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### A right to identity to face the internet of things?

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## ***A right to identity to face the Internet of Things?***

Paul De Hert

*“States Parties undertake to respect the right of each persons to preserve and develop his or her ipse and idem identity without unlawful interference”.*

### ***Introduction***

In a world of “Internet of things”, computing is enabled to melt invisibly into the fabric of our business, personal and social environments, supporting our economic, health, community and private life. In a world of “Internet of things”, it will be easier to establish new relationships, but also to identify people, since all possible everyday objects will be part of a network. After having introduced two notions of identity, viz. ipse and idem identity, we look briefly at the impact of new modern and future computing. The European Court of Human Rights, in its interpretation of Article 8 of the ECHR, in particular the right to respect for private life, has ruled that this right covers an individual’s physical and social identity, such as gender identification, name sexual orientation and sexual life and the right to personal development and personal autonomy. However, in the light of emerging technological threats to the individual and in the light of certain resistance to the privacy right, the suggestion to create or recognise a specific ‘right to identity’ needs to be taken into consideration. Such rights could be useful, taking into consideration the challenges of the Internet of things, and the problems of existing human rights law to cope with these. Even more weight can be given to the recognition of new human rights when looking at some broader identity issues, such as the double nationality issue. New human rights could be instrumental to the delicate balancing of interests these issues, granted it is conceived as a liberty rights to both aspects of identity.

### ***Two kinds of identity***

When the police speak about identity checks, they refer to the legal or administrative identity of a person. This civil identity is the instrument societies use to determine whether persons have legal access to certain goods and services. Civil identity in reality is no more than a convention, although it is a very important one in a person’s life and not many people are ready to give their national identity. Slightly distinct are collective identities, such as those shaped by religion, gender, ethnicity, race, and sexuality (Appiah, 1994 & 2005). Often, if not always, these are internalised conventions, and, again, not many people consider these volatile assets of their life. On the contrary we consider these issues very tightly linked with our personal identity, a term we use to denote the image that we have for ourselves and about ourselves and that we want to use to make us known to others (Prins, 2007). Brussels based scholar, Mireille Hildebrandt, drew my attention to the important distinction between *ipse identity* and *idem identity*. Both terms nicely illustrate the interesting back and forths between me and the others that look at me or me looking at the others. Personal identity is understood as a mix of ipse identity and idem identity. Ipse (or self) identity is the irreducible sense of self of a human person. It is reflexive consciousness of oneself. Idem (or sameness) identity is the objectification of the self that stems from comparative categorisation (Ricoeur, 2005; Hildebrandt, 2007). Elements of idem identity are social identity, cultural identity, legal identity (‘identité civile’). It would however be wrong to see this idem identity mainly in terms of a through the outside world imposed identity. As I understand the difference, the comparative labour is also be done by persons themselves. In fact we are constantly comparing with others and adapting our self-image. Psychology teaches us that the development of personal identity follows a double movement, one towards resembling the other through identification (resembling people nearby) and one differentiating one self in a perspective of individualisation (Neyrand, 2002).

Ricoeur, whose interrogative work lays at the basis of this distinction between ipse and idem identity, was puzzled by the observation that persons change continuously, but are in the same time in need of some stability in the recognition of the other: “en dépit du changement, nous attendons d’autrui qu’il

réponde de ses actes comme étant le meme que hier a agi et aujourd'hui doit rendre des comptes et demain porter le consequence? Mais s'agit-il encore de la même identité (mêmeté)? Ne faut-il pas, prenant pour modèle la promesse, base de tous les contrats, de tous les pactes, de toutes les ententes, parler d'un maintien de soi malgré le changement –maintien au sens de la parole tenue?" (Ricoeur, 2001:92). It is quite clear that law and in a broader sense, society does not and cannot function solely on the basis of ipse identity. Idem identification allows societies to integrate the person and allows the person to integrate himself in society (Neyrand, 2002). "La personne est toujours tenue pour identitique à elle-même, on ne tient pas compte (on ne peut pas) des variations de ses sentiments, de ses pulsions secretes" (Ellul, 1963 quoted by Christians, 2002:67).<sup>1</sup>

### ***The Internet of Things as a technology of freedom***

The term "Internet of Things" has come to describe a number of technologies that enable the Internet to reach out into the real world of physical objects. The Internet of things predicts a world wherein billions of everyday objects are linked in a network and are intercommunicating. This idea has grown from advanced concepts from the last twenty years, such as ubiquitous communications, pervasive computing and ambient intelligence (EC, 2006). In a world of "Internet of things", computing is enabled to melt invisibly into the fabric of our business, personal and social environments, supporting our economic, health, community and private life (EC, 2006).

This foreshadows an exciting future that closely interlinks the physical world and cyberspace - a development that is highly relevant to individuals and their identity.

Partly this future is already happening. New technological developments see the light, such as Rfid and biometrics, that are already making the paradigm "the Internet of things" more realistic. On the basis of what has been achieved so far and on the basis of the predictions of what lays ahead, some important consequences can be canvassed. The human interdependencies become subject to change. Through all these technologies people see their possibilities of actions heightened, e.g. using mobile phones when standing in line. Also, they can become part of larger social networks and start relationships with people and machines far away, without this being checked by people near by and with less dependency (Stol, 2007). Virtual communities without geography become part of life (Mesch & Talmud, 2007; Gennaro & Dutton, 2007). However specific preferences are, likeminded people can always be found, granted that they are 'connected'. Identity plays have always existed, but new technological identities allow playing it at a far better performing level. Identities can become more multifaceted and specific than ever before. Every possible lifestyle is conceivable (Frissen, 2002).

Already in 1984 Pool contended that the then existing telecommunications technologies had the potential to enrich the freedom of speech guaranteed us by the existing human rights instruments. In his book *Technologies of Freedom* he held that electronic media could provide a broader access to more knowledge than ever before and therefore had the potential to open new vistas of freedom of speech and of access to information and ideas (De Sola Pool, 1983; Stol, 2007)

On reflection this assumption can be generalised. Technical advances often change the way in which we exercise our rights and freedoms, and thus broaden the practical scope of these rights. Freedom of movement now extends to moving around by car, plane and Internet, and not just by foot, boat or bike (Harris, 2007: 76).

To believe Paul Frissen, a Dutch social scientist studying the societal impacts of ICT, these 'second and third life' possibilities are more than minor changes to human condition. In his book *The State* he takes growing diversity as a starting point for a provoking analysis showing the failing grip of political systems on the life of citizen. Public debate is less and less monopolized by the political system. Citizens organise themselves outside the party system. Classical political institutions become an actor amongst others within a more horizontalized spectre. The public domain, more fragmented than before, stretches out and encloses new issues. Frissen holds that contemporary developments towards globalisation, facilitated and radicalised by new technological developments, will bring about new conceptualisations of the public domain and a new style of politics that reflects the ethics of the networking society with nomadic operating actors. There is no longer one public domain build upon a

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<sup>1</sup> Hildebrandt rightly stresses that identity needs to be understood in dynamic terms, necessitating a mix of negative and positive freedom to reconstruct one's identity in the course of time (Hildebrandt, 2007). I will come back to this observation *below*.

set of shared values and traditions, but there are more and more public domains that need to be balanced against each other and go far beyond the territorial limits of states. Although Frissen pretends that this 'new multiculturalism' (Frissen, 2002: 181) should be regarded as an empirical fact, one that one cannot reject or applaud to, he is clearly not opposed to the new opportunities for the individual operating through many identities and travelling in this virtual worlds without the lasting (community) bounds and cultural codes of the past (Frissen, 2002: 177).

