Right to Identity

Proceedings of the Special Workshop "Right to Identity" held at the 27th World Congress of the International Association for Philosophy of Law and Social Philosophy in Washington DC, 2015

Edited by Paul Tiedemann



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Introduction

The meaning of the concept of human rights does not depend on whether rights in national or international codifications are denoted as such. Therefore, there can be rights that are explicitly mentioned in human-rights codifications that actually cannot be considered real *human* rights. It is equally conceivable that there are rights which have not been included in human-rights codifications that should nevertheless be recognized as such. These unwritten human rights only have a chance at future codification through human awareness.

Awareness of new hitherto unwritten human rights does not arise in the context of abstract philosophical considerations. Rather, awareness arises when dealing with real conflicts and man-made human suffering. Since it is just the Courts of Justice that have to deal with such conflicts and have to find legal solutions, it stands to reason that it is the Courts that become aware of gaps in the system of codified human rights and "discover" new unwritten human rights. One prominent example is the discovering of the *Right to Informational Self-Determination*, which was first formulated by the German Federal Constitutional Court in 1983 and is now well established and recognized under the denomination *Right to Personal Data Protection*.

The Inter-American Court of Human Rights recently claimed to have identified another gap in the human-rights-codifications, in particular in the American Convention of Human Rights, which is supposed to be filled with a new and unwritten human right which they have called *Right to Identity.* (For more details concerning this jurisprudence see the articles of *Tiedemann* and *Zhang Tu*). The proposal is – already because of its prominent source – worth examination and discussion among legal and philosophical scholars. However, the proposal is not only of relevance in the context of the American Convention of Human Rights. Since a *Right to Identity* does not exist either in any other human-rights codification worldwide it is a proposal that should affect the interest of human rights scholars everywhere in the world. It was therefore a great honor to have the opportunity to discuss the issue on an international and multicultural level in the frame of a Special Workshop during the XXVII World Congress of the *International Association for the Philosophy of Law and Social Philosophy* that took place at the end of July 2015 in Washington DC. This ARSP-Beiheft contains the elaborated versions of the papers that where presented at this Workshop. The article of *Janne Mende*, who did not have the opportunity to participate in the workshop, is added.

The first article (*Paul Tiedemann*: "Identity and Human Rights") examines the different meanings of the term "identity" and relates each of them to specific human interests. It examines the possible conflicts in which these interests can be involved and to what extent the existing catalogues of written human rights keep in stock sufficient rights for the protection of the respective interest or to what extent new unwritten rights should be demanded. The article concentrates on the most relevant meanings of identity understood as individual identity.

The following four articles focus also on an individualistic approach to identity in the context of human rights. *Zeynep İspir* ("Human Dignity as a Common Iden-

tity") considers the fact that all of our individual particularities which distinguish one from another can be made a crucial characteristic of our personality and identity. However, she argues that this is not a sufficient basis for the understanding of human rights. According to *İspir*, identity as a matter of human rights only comes in focus when we refer to the "sameness as human beings". She discusses the question of whether the concept of human dignity expresses the common identity of human beings adequately and whether therefore the concept of human dignity should be considered as a yardstick for the justification of human rights.

Reiner Keil ("A Negative Right related to Identity as a Right to Change: A Kantian Approach to Philosophical Aspects of Criminal Justice, especially of Life Imprisonment") deals with the aspect of diachronic identity and asks whether and to what extend the present imputation of past acts to a person for the purpose of proportional future legal consequences is in terms of morality, justified or even compelling. Starting from the critical analysis of Kant's fragmentary theory of punishment and his rigorous statements regarding punishment the author pleads for a permanent *Right to Change One's Identity*. This right constitutes the crucial argument for limiting the term of punishment and to abolishing life imprisonment.

Zhang Tu ("Is the Right to Identity a Fundamental Human Right?") discusses the question of whether the Right to Identity can be considered a fundamental human right. She starts with Charles Taylor's account of identity and considers the research question in light of two standards of human rights as two tests. One is a humanity standard which fundamentally takes human rights as moral rights; the other is a political conception of human rights, which understands human rights in view of our international human rights practice. According to the author neither of these standards can show that the *Right to Identity* as it is demanded by the Inter-American Court of Human Rights can be understood as a fundamental human right.

