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The range of the right to personal identity in brazilian civil law

O alcance do direito à identidade pessoal no direito civil brasileiro

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Abstract

The article deals with the transformation of the right to personal identity, going from its initial version, conformed by Italian decisions of the 1970s, as a defense against the imputation of an identity that is not compatible with its own, for an interdisciplinary version, in the which protects the very dynamic process of the dialogical construction of identity, protecting it against the absence or insufficiency of its recognition. Current and controversial issues involving the right to identity, such as the right not to have their image used out of context, *fake news*, the protection of indigenous lands and quilombolas, the right to oblivion, the protection of genetic identity and the right to know their own origins, the creation of false profiles in the network, the freedom of sexual orientation and the juridical treatment of transsexuality, in order to discuss the limits to the right to personal identity. At this point, the article refutes the abstract use of the public interest and discusses the criterion of the protection of existential autonomy.

Keywords: Dignity of the human person. Identity. Public interest.

Resumo

O artigo aborda a transformação do direito à identidade pessoal, passando de sua versão inicial - conformada por decisões italianas da década de 1970 como defesa contra a imputação de uma identidade que não seja compatível com a sua - para uma versão interdisciplinar - na qual se tutela o próprio processo dinâmico de construção dialógica da identidade, protegendo-o contra a ausência ou insuficiência do seu reconhecimento. São mencionadas questões atuais e controversas envolvendo o direito à identidade, tais como: o direito a não ter sua imagem utilizada fora de contexto, as fake news, a proteção das terras indígenas e quilombolas, o direito ao esquecimento, a tutela da identidade genética e do direito a conhecer as próprias origens, a criação de perfis falsos na rede, a liberdade de orientação sexual e o tratamento jurídico da transexualidade, para então, diante de toda essa abrangência, discutir os limites ao direito à identidade pessoal. Nesse ponto, o artigo refuta a utilização em abstrato do interesse público e discute o critério da proteção da autonomia existencial.

Palavras-chave: *Dignidade da pessoa humana. Identidade. Interesse público..*

1 Introduction

The original conception of the so-called right to personal identity, formulated from Italian judicial decisions in the 1970s, had little receptivity between us, but the theme today gains prominence in the national scene from the expansion of its reach, arousing great resistance and controversy about some of its manifestations. From the right not to have their image used out of context until the protection of indigenous lands and quilombolas, from defense against the *fake news* industry to freedom of sexual orientation, from creating false profiles in the network to the right to be forgotten in the case of transsexuality, in the face of all this scope, are there limits to the right to personal identity?

Based on the premise that personal identity is a cross-cutting theme, which cuts the separations between the traditional branches of law and the archaic dichotomy between public law and private law,

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this article aims to discuss the scope of the right to personal identity. It understands personal identity as an example of the insusceptibility of the manifestations of the dignity of the person to be restricted to typical models of protection, such as the rights of the personality, or to stick to the repressive pattern, neglecting its promotional aspect.

For this, the text starts with a panoramic presentation of the decisions that gave rise to it, understanding its original contours, and then addresses the profound transformation that was carried out based on an interdisciplinary deepening on the very construction of identity. Only from that its main impact will be addressed and finally discussed its limits.

2 Origins of the right to personal identity

The first reference to a right to personal identity under civil law is usually attributed to Adriano De Cupis in his 1959 work on personality rights. Although he referred to the need to "be known for who he really is" and a "right to the personal truth" at that time, his approach was still restricted to a static view of identity, limited to the classic categories of personality rights, such as the right to the name (DE CUPIS, 2004, p. 179-180).

It was, once again, the tireless performance of jurisprudence in its fruitful activity of dealing with the new dramas of reality, which gave amplitude and concreteness to the right to personal identity, freeing it from traditional models of personality rights. The paradigmatic decisions of the Italian courts during the 1970s, painstakingly described by Lígia Fabris Campos in one of the main works on the subject (CAMPOS, 2006), deserve mention.

It starts with decision of the Court of Rome, analyzing the case of the National Committee for the Referendum of Divorce, which, in a manifesto in favor of the repeal of the law authorizing divorce, used the image of two people with the words "To defend the family, farmers, on May 12, will vote YES against the divorce." It occurs that the portrait used, from a photographic contest held eighteen years earlier, had two people who were not only not married and not farmers, but were actually co-authors of the law that had authorized divorce (CAMPOS, 2006, p. 52).