These technology driven developments should be understood of a broader cultural development towards individualism. People become more aware of their authenticity and uniqueness and do not longer accept descent from (certain) social groups and certain determining factors that used to be seen as unalienable, viz. name, sex, nationality, etc. All these issues become the object of struggle and of claims for more subjectivity and flexibility.

Needless to say that Frissen's analysis, based on an intelligent personal mix of authors such as Castells and Negri, can be easily confronted with many other writings stressing the vulnerabilities of the new autonomy of this nomadic operating citizen. Many authors, borrowing on Charles Taylor's anti-individualist work, assess critically this urge for more identity-flexibility or more individualism (Nys, 2007; Neyrand, 2002; Christians, 2002). We recall Taylor's important analysis of the risks of centring on the self and of classical liberal theory with its abstract image of individual having no one but him or herself to give meaning to life. The individual, Taylor holds, needs the others to understand what is meaningful in life. Even our deepest feeling of authenticity is coloured or produced in a given social context (Taylor, 1989). Central to most authors in the massive treaty *L'identité de la personne humaine. Etude de droit français et de droit comparé* (2002), edited by J. Pousson-Petit, is this feeling that contemporary emphasis on subjectivity and authenticity and choice with regard to identity, resonating through some important recent judgements of the European Court of Human Rights, neglects important societal interests and choices behind certain social and legal arrangements that are the object of identity claims. Even when not all authors go as far as to reject overtly these subjectivist identity claims, most of them retain cynical distance. Neyrand, for instance, critically stresses the efforts of the contemporary 'authentic' individual to engage him or her, without ever engaging totally. *L'engagement implique le déengagement* (Neyrand, 2002). Another author ironically notes that claims for the individualisation of the regulatory framework of names and other personality aspects is countered and compensated by a growing use of strong identification schemes (J.-J., Lemouland, 2002). Liberty, what liberty?

Contrary to most of these authors, we do not see too many judgements of the European Court threatening the fabric of law by recognising subjectivist identity claims. Take for instance the *Stjerna v. Finland* Judgment of November 25, 1994.<sup>2</sup> The applicant wants to change his surname from Stjerna to Tavaststjerna. He claimed that as an old Swedish name, Stjerna was frequently misspelt and difficult to pronounce in Finland where Swedish-speaking people amounted to only some six per cent of the population and resided mainly in the coastal regions. His mail was delayed as a result of his name being misspelt and the name had given rise to a pejorative nickname: "kirnu" in Finnish, derived from the Swedish word "kärna" ("churn" in English). The newly proposed name was by no means unconnected with the applicants life. His ancestor, Mr Fredrik Stjerna was born in 1764 and had been the illegitimate son of Mr Magnus Fredrik Tavaststjerna. The applicant maintained that his ancestors had used the proposed name and that he and other members of the Stjerna family had always felt it an injustice only to bear half of the original name.

The European Court held that Finland's refusal to permit a change of surname based on the remoteness of the ancestor and the fact that he was born out of wedlock did not violate Articles 8 and 14 of the European Convention on Human Rights, protecting against interference in the right to respect for family life and discrimination, respectively. Public interest is the rationale behind the power of states to limit claims to have names changed: states are in need to identify people, to trace them back to their families, and to register them.<sup>3</sup> The Court also concluded that the inconvenience such restrictions imposed upon the applicant were not great: the sources of inconvenience were no sufficient. Although

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<sup>2</sup> European Court of Human Rights, Case of *Stjerna v. Finland*, Judgment of November 25, 1994, Application number 00018131/91 (all European cases referred to in this paper are available via <http://www.echr.coe.int>)

<sup>3</sup> Para. 39 of the judgement

the applicant's name may have given to a pejorative nickname, this was not a specific feature of his since many names lend themselves to distortion.<sup>4</sup> The latter argument of the Court shows to what degree choice of names is *not* perceived as a liberty choice, contrary to what one would expect in issues relating to personal identity (Harris, 2007). In a full blown liberty perspective the onus of proof (of the inconvenience) should not be on the side of the individual, but on the side of the government arguing that needs to demonstrate that there are compelling interests to impose restrictions to liberty. Although the European Court accepts that that an individual's name pertains to his or her private life, its starting point is that 'national authorities are in principle better placed to assess the level of inconvenience relating to the use of one name rather than another within their national society'.<sup>5</sup> It is up to the individual to adduce sufficient grounds about disproportional inconvenience. Stjerna's argument 'that decisive weight should be given to the fact that he himself resented these sources of inconvenience' was thus rejected.<sup>6</sup> A name that becomes a nickname; a family history where 'natural children' had no right to bear the real fathers name; an attempt to sound less Swedish in a Finnish society, mails that do not arrive, .... We personally feel that here is more at stake than an irresponsible individual changing personality items like changing clothes.

Interestingly for our purpose is Stjerna's argument that public interests considerations not to allow his choice of name were flawed, since not names but 'identity numbers are now used for this purpose'. The Court simply contradicts this argument by holding that "despite the increased use of personal identity numbers in Finland and in other Contracting States, names retain a crucial role in the identification of people".<sup>7</sup>

### ***Risks of abuse and risk of normalisation***

Linking people to identification numbers allows more choice. Of course this sounds a bit like a trade off. Are we really considering technologies of freedom, or should we rather speak about technologies of control (Stol, 2007 with ref. to Garland, 2001)? We saw that technology offers more choice and allows people to reproduce a social reality where informal social control has a harder time getting a grip on their behaviours allowing for more norm deviating behaviour. They can thus search more easily for the limits of the acceptable (Frissen & Van Lieshout, 2003). On the other hand it will be (or it might be) easier in a world of "Internet of things", to identify people, since all possible everyday objects will be part of a network. Continuous monitoring by government authorities (dataveillance) becomes possible. More identification will then allow more formal social control. It is very important to distinguish between what *could* be and what *will* be. Human rights based regimes will most certainly oppose technological developments that might erode the very same values that they stand for. We do therefore not believe that there will be a straightforward government policy towards a culture of control, although some initiatives point that way. One author adds an important subtlety to Orwell's dark scenario. Control strategies, based upon technology, imposed by the government will often fall, since governments need people to collaborate in one way or another before control schemes succeed. They have to bind themselves to technological artefacts, and in fact they are doing so in the world of the Internet of things by using Rfid integrated passports and mobile telephones (Stol, 2007)

However not the identification, but the profiling that follows the identification should attract our concern, especially there is in principle no human intervention in the identification process (Hildebrandt, 2007). Indeed, in the Internet of things privately and publicly owned machines, not humans, gather and exchange data on people's behaviour. The human involvement is even less, since the data controllers behind these machines are not really interested in our selves or even in what we do, they just want to assess their opportunities and risks regarding our future behaviour. What they are interested in is knowledge, not our data. Hildebrandt therefore allies with Solove who judges Orwell's Big Brother scenario to be inadequate for our understanding of real risks posed by surveillance, profiling and data mining. The real scenario we are facing is not that of governmental agents looking at us and listening to us, but rather one as depicted in Kafka's *Trial* where Josef K. gets arrested and entangled in judiciary machinery without logic or due process for an unspecified crime. In this

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<sup>4</sup> Para. 42 of the judgement

<sup>5</sup> Para. 42 of the judgement

<sup>6</sup> Para. 40 of the judgement

<sup>7</sup> Para. 39 of the judgement

scenario human indifference is replaced by the indifference of the machines that collect and store our data, forming a multiplicity of 'dossiers' on our whereabouts, “without accusing us – yet – of anything specific, but capable of providing the evidence for a conviction at some point in time” (Hildebrandt, 2007).