Fabio Queiroz Pereira / Mariana Alves Lara / Felipe Quintella Machado de Carvalho ("Body Integrity Identity Disorder: An Interface between Body and Personal Identity") deal with the aspect of body-identity. They discuss the case of a severe disorder of body-identity (Body Integrity Identity Disorder – BIID) and ask whether the desire of the concerned individuals to cut off one or some of their own limbs should be considered as protected by human rights and whether they are supposed to have access to an amputation surgery. The authors argue in favor of the opinion that the desire falls in the scope of private autonomy and is therefore to be recognized.

The following articles are focused on a rather collective understanding of identity. *Janne Mende* ("Collective Identity") analyzes the different meanings of the term "Collective Identity" by discussing strong and weak points of basic identity concepts from philosophy and social sciences. She stresses the fact that identity is constitutively and necessarily intrinsically entangled with its other, the non-identical. She analyzes the different forms that the other can take on in its relation to identity. She analyzes further the emancipatory and the repressive effects of these forms and scrutinizes on this basis the concept of collective identity in normative perspective. She examines the constitutive role of collective identity for individual identity and the relevance of its openness to its other and to other others.

Marcos Augusto Maliska ("Right to Identity in the Context of Constitutional Pluralism") discusses the right to collective identity under the aspect of constitutional pluralism. First he describes several collective identities which are protected

under the Brazilian Constitution. In the second part of his essay he shows that protection of collective identity by the Constitution does not mean that the State has the right to define the content of the respective identity. The constitution of a pluralistic society has to be an open constitution. This means openness for different pre-understandings of the collective identity with which individuals identify. So the interpretation of the Constitution may not be based on a certain particular unambiguous understanding of the respective collective identity. Pluralism demands rather the recognition of the pre-understanding of those who identify with a particular social group as e.g. their family.

Akihiko Morita ("Collective Human Right to Collective Identity") defends the position that collective identity is an indispensable part of the individual identity. He argues that individual human rights are not sufficient to protect collective identity and demands therefore a collective right to collective identity. The *Collective Human Right to Collective Identity* must, however, stand under moral limitations in order to avoid the legitimation of suppression of minority groups or individual members in the given society. Morita locates his approach in the framework of Charles Taylor's conception of interculturalism.

Identity as a matter of law is a very wide field. The contributions of this book can only deal with some of the many aspects. So, this book does not give a final answer concerning the question of a Right to Identity but it is a small contribution to a dialogue that has just recently begun.

I would like to express my gratitude to all the authors for the excellent cooperation, in particular for the delivery of the manuscripts exactly on time. I thank further Yasmine Akkad and Joshua Nolet for the careful and thorough pro bono revision of the texts in terms of proper English and reasonable style. This was a great work and not highly enough to appreciate. I am very grateful to Professor Mortimer Sellers of the University of Baltimore for establishing the connection to Yasmine Akkad and her colleague. My thanks apply finally to Dr. Annette Brockmöller, editor-in-chief of ARSP, for accepting the results of the Special Workshop "Right to Identity" for the ARSP-Beihefte series and Dr. Thomas Schaber, Katharina Stüdemann, and Sarah Schäfer of Franz-Steiner-Verlag for their excellent assistance.

Paul Tiedemann, Frankfurt am Main/Giessen

Identity and Human Rights

Considerations on a *Human Right to Identity*

Abstract: On the basis of the "Gelman" judgment of the IACourtHR asks the author for the justification of the demand for a "right to identity". This paper identifies six different meanings of the term "identity" (Synchronic I., Diachronic I., Ego-I., Personal I, narrative I., Role I.) and examines each of these meanings to the extent that there is a significant relationship to human rights. It is found that important aspects of identity are already under the protection of human rights. As far as that is not the case, but desirable, demanded rights must have a sufficiently clear description of the scope of protection in order to distinguish the right concerned from other human rights and in order to allow juridical subsumtion.

