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FUNDAMENTAL RIGHTS AND DISRUPTIVE TECHNOLOGIES: A RIGHT TO PERSONAL IDENTITY UNDER THE EUROPEAN MULTI-LEVEL SYSTEM OF PROTECTION?

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1. Introduction

This article aims to explore the need, emerged in particular in the last few years, to protect the right to individuals' personal identity in the European legal order.[1] This need emerges from the diffusion of technologies that represent, for human development, both an invaluable opportunity and a cause of deep concern. This is the case for blockchain technology, defined correctly as a 'disruptive technology', capable of changing the lives

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[1] On the concept of personal identity, cf. G. PINO, *The Harmonization of Private Law in Europe*, in M. VAN HOECKEand F. OST (eds.), Oxford, 2000, pp. 225-237; G. PINO, *Il diritto all'identità personale. Interpretazione costituzionale e creatività giurisprudenziale*, Bologna, 2003.

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of individuals in a way similar to the one of the World-Wide-Web.[2] Via blockchain technology, it is possible to collect, manage, and store – with a high degree of safety and security – an enormous amount of personal data.[3] The purpose of this paper is not to question the suitability of the blockchain infrastructure to contribute to the processing of personal data in a completely safe way. Rather, to be prepared for a scenario where something goes wrong, and the amount of processed data via this disruptive technology is used for different purposes. In this case, what is at stake is not simply a considerable amount of information about one or more individuals, but also their personal identity. Thanks to the ability to process data via this technology, it is possible to bring together information about religious belief, political orientation, and sexual orientation to an unimaginable scale until very recently.[4] To a lesser extent, there is also the issue posed by the circulation of the data collected via this technology and, in particular, in the circumstances in which the data collected are used or disseminated for a purpose different from the one that was originally foreseen.[5] National legal orders can resort to their constitutional charters as the ultimate source of rights and duties for individuals in their relative ambit of application. The scope of this paper is to review if the two main actors in the international and supranational regional system of protection of fundamental rights are sufficiently well equipped to protect the right to European citizens' personal identity. Hence, the final section of this article will analyse why the need to protect personal identity in a multi-level system of protection of fundamental rights would perhaps be enhanced by more inter-operability between the EU and the ECHR legal systems. The 70th anniversary of the signature of the Convention and of the Schuman declaration is – in this way – an occasion for re-opening the debate.

2. Disruptive Technologies and the Emersion of the Need to Protect Personal Identity

Blockchain is currently used to identify individuals, allowing their recognition in a way that is considerably more secure than ordinary data collection methods.[6] It is equally used to collect, store, and manage data, independently from identity management *per se*. These data can be used similarly by national authorities to identify

[2] E.g. see M. FINCK, *Blockchains: Regulating the Unknown*, in *German Law Journal*, 2018, n. 4, pp. 665-692; ID., *Blockchain Regulation and Governance in the European Union*, Cambridge, 2018.
[3] M. FINCK, *Blockchains and Data Protection in the European Union*, in *European Data Protection Law Review*, 2018, n. 1, pp. 17-35.
[4] E.g. the example of healthcare data. B. SHEN, J. GUO and Y. YANG, *MedChain: Efficient Healthcare Data Sharing via Blockchain* in Applicated Sciences 2019, n. 6, p. 1207.
[5] M. FINCK, *Blockchain and the General Data Protection Regulation*, *Study for the European Parliament Research Service*, 2019, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634445/EPRS_STU(2019)634445_EN.pdf.
[6] T. LYONS, L. COURCELAS, K. TIMSIT, *Blockchain and Digital Identity*, *European Union Blockchain Observatory & Forum,* 2018, available at https://www.eublockchainforum.eu/sites/default/files/report_identity_v0.9.4.pdf.

a specific person, a group, or a class of persons.[7] The blockchain infrastructure is, as the name suggests, a chain of numerical blocks that are connected via an algorithm that, through increasingly complicated mathematical problems, allows the nodes (smartphones, personal computers, servers, portable devices) to add further data to the chain. It is thus essentially 'a distributed database that is stored on various nodes (the computers that store a copy of the database) and maintained by a consensus algorithm.'[8] In this way, a blockchain is a virtually tamper-proof and cannot in itself be violated by individuals.[9] This is a common argument that is raised while discussing the possibility to regulate blockchain, up to the point that blockchain is defined as a 'legal' system in itself.[10] The purpose of this paper is not to regulate blockchain in itself, as it is an issue that requires technical knowledge and expertise that goes beyond the ability of public and private lawyers. It is rather to assess the presence of legal guarantees for individuals concerning the consequences, in terms of misuses, of blockchain technology. It is also important to underline that blockchain is, at the same time, a technology for data storage, but can also be used as a programmable platform that enables new applications such as smart contracts.[11] In this work, however, we will mainly discuss a primary legal implication – the one on the right to personal identity – of the role of blockchain and distributed ledger technologies for data storage (and, in particular, for the storage of data that contributes to the identification of the person). The management of data via blockchain technology makes possible the use of the data concerning a specific person for the identification of his or her personal identity.

In order to contextualise the protection that can be offered to personal identity in Europe, it is important to set the stage.