“Being profiles” therefore supplements “being identified” as the real threat to identity posed by the Internet of things. Because profiles on us will be established on us without us knowing how and when and if they will be used, ‘behaving normal’ will eventually become the ultimate practice in the Internet of things. Both governments and private actors will monitor us and assess our behaviour continuously in order to fit us into new idem identities that we cannot control and that we are often not aware of. Hildebrandt rightly notes that the point is not just whether profiles are abused (e.g. unfair discrimination) but “that (1) an abundance of correlatable data and (2) the availability of relatively cheap technologies to construct personalised knowledge out of the data, create new possibilities to manipulate people into behaviour without providing with adequate feedback of how their data have been used. This may lead to major shifts in power relations between individual citizens on the one hand and commercial or governmental organisations on the other. The crucial issue is not abuse, but the fact that we have no effective means to know whether and when profiles are used or abused” (Hildebrandt, 2007). Identity suffers in two ways. Phrased in Berlin’s famous distinction between negative liberty (absence of interference) and positive liberty (the possibility to act), profiling impacts negatively by bringing individual characteristics and preferences to the lights and positively by curtailing one’s autonomy and social development. Persons will be approached, for instance by private actors, with information in a selective way. Differences in approaches will not result from their choice but from consumer profiles established without their consent. Personal identity cannot flourish when ipse identity-building is deprived from the idem identity-input. Persons will abstain from certain atypical social and societal contacts out of fear of being profiled development negatively (Hildebrandt, 2007).<sup>8</sup>

### ***Traditional human rights will protect identity (e.g. Germany)***

Let us go back to our observation that one should never confound between what *could* be and what *will* be. The foregoing is based on possible negative scenarios and we already expressed our view that human rights might very well prevent these things to happen, at least in part.

In particular German constitutional law with its strong ethical footing seems capable of responding to the identity threats we discussed earlier.<sup>9</sup> Already in the *Mikrozensus Urteil* of 1969 the German Constitutional Court held that the inner space of the right of self-determination should not be intruded by the state (27 BVerfGE I, 1). This right was identified by the Court as a tenet of the constitutional rights to human dignity under Article 1 of the Constitution. The case, dealing with a federal law on the population census, was brought before the Court by a person claiming that compulsory disclosure of private information (e.g. on recreational aspects of citizens), even if for statistical purposes, violated this right. Although the Court held that in this concrete case there was no unconstitutional violation of the ‘most intimate realm into which a state may not intrude’, the tone was set. Fourteen years later, in the *Volkszählungsurteil* of 15 December 1983 (BVerfGE 65 E 40) the same Court was asked again to pronounce itself on the German census act. The Court affirmed the existence of a right to self-determination based on the *allgemeines Persönlichkeitsrecht* as protected under Article 2 of the Constitution in conjunction with Article 1 on human dignity. On this basis individuals need “to be protected from unlimited collection, storage, use, and transmission of personal data as a condition of the development of his or her free personality under the modern conditions of data processing”. With a precision that is unmatched even today the Court spelled out in detail the shift of power that occur when state and private actors subject persons to information technology. The Constitutional Court made it clear that even a person’s awareness that his or her movements are being watched could affect his or her freedom to move or act: “*Anyone who is uncertain whether his or her deviating behaviour will always be noted and recorded, used or transmitted in the longer term, will try to not attract attention by such behaviour. Anyone who is concerned, for example, that his participation in a gathering or civil action could be recorded by the government and that this will involve risks for him,*

<sup>8</sup> About the risks generated by the Internet, viz., manipulated identity, borrowed identity, spied identity, and profiled identity, see D. Pousson, 2002.

<sup>9</sup> This paragraph borrows from the Chapter on Germany in Brouwer, 2007.

*may refrain from exercising his constitutional rights. (...). This would not only be detrimental to the possibilities for individual self-development, but also to the public interests, because individual self-determination is a basic condition for the functioning of a democratic society, based on the freedoms of citizens to act and to cooperate”.*

Brouwer (2007) rightly stressed that these and other considerations are still valid today, or even more so, with regard to current developments. The Court also pointed out that “the use of networks, information shared by different authorities, could lead to the situation that individuals have no control on the use and accuracy of their data”. Integrated information systems, compiling data, could produce an overall personality picture (*Persönlichkeitsbild*) without giving individuals the opportunity to check the accuracy or use of this picture. Specific guarantees are needed, including organisation and procedural measures designed to safeguard the individuals from infringements on their right to personality. One of the guarantees identified by the Court, is the prohibition to collect personal information by anticipation (*Verbot der Sammlung personenbezogener Daten auf Vorrat*) if these data are to be used for non-statistical purposes.

If there was ever any doubt about judges not reading Kafka then these passages should take it away completely. This sensibility for human rights issues of modern technology resonates in the *Rasterfahndungsurteil* of 4 April 2006 (1 BvR 518/02) concerning the complaint by a Moroccan student concerning whom (and others) the police had gathered personal information using data profiling. The Constitutional Court decided that this use of data profiling, based on an earlier transmission of 5.2 million data items was a disproportionate breach of the applicant’s constitutional rights. In the judgement, the Constitutional Court explicitly referred to the extended scope of the collection of information by the German authorities, the use of many different information systems and the higher risk for the person concerned of becoming a target of criminal investigation through this use of data profiling. Persons to whom data profiling is applied, the Court held, risk becoming the subject of further administrative control measures. The possibility exists that it will lead to stigmatisation of groups of persons in public life, especially when it concerns, as in the refuted practice of data profiling, persons from specific countries who are also Muslim. The Court concluded that data profiling could only be justified on the basis of a specific threat of an attack which could cause substantial harm and this based on concrete facts. For the Court the general situation in Germany after 9/11 did not give sufficient reasons to justify the refuted practice of data profiling.

***Traditional human rights will protect personal data (the European Convention on Human Rights).***

Brouwer notes correctly that the strong German constitutional history of human rights protection is backed by a tradition, possibly stronger, of massive personal data gathering by authorities (Brouwer, 2007:378). Notwithstanding this important corrective fact, the framework of principles elaborated by the German Constitutional Court is impressive. Unlike other legal regimes, such as the Netherlands and Belgium, the German right to privacy was never considered the starting point for this framework. The right to privacy played an important role with regard to the balancing of interests, but was not seen as an appropriate basis for a general and preventive framework. The Court relied on rights such as human dignity and the general personality right (*allgemeines Persönlichkeitsrecht*) to affirm the existence of the right to informational self-determination. We emphasize that these rights are absent in most other constitutions of the world and in the 1950 European Convention on Human Rights. The right is introduced in Article 1 of the non binding Charter of fundamental rights of the European Union (published in the *Official Journal of the European Communities*, C 364/1, 18 December 2000). The provision is of a general nature (*‘Human dignity is inviolable. It must be respected and protected’*), and although some courts refer to the non binding the 2000 EU Charter, it is difficult to predict whether European constitutionalism will generate principles similar to the German principles discussed *above* regarding new technologies.