1. Introduction

In its February 2011 *Gelman* judgment,[1] the Inter-American Court of Human Rights (IACourtHR) determined that eight of the claimant's rights from the catalogue of the American Convention of Human Rights (ACHR) were violated, in addition to the claimant's unwritten "so called" *Right to Identity – derecho a la identidad* (MN 122). The case involved a woman who was born in a Uruguayan torture prison in 1976, where her mother had been abducted from Argentina. The woman was taken away from her mother shortly after birth and fostered under a false identity by a Uruguayan couple. All traces of the mother were missing. Like the woman's father, the mother was likely killed.

The idea is not new according to which it is possible to take from the codified catalogues of human rights not only the expressively written human rights but also unwritten human rights. However, this requires that the catalogues are incomplete and have gaps. One can identify a gap only if one can find a general basic idea in the codified law that can be applied to facts, which are not covered from the scope of protection of the written rights. In this way the German Federal Constitutional Court has e.g. developed the right to informational self-determination from the basic principle of human dignity.[2] Even the IACourtHR established a connection with human dignity by emphasizing that the right to identity "is consubstantial to the attributes of human dignity" (MN 123).[3]

Concerning the content of the Right to Identity the Court refers to the Convention on the Rights of the Child by saying that "although it is a right that is not

1 IACourtHR, judg. of 24.02.2011–12.607 – "Gelman v. Uruguay" – http://www.corteidh.or.cr/docs/casos/articulos/seriec_221_ing.pdf [5.10.2015]

2 Judg. of 15.12.1983, BVerfGE 65,1 [41] = http://www.servat.unibe.ch/dfr/bv065001.html [5.10.2015]

3 The official wording of the English version is: "…the right to identity is consubstantial to the attributes ***and*** human dignity." I guess that this is a mistake and that "and" should be read as "of"

found expressly established in the [American] Convention [on Human Rights], it is possible to determine it on the basis of that provided in Article 8 of the Convention on the Rights of the Child, which established that said right encompasses the right to nationality, to a name, and to family relationships. Likewise, it can be conceptualized as the collection of attributes and characteristics that allow for the individualization of the person in a society, and, in that sense, encompasses a number of other rights according to the subject it treats and the circumstances of the case." (MN 122) So it seems that the *Right to Identity* is not considered as a particularly new right apart from all the other mentioned rights but only as a collective name of a bundle of codified rights.

In any case the content of the Right to Identity remains rather unclear according to the statements of the Court. The protection scope is not described positively. It is not even clear that the written catalogue of human rights of the ACHR in general contains a gap that can only be closed by a judicially developed right to identity.

In the following I want to examine the question of whether there is such a gap in the human rights codifications that must be closed by a new and unwritten Right to Identity. This question should be examined in particular with regard to the catalogues of the International Covenant on Civil and Political Rights of 1966 (ICCPR)[4], the American (ACHR)[5] and the European Convention on Human Rights (ECHR).[6]

First we must clarify which protection scope is meant when identity is mentioned. It turns out that the concept of identity is very ambiguous and has several distinguishable meanings. For the most important of these meanings it is to examine whether and to what extent human-rights-related relevance can be seen, which is not or not sufficiently covered from the existing body of codified human rights.

Some meanings of identity are not discussed in this article. These are those for which by definition no subjective individual human right can be claimed, because they refer to a kind of identity that can only be assigned to groups or entire societies but not to single individuals. Insofar it should be pointed to the intense debate about what is referred to Karel Varek "human rights of third generation".[7]

4 https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf [5.10.2015]

5 http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm [5.10.2015]

6 http://www.echr.coe.int/Documents/Convention_ENG.pdf [5.10.2015]

7 Christoph Menke / Arndt Pollmann, *Philosophie der Menschenrechte. Zur Einführung*, Hamburg 2nd edition, 2008, 118; Susanne Boshammer, *Gruppen, Rechte, Gerechtigkeit. Die moralische Begründung der Rechte von Minderheiten*, Berlin, 2003

2. Numeric (Synchronic) Identity

The word "identity" goes back to the late-Latin root *idem* (= the same). It is originally a term of philosophical logic.