The right to personal identity is a fundamental right.[12] Fundamental rights are, in Europe, protected through a system that is named after the interaction between different levels, the 'multilevel system of protection of fundamental rights.'[13] The levels

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[7] A. THIRD, K. QUICK, M. BACHLER, J. DOMINGUE, *Government services and digital identity,* EU Blockchain Observatory and Forum Research Paper, 2019, availableathttps://www.eublockchainforum.eu/knowledge?page=1.

[8] P. YPMA, M. FINCK, P. FOLEY, R. LYNN JOHNSON et al., *Study on Blockchains Legal, governance and interoperability aspects,* European Commission, 2020, p. 28.

[9] *Ibid.*, p. 29.

[10] P. DE FILIPPI, *Blockchain and the Law: the Rule of Code*, Harvard, 2018.

[11] P. YPMA et al. (above n. 8), p. 29.

[12] R. ALEXY, *A Theory of Constitutional Rights*, Oxford, 2010.

[13] G. RAIMONDI, *Spazio di libertà, sicurezza e giustizia e tutela multilevel dei diritti fondamentali*, in A. DI STASI, L. S. ROSSI (a cura di), *Lo Spazio di libertà, sicurezza e giustizia a vent'anni dal Consiglio europeo di Tampere*, Napoli, 2020, pp. 27-39; M.C. CARTA, *I "livelli" di tutela dei diritti fondamentali nello Spazio giuridico europeo: i limiti del "dialogo" tra Corti*, in *Studi sull'integrazione europea*, 2019, p. 161 ff.; C. AMALFITANO, *General Principles of EU Law and the Protection of Fundamental Rights*, Cheltenham, 2018; E. MALFATTI, *I "livelli" di tutela dei diritti fondamentali nella dimensione europea*, Torino, 2018, p. 6 ff.; S. MORANO-FOADI, L.VICKERS (eds.), *Fundamental Rights in the EU - A Matter for TwoCourts,* Oxford, 2015; S. MORANO-FOADI, S. ANDREADAKIS, *Protection of Fundamental Rights in Europe*, Cham, 2015; F. FABBRINI, *Fundamental Rights in Europe*, Oxford, 2014; F. FERRARO, *Lo Spazio giuridico europeo tra sovranità e diritti fondamentali. Democrazia, valori e rule of law nell'Unione al tempo della crisi*, Napoli, 2014, p. 188 ff.; B. NASCIMBENE, *La centralità della persona e la tutela dei suoi diritti*, in *Studi sull'integrazione europea*, 2013, n. 1, p. 9 ff.; G. STROZZI, *Il sistema integrato di*

interacting in this system are the national constitutions, the supranational, and the international level. For this work, we will focus on the supranational and international level, and in particular on the protection granted to the right of personal identity by the European Convention of Human Rights and by the European Union. This year marks the 70th anniversary of two events that, in different ways, changed the history of the two systems. The 70th anniversary of the opening of the signature of the European Convention of Human Rights (ECHR)[14] and the 70th anniversary of the Schuman Declaration.[15] This gives us the occasion to reflect on the relevance of the two systems and on their ability to represent, 70 years after two events that contributed to their foundation, a bastion of protection of fundamental rights.

3. The Right to Personal Identity in the European Convention of Human Rights

The importance and authority of the two Courts justify the need to carry an analysis of the case law of the ECtHR (here) and of the ECJ (in the following section). The two jurisdictions have an influence in the European multi-level framework of protection of fundamental rights,[16] to the point that their authoritative interpretation can change the direction of the transition towards a digital society.[17]

As pointed out by O'Leary, with reference to surrogacy and freedom of religion, the protection of the right to personal identity in the two legal orders can be described with the approach of the judicial story-telling.[18] This being mindful that, in light of the complexity of the issue at hand, there are cases in which the protection of fundamental rights ensured in this system of legal integration, rather than converge, might tend to diverge.[19]

The right to personal identity is not expressly protected under the European Convention of Human Rights. It is, however, protected under the umbrella of Article 8 ECHR, the 'Right to respect for private and family life, home and correspondence.'[20]

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tutela dei diritti fondamentali dopo Lisbona: attualità e prospettive, in *Il Diritto dell'Unione Europea*, 2011, n. 4, p. 837 ff.; L.S. Rossi, *How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon*, in *Yearbook of European Law*, 2008, n. 1, pp. 65-87.

[14] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome, 4 November 1950.

[15] Schuman Declaration, 9 May 1950.

[16] See, e.g. S. O'Leary, *A Tale of Two Cities: Fundamental Rights Protection in Strasbourg and Luxembourg* in *Cambridge Yearbook of European Legal Studies*, 2018, pp. 3-31.

[17] For the concept of 'digital society' see European Commission, *Creating a Digital Society*, available at https://ec.europa.eu/digital-single-market/en/policies/creating-digital-society.

[18] *Ibid.,* p. 7.

[19] *Ibid.,* p. 14 ff.

[20] On Article 8, see in Z. Zencovich, *Articolo 8 - Diritto alla vita privata e familiare*, in S. Bartole, P. De Sena, V. Zagrebelsky (a cura di), *Commentario breve alla Convenzione europea dei diritti dell'uomo*, Padova, 2012, p. 297-370; Y. Al Tamimi, *Human Rights and the Excess of Identity: A Legal and Theoretical Inquiry into the Notion of Identity in Strasbourg Case Law,* in *Social & Legal Studies,* 2018, n. 3, pp. 283-298; T. Aplin, J. Bosland, *The Uncertain Landscape of Article 8 of the ECHR: The Protection of Reputation as a Fundamental Human Right?*, in A.T. Kenyon, *Comparative Defamation*

The possibility to interpret the Convention beyond its literal meaning is due to its nature of the living instrument,[21] that marks the difference with other instruments of protection of fundamental rights, as the Charter of Fundamental Rights of the EU.[22] It must be pointed out that this case law goes a long way towards the connection between the right of personal identity and disruptive technologies like blockchain. Nonetheless, it is important to understand if and to which extent concepts that were valid in an era where the technological impact on our daily life was significant are still of relevance today.