Although the European Convention and the case-law of the European Court on Human Rights does not recognise a right to informational self-determination, many data protection aspects are brought under the scope of Article 8 of the Convention (right to privacy) by the Court. In its case-law, the Court recognises the right of individuals to control to a certain extent the use and registration of their personal information (Brouwer, 2007) and has considered claims regarding access to personal files

(*Gaskin v. the United Kingdom*), regarding deletion of personal data from public files (*Leander v. Sweden* and *Segerstedt-Wiberg v. Sweden*), regarding claims of transsexuals to have their 'official sexual data' corrected (*Goodwin*). Moreover, the Court has insisted on the need for an independent supervisory authority as a mechanism for the protection the rule of law and to prevent the abuse of power, especially in the case of secret surveillance systems (*Klass v. Germany*, *Leander v. Sweden* and *Rotaru v. Romania*). In other cases the Court demanded access to an independent mechanism, where specific sensitive data were at stake or where the case concerned a claim to access to such data (*Gaskin and Z. v Finland*). In *Peck*, in *P.G. and J.H.* and in *Perry* the Court acknowledged the basic idea behind the fundamental principle of purpose limitation in data protection, viz. that personal data cannot be used beyond the normally foreseeable use. In *Amann v. Switzerland* the Court demanded that governmental authorities only collect data that is relevant and based on concrete suspicions. In several cases the Court added that information (about persons) belonging in the public domain may fall within the scope of Article 8, once it is systematically stored (*Rotaru v. Romania*, *P.G. and J.H. v. the United Kingdom*, *Segerstedt-Wiberg v. Sweden*). Finally, in the *Rotaru v. Romania* judgement of 4 May 2000 the Court acknowledged the right to individuals to financial redress for damages based on a breach of Article 8 caused by the data processing activities of public authorities.

### ***Traditional human rights will protect identity (the European Convention on Human Rights).***

There is no general personality right or right to identity or to human dignity in the 1950 European Convention on Human Rights. In this state of affairs law courts will turn to privacy. Within the framework of Article 8 (right to privacy), the European Court of Human Rights, has indeed incorporated important aspects of a right to identity. Take for example the *Stjerna v. Finland* Judgment of November 25, 1994 discussed *above*. Citing the case of *Berghartz v. Switzerland*, the Court noted that although the European Convention does not contain any explicit reference to names, an individual's name pertains to his or her private and family life protected by Article 8. This judgement is only the start of a series of judgements that all contribute to the recognition of a right to identity as a tenet of the personal privacy right, next to other more traditional elements of this right such as moral and physical integrity (Tulkens, 2007a). This European identity right protects interests with regard to name, first name, sex, and access to data about ones origins. All these interests contribute or enhance claims to self-developments and personality development. In the *Odièvre v. France* judgement of 13 February 2003 ('accouchement sous X'), the Court states that «birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention' (par. 29).

This judgement will be the start of many others, in which the Court will confront identity issues raised by or linked to enhanced technologies of identification, such as DNA testing. In the *Jäggi v. Switzerland* judgement of 13 July 2006, the applicant complains that he was unable to have a DNA analysis carried out on a deceased person in order to ascertain whether the person was his biological father. The Court held by five votes to two that there had been a violation of Article 8 of the European Convention on Human Rights (right to respect for private life) on account of the fact that it had been impossible for the applicant to obtain a DNA analysis of the mortal remains of his putative biological father. The Court considered that the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases, particularly rigorous scrutiny is called for when weighing up the competing interests (par. 37). Although the applicant, aged 67, has been able to develop his personality even in the absence of certainty as to the identity of his biological father, it must be admitted that an individual's interest in discovering his parentage does not disappear with age, quite the reverse (par. 40). Therefore, the Court noted that the protection of legal certainty alone could not suffice as grounds to deprive the applicant of the right to discover his parentage (par. 43).

A right to identity can also be claimed by the presumed father. In the *Mizzi v. Malta* judgement of 12 January 2006, the Court considered that the fact that the applicant, a well-known businessman, was never allowed to disclaim paternity was not proportionate to the legitimate aims pursued. In 1966, his wife X became pregnant. In March 1967 the applicant and X separated and stopped living together and, on 4 July 1967, X gave birth to a daughter, Y. The applicant was automatically considered to be Y's father under Maltese law and was registered as her natural father Under Maltese law the applicant



had never had the possibility of having the results of his daughter's blood test examined by a tribunal. The Court was not convinced that such a radical restriction of the applicant's right to take legal action was "necessary in a democratic society". It found that the potential interest of Y to enjoy the "social reality" of being the daughter of the applicant could not outweigh the latter's legitimate right of having at least one occasion to reject the paternity of a child who, according to scientific evidence that the applicant alleged to have obtained, was not his own. It followed that a fair balance had not been struck between the general interest of the protection of legal certainty of family relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of the biological evidence. Therefore, the domestic authorities failed to secure to the applicant the respect for his private life, to which he was entitled and there had been a violation of Article 8.<sup>10</sup>

Moving up to the issues of sexual and biological choice, one needs to mention the *Evans v. United Kingdom* judgement of 7 March 2006 concerning the withdrawal of consent of her former partner ('J') to the continued storage of the embryos or use of them by the wife after a separation. The Court saw no violation of Article 8 but it did recognise for the first time an explicit liberty-right to have or to have not children.<sup>11</sup> In the appeal judgement of 10 April 2007 the Grand Chamber confirmed the judgement. The Grand Chamber noted that the Ms. Evans did not complain that she was in any way prevented from becoming a mother in a social, legal, or even physical sense, since there was no rule of domestic law or practice to stop her from adopting a child or even giving birth to a child originally created in vitro from donated gametes. (Her complaint was, more precisely, that U.K. legislation prevented her from using the embryos she and J created together, and thus, given her particular circumstances, from ever having a child to whom she was genetically related).

Central in the reasoning of the Court in *Evans* is its reliance of the notion of personal autonomy first recognized in the 2002 *Pretty v. United Kingdom* judgement. Before the Court the question was put whether the right to private life encapsulated a right to die with assistance for persons paralysed and suffering from a degenerative and incurable illness. Pretty alleged that the refusal of the Director of Public Prosecutions to grant an immunity from prosecution to her husband if he assisted her in committing suicide and the prohibition in domestic law on assisting suicide infringed her rights under Articles 2, 3, 8, 9 and 14 of the Convention. The right was not recognized, but par. 61 of the Judgement contains a very relevant and broad recognition of an identity rights based on the principle of personal autonomy:

"As the Court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (*X. and Y. v. the Netherlands* judgment of 26 March 1985, Series A no. 91, p. 11, § 22). It can sometimes embrace aspects of an individual's physical and social identity (*Mikulic v. Croatia*, no. 53176/99 [Sect. 1], judgment of 7 February 2002, § 53). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see e.g. the *B. v. France* judgment of 25 March 1992, Series A no. 232-C, § 63; the *Burghartz v. Switzerland* judgment of 22 February 1994, Series A no. 280-B, § 24; the *Dudgeon v. the United Kingdom* judgment of 22 October 1991, Series A no. 45, § 41, and the *Laskey, Jaggard and Brown v. the United Kingdom* judgment of 19 February 1997, *Reports* 1997-1, § 36). Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz v. Switzerland*, Commission's report, *op. cit.*, § 47; *Friedl v. Austria*, Series A no. 305-B, Commission's report, § 45). Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees".