In view of this, the court upheld their claim and ordered the prohibition of publication of the manifesto and disclosure in the press, at the expense of the Committee, of a clarification that the photograph was used without his consent and did not reflect his opinion. In its reasoning, it was stated that the protection of the right of all to see the paternity of their own acts involves, above all, the right not to be attributed authorship of acts that were not deeds of the person, that is, the right of not having distorted his own individual personality, especially when involving political, ethical and social convictions of the individual, because they are linked to the most intimate sphere of personality (CAMPOS, 2006, p. 53-54). That is, the problem was not the use of the image alone, but the context in which it was used, creating a linkage of the image with an ideological meaning incompatible with the identity of the portrayed.

Five years later, a new decision in Turin followed the development of the right to personal identity. Pamphlets produced by the Italian Communist Party said the Italian politician Marco Pannella supported the position adopted by the representatives of the so-called New Republic, political group of diverse inspiration from his party, conduct that the judge understood that, although the statement in the pamphlet not could be considered an offense to honor, it was a disfigurement of his political identity (CAMPOS, 2006, p. 55). It was argued that associating that person's name to a political position incompatible with the one to which he had devoted his entire history was not a fact that could be brought back to a violation of honor, for that would imply that to adopt that political orientation was a fact negative, which would not be legally admissible in a pluralistic and democratic order.

It is also worth mentioning Milan's decision of the following year. The renowned oncologist Umberto Veronesi gave an interview in which he published results of scientific studies that related the habit of smoking with the development of malignant tumors. When asked whether all cigarettes generated the same

risk, he replied that some brands, lighter, generated less risk, about half of the risk generated by brands with a more carcinogenic content (CAMPOS, 2006, p. 90). One of the brands considered more lenient by the doctor turned this into an advertisement in which was affirmed that, according to Prof. Umberto Veronesi, director of the Milan Cancer Institute, smoking cigarettes of the brand she marketed reduces the risk of cancer by almost half (CAMPOS, 2006, p. 91). The Court held that the decontextualized and partial use of the statement implied a distortion of its professional personality, "an attack against its notorious scientific seriousness publicly projected in time" (CAMPOS, 2006, p. 91).

It can be said that these decisions, in fact, gave rise to the right to personal identity. The rich doctrinaire studies that analyzed them in the decades that followed, among them the works of Carlos Fernández Sessarego (1992) and Giorgio Pino (2003), served to systematize such decisions, discussing the autonomy of personal identity and questioning the traditional organization of personality rights. In fact, excessive attachment to the consolidated categories of personality protection meant that several similar cases in the Brazilian order – in which the category of personal identity was slow to diffuse – were brought back to figures such as the right to the image or the right to honor, from enlargements of those categories.

The expansion of the right to the image favored this possibility, in that it now covers not only the individual physiognomic features (image-portrait), but also its attributes identifiable in their social relations (image-attribute), namely "the set of behavioral peculiarities that distinguish one person from the other, and such peculiarities may render or discredit the individual." (SOUZA, 2003, p. 42). Thus, in the context of the violation of the way in which the subject presents itself to the society in which it is inserted, the border between what is its image and what is its identity becomes quite cloudy. An example of the nebulosity of this border was the case of the actress Maitê Proença, who sought indemnification from the pharmaceutical company Schering for advertising the contraceptive product of the defendant that proved to be ineffective due to manufacturing defects ("flour pills"), undermining the credibility of its presentation to the public: the question was exclusively addressed as to whether or not there was a violation of its image-attribute.[1]

In the same vein, the tutelage of honor, rooted in the sexist and patriarchal view of family honor and female honesty, is re-signified as a manifestation of the dignity of the person, becoming a pretension of respectability of the individual before the social sphere of which he is a part (REIS JR., 2013, p. 23). Again, the debauchery of the way the subject is recognized by his social circle can be brought back to this new reading of honor as well as to the new figure of personal identity. Here is illustrative of the penumbra zone the case of the soccer player Edmundo, who filed a suit against the magazine Veja because of the cover that presented his photo with the headline "animals in the steering wheel", illustrating report about traffic accident in which he was involved: the discussion in the process involved the justification of the headline based on the way in which the player was known by the public, by virtue of its aggressiveness in the fields.[2]

From a more dogmatic perspective, it is possible to identify and delimit the areas of intersection between these categories and the exclusive zones of each one, recognizing their own space of action that justifies their autonomy. However, it seems that what was most important in the pioneerism of those Italian decisions was to recognize a manifestation of the human personality that was deserving tutelage regardless reversion to the preexisting typical models.