The case law on sexual identity has been widely used, by the European Court of Human Rights (ECtHR), to recognise that gender is an important part of the person's identity, and thus sex and gender are not equivalent.[23] The case law on religious freedom and religious identity was also used to protect equally the freedom of religion and the freedom from religion.[24] There are more dimensions and angles to the concept of personal identity that deal, for instance, with political beliefs, ethnicity, or culture that contribute to the formation of one's self, which have not been analysed in depth yet. In this context, personal identity remains a fundamental concept for the legal order of the Convention, and the ECtHR itself contributed extensively to its affirmation beyond the boundaries of the national constitutions of the parties of the Convention.[25]

The case law of the ECtHR on personal identity reflects the socio-legal tradition according to which the identity of the person is connected to its own self-determination and realisation, and has a broader meaning than the protection of privacy. These two different concepts, although with a certain degree of simplification, usually reflects the European continental approach *vis-à-vis* the US approach to the protection of private life. If, in the European legal orders, the protection of private life also encompasses the concept of personal autonomy (intended as the possibility to freely develop one's self), the approach is primarily negative in the US, and the State is intended primarily as a limit against the intrusion from the outside.[26]

This approach is well summarised in the case law of the ECtHR on Article 8 ECHR. Already in *X and Y v. the Netherlands* the ECtHR held that 'a matter of "private life"' is 'a concept that covers the physical and moral integrity of the person, including his or

and Privacy Law, Cambridge, 2016, p. 6. A Working Paper version is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2674113.

[21] European Court of Human Rights, judgment of 30 April 2009, application no. 3444/04, *Glor v. Switzerland*, para. 75.

[22] Recently, there have been attempts to upheld an interpretation of the Charter as a living instrument. It continues, however, to live within the rigid limits of the competences conferred by the EU to the EU Member States. See M. O'FLAHERTY, *The EU Charter of Fundamental Rights – a living instrument at the national level?*, in *Keynote Speech of 10 November 2019, Joint FRA, European Commission and Finnish Presidency of the Council of the EU,* available at https://fra.europa.eu/en/speech/2019/eu-charter-fundamental-rights-living-instrument-national-level.

[23] E.g. see sub-section e) *infra*.

[24] E.g. see sub-section c) *infra*.

[25] J. MARSHALL, *Human Rights Law and Personal Identity*, London, 2014, p. 36.

[26] *Id.,* p. 45.

her sexual life.'[27] The Court restated, in *Mikulić v. Croatia*, that the concept equally covers 'a person's physical and psychological integrity and can sometimes embrace aspects of an individual's physical and social identity.'[28] Other essential components of personal identity, as gender identification, name and sexual orientation and sexual life have been found by the ECtHR to fall within the personal sphere protected by Article 8.[29]

In *Pretty v. UK* the ECtHR explicitly recognised that Article 8 ECHR goes beyond the avoidance of external intrusion in own life, and embraces as well the possibility to develop the identity of the person.[30] The Court of Strasbourg, in particular, points to the fact that the notion of 'private life' in Article 8 ECHR 'is a broad term not susceptible to exhaustive definition.'[31] This is a very important consideration, as it opens to the recognition and protection of other different components of personal identity in the European multi-level legal system. In particular, in *Pretty v. UK* the Court considered that the notion of personal autonomy is an important principle underlying the interpretation of Article 8, and that personal identity cannot be understood separately from personal autonomy.[32] The ECtHR, in a seminal judgment on sexual identity, *Goodwin v. UK*, also stressed that 'serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity'.[33] The Court thus expressed that the parties of the Convention should not impair the possibility of sexual reassignment as it represents an interference with Article 8: "Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings."[34]

The application of Article 8 of the Convention is also invoked when there is an interference with the personal data of the individuals. Personal data are defined as the data that allows the disclosure of the individual's personal identity, and they are thus of special importance for this work. They allow the recognition of characteristics as the religious, political, philosophical convictions, gender or sexual orientation. The ECtHR, in cases like that, afforded similar protection against the public authority as well as

[27] European Court of Human Rights, judgment of 26 March 1985, application no. 8978/80, *X and Y v. the Netherlands,* para. 22.
[28] European Court of Human Rights, judgment of 7 February 2002, application no. 53176/99, *Mikulić v. Croatia*, para. 53.
[29] E.g. European Court of Human Rights, judgment of 22 October 1981, application no. 7525/76, *Dudgeon v. the United Kingdom*, para. 41; judgment of 25 March 1992, application no. 13343/87, *B. v. France*, para. 63; judgment of 22 February 1994, application no. 16213/90, *Burghartz v. Switzerland*, para. 24.
[30] European Court of Human Rights, judgment of 29 April 2002, application no. 2346/02, *Pretty v. United Kingdom*.
[31] *Pretty v. United Kingdom*, cit., para. 61.
[32] *Ibid*. para. 61.
[33] European Court of Human Rights, judgment of 11 July 2002, application no. 28957/95, *Christine Goodwin v. the United Kingdom*, para. 77.
[34] *Christine Goodwin v. the United Kingdom*, cit., para. 91.