We do not think that conceptually all is clear in the case law of the European Court. In *Pretty* autonomy is considered a 'principle' and physical and social identity are issues of which 'aspects' are sometimes protected by the right to private life. In their joint dissenting opinion to *Odièvre v. France* judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää consider autonomy and identity to be 'rights': "We are firmly of the opinion that the *right to an identity*, which is an essential condition of the right to autonomy (see *Pretty v. the United Kingdom*, no. 2346/02, § 61,

<sup>10</sup> Similar stands were taken by the Court in *Paulik v. Slovakia* (10 October 2006) and *Tavlic v. Turqui* (9 November 2006).

<sup>11</sup> "The Court agrees, since "private life", which is a broad term, encompassing, *inter alia*, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world (*Pretty*, § 61), incorporates the right to respect for both the decisions to become and not to become a parent" (par. 57).

ECHR 2002-III) and development (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I), is within the inner core of the right to respect for one's private life" (par. 11 of the Opinion). Hence persons have a right to autonomy and (personal) development, rights that cannot exist without the recognition of a right to identity. Paragraph 29 of the *Odièvre v. France* judgement nicely illustrate our point about the sloppy conceptual analysis that seems to have no other rationale than to show how tightly identity, development and autonomy are connected. In this paragraph identity and development are first presented as two separate rights. Subsequently however the same paragraph seems to suggest that identity is a 'matter of relevance' to development.<sup>12</sup>

With the recognition of rights to autonomy and personal development, it becomes apparently much easier to have sexual identities recognized (Grigolo, 2003). In *Bensaid* the Court holds that "that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8" (par. 47)

Interesting is the case of *K.A. and A.D. v. Belgium* concerning sadomasochistic practices. In its judgement of 17 February 2005 the Court upheld a conviction by the Belgium authorities, not because they engaged in those acts, but because they engaged in it drunk and with great risk for the women involved in it. The case can be read as a standard text on sexual freedom, giving way to classical conservative objections (Fabre-Magnan, 2005). The Court derived the right to engage in sexual relations from the right of autonomy over one's own body. This right forms an integral part of the notion of personal autonomy, which could be construed in the sense of the right to make choices about one's own body. It follows that the criminal law could not in principle be applied in the case of consensual sexual practices, which were a matter of individual free will. Accordingly, there had to be "particularly serious reasons" for an interference by the public authorities in matters of sexuality to be justified for the purposes of Article 8 § 2 of the Convention (par. 84).

In case *Smirnova v. Russia* a complaint was raised about the withholding of an identity card ('internal passport') by the Russian police. Yelena Smirnova's national identity card was taken away from her when she was arrested on 26 August 1995. Domestic law provided that the identity card had to be returned when an individual was released from detention on remand. This did not happen. The card was withheld until 6 October 1999. From December 1997 on several firms refused to employ Smirnova because she did not have an internal passport; she was refused free medical treatment and notarial deeds because of not having her internal passport. For the same reason, the Moscow Telephone Company had refused to install a telephone line in her home. The registration of her marriage was refused and when stopped by a police patrol for an identity check, she had been taken to a police station and had had to pay an administrative fine, because she had been unable to produce the passport. In its judgment of 24 July 2003 the Court underlined the direct relationship between the official duty to identify as a citizen and the right to private life. The Court noted that that the interference with Smirnova's private life was peculiar in that it allegedly flowed not from an instantaneous act, but from a number of everyday inconveniences taken in their entirety (par. 96). The Court found it established that in everyday life Russian citizens often had to prove their identity, even when performing certain mundane tasks. Moreover, the internal passport was required for more crucial needs such as finding employment and obtaining medical care. There had therefore been a continuing interference with Smirnova's private life. Since the Government had not shown that the failure to return it on Smirnova's release had had any basis in law, the Court found a violation of Article 8 of the Convention.

The overall image of this survey of the European case-law is this of a well protected right to identity aspects such as such as gender identification, name and sexual orientation and sexual life. The broad recognition of data protection issues as issues covered by Article 8 equally contributes to the strength

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<sup>12</sup> "The Court reiterates in that connection that "Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. ... The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life" (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I). Matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see *Mikulić v. Croatia*, no. 53176/99, §§ 54 and 64, ECHR 2002-I)" (par. 29 of the *Odièvre v. France* judgement).

of the European human rights machinery. In their already mentioned joint dissenting opinion to *Odièvre v. France* judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää go as far as to consider the right to identity as a core aspect of one's private life: "Thus, certain aspects of the right to private life are peripheral to that right, whereas others form part of its inner core. We are firmly of the opinion that the *right to an identity*, which is an essential condition of the right to autonomy (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III) and development (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I), is within the inner core of the right to respect for one's private life. Accordingly, the fairest scrutiny was called for when weighing up the competing interests" (par. 11 of the Opinion).

### ***Will privacy do?***

In an article published in 2002 Stan Karas discusses modern use of consumer databases and developments towards exhaustive consumer profiles (Karas, 2002). Although there are many theoretical shortcomings in the contemporary privacy discourse, popular understanding of these issues in terms of privacy is correct, Karas holds, since privacy needs to be understood as control over information that is expressive of one's identity. Privacy, protecting information about difference, is the proper rationale behind demands for protection of information concerning our identities, for example our consumer identity.

The foregoing shows that many identity issues can be brought under the scope of the privacy right in the European Convention. At a more global level this approach is not wholly satisfactory, since not all constitutions recognize an explicit right to privacy comparable with Article 8 ECHR. Moreover privacy may not be the ideal partner for those that are in favour of protecting (better) identity. Indeed, privacy and security concerns are often framed in terms of fraud and abuse; privacy is formulated as negative rights, whereas identity has also to do with positive freedom (Hildebrandt, 2007). Of course there is the expanding case law of the European Court of Human Rights concerning the positive obligations under the European Convention (Mowbray, 2004). In the area of Article 8 ECHR these positive obligations require many different forms of action by member states, ranging from the protection of persons from sexual abuse, the official recognition of transsexuals and of choice of names, access to official information, establishing paternity to facilitating the traditional lifestyle of minorities (Mowbray, 2004). Again it is not entirely clear whether all identity aspects are protected by these positive obligations. Equally, there is in general no parallel to this development towards recognition of positive human rights obligations outside Europe.<sup>13</sup>

At a more fundamental level we see a problem resulting from the perception that privacy has a plain political dimension. Privacy is understood by many as a liberal right and is challenged on this basis. Intimately tied to the idea of personal freedom, privacy is a pivotal legal instrument created in Western legal systems for the sake of individuals to challenge actions by others that affect them in an undesirable way. Combined with the idea of the rule of law (as opposed to the idea of the rule of God or the rule of the Family) it feeds the liberal principled stance that the individual is (rather should) be free from environmental pressure while constructing his identity. Although very few liberal thinkers deny actual dependencies of the individual, this principles stand is heavily criticised by communitarian inspired voices stressing the need to understand the building and functioning of the individual within a larger context of cultural and other values that exist at a certain moment in time and at a certain point in time (Etzioni, 1999; Van den Hoven, 2000 & 2001). In this perspective liberalism is criticised because of its inability to understand the dynamics of recognition. Right such as privacy are targeted upon specifically. Like property rights, it is perceived by many as a liberal value, standing in the way of realising the good of the community or the public good.<sup>14</sup> This critical view on privacy explains, for instance, why Amitai Etzioni in *The Limits of Privacy* in almost all the case studies that the book contains, -sex offenders; HIV testing; medical records; ID cards; encrypted communications, etc.-, concludes that privacy ought to yield because upholding it would impact negatively on public health and safety.

