter becomes more

complicated at the level of personal identity. The specificity of this identity is related to particular values that affect behaviour, views, attire, social interactions, etc. If such elements are legally irrelevant and socially neutral, they should be protected by law by virtue of the right to respect for private life.

It is different if the behaviour of an individual does not fall within the canons of socially acceptable behaviour or if the behaviour and claims of the individual lead to a collision in the sphere of values. In the former situation, the behaviour of the individual may be perceived as deviating (inappropriate behaviour). In view of the foregoing, the lack of social acceptance may also result in a refusal to grant legal protection to such conduct. Thus, the personal identity of an individual may not be legally guaranteed, even if, from the individual's point of view, it falls within the right to respect for private life (e.g. smoking cannabis in public places), on the ground that the person infringes the law. Probably as soon as behaviours perceived as deviating become adapted and socially acceptable, legal protection will also be granted to them (e.g. legal recognition of homosexual relationships). Denmark was the first country in the world to have the right to register single-sex partnerships, since 1989. At the same time, the legal systems of many countries in the world, such as Afghanistan, Pakistan, Saudi Arabia, Somalia, Sudan, Yemen, Nigeria, Mauritania, Brunei, Iran and the Chechen Republic in Russia, still provide for the death penalty for homosexual relationships.

In the second situation, even though it is recognised that a behaviour which is an externalisation of personal identity falls within the right to privacy, refusal of legal protection involves a conflict in the sphere of values. An example of such a situation was presented above, concerning the refusal of legal recognition of surgical gender reassignment due to the fact of being married; the refusal was related to the lack of legal sanctioning for same-sex marriages. It turns out that in a legally regulated institutional setting, one and the same behaviour can be legally accepted or unacceptable, due to a collision with another legally protected good.

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