against other private individuals. Thus, the ECtHR – in a judgment brought by a representative of a notable European royal family – stated that Article 8 is applicable in case of the publication of materials that allow for the identification of a person, even if such a person is a public figure.[35] The ECtHR, however, maintained that it is within the margin of appreciation of the Member States to balance the protection of personal identity (via the protection to private life) with the freedom of information.[36] The collection and storage of personal data by an agent of the State were also considered by the ECtHR as an interference with the private life of a person, especially when such information is likely to influence the reputation of the person[37] On the other side, the ECtHR ruled that the case of a person that participates in a public event or find himself into a public space is not necessarily covered by the guarantee of Article 8 ECHR.[38] In the same judgment, the Court held as well that the activities that allow the identification of a person online, like the IP address, should be considered as personal data and thus protected by Article 8 ECHR.[39] Via the data that are collected by providers of internet services – a notable application of blockchain technology – it is possible to accede to particularly sensitive information, as, for instance, the political preferences via the chronology of his or her web history.

Continuing the analysis of the case law of the European Court of Human Rights on Article 8, we can distinguish various components of the right to personal identity. The most relevant are: the right to personal development and autonomy, the right to discover one's origin, religious and philosophical convictions, right to name and to identity documents, gender identity, the right to ethnic and cultural identity, and the right not to be deprived of its own citizenship or nationality.[40]

a) Right to Personal Development and Autonomy

The right to personal development and autonomy connects, in the ECHR, the concept of private life and personal identity with the one of self-determination. Accordingly, the personal identity of an individual depends as well on the choices that he or she is allowed to perform in society. This is the case, for instance, of the right to apply for adoption, that is protected under Article 8 ECHR.[41] On the contrary, the

[35] European Court of Human Rights, judgment of 24 June 2006, application no. 59320/00, *Von Hannover v. Germany,* paras. 50 and 53.
[36] European Court of Human Rights, judgment of 7 February 2012, applications no. 40660/08 and 60641/08, *Von Hannover v. Germany(No. 2),* paras. 123-126.
[37] European Court of Human Rights, judgment of 4 May 2000, application no. 28341/95, *Rotaru v. Romania,* para. 44.
[38] European Court of Human Rights, Judgment of 24 April 2018, application no. 62357/14, *Benedik v. Slovenia*, para. 101.
[39] *Benedik v. Slovenia*, cit., para. 106.
[40] See the division proposed in ECHR, *Guide on Article 8 of the European Convention of Human Rights*, available at https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf, p. 47.
[41] European Court of Human Rights, judgment of 17 January 2017, applications nos. 6033/13, 8927/13, 10549/13, 12275/13, 23890/13, 26309/13, 27161/13, 29197/13, 32224/13, 32331/13, 32351/13, 32368/13, 37173/13, 38490/13, 42340/13 and 42403/13, *A.H. and Others v. Russia*, para. 383.

protection of the Convention is not ensured in case of a child born under a surrogacy agreement in violation of national legislation. The Court, in the landmark *Paradiso and Campanelli v. Italy*, held that, although the applicant's interest in maintaining and developing her relationship or link with the child falls within the scope of 'private life,' the separation between the adoptive mother and the child following the discovery of an attempt to become parents via surrogate motherhood does not represent a violation of Article 8.[42] In these particular situations, it is of relevance the margin of appreciation enjoyed by the High Contracting Parties of the Convention, which makes the difference in finding if the interference with Article 8 constitutes a violation of the Convention or not.

b) Right to Discover One's Origin

Strictly connected to personal identity, the right to discover one's origin is also protected under Article 8 ECHR. Also, in this context, the margin of appreciation of the High Contracting Parties of the Convention plays a vital role. In two opposing cases about the right of an adopted child to know the identity of his or her real parents, the Court, in a judgment against France, found that it was within the margin of appreciation of the State to introduce legislation ensuring the anonymity of the parents of an adopted child.[43] In lack of a similar provision, in *Godelli v. Italy*, the Court ruled that the denial to know about the origin of one's parents represented a violation of Article 8 ECHR.[44]

c) Religious and Philosophical Convictions

The case law on religious freedom falls, in particular, under Article 9 and 11 of the Convention. However, the request to parents to share with their children's school personal data about their own philosophical and religious convictions was found to violate Article 8 of the ECHR.[45]

d) Right to Name

[42] European Court of Human Rights, judgment of 24 January 2017, application no 25358/12, *Paradiso and Campanelli v. Italy*, para. 215.
[43] European Court of Human Rights, judgment of 13 February 2003, application no. 42326/98, *Odièvre v. France*.
[44] European Court of Human Rights, Judgment of 25 September 2012, application no. 33783/09, *Godelli v. Italy*, pars. 57-58. See the comment by L. CASSETTI, S. VANNUCCINI, *La ricercar delle proprie origini ed il diritto all'identità personale*, in A. DI STASI (a cura di), *CEDU e ordinamento italiano. La giurisprudenza della Corte europea dei diritti dell'uomo e l'impatto nell'ordinamento interno (2010-2015)*, Wolters Kluwer Italia, 2016, pp. 625 – 656.
[45] European Court of Human Rights, judgment of 29 July 2007, application no. 15472/02, *Folgerø and Others v. Norway*, para. 98.