Here again, the category of so-called personality rights ends or limits more than expands the protection of the human person, imprisoning it in typical categories and subjecting it to the patrimonialist model of subjective rights. The fundamental premise is that the efforts to imprison in typical models the protection of the dignity of the human person are bound to fail, since it is transformed and renewed with the transformations of the society in which the person is inserted. Personality, conceived as a value rather than a right, "is at the base of an open series of existential situations, in which its incessant changing demand for tutelage is translated" (PERLINGIERI, 2008, p. 764). In this sense, the dignity of the human person, in

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1 BRASIL. STJ. 3rd T. R and sp 578.777, Rel. Min. Castro Filho. Rel. For judgment Min. Humberto Gomes de Barros, jul. 24.08.2004.

2 BRASIL. STJ. 3rd T. Resp 1.201.688, Rel. Min. Massami Uyeda, Relation to the judgment of Min. Sidnei Benetti, jul. 23.06.2009. About the Judged. (MORAES, 2011, p. 597-614).

addition to principle, is configured in a general clause, capable of encompassing an infinite number of forms of protection and promotion of the subject (TEPEDINO, 2008, p. 54).

That original conception of the right to personal identity, therefore, even if in some cases it may be attributed to a right to an enlarged image (image-attribute) or a right to resignified honor (honor-respect), justifies its autonomy as a manifestation of the incessant capacity of the human personality to exteriorize in the social environment, as well as the unceasing need to protect and promote it in this environment. In fact, the cases covered by Italian decisions continue to be present even after almost half a century and proliferate beyond their origin order, giving rise to new categories of legal protection of identity.

Like the two Italian co-authors of the divorce Law felt offended to see their image associated with a campaign for the end of the divorce, a few years ago the model and actress Luma de Oliveira found herself surprised at the use of her portrait in costume dancing in the carnival to illustrate a story published in the English newspaper *The Independent* concerning a scandal involving the association of public men and the automaker Volkswagen with prostitution (CAMPOS, 2006, p. 145). In this sense, one speaks of a right not to have its image used out of context (*false light*), since the context is one of the criteria that confer legitimacy to the use of the image of others without authorization of the owner (ALMEIDA JR., 2013, p. 167).

Just as Marco Panella was injured by its improper association with the New Republic group, in *fake news* or "post-truth" times are not rare false information about candidates' positions in elections that have circulated on the network, as a result not only of the capillarity of the Internet, but also of a professional industry of rumor-making driven by economic interests. In this type of conduct, not only the candidate's personal identity is affected, but democratic access to the genuine debate of positions as well as the legitimacy of the electoral process, with a new force affirming, with a new force, a right to the truth (BARBOSA, 2017).

Anyway, just like Dr. Umberto Veronesi was professional and personally debased by the publicity smoker who made use of his name, the also oncologist Dr. Drauzio Varela was hit by the disclosure of a false position in the sense that he would be in favor of the policy of compulsory hospitalization of chemical dependents during the measures recently taken by the city of São Paulo, an orientation that he always fought. Once again, the conduct reaches not only the personal identity of the victim, but also access to reliable public health information, in view of the growing search for this type of information through the internet (SILVA FILHO *et al*., 2017).

This rapid overview reveals the importance that the recognition of the right to personal identity in our legal system continues to have, even in this original sense. However, this right would suffer a significant leap in its reach, from a deeper understanding of the meaning of personal identity in social relations, as it is to be addressed.

3 Transformations of the right to personal identity

From this original version, marked by an individual bias characteristic of traditional private law, the right to personal identity gained new perspectives and possibilities thanks to an interdisciplinary reflection. In fact, when working with a theme such as personal identity, it is essential to resort to the scientific developments of psychology, anthropology and sociology, and also, within law, to studies of the philosophy of law, constitutional law and, of course of civil law. As Claudia Carvalho (1999) points out, the term "identity" is part of the theoretical vocabulary of almost all sciences, from logic and mathematics to the so-called human sciences – personal identity, cultural identity and national identity – which is why "the questions that the study of identity poses, cannot be answered within the exclusive scope of a single theory/science" (CARVALHO, 1999, p. 727-728). Thus, the understanding of the right to identity is only viable through an extended and interdisciplinary perspective (CHOERI, 2010, p. 72).