2.1 The Concept of numeric (synchronic) Identity

The *Principle of Identity* (principium identitatis)[8] – is beside of the Principle of Contradiction, the Principle of Excluded Middle, and the Principle of Sufficient Reason[9] one of the basic principles or axioms of logic.[10] There are different formulations of this principle. So, one can read, identity denoted a relation in which "every entity relates to itself and only to itself".[11] From Christian Wolff (1679–1754) stems the formulation: If I can replace a thing B by a thing A and everything remains as it was before, so A and B are identical".[12] These formulations are so confusing because they speak about two entities whereas the principle of identity refers to one and the same entity. In the same way it is confusing to express the principle by means of modern predicate logic ($\Lambda\, x(x = x)$: "For every x: x is identical with x"). The proposition "x = x" is so trivial that a deeper meaning is hard to understand. By way of example, the poet Matthias Claudius (1740–1815) made fun of a 18th century logic lecture by saying that one could learn from the professor's very clear demonstration that "a student was a student and not a rhinoceros".[13] Seriously and soberly Ludwig Wittgenstein has expressed what seemed so disturbing to the principle of identity: "To say of two things that they are identical is nonsense, and to say of one thing that it is identical with itself is to say nothing."[14]

Only modern analytic philosophy of language, which began with Wittgenstein, seems to have clarified what it actually is with numeric identity. It is not about entities or things, and also not about the relationship between entities. Rather, it is about the relationship between entities and their names: "Identity of the object I express by identity of the sign and not by means of a sign of identity. Difference of the objects by difference of the signs."[15] We could, therefore, dispense with the concept of numeric identity, if we could, instead, determine that one and the same object may not have more than one and the same proper name.[16] But this is not our

8 Cf. Niko Strobach, *Einführung in die Logik*, Darmstadt, 2005, 19103; Jan C. Joerden, *Logik im Recht*, Heidelberg/Berlin,: 2nd edition, 2010, 30

9 The *Principle of Sufficient Reason* means that the concept of the predicate is included by the concept of the subject – cf. H.-J. Engfer, Principium rationis sufficientis, in: Joachim Ritter / Karlfried Gründer (ed.), *Historisches Wörterbuch der Philosophie,* vol. 7, Darmstadt, 1989, row 1326

10 In general on the axioms of logic and the logical principles cf. Strobach (footnote 8), 19

11 Arnim Regenbogen / Uwe Mayer, *Wörterbuch der philosophischen Begriffe*, Hamburg, 1998, catchwords: "Identität" and "Prinzip der Identität des Ununterscheidbaren"

12 Cited from Rudolf Eisler, Wörterbuch der philosophischen Begriffe, Berlin, 1904, catchword: "Identität, Satz der" – http://www.textlog.de/4002.html [5.10.2015]

13 Hans-Albrecht Koch, *Die Universität. Geschichte einer europäischen Institution*, Darmstadt, 2008, 127

14 Ludwig Wittgenstein, *Tractatus logico-philosophicus,* 1916 ed. by Kevin C. Clement – http://people.umass.edu/phil335-klement-2/tlp/tlp.pdf [5.10.2015], 5.5303

15 Wittgenstein (footnote 14), 5.53

16 Vincent Descombes, *Das Rätsel der Identität*, Berlin, 2013, 67

practice. Sometimes we use different names for one and the same object or we use one and the same proper name for different objects. So, the author of the novel *Night Train to Lisbon* is called Pascal Mercier while the author of *Das Handwerk der Freiheit* is called Peter Bieri. However, Mercier and Bieri are the same person. Similarly, it is possible to denote different objects with one and the same name. Paul Tiedemann is not only the name of the author of this article. It is also the name of the former head coach of the East German handball team while both are different people. The equal sign in the formula $\Lambda\ x\ (x = x)$ thus represents no relationship between objects, but a relationship between the different names for the same object: "Pascal Mercier" is identical to "Peter Bieri". "Paul Tiedemann" (author) is not identical to "Paul Tiedemann" (coach).