The ECtHR established that the right to private life applies to issues concerning an individual's first name and surname.[46] The Strasbourg Court held that, in order to identify a person and to establish a connection with a family, a person's name concerns his or her private and family life, and found a violation of Article 8 where national administration refused to register the applicant's surname after his family surname was registered as his wife's surname.[47] The ECtHR established a violation of Article 8 when national authorities decided not to allow two Turkish men to change their surnames to names which were not 'of Turkish language.'[48] In this case, according to the ECtHR, the national courts involved conducted a purely formalistic examination of the legislative and statutory texts, instead of taking into account the arguments and the specific and personal situations of the applicants, or balancing the competing interests at stake.[49]

According to the ECtHR, legislation on first names also falls within the scope of 'private life.'[50] Importantly, the Strasbourg Court also affirmed that the adoption by wives of the surname of their husbands is not compatible with the Convention.[51] This case law is sensible to carry important shortcomings, if a case concerning the misuse of personal data is brought in front of the Strasbourg Court, and provides the applicant with a good point of reference. It should be, of course, adapted, but it represents an important starting point.

e) Gender Identity

The relationship between gender and personal identity is crucial for the development of a living concept of Article 8 ECHR. As known, sex, as a biological factor, is immutable (unless subjected to a surgical intervention). Gender, on the other side, is a subjective choice that reflects the right to self-determination of an individual and accordingly falls under the scope of Article 8 ECHR. The notions of gender and sex are also of particular importance since the ECHR reunites more than 40 very different legal order, where the understanding of these notions are very different. The Strasbourg Court has been called on many times to distinguish between situations that represent a violation of the Convention and other that falls within the margin of appreciation of the

[46] E.g. European Court of Human Rights, decision on admissibility of 7 December 2004, application no. 71074/0*, Mentzen v. Latvia*; judgment of 5 December 2013, application no. 32265/10, *Henry Kismoun v. France*.
[47] European Court of Human Rights, Judgment of 22 February 1994, application no. 16213/90, *Burghartz v. Switzerland*, para. 24.
[48] European Court of Human Rights, judgment of 25 June 2019, application nos. 18684/07 and 21101/07 *Aktaş and Aslaniskender v. Turkey*.
[49] *Aktaş and Aslaniskender v. Turkey*, cit., para. 47.
[50] European Court of Human Rights, judgment of 24 October 1996, application no. 22500/93, *Guillot v. France*, paras. 21-22; judgment of 21 October 2010, application no. 37483/02, *Güzel Erdagöz v. Turkey*, para. 43; judgment of 16 May 2013, application no. 20390/07, *Garnaga v. Ukraine*, para. 36.
[51] European Court of Human Rights, judgment of 16 November 2004, application no. 29865/96 *Ünal Tekeli v. Turkey*, paras. 67-68.

parties.[52] Particularly important is the situation of legal orders where the assignment of a new gender should be preceded by a surgical operation or behaviour that reflects the new gender.[53] The landmark *Goodwin v. the United Kingdom* case raised the issue of whether or not the respondent State failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transgender, to respect for her private life, in particular through the lack of legal recognition given to her gender reassignment.[54] The Court, on the same occasion, stressed on the importance of the Convention as a living instrument: "It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by […] to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement."[55]

The idea that the Convention interpretation should be dynamic and evolutive makes a compelling case for the application of the Convention to situations not regulated by current legislation as blockchain. The possibility to adapt the Convention to the current situation, although within the margin of appreciation of the parties, would be a crucial factor for applicants seeking judicial redress.

In a recent landmark judgment, *S.V. v. Italy*, the Strasbourg Court recognised to be against the Convention the refusal to change the gender identity of a person pending a gender reassignment surgery through which the applicant decided to undergo.

The Court considers that the applicant's inability to obtain a change of forename over a period of two and a half years, on the grounds that the gender transition process had not been completed by means of gender reassignment surgery, amounts in the circumstances of the present case to a failure on the part of the respondent State to comply with its positive obligation to secure the applicant's right to respect for her private life.[56]

It is interesting to note that the Convention was used in the past to provide judicial redress in situations that were not regulated by the law in the past. Similarly, it can be used to provide judicial redress in the case of the misuse of disruptive technologies, as blockchain.

f) Right to ethnic and cultural identity

Ethnic and cultural identities represent a powerful tool to protect, under the umbrella of Article 8 ECHR, certain specific rights attached to the conditions of minorities. This, with particular reference to the rights of members of a national

[52] E.g. European Court of Human Rights, judgment of 16 July 2014, application no. 37359/09, *Hämäläinen v. Finland*, where the ECtHR was called to examine the situation of the condition of the modification of a marriage into a registered partnership following gender reassignment.
[53] E.g. judgment of 6 April 2017, applications no. 79885/12 52471/13 52596/13, *A.P., Garçon and Nicot v. France*.
[54] *Goodwin v. the United Kingdom*, cit., para. 71.
[55] *Goodwin v. the United Kingdom*, cit., para. 74.
[56] European Court of Human Rights, judgment of 11 October 2018, application no. 55216/08, *S.V. v. Italy*, para. 74.

minority to maintain their identity and to lead a private and family life according to their own cultural traditions, an important part of the Article 8 right to private and family life.[57]