Based on this expanded perspective, it appears that the identity is formed in dialogue with each other and that, therefore, the right to personal identity is built both individually and collectively (CHOERI, 2010,

p. 166). In this way, the protection of personal identity cannot be restricted to the reading of its construction in a strictly isolated way, taking the subject as an atom, under penalty of, again, restrict the protection of the dignity of the person to limited aspects of personality manifestation. The right to personal identity must give shelter to the collective and dialogical construction of identities, protecting the very process by which identities are constructed intersubjectively.

The construction of identity involves, primarily, the freedom to make your own choices of values. Charles Taylor explains that identity is defined by the commitments and identifications that determine, case by case, what the subject believes it is good or valuable, what must be done and what to endorse or to oppose, in short, how he places himself in the world (TAYLOR, 1997, p. 43-44). This construction of identity – "what allows us to define what is and what is not important to us" (TAYLOR, 1997, p. 47) depends crucially on the subject's relations with others (TAYLOR, 1993, p. 55). That is, each one chooses the values, attributes, characteristics and preferences that make him himself from the dialogue with the other subjects and it is only possible to elaborate an identity with references to the other identities that surround it (TAYLOR, 1997, p. 53).

In this context, recovering the initial examples, the identities of the co-authors of the divorce law, the politician Marco Panella and the doctor Umberto Veronesi, as well as the actress Luma de Oliveira, candidates victims of *fake news* and Dr. Drauzio Varella, should be guarded not only as a final, static result of personal attributes, but as the very dynamic process of its dialogical construction with others. Again, Taylor (1997, p. 69-70) explains: "The question about our condition can never be exhausted for us by what we are, because we are also changing and becoming all the time".

Thus, the right to personal identity invariably corresponds to the right to recognition of that identity, which, when nonexistent or defective, clearly implies an injury to the dignity of the human person. The theme of recognition has become central to the debate over the legal protection of identities insofar as it has been found that it essentially involves the possibility of its free dialogical construction and, more than that, the collective acceptance of the plurality of identities. In the words of Daniel Sarmento (2016, p. 241):

> The look of the other makes us. What we are, what we do, how we feel, our well-being or suffering, our autonomy or subordination, all depends very much on how we are seen in the relationships we have with others. When society systematically treats us as inferior, we internalize a negative image of ourselves and begin to shape our choices and actions from it.

In this way, the deepening of the understanding of what constitutes the construction of identity also implies the expansion of its protection: the subject is protected not only against the imputation of an identity that is not compatible with his own, but also against the absence or insufficiency recognition of their identity. To the extent that identity is shaped by the recognition of the other, the lack of it or false recognition is a real damage, a real injury to the right to personal identity (TAYLOR, 1993, p. 43). This causes a violation of the principle of human dignity also in the aspect of equality, "non-recognition means social subordination in the sense of being deprived of participating as an equal in life." (FRASER, 2007, p. 107).

Among the different theoretical aspects about the right to recognition in a multicultural context, the debate itself has the merit of emphasizing that ensuring the right to personal identity involves demanding not only a repressive action, but also the exercise of the promotional function of the law, in the sense of allowing all, individually and collectively, the construction, exercise and recognition of their own identities. Again, the dignity of the human person is manifested here as a general clause that not only represses injuries to standard situations, in a repressive and compensatory technique, but acts especially in a promotional function, making use of the various legal instruments for the promotion of personality (TEPEDINO, 2008, p. 52).

From this perspective, one can mention the reservation of the indigenous and quilombo lands projected by the constituent as manifestation of a promotional action of the identity, since the land, in that context, functions like main repository of an identity constructed historically and collectively. The hypothesis goes back to the category of "cultural goods", listed in Article 216 of the Constitution as "the forms of expression;

the ways of creating, doing and living; scientific, artistic and technological creations; and works, objects, documents, buildings and other spaces destined to the artistic-cultural manifestations" when "individually or jointly, bearers of reference to identity, action, and memory of the different formative groups of Brazilian society". These cultural assets are protected as instrumental to the promotion of the right to cultural identity shared by that community (MIRANDA, 2016, p. 17-18).

Technology also brought a new expansive impulse to personal identity, since, as Stefano Rodotà (1997, p. 5) pointed out, if philosophy was saved by ethics, private law was saved by technology. Specifically on the subject of identity, the author emphasizes how technology allowed the dissociation of the physical body and electronic body, the multiplication of identities by the person himself, and "identity theft", recounting the experience of Sherry Turkle, who opened a forum for discussion on the internet under a pseudonym, so as not to be recognized as an authority on the subject, until she was challenged by one of the users, who, to legitimize her arguments, presented herself as Sherry Turkle (RODOTÀ, 2009, p. 76).