The repetition of the proper name of an object is equivalent to the numeric identity[17], also called synchronic identity.[18] To be sure it is the same thing we first called the same proper name, we need a list of attributes, in whose presence we recognize the object as the same: The planet, which we denote by the proper name Venus, the morning star and the evening star, is exactly that planet in the solar system, which has the property to remain longest visible at daybreak, while being the first visible in the evening. The question of the numeric identity of a human individual always stems from the perspective of the other; hence, those who want to talk about the individual in his absence, and must therefore refer to him in a sufficiently clear manner. Confusion concerning numerical identity leads to confusion in communication *about* someone, but not in communication *with* someone. However, such confusion can also be a heavy burden for the individual concerned, because the smooth integration in a communicating community requires the possibility of communication about someone in his absence, so that he can be recognized by all other members of the community under the same criteria of recognition. For example, the confusion concerning numeric identity of an individual might have no consequences if he buys and pays cash at the supermarket. But if he wants to pay by credit card, the said confusion can lead to the result that his credit card will not be accepted. Hence the numeric identity of a human individual is a social category. It is important for the others to let them know about whom they speak. And it is important for the person concerned because it is a requirement of integration into the social communicative web.

2.2 Relevance of Numeric Identity in Terms of Human Rights

It is obvious that the proper name of a person is the elementary condition to attribute events or acts to her while she is absent. In modern civil status law, the proper name of a person is assigned to the person through an appropriate certificate, or an identification document such as an identity card. Since traditional name words are no longer sufficient to distinguish between different individuals, the identity documents contain not only the first and the family name, but also the date of birth, a passport photo, and possibly more indicators such as finger-prints or DNA sequen-

17 Descombes (footnote 16), 71
18 Michael Quante, *Person*, Berlin/New York, 2007, 9

ces. The identity certificate is supposed to ensure that the numeric identity of a person cannot be destroyed or distorted in a way that makes it impossible for her to take the legal position she deserves within the legal system and within the society.

There can, therefore, be no doubt that there must be a right to accurate numeric identification. However, there is no need to postulate this as an unwritten human right. There is no gap concerning this matter in the ACHR. Rather, the necessary right to correct numeric identification is codified in Article 18 ACHR as Right to a Name.[19] The scope of this right relates exactly to the protection of the correct and sufficiently unambiguous identification of the person.

A comparable right also exists in the ICCPR. Articles 24 II ICCPR provides: "Every child shall be registered immediately after birth and shall have a name." This right can also be interpreted as a right to correct numeric identification. In contrast, the ECHR does not include a right to name. The ECtHR derives such a right, however, from the right to private life (Article 8). It has expressly stressed in this context that the right to private life embraces, among other things, the right to a name as means to personal identification.[20] The notion of correct identification has, however, not been the focus of the Court's case law. The focus only concerned whether, and to what extent, parents, or even the persons concerned, have a right to choose a name. However, there is hardly any doubt that the Court in a case like *Gelman*, would come to the conclusion of a violation of the right to private life. So, there is also from a European perspective, no need to demand a new right under the name "Right to Identity".

3. Diachronic Identity (Persistence)

The so called diachronic identity, also known as persistence, comes into consideration as a second candidate of a human right to identity.

3.1 The Concept of Persistence

In addition to the numeric or synchronic identity the European philosophy has since ancient times always dealt with the problem of diachronic identity. This problem is described by the question of how it is possible to remain the same while one is changing and evolving with the times. Plutarchos reports in the context of his *Life of Theseus* that the Athenians stored the vessel, with which the hero was sailed to Crete and happily came back with the freed hostages, for more than 1000 years, "by replacing the rotten wood by solid new planks. So consequently the philosophers tended in their disputes about the growth of things always to rely on this vehicle, so that some said it would be and remain the same ship, while others, it would be a

19 Art. 18 ACHR: "Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary."

20 ECourtHR, judg. of. 02.06.2005 – Nr. 77785/01 –, "Znamenskaya v. Russia", MN 23 with further references; cf. judg. of. 16.05.2013 – Nr. 20390/07 –, "Garnaga v. Ukraine"

very different one".[21] The latter view shared also Heraclitus, according to whom you cannot step twice into the same river.[22]

What applies to ships or a river that applies also to human beings. From the comic poet Epicharmos the saying is delivered: "Those whose nature changes / must be different at each successive moment, / from the thing it was before. / So also, you and I are different people now from what we were but yesterday."[23] The quotation shows that the question of diachronic identity is an eminent practical problem, namely the problem of the current allocation of earlier acts with a present person.