Also, in the case of demonstrations motivated by hostility towards an ethnic group that attempted to intimidate rather than provoke physical harm to the opposite part, the Strasbourg Court found that important criteria to assess a violation of Article 8 ECHR[58] are whether the statements were made in the context of a particularly tense political and social background, whether they amounted to a direct or indirect appeal to violence, hatred or intolerance, and their capacity to lead to harmful consequences.[59]

In *S. and Marper v. the United Kingdom*, the ECtHR found that the retention by national authorities of biological samples (as DNA, fingerprints, cellular samples) and its use to infer the ethnic origin of the persons involved violated the applicants' right to ethnic identity under Article 8.[60] This is another demonstration of how the importance of the right of ethnic and cultural identity in case of misuse of personal data (of which genetic data are a part), a situation that, in the case of disruptive technology, can well be verified. In case the national legal order does not allow for the necessary legal remedies, the ECtHR would be well placed to hear the complaint of individuals, although, of course, it will remain to be seen how the case law will be adapted.

g) Right not to be deprived of its own citizenship or nationality

A last but important element of the right to personal identity in the ECtHR case law is the right not to be deprived of its own citizenship. This is not an absolute right, as the High Contracting Parties remain free to concede or withdraw citizenship unless in particular circumstances. There are, however, cases where the admission or the withdrawal from the status of citizen might represent an unjustified interference with the letter of Article 8 ECtHR. For example, the ECtHR found that an arbitrary refusal of citizenship may, in certain circumstances, impact the private life of an individual.[61] At the same time, the withdrawal of the status of a citizen may entail similar – if not greater – interference with the person's right to respect for his or her private and family life.[62]

[57] European Court of Human Rights, judgment of 16 May 2019, application no. 9825/13, *Tasev v. North Macedonia*, paras. 32-33.
[58] In this case, the violation of Article 8 should be assessed, if applicable, also in light of the established case law on Article 10 ECHR.
[59] European Court of Human Rights, judgment of 17 January 2017, application no. 10851/13, *Király and Dömötör v. Hungary*, para. 72 ff.
[60] European Court of Human Rights, judgment of 4 December 2008, applications no. 30562/04, 30566/04, *S. and Marper v. the United Kingdom*, para. 66.
[61] European Court of Human Rights, decision on admissibility of 12 January 1999, application no. 31414/96, *Karassev v. Finland*; decision on admissibility of 23 January 2002, application no. 48321/99 *Slivenko and Others v. Latvia*; judgment of 11 October 2011, application no. 53124/09, *Genovese v. Malta*.
[62] E.g. European Court of Human Rights, judgment of 21 June 2016, application no. 75136/12, *Ramadan v. Malta*, para. 85.

The analysis of the case law of the European Court of Human Rights on personal identity protected under the umbrella of Article 8 ECHR allows the formulation of some preliminary conclusions. The ECtHR, thanks to the living nature of the Convention and of its dynamic interpretation, seems well placed to hear complaints from individuals on the possible violation of the right to personal identity. This, with particular reference to the protection of personal data, which is also covered under Article 8 ECHR. However, there are concerns on the nature of the Convention legal order and on the possibility to timely raise a complaint in front of the Strasbourg Court, in light of the need for applicants to wait for the exhaustion of internal legal remedies before introducing a case in front of the ECtHR. The newly introduced Protocol No 16 to the Convention provides to individuals the possibility to ask the ECtHR advisory opinions on questions of principle relating to the interpretation or the application of the Convention without the need to wait for the expiry of internal remedies.[63] Also, to the date of writing, the ECtHR did not have to rule on the application of blockchain technologies to the ECHR. However, it seems likely that the dynamic interpretation of the Convention would allow the ECtHR to take a clear position on the legal issues deriving from the misuse of such technology over the right to personal identity.

4. The Right to Personal Identity in the European Union Legal Order

Identity is a critical concept for the European Union process of legal integration.[64] The process of legal integration in Europe is known for being characterised by the confrontation between the national and European levels, eventually solved by the intervention of the judiciary that, through dialogue, attempts to find a solution to the disagreement.[65]

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[63] J. GERARDS, *Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal,* in *Maastricht Journal of European and Comparative Law*, 2014, n. 4, pp. 630-651; I. ANRÒ, *Il Protocollo 16 in vigore dal 1° agosto 2018: una nuova ipotesi di forum shopping tra le corti?* in *Eurojus.it*, 24.04.2018, available at http://rivista.eurojus.it/il-protocollo-16-in-vigore-dal-1-agosto-2018-una-nuova-ipotesi-di-forum-shopping-tra-le-corti/?print=pdf; K. LEMMENS, *Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?*, in *European Constitutional Law Review*, 2019, n. 4, pp. 691-713.

[64] Usually the academic debate on identity in EU law is referred to the concept of national identity, as opposed to the one European identity. This discussion can be translated into a parallel legal debate, over the national constitutional *vis-à-vis* a European constitutional identity. Also in this case, the European constitutional identity brought important legal consequences, attached to the status of EU citizen that is parallel to the one of citizen of the EU Member States. On this, see G. DI FEDERICO, *Identifying National Identities in the Case Law of the Court of Justice of the European Union*, in *Il Diritto dell'Unione Europea*, 2014, p. 769 ff.; F. FABBRINI, A. SAJO, *The Dangers of Constitutional Identity,* in *European Law Journal*, 2019, p. 457 ff.; G. DAVIES, *'Any Place I Hang My Hat?' or: Residence is the New Nationality* in *European Law Journal*, 2006, n. 1, pp. 43-56.