In fact, the virtual environment of social networks gave new meaning to identity, with a new myriad of possibilities and challenges. In a medium in which all information disclosed becomes available not only to mankind but also to eternity, the so-called "right to oblivion" has gained renewed importance. The impact of such a right on communicative freedoms has generated great resistance to its recognition in the Brazilian legal system (EHRHARDT JR. *et al*., 2017, p. 76-77). However, his assertion does not involve attributing to the arbitrariness of the subject the prerogative to erase information that is unpleasant to him, but avoiding the damages resulting from the imputation of characteristics that no longer correspond to his identity. In this sense, beyond the controversies that surround it, the reference to "a right not to be constantly chased by facts of the past, which no longer reflect the current identity of that person", on the expression of Anderson Schreiber (2017), reminds us of the importance of ensuring not only the right to build one's own identity, but also to rebuild it, since that identity is dynamic and changeable.

Technology breaks new ground for personal identity when it ventures into the realm of the so called biolaw. For example, the right to know one's origins, which is considered essential for the person to be able to effectively reach self-knowledge and self-understand, already recognized in the sphere of adoption, is put in check by the procedures of assisted heterologous reproduction, that is, with genetic material from an anonymous donor. It is the genetic identity, central to the understanding of the subject's biological individuality from his or her ancestry and part of what could be referred to as "Bioconstitution" (SPAREMBERGER, THIESEN, 2010, p. 63).[3]

In a similar vein, the mechanisms of embryonic genetic manipulation and, in their extreme, cloning, violate the right to personal identity in its broadest sense, insofar as they transform body traits, usually results of chance, into personal choices of their parents. The impact this choice would have on the subject's moral self-understanding cannot be overlooked, since the characteristics and limitations of his biological body, which condition his right to follow individual life choices, are not the product of a natural fact or of a contingent circumstance, "preventing him from freely understanding herself as the sole author of her own life" (HABERMAS, 2010, p. 87).

Certainly, however, the wave crest of personal identity in the contemporaneous world is within the scope of sexuality. From the fragmentation of the concept of sex – genetic, endocrine, morphological – his legal qualification (also called civil) becomes the product of a choice related to their civil life, in his relations in society (CHOERI, 2004, p. 46-51). Thus, sex and gender are divided, translating, the result of the individual's cultural and social experiences and, therefore, an aspect of his/her dynamic identity (CORBO; DANTAS, 2014, p. 56). Thus, gender identity presents itself from a perspective of belonging, demanding adequate recognition by the State (CUNHA, 2015, p. 37-52).

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[3] For a deeper understanding of the concept of "bioconstitution" and its relation to genetic identity, see the pioneer Baracho (2000, p. 88-92).

In this sense, the legal and social recognition of freedom for the construction of one's sexual identity can be indicated it as the greatest achievement of recent decades with regards to the execution of an existential autonomy in regard of the right to identity. Like any movement of deep transformation involving historically ingrained taboos and prejudices, it brings out from the darkest alleys forces of resistance and obscurantism, which is why there is still a long way to go, but one cannot deny the enormous achievements of the recognition of a right to identity in this field.

Among all the fundamental demands related to sexual diversity, transsexuality is probably the greatest example of expanding the right to personal identity.[4] As early as 1998, Gustavo Tepedino drew attention to the subject, reporting the case of Juracy, a transsexual who, after having surgery abroad, started a family and adopted a child, was arrested on his return to Brazil for false identity, use of false documents and act destined to send children abroad, and was taken to the male ward of the Água Santa prison, where she was detained until the decision of the TRF (Regional Federal Court). (TEPEDINO, 2008, p. 71-72).[5] The jurisprudence that assessed requests for rectification of registration was guided by the affirmation of a truth of biological sex against the right to personal identity.[6] The registry changes occurred at hard cost, leading to the pathologization of transsexuality, transforming the surgery into a "cure" required to authorize the legal recognition of the new identity.[7]