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<sup>13</sup> The case for a positive concept of negative freedom is made by many authors. For an overview of literature, see Sen, 1987: 57.

<sup>14</sup> About the individualistic, even egocentric principle underlying the privacy rights: Pousson (2002: 539)

Calling the privacy right in might stand in the way of effective protection of identity. Past experiences regarding the recognition of anonymity might illustrate my point. The proper role of anonymity and its position in Western law is not very clear. Only recently it has been picked up as a research theme. The importance of anonymity has been highlighted in a number of workshops and studies carried out in recent years (De Hert & Gutwirth, 2003). There is a strong tendency in European literature to consider anonymity as an asset of a broader privacy right. However, once anonymity is labelled a privacy issue, then a lot of issues are lost in the discussion, e.g. the freedom of expression-related issues regarding anonymity. Issues are not only lost, but the old bias against privacy is then mobilised to the detriment of the anonymity issues at stake. I foresee a similar faith for the discussion regarding identity.

### ***Other rights might tackle identity issues that are not related to privacy?***

Hence, privacy may not be the strongest perspective on problems regarding identity. Some therefore turn to data protection as a distinct, more effective and neutral perspective on contemporary issues raised by new technology (Van den Hoven, 2000 & 2001).<sup>15</sup> Although there are strong arguments in favour of distinguishing between privacy and data protection (De Hert & Gutwirth, 2005), this does not seem to be the right approach. There is simply too much at stake with identity in contemporary society. Many existing identity issues are not related to privacy and not directly to the internet of things. There is, for instance, an identity issue when homosexuals seek anonymous contact with others fearing that overtly homosexual contacts might be harming their professional prospects. Is this a privacy issue? A liberty issue? A freedom of movement issue? What to think about family names? We see hardly any privacy issue in the debate around the choice of family names, for instance at the moment of marriage.<sup>16</sup> Is there anything more public than a family name? If no, why considering claims for more flexibility to be off-springs of a battle for more privacy? Another identity issue that has broader implications is the issue of sexual identity and choice.<sup>17</sup> The illustrations do not stop here. Consider also the following identity-related issues and debates on:

-Recognition of a right to oblivion ('droit à l'oubli'), a right to have time erase from memory some facts about persons (D. Pousson, 2002: 385). The tension between *le droit à l'oubli* and *le droit à la mémoire* is of course very clear in the Internet of things, where actors are unwilling to delete data after certain periods although data protection principles requires them to preserve data for no longer than is required for the purpose for which data is stored (Warner, 2005). The recognition of such a right would without doubt be a powerful instrument against developments towards a society modelled after Kafka's *Process* where nothing is forgotten. The debate about the existence and scope of a right to oblivion predates the Internet of things. Lemmens insists on the difference between this right (under construction) and the right to privacy (Lemmens, 2002). Most of the time conflicts concern public facts (for instance, persons involved as victims or witnesses in crime) that are not protected by privacy rights.

-Biomedical implants (Warwick, 2002);

-Ethno-screening: governments are increasingly turning (back) to ethnic sorting of people to allocate help and benefits, but also to affect them negatively (use of profiles in police work) (Prins, 2006; D. Pousson, 2002). Companies are discovering ethnical marketing (Prins, 2006).

-Enhanced testing of newborns and ethno-screening with the purpose of avoiding health-risks (Krimsky & Shorett, 2005; Prins, 2007). Medical ethno-screening and use of health profiles triggers the debate about the right to know and not to know. Undoubtedly the availability of knowledge concerning future health problems and life expectations will influence our perception of our identity. Crucial with regard to this is the potential interest in this type of information for immediate third persons (e.g. family members of an individual) and distant third persons (e.g. governments, insurance companies, etc.) (Prins, 2007).

-Conception outside the body (Krimsky & Shorett, 2005) and about giving birth anonymously (Wenner, 2002; Achille, 2002; Michaux, 2005);

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<sup>15</sup> See on the issue of anonymity and data protection, D. Pousson, 2002: 385-394.

<sup>16</sup> See on the differences in legal regimes of the European Member States, Pousson-Petit (2002: 762 and following); Lemouland (2002)

<sup>17</sup> About the conceptual mutations with regard to gender, female and masculine sexual identity, and hetero and homosexual identity, Pousson-Petit, 2002 and some concern about ultra subjectivist and individualist claims. See equally J.-J., Lemouland (2002: 669)

- Human enhancement, for instance towards extreme life prolongation (Krimsky & Shorett, 2005).<sup>18</sup>
- Dual nationality (Kuitenbrouwer, 2004; Pennarun, 2002: 520 and following).
- Right to cultural identity (*below*).

What strikes us when overseeing these issues is the complexity of the balancing that they demand. One simple balancing act will seldom do and the outcome of the balancing act will change over time.<sup>19</sup> Some of these issues arise from individuals claiming more freedom to make their own life choices. Apparently these claims meet with a growing success. In a seemingly ever expanding manner legal instruments are recognised that allow individual to influence aspects of their identity: break the chains of filiations, modifying names, drop nationalities and transform sex (Pousson, 2002:529). These claims are not wholly unproblematic. Some therefore insist on the need for careful consideration when balancing and the need to understand the danger of destabilising legally identity (civil identity) (Christians, 2002: 67-69) or identity in general. Quite often reference is made to Charles Taylor's treatment of the struggle for recognition in Chapter 5 of *The Malaise of Modernity*. We already touched upon bits of Taylor's analysis *above*. In *The Malaise of Modernity* Taylor holds that total subjectivism, doing away with criteria of difference, renders impossible the construction of personal identity. Being able to recognize differences and self-choice, requires a shared horizon of meaning and values. It is through social confrontation and legal confrontation that the elements of what constitutes criteria for identity become discernable (Taylor, 91).

Not all identity issues can be brought back to the position of the modern individual claiming more personal choice. In these other areas the balancing problems remain as delicate. Take for instance the issue of recognition of cultural identities and minoritarian identities ('identités minoritaires') in international human rights law (Otis, 2002). The recognition of rights for indigenous people might be an important instrument to safeguard cultural diversity of mankind. The protection of cultural identity has been included in several instruments such as Article 30 of the 1990 International Convention on the Rights of the Children and Article 25 and 27 of the International Convention on Civil and Political Rights.<sup>20</sup> However beneficial these provisions might be for the benefit of our idem identity, the question whether a separate right to cultural identity needs to be adopted remains highly controversial. Some convincingly argue that such a development towards a separate right to cultural identity is neither desirable nor necessary. It is not desirable because translating the vague and general concept of cultural identity into a right would risk abuse or suppression of individual rights and freedoms within a cultural context (Donders, 2002). It is also not necessary because existing cultural rights in the broad sense already offer possibilities to protect cultural identity (Donders, 2002).

Consider also the issue of double nationality. Governments do not like it for all sort of "sorting" reasons but quite often the people that have it take great pride in it. The old legal framework is therefore the object of debate. The Council of Europe's "Convention on the Reduction of Cases of Multiple Nationality" (Council of Europe 1963) is part of the body of international law whose purpose is to minimize conflicts of laws among states arising from differing nationality laws. In consideration of increasing numbers of permanent resident aliens and increasing numbers of mixed marriages, a new protocol has been adopted that gives parties to the convention the option to permit dual nationality in certain cases (Council of Europe 1993). Several European states have ended their prohibition of dual nationality for those who naturalize and the advocacy of allowing dual nationality in other European states is not expected to stop, since dual nationality, however cumbersome for states, offers many advantages for the individual, not in the least on the affective side (H.U. Jessurun d'Oliveira, 2004; Donner, 2004; Martin & Hailbronner, 2003; Koslowski, 1995).<sup>21</sup>

<sup>18</sup> See on issues of successive selves, successive different persons inhabiting the same body Harris, 2007

<sup>19</sup> In the nineties dual nationality was seen as a positive instrument for integration by the Dutch government, whereas today it is seen as an obstacle for integration (Jessurun d'Oliveira, 2004).