[65] U. VILLANI, *I diritti fondamentali nel dialogo tra la Corte Costituzionale e la Corte di giustizia*, in A. DI STASI, L. S. ROSSI (a cura di), cit., pp. 39-65; V. PICCONE, *Fra interpretazione e dialogo. Il ruolo del giudice nazionale*, *ibidem*, pp. 97-138; M.D. POLI, *The Judicial Dialogue in Europe: Adding Clarity to a Persistently Cloudy Concept*, in *Vienna Journal on International Constitutional Law*, 2017, n. 3, pp. 351-364.

The tendency towards opposing, rather than harmonising, the national and the European concept of personal identity might help in explaining why the right to personal identity is not explicitly recognised in the EU legal order. This marks an important difference with the ECHR, where the Strasbourg Court recognised that personal identity is protected under Article 8.

This represents one of the many differences between the system of protection of fundamental rights in the EU and in the ECHR. While these two systems belong to the equally important supranational (EU) and international (ECHR) levels of protection, there are systemic differences between the two legal orders in the multi-level systems of protection of fundamental rights.[66]

There are, however, elements of the right to personal identity in primary legislation as well as in the case law of the Court of Justice that can be identified. I will summarise them in the following sections.

a) Elements of the Right to Personal Identity: the Protection of Personal Data

The right to personal identity has two main components. The right to be identified with the identity of the person, as reflected by the official (digital or paper-based) documents (*objective* identity), and the right to the protection of the identity that the person wants to be associated with, as resulting from its political, cultural, philosophical, and religious convictions, as well as from its behaviour (*subjective* identity). Subjective and objective identity are strictly connected, as the subjective personal convictions of an individual might well allow the identification of its 'official' objective identity. The protection of personal data is strictly connected with subjective identity, but also fundamental in the identification of objective identity. While, as we maintained, there is no official recognition of the right to personal identity, there is wide recognition of the right to personal data in the European Union. This right is largely based on the evolution of EU primary and secondary legislation devoted to this scope.

Article 7 of the Charter[67] is devoted to the rights of private and family life,[68] and, according to the explanations to the Charter, should have the same scope of Article 8 ECHR.[69] However, there is no clear indication in the case law of the Court of Justice

[66] T. LOCK, *The future of EU human rights law: Is accession to the ECHR still desirable?*, in *Journal of International and Comparative Law*, 2020, n. 2 (forthcoming). A working paper version is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3633997.

[67] On art. 7 and 8 of the Charter, see the various commentaries, S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford, 2014; R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (a cura di), *Carta dei diritti fondamentali dell'Unione europea*, Milano, 2017; F. PICOD, S. VAN DROOGHENBROECK (dir.), avec la collaboration de C. RIZCALLAH, *Charte des droits fondamentaux de l'Union européenne. Commentaire article par article*, Bruxelles, 2018.

[68] Article 7 CFREU: 'Everyone has the right to respect for his or her private and family life, home and communications'.

[69] Explanations relating to the Charter of Fundamental Rights OJ 2007 C 303/17. Explanation on Article 7 — Respect for private and family life: 'In accordance with Article 52(3), the meaning and scope of this

that this is applicable as well with reference to the dynamic and evolutive interpretation of the Convention that allowed the ECtHR to protect personal identity under the umbrella of Article 8 ECHR.[70] Article 8 of the Charter of Fundamental Rights deals more directly with the right to the protection of personal data.[71]The explanation on Article 8 of the Charter confirms that the Article is based on what are now Articles 39 TEU and 16 TFEU, and mentions laterally Article 8 of the ECHR and the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data.[72]

Secondary legislation on which the protection of personal data is based in EU law is vast. For the purpose of this work, it is important to mention the General Data Protection Regulation (GDPR),[73] based on previous legislation introduced in 1995[74] and in 2001.[75] The GDPR came to light in 2016, after lengthy political negotiations,[76] and introduced a comprehensive framework for the protection of personal data of individuals under EU law. The GDPR adopts a broad definition of personal data: personal data are, according to the letter of the text 'any information relating to an identified or identifiable natural person.'[77] The identifiable natural person is 'one who can be identified, directly or indirectly, in particular by reference to an identifier, such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.'[78] According to the text of the GDPR, EU law recognises that personal data contributes to the composite identity of the person, although not mentioning the concept of 'personal identity' directly. This allows the EU legislation to provide the necessary protection to the data that contributes to the personal identity of the person. According to this abridged reconstruction, personal data enjoy

right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR […].'

[70] See Section 3, above.

[71] Article 8 CFREU: '1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority'.

[72] Explanation on Article 8 — Protection of personal data.

[73] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC OJ 2016 L 119/1.

[74] Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ 1995 L 281/31.

[75] Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data OJ 2001 L 8/1.

[76] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, Vienna, 2018, p. 29, available at https://fra.europa.eu/en/publication/2018/handbook-european-data-protection-law-2018-edition#:~:text=Related-,Overview,European%20Court%20of%20Human%20Rights.

[77] Regulation (EU) 2016/679 (GDPR), Art. 4(1).