Gradually the scenario was changing and it was admitted both the change of registration name and gender. The issue came to higher courts, where the first decision of the STJ (Superior Federal Court), dated of 2007, required the registration of the change, charged the view that the advertising change was the burden of a choice that could not be the hidden or forgotten.[8] However, only two years later, a decision considered pioneer, reported by Minister Nancy Andrighi, authorized the amendment, with rectification of the registration, on the grounds that "to affirm human dignity means for each to manifest their true identity, which includes recognition of the real sexual identity, in respect of the human person as absolute value."[9]

Since then, jurisprudence has been evolving in great strides, admitting even the rectification of the independent registry of surgery, in recognition that the tutelage of identity must be guided not only by the body but by the way in which the person presents himself socially, moreover, it determines the legislation that protects the use of the so-called "social name".[10] The issue today reaches the STF (Brazilian Supreme Court), in terms of general repercussion, regarding the rectification of the registry and the use of bathrooms.[11]

4 Where does the right to personal identity go?

The significant process of transforming the right to personal identity – which can be understood even as a re-signification rather than an enlargement – puts in perspective the question of its scope. By

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4 For an approach to the question by means specifically of the right to forgetfulness (MOREIRA; ALVES, 2015, p. 81-102; CASTRO; ALMEIDA, 2017, p. 65-96).

5 TRF-2, 1st T., ACR 92.02.18299-0, Rel. Judge Tania Heine, jul. 08.03.1993.

6 For example, "Civil birth record. Name. Rectification. Change of sex. Impossibility. Rectification in the Civil Registry. Change of name and gender. Impossibility. [...] if the applicant bears a feminine appearance, incompatible with his condition as a man, he will have to bear the consequences, because the choice was his. Whoever is born a man or a woman dies as he was born. Genitalia similar is not authentic. Authentic is the man being male and the woman of the feminine, in all evidence". (RIO DE JANEIRO. TJRJ, 8th CC, Ap. Civ. 1993.001.06617, Rel. Des. Geraldo Batista, July 18, 1997).

7 For arguments against depathologization , cf. (WILD; LOURO, 2016).

8 "Change of sex. Registration in the civil registry. 1. The defendant wanted to follow his destiny, and an agent of his free will sought to change in his civil registry his option, surrounded by the necessary medical and intervention that caused him to change the nature generated. [...] To hide the will of those who manifested it freely is that it would be prejudice, discrimination, opprobrium, dishonor, indignity with the one who chose to walk in the transitory transit of life and in the permanent light of the spirit. 2. Special appeal known and provided". (BRASIL. STJ. 3rd T. REsp 678933. Min. Carlos Alberto Menezes Law, Judgment 22/03/2007, publ.DJ 21.05.2007)

9 "Civil law. Special resource. Transsexual undergoing sexual reassignment surgery. Change of first name and gender designation. Principle of the dignity of the human person. [...] - Ultimately, affirming human dignity means for each to manifest their true identity, which includes the recognition of the real sexual identity, in respect of the human person as an absolute value. [...] And the alteration of the designative of sex, in the civil registry, as well as the name of the operative, is as important as the surgical adequacy, since it is an unfolding, a logical consequence that the law must ensure". (BRASIL. STJ. 3rd T. REsp 1008398. Rel. Minister Nancy Andrighi, judgment on 15.10.2009, pub. DJe 18.11.2009).

10 For quantitative examination of decisions, cf. (CORBO; DANTAS, 2014; SILVESTRE; LOURO, 2016).

11 BRASIL. STF. RE 845779 RG. Rel. Min. Roberto Barroso, jul. 11/13/2014; BRASIL. STF. RE 670422 RG. Rel. Min. Toffoli Dias, julg. 9/11/2014.

operating a cross-section between the traditional categories of personality rights and opposing, in many concrete cases, diverse constitutional interests, a great resistance is placed to all this broadness attributed to the protection of personal identity. Instead of giving in to any kind of misoneism, which abstractly rejects the very expansion of this category, we must investigate whether there are limits to this process.

On the assumption that personal identity is a fundamental right, as a manifestation of human dignity, free development of personality and existential autonomy, one cannot understand that it, in order to be protected, should serve some function, since existential situations are, themselves, their own functions: the dignity of the human person prefers, fundamentally, not the instrumentalization of the subject to the attainment of other ends. Therefore, the protection of personal identity is not conditioned to the internal limit of reaching a certain end: any limit to it must originate directly from the same dignity of the human person that gives it foundation in a process of balancing interests.