<sup>20</sup> Article 27 of the International Covenant on Civil and Political Rights provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

<sup>21</sup> Belgium is planning to withdraw from the Council of Europe's 1963 Convention, at least from Chapter I of the Convention, in order to allow dual nationality for those Belgians that acquire another nationality on a voluntary basis. See already Article 386, 1° and 2° of the Law containing miscellaneous provisions published in the *Moniteur Belge*, 28 September 2006

I join Corien Prins when she states that we witness many new developments that can have an impact on our understanding of identity and call for new balancing of interests (Prins, 2007). One can try, Prins writes, to link this balancing to established rights and concepts such as privacy, liberty, autonomy and discrimination, but ‘my feeling is that we just do not get there’, unless we recognise a explicit right to identity as an aspect of the human dignity right in the EU Charter on Fundamental Rights (Prins, 2007).

### ***Characteristics of the right to identity under construction***

When considering the elaboration of a new right to identity several considerations have to be taken into account. Such a right should be distinguished clearly from the classical or first generation (shielding) human rights, such as privacy. Upholding identity is not only an issue of shielding persons against intrusions by governments and other actors, but also an issue of making identity formation possible. A formulation of an identity right as a first generation human right would not pay enough respect to the positive nature of the relationship between ipse and idem identity. Above we observed that identity needs to be understood in dynamic terms, necessitating a mix of negative and positive freedom to reconstruct one's identity in the course of time (Hildebrandt, 2007). This double tension of personal identity, (*mêmeté-ipseité*) should therefore not be ignored, as is the case in much legal literature (Christians, 2002:66). Mordini and Ottolini rightly stress the positive aspects of ‘official’ or civil identity (parts of idem identity) by referring to a UNICEF study (2000) calculating that 50 million babies (41% of births worldwide) were not registered and thus without any identity document. They equally single out that countries such as Pakistan, Bangladesh and Nepal have not yet made mandatory child registration at birth (Mordini & Ottolini, 2007 with ref.).<sup>22</sup> Of course specific human rights are already in place coping with this problem,<sup>23</sup> but the point we are making is of a more general nature and does not only consider children. Civil identity is essential to both for the ensure respect for fundamental rights. Human rights are unthinkable without “identifiable people”. “One can be entitled with rights only if he has an identity. No political, civil and social right can be enforced on anonymous crowds. Even the right to anonymity can be enforced only if one has an identity to hide” (Mordini & Ottolini, 2007:52).

We agree with Mordini and Ottolini about the importance of civil identity, but we like to broaden up the argument to cover the entire idea of idem identity of which civil identity is only a part. With Taylor, Nys and others (*above*) we have argued that one needs the outside world to build up his or her personality. The self is in need of the objectification that stems from comparative categorisation. For a person to have a meaningful life he should engage in projects that he autonomously endorses, but which are objectively valuable. Hence, the legal recognition of identity as a right should encompass both ipse and idem identity, negative and positive freedom and concepts of rights, individual and social components.

Can and should such a separate right be further developed within the framework of international human rights law? Undoubtedly such recognition would be consistent with the human rights perspective defended by Amartya Sen and Martha Nussbaum in their mutual and respective work. People cannot function without an identity. To have an identity is like living, breathing, having a healthy life, to be able to feel and think. These capabilities are minimal requirements for social justice and human rights (Sen, 1987; Nussbaum, 2001 & 2007). The recognition of identity as a human capability that deserves our concern seemingly paves the way for a straightforward recognition of identity as a right protected by international human rights law.

Legally speaking, and at a more technical level, it is possible to conceive such a right as an asset of the right to human dignity recognized in Article 1 of the 2000 EU Charter on Fundamental Rights (Prins,

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<sup>22</sup> See on children without name or official identity, Mirabail (2002), Paruta & Pousson (2002), Abomo (2002), Laroche-Gisserot (2002)

<sup>23</sup> The right to have a nationality for a child, from his birth, is enshrined in several international human rights instruments (Pennarun, 2002: 512 and following), such as article 24 of the International Convention on Civil and Political Rights, article 7 and 8 of the 1990 International Convention on the Rights of the Children, article 15 of the Universal Declaration of the Rights of Man and article 4 of the 1997 European Convention on Nationality. These instruments recognize both a right not to be deprived of the nationality and a right not to be deprived of the right to change your nationality (See for a treatment of both rights Pennarun, 2002: 512-518).

2007).<sup>24</sup> A second option is to use as a model Article 8(1) of the 1990 United Nations Convention on the Rights of the Child: *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.* This unique provision is not present in any other international (or regional) human rights treaty. The Convention does not define identity and limits itself to a non-exhaustive list of elements of the child's identity. But these listed elements are already protected by other articles of the Convention. More generally, one can say that protection for elements such as name and family is already provided for by many provisions of international human rights law (Doek, 2006:11). The right to be registered immediately after birth is contained in Article 7 and 24 of the Convention. One can also refer to Article 16 of the Convention concerning the right of everyone to recognition as a person before law. Hence, rises the question what the other elements of a child's identity could be?<sup>25</sup> Doek suggests that one needs to think about the right to be informed about biological origins (Doek, 2006:11-13). One can however challenge the necessity to resolve this issue through the recognition of a general right to identity. Is this the appropriate way to achieve the subtle balancing that is needed in each specific issue regarding identity? Above we discussed briefly the need to recognize a specific right to cultural identity and the view of some that a development towards a separate right to cultural identity is neither necessary (existing cultural rights already offer possibilities to protect cultural identity) nor desirable because translating a vague and general concept into a right would risk abuse or suppression of individual rights and freedoms within a cultural context. The same observation can be made about a general right to identity to develop within the current international human rights framework. Where will such a right bring us?

The recognition of a legal right to identity might have undesirable consequences in an era full of clamour for recognition and respect of collective identities such as race, ethnicity, nationality, religion, gender and sexuality. Contemporary anthropology challenges the concept of a "normal" identity in opposition to dissociated, complex identity, which has been - and often still is - seen as something pathological. People are not only different to one another, but they are also different within themselves. They are the object of incessant variations. They have dissociated identities build upon internal contradictions and opposing forces. The person exists but is not unified and it would therefore be very problematic to encapsulate him or her in fixed screenplays that do not take into account this fluid and complex dialectic (Boumard, Lapassade & Lobrot, 2006).

The creation of a new specific right to identity might strengthen sensibilities that are already overstretched in many regards (Balibar & Wallerstein, 1991). Take for instance Huntington's famous clash of civilisation perspective. Although far from entirely wrong,<sup>26</sup> it focuses our attention on the retreat in many parts of the world into cultural stereotypes, identity politics and politicised religion and seemingly obstructs our understanding of other, probably more fundamental, dynamics such as economic globalisation and the Internet that open up new channels of connectedness beyond these, more primitive communities to which people retreat in times of trouble or crisis (Fukuyama, 2007).<sup>27</sup> Equally there is the argument for personal freedom. Without rejecting the value of collective identities, there should not be a mistake about their potential to constrain individual freedom, and the ability to make an individual life, and to what extent do they enable our individuality (Appiah, 1994 & 2005; Gutwirth, 2005). A limit is trespassed, Appiah observes, when I am asked, as a black homosexual

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<sup>24</sup> See on the dignity of personal identity as one out four major meanings of dignity, the research project 'Dignity and Older Europeans' coordinated by Win Tad (Department of Geriatric Medicine, Cardiff University, Cardiff, UK) discussed in Van Steendam, 2006:773.