Plato solved this problem through the consideration that change is a lasting process of becoming and that things that are permanently in a state of becoming, never achieve the state of being. They do not really exist. Only the content of thoughts ("ideas") could be considered as enduringly existing and therefore only ideas could really exist. According to Plato ideas are not products of human thinking but rather independent entities which can reveal themselves towards human beings. According to the philosophy of Plato Ideas should be considered as bearers of attributes. The attributes they are bearing can change but the bearer itself is immutable. The philosophical tradition coined the expression "substance" as denotation of the ideas as immutable bearers of properties and attributes.[24] The properties (accidentiae) can change, grow and perish. The substances remain immutable.

One of the Platonian Ideas was the immutable and immortal soul.[25] The soul provides the persistence of a person and makes it possible to ascribe former actions to the present individual. The empirically perceptible human individual, with all its mutations regarding its body and its intellect, is only a contingent property of the immutable soul. The human being is not body or person, but the soul has the property from time to time to have a body or personhood. According to this understanding, it is not the human being who has a soul but it is the soul who has a human being.

This theory has lost its power of persuasion through the criticism of the philosophy of the Enlightenment. Descartes' radical doubt brought to light that the idea of the soul is neither based on empirical experience, nor on unavoidable logical implications. What we know for sure is that we are thinking. In other words, there is a process of thinking. But we do not know anything about a substance, which we can distinguish from this process, and which has the property and ability to think.[26] John Locke regarded the substances as pure constructions of thoughts, as pure webs in which we connect sensations or reflections (concepts with which we denote sensations). He called them *complex ideas*.[27]

21 Plutarchos: The Life of Theseus http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Lives/Theseus*.html [5.10.2015], 1, 23

22 Wilhelm Nestle, *Die Vorsokratiker*, Wiesbaden, 1978 (Heraklit fr. 58a, 93, 94)

23 Diogenes Laertius: The Lives and Opinions of Eminent Philosophers, translated by C. D. Yonge, http://classicpersuasion.org/pw/diogenes/ [5.10.2015], III, 12

24 Jens Halfwassen, Catchword "Substanz", in: Joachim Ritter / Karlfried Gründer (ed.): *Historisches Wörterbuch der Philosophie,* vol. 10, Darmstadt, 1998, row 495

25 Platon, Kratylos, 400c; Phaidon 79e–80b

26 René Descartes, *Discours de la méthode pout bien conduire sa raison et chercher la vérité dans les sciences*, 1637, II VII

27 Lohn Locke, An Essay Concerning Human Understanding, 1689, http://oll.libertyfund.org/titles/762 [5.10.2015], Book II Ch. XIII, 19

According to this new approach, there is, for example, no substance we can call sun, which has attributes including heat, the ability to radiate, the ability to shine, and the ability to move in a certain way. Instead, we combine different empirical experiences of heat, radiation, shining etc. to the complex idea of "sun". Today, we prefer to talk about concepts instead of ideas and we would call the considerations above an analysis of the concept "sun". We do this in the same way we combine the simple operations of claiming, concluding, and doubting to the complex idea (concept) of spirit, according to Locke.

According to Locke, there is no metaphysical persistent bearer (substance). What really exists is mutable. According to this approach, the traditional basis of attributation of former actions to a present person was lost, and Locke was coerced into finding a new solution to the problem of diachronic identity.

Locke solved the problem by asserting that it made no sense to claim the persistence of particular material things. Only relations between things can be persistent. Persistence is a matter of systems and organisations, and not a matter of single entities. It is not the particular things that remain identical through the times, but only the organisation of things.[28] Thus, Locke no longer understands diachronic identity in a materiel meaning, but rather in a formal meaning. Material entities, including the human body, are no longer considered substances in a Platonian meaning, but are considered events or processes that include dynamic change and mutation while the dynamic, as such, always remains the same during the time. According to this approach, it is very possible to step in the same river twice – as long as the watercourse remains the same.