This allows to flatly reject the fallacious argument that persists in our legal culture of finding a limit in the so-called 'public interest'. The public interest will never be a limit to being weighed against identity, oblivion, or any other fundamental right. Determining whether a certain interest is public or not, relevant or not, worthy of tutelage or not, is always the result of balancing, not its premise. The collective relevance of a certain interest, as well as its primacy, can only be ascertained in concrete, through the detailed examination of the circumstances of the case. At the same time,

> The definition of what is a public interest, and its affirmed supremacy over particular interests, is no longer at the discretion of the administrator, and depends on judgments of proportional balancing between fundamental rights and other constitutionally consecrated metaindividual values and interests (BINENBOJM, 2007, p. 749).

An individual interest can also be "public" once it is established that it should be protected for anyone in the same situation. Personal identity may be – and frequently is – a public interest, i.e., the community's interest that everyone has assured the protection of the personal identity. Therefore, to assert in the abstract the public interest as a limit to personal identity is a disservice to its scientific analysis.

This does not mean, however, that the right to personal identity cannot, in concrete terms, conflict with other interests that may ultimately prove to be public, relevant, worthy of tutelage, or simply more suitable for the protection of the human person. A case illustrates this situation well.

The media disclosed the story of Sandra Duchesneau and Candy McCullough, Americans, and deaf-born, who, after tackling a number of unsuccessful semen banks, succeeded in implementing the desire to obtain semen from a deaf donor, in order to increase the chances that their child had the same condition. The two now have two children, Jennifer and Gauvin, both with severe hearing impairment, and argue that deafness is not a disability, but a cultural identity (MORAES; KONDER, 2012, p. 95-96). The case is not unique: it was reported in the media that also Tomato Lichy and Paula Garfield, British, are engaged in the same enterprise in order to have a deaf son (ATKINSON, 2018).

In this case, the balancing of interests may call into question the invocation of the right to identity by the couples. It is necessary to take into account, in the present case, that even if the legal classification of the deficiencies has undergone a new reading, in the case in question this condition, instead of the product of a fatality of chance, would result from a personal choice of the parents. That is, the right to personal identity, that finds shelter in existential autonomy, is being invoked to subject someone to a predetermined identity. The identity would serve to limit the person, in the sensorial aspect, and the limitation would be heteronomous, that is, an imposed identity.

This is always a delicate point in a multicultural context, but perhaps it is possible to take into account, if not as a limit at least as a parameter, that the right to personal identity is primarily intended to ensure a sphere of freedom and, therefore, if it is imposed externally, that circumstance must weigh negatively on the balancing. Thus, when the invocation is made by the parents for the configuration of the children's identity, the argument is more sensitive.

It is important to point out that this view does not intend to deprive children and adolescents of access to this right. The increasing recognition of spaces of autonomy, even if assisted, to the minors, traditionally incapable, is also accompanied by the construction of a personal identity, of course, conducted in the best interest of the child, as exemplified by the increasingly debated child transsexuality. It is important, however, to take into account their personality "still in the making", so as not to confuse the authentic exercise of autonomy with the susceptibility to external pressures. Again, only the circumstances of the case allow an adequate judgment.

5 Conclusion

The right to personal identity thus reveals itself as a great example of the impossibility of typifying or delimiting forms of manifestation of the personality that deserve protection. Its birth comes from judicial decisions that identified the antijuridicity of imputing to somebody orientations or characteristics incompatible with the way in which the person presents socially, although they do not fall in the categories of injuries to the image or the honor, as traditionally conceived. This illustrates, therefore, the desirability of conceiving the dignity of the human person as a general clause for the protection of the personality, capable of including under its protection the most diverse manifestations of her free development.

This aspect highlights the transformation undergone by the verification of the dialogical and collective aspect of identity construction, in which the subject chooses his preferences from the relation and opposition with the other members of the social environment in which he is inserted. Thus, the fundamental role of the adequate recognition of personal identities, to be promoted especially by the State, is affirmed. Again, the protection of personal identity emphasizes the affirmation of the dignity of the human person as a general clause, since it emphasizes its non-strictly repressive but also promotional role of favoring the recognition of personal identities in the various forms and contexts of its manifestations.

In the face of all this expansive process, object of deep resistance, it is necessary to discuss its scope: are there limits to the right to personal identity? Of course, any statement of an abstract general limit, such as the invocation of the public interest, is discarded. The fundamental importance of personal identity means that it can only be limited in concrete, balanced with other fundamental rights. What can be built are only criteria and parameters to take into account in the process.

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