<sup>25</sup> A second question pertains to the limiting qualification 'as recognized by law' in Article 8(1). It is not fully clear whether this clause should be linked to 'identity' or (only) to family relations'. In the former case this would exclude important psychological or ipse identity elements that are nevertheless worthy of protection.

<sup>26</sup> In his book *The Clash of Civilisation*. Huntington claims that after the Cold War politics are dominated by conflicts between civilizations and cultures. These powers will trump the integrating forces of globalization and make people define their loyalties no longer on ideological grounds but on ties of religion, ethnicity and shared history. Politicised religion everywhere in the world and American neo-conservatism are indicative for many that that Huntington's clash of civilizations hypothesis has been proven right by events. The broad rise in religious energies and identity, particularly notable in the Muslim world, affects most legal systems. Marokan law on naming and nationality does not allow 'non-Marocan' first names and refuses to grant nationality to people with such names. This limits considerably the choice of names for mixed Belgium couples: if they want to have their children to enjoy the benefits of dual nationality (Marrocan and Belgian), they will have to register their children with Marrocan namens in Belgium (Van Den Broeck, 2007). The identity consequences are evident.

<sup>27</sup> Compare Wendy Hamblet's position on the U.S. invasion of Iraq: "Rather, the rhetoric of "clashes of civilizations" and conflicting "identity politics" may offer a convenient smokescreen to mask the stark fact of the continuing capitalist plunder of the world" (Hamblet, 2005). See on Huntington's clash of civilisation perspective as a dangerous self-fulfilling prophecy, Balibar, 2006.

living in the States, to organise my life around race or sexual preferences. Between politics of recognition and politics of coercion there is no clear bifurcation (Appiah, 1994: 160). Amy Gutmann recognises these risks but her approach is more nuanced since identity groups aid as well as impede democratic justice and the freedom of their members. Identity groups are not good or bad in themselves, but should be evaluated according to what they publicly pursue and express, granted that they might never be elevated above basic individual rights and that their group identity is neither comprehensive nor immune from identification (Gutmann, 2003).

Whenever the recognition of a general right to identity in law would contribute to such a perspective and heighten the tensions between personal and collective identities, such as those shaped by religion, gender, ethnicity, race, and sexuality, there is reason to oppose it. It would then bring us far away from the ideas behind Nussbaum's capability approach. Identity is a human capability. It is about what people can do and can be. It is a liberty asset in the sense that it allows people to be capable of. What needs to be guaranteed is that people are capable to function as humans. There is no necessity to guarantee that people function in a certain way. If that is a consequence of the recognition in law of a right to identity, I would suggest not pursuing this path and to look for other instruments to protect the human person in the Internet of things.

However there is no reason to that far. Authors like Gutmann and Ingram have convincingly argued that identity politics are an unavoidable feature of liberal democracy. In democratic politics, identity groups are particularly important because the numbers count and stigmatised or negatively stereotyped individuals acting alone are relatively powerless to effect change (Gutmann, 2003). But identity politics are more than just a question of strategy; it is a tenet of modern life. Our humanity, Ingram notes, has become lost in the jungle of identity politics and each of us is positioned with respect to numerous points of view reflecting numerous group and individual identifications (Ingram, 2004). Free people have multiple and alterable identities, and except under conditions of tyranny, (most) group identities are best conceived as multiple and fluid, since they do not comprehensively determine the identities of individuals (Gutmann, 2003).

In the light of the foregoing several options exist with regard to a specific right to identity. One can recognize it at the level of ethics, for instance by recognizing it in the Unesco's *Code of Ethics for the Information Society* that is now preparatory phase.<sup>28</sup> More specific, unambiguous legal rights could be added on top of that when it turns out that existing rights such as privacy are insufficient. Concrete proposals for such rights in the area of the Internet of things are discussed by Pouillet and Dinant (2006), whereas proposals regarding genetic developments are nicely presented under the banner of a 'Genetic Bill of Rights' by Krinsky and Shorett (2005).

Another option is to go one step further and draft a specific legal right to identity with a general stretch. We have attempted to draft one *above* (our opening quote) and we pray that the inclusion of both *ipse* and *idem* identity may serve as constant reminder of the complexity of identity.

### **European Judgements**

European Court of Human Rights, *Klass v. Germany*, Application no. 5029/71, Judgement of 6 September 1978

European Court of Human Rights, *Leander v. Sweden*, Application no. 9248/81, Judgement of 26 March 1987

European Court of Human Rights, *Z. v Finland*, Application no. 22009/93, Judgement of 25 February 1997

European Court of Human Rights, *Pretty v. United Kingdom*, Application no. 2346/02, Judgment of 29 April 2002

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<sup>28</sup> See [www.unesco.org/webworld/fr/ethics-humanrights-informationssociety](http://portal.unesco.org/ci/en/files/24935/11841676611Code_of_Ethics.pdf/Code+of+Ethics.pdf).  
[http://portal.unesco.org/ci/en/files/24935/11841676611Code\\_of\\_Ethics.pdf/Code+of+Ethics.pdf](http://portal.unesco.org/ci/en/files/24935/11841676611Code_of_Ethics.pdf/Code+of+Ethics.pdf)

See also:



European Court of Human Rights, *Bensaid v. the United Kingdom*, Application no. 44599/98, Judgement of 6 February 2001

European Court of Human Rights, *Evans v. the United Kingdom*, Application no. 6339/05, Judgment of 7 March 2006

European Court of Human Rights (Grand Chamber), *Evans v. the United Kingdom*, Application no. 6339/05, Judgment of 10 April 2007

European Court of Human Rights, *K.A. & A.D. v. Belgium*, Applications nos. 42758/98 and 45558/99, Judgement of 17 February 2005

European Court of Human Rights, *Smirnova v. Russia*, Applications nos. 46133/99 and 48183/99, Judgement of 24 July 2003

European Court of Human Rights, *Odièvre v. France*, Application no. 42326/98, Judgment of 13 February 2003

European Court of Human Rights, *Rotaru v. Romania*, Application no. 28341/95 judgement of 4 May 2000.

European Court of Human Rights, *Gaskin v. the United Kingdom*, Application no. 10454/83, Judgement of 7 July 1989

European Court of Human Rights, *Segerstedt-Wiberg and others v. Sweden*, Application no. 62332/00, Judgement of 6 June 2006.

European Court of Human Rights, *Perry v. the United Kingdom*, Application no. 63737/00, Judgement of 17 July 2003

European Court of Human Rights, *Christine Goodwin v. the United Kingdom*, Application no. 28957/95, Judgement of 11 July 2002

European Court of Human Rights, *Peck v. the United Kingdom*, Application no. 44647/98, Judgement of 28 January 2003.

European Court of Human Rights, *P.G. and J.H. v. the United Kingdom*, Application no. 44787/98, Judgement of 25 September 2001.

European Court of Human Rights, *Amann v. Switzerland*, Application no. 27798/95, Judgement of 16 February 2000.

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