When it comes to the ascription of human actions, the persistence of the human body in the meaning of an enduring process is not really useful. The ascription of human actions, and the responsibility for these actions, is connected with the ability to reflect and to think. It is connected with intellectual abilities. Locke assigned these abilities neither to a soul nor to the body but to the personhood which he understood as a spiritual process and not as a biological one. But this approach confronted Locke with the problem of how it is possible to maintain a pure intellectual process on the basis of pure empirical experience. This was a serious problem because we have no sensations by which it would be possible to experience the thoughts of other persons. In order to avoid that personhood becomes a metaphysical construction like the Platonian soul, Locke tried to understand it from the *first-person-perspective*. Only by this approach (by inspection) was he able to avoid pure speculation and to ground the personal persistence on empirical experience, because from the first-person-perspective we have access to an empirical experience of our own thoughts.[29]

The person, according to Locke, is a complex idea of its own. The person differs from other living beings in that she has self-reflexive knowledge of herself. This self-reflexive knowledge constitutes "Ego-Consciousness". Ego-consciousness accompanies the thinking of the person permanently through the time and always remains the same through time and space. As far as this consciousness can be extended backwards to past actions or thoughts the scope of diachronic identity of the

28 Locke (footnote 27), II, XXVII 4
29 Locke (footnote 27), II, XXVII, 9

person extents.[30] Just as a limb which is separated from the body is no longer covered by the bodily identity, past actions or thoughts are no longer covered by the identity of the person if the memory is lost.[31] The diachronic identity of the person is not the persistence of material processes, but it is the persistence of memory.

Since the memory or the ego-consciousness is only accessible from the first-person-perspective, it follows that the diachronic identity of a person can also only be accessible from the first-person-perspective. Therefore, Locke can solve the problem of attributation of former actions and thoughts to a present person only as long as it concerns the self-attributation of former actions and thoughts by the person concerned. It is, however, not possible to attribute foreign former actions and thoughts to a certain foreign person. Locke, however, has not quite realized this. So, he has become entangled in a contradiction when he, on the one hand, claims that law and justice reward and punishment is based on the diachronic identity of the person which is mediated on her memory[32], but on the other hand added that it is justified when the courts attribute a fact if the defendant cannot remember it, "because the fact is proved against him, but want of consciousness cannot be proved for him".[33]

Locke's contemporaries already posed serious objections against Locke's theory of diachronic identity that could not be resolved to this today. The most important are the transitivity-argument and the circular-argument.[34] Locke's most fundamental error was, however, that he wanted to construct the persistence of the person from a first-person-perspective, although his knowledge interest was focussed on the persistence of the person from the third-person-perspective (observer-perspective).

Locke's theory fails because he does not begin with the idea of an over the time identical bearer, who has consciousness. Instead, he begins with the idea that there is a process of consciousness, which bears itself. I guess that the idea of a self-bearing-process of thinking, without a subject of the thought-producing-process, is not sufficient. It is even true that the Platonian idea of an immutable and immortal soul

30 Locke (footnote 27), II, XXVII, 9
31 Locke (footnote 27), II, XXVII, 11
32 Locke (footnote 27), II, XXVII, 18
33 Locke (footnote 27), II, XXVII, 22)
34 Quante (footnote 18), 48 et pass. The transitive relation says that if A is identical with B and B is identical with C than A is identical with C. This means applied to Locke's theory of the personal persistence the following: If a person in the moment she meet with B does remember A and if she in the moment when meeting C remembers on B but not on A anymore than this person is nevertheless identical with the person she was when meeting with A. But according to the theory of Locke the person in C would not be identical with the person in A because she could in C not remember of A. The defenders of Locke replay against this argument that the current memory would not matter. Relevant would only be the psychological continuity. However, with this argumentation the first-person-perspective is given up, because the psychological continuity between A and C is not given to the person from the first-person-perspective. It appears only from the observer-perspective to which Locke just does not refer to.
The circular-argument points out that Locke's theory already presupposes the personal diachronic identity and does not constitute it. Our memories can namely delude. So it is possible to remember to have done something that in fact was not done or what was done by somebody else. We need an additional criterion that makes us able to distinguish between true and false memories. This criterion can only be the diachronic identity. The same person is just presupposed as just the person who has met with what she is remembering. This shows again that the diachronic identity of the person is not a given fact from the first-person-perspective.