[78] *Ibid.*

protection at the level of primary and secondary legislation according to EU law. In the case of technologies like blockchain, the misuse of information referring to an individual can thus be tackled under this angle.

b) Elements of the Right to Personal Identity: the Recognition of Public Documents

Within the EU, legal order can be observed as another important part of the *objective* right to personal identity.[79] Public documents and, in particular, documents that, like civil status documents, are fundamental to determine one person's identity, are necessary elements of the right to personal identity. However, it is well known that civil status documents are managed by national administrations, which are the sole entitled to grant on EU citizens and third-country nationals the rights attached to their civil status. The European Union is, however, built on the four freedoms, and, for a person to be able to travel (free movement of persons) and work or establish a business in another member state (freedom to the establishment and to provide services), it is very important to have the possibility to have its civil status or the civil status of its relatives recognised by the administration of the host state.[80] The traditional procedure requires citizens of other EU Member States to attest the legalisation through an apostille stamp to prove that their public document is authentic and, in certain conditions, may be required to present a certified copy or a translation of their public document.[81] This is because the Member States have diverging rules on birth, death, adoption, and also on marriage and civil partnerships certificates.[82] These formalities and lengthy administrative procedures lead nationals of another EU Member States to redact the act twice instead of having one act recognised by another Member State, even if the same act is equally regulated and recognised in that State. The European Union attempted to facilitate the free movement of persons via allowing for the automatic recognition of certain civil status documents in Regulation (EU) 2016/1191.[83] This Regulation, entered

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[79] S. MARINO, *Cooperazione amministrativa e circolazione delle persone: verso il riconoscimento automatic degli atti di stato civile?,* in *Rivista di diritto internazionale*, 2013, pp. 964-970; ID. , *The Cross-border Continuity of Personal Identity in the European Union,* in *UACES Conference Papers,* 2018 available at https://www.uaces.org/archive/papers/abstract.php?paper_id=1179 also appeared as ID., *The Cross-Border Continuity of Names in the European Union,* in *European Review of Private Law,* 2017, pp. 1009-1030.

[80] G.-R. DE GROOT, D. DE GROOT, *Recognition of Civil Status (Certificates), with Special Attention to Secondary Recognition of Documents Already Recognized in Another Member State*, in A. JANSSEN, H. SCHULTE-NÖLKE (eds.), *Researches in European Private Law and Beyond*, 2020, Berlin, p. 283-298.

[81] Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=41.

[82] E.g. see M.C. BARUFFI, *Uno spazio di libertà, sicurezza e giustizia a misura di minori: la sfida (in)compiuta dell'Unione Europea nei casi di sottrazione internazionale*, in this *Journal*, 2017, n. 1, pp. 2-25; G. ROSSOLILLO, *Recognition of Family Status and Adoptions Not Allowed by Italian Law*, in *Diritti umani e diritto internazionale*, 2016, n. 2, pp. 335-360.

[83] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 OJ 2016 L 200/1.

into force on 16 February 2019, exempts public documents produced by one Member States from legalisation or similar formality and simplifies other formalities in another Member State.[84] The list of the documents included in the Regulation is quite comprehensive, and – at first glance – one could be optimistic about the impact that this legislation might have over the possibility to facilitate the circulation of documents attesting the personal identity of an individual.[85] Scholars have, however, raised concerns on the fragmentation and incompleteness of the picture at EU level[86] as well as on the scope and the ambit of the Regulation, defining it as a 'minimal reform.'[87] The Regulation, accordingly, represents an important step forward,[88] but its coverage of the recognition of public documents is still unsatisfactory.

The main issue is represented by the lack of recognition in a Member State of 'legal effects relating to the content of public documents issued by the authorities of another Member State.'[89] This is also made clear in Recital (18), where it is maintained that 'The aim of this Regulation is not to change the substantive law of the Member States.' This as, according to Zanobetti, the Regulation disciplines the document as *instrumentum* and not the document as *negotium*.[90] According to Vettorel, the Regulation does not address problems related to the movement of businesses across EU borders and avoids the issue of continuity of civil legal status across the Member States within the EU.[91]

However, from a systemic perspective, it is difficult to deny the importance of the novelty introduced by the Regulation. The nature of the process of European integration is to be built step after step.[92] The fact that the circulation of public documents is facilitated should allow the Court of Justice to be well placed, in case of being called to interpret the notion of personal identity, to affirm that EU law also covers the right to individual's personal identity and accordingly protect them from misuse of personal data.

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[84] Regulation (EU) 2016/1191, Art. 1.

[85] Art. 2 of Regulation (EU) 2016/119 lists the public documents attesting: birth; a person being alive; death; name; marriage, including capacity to marry and marital status; divorce, legal separation or marriage annulment; registered partnership, including capacity to enter into a registered partnership and registered partnership status; dissolution of a registered partnership, legal separation or annulment of a registered partnership; parenthood; adoption; domicile and/or residence; nationality; absence of a criminal record, provided that public documents concerning this fact are issued for a citizen of the Union by the authorities of that citizen's Member State of nationality.

[86] A. ZANOBETTI, *La circolazione degli atti pubblici nello spazio di libertà, sicurezza e giustizia* in this *Journal*, 2019, n. 3, pp. 20-35.

[87] A. VETTOREL, *La circolazione dei documenti pubblici stranieri dopo il regolamento (UE) n. 2016/1191*, in *Rivista di diritto internazionale privato e processuale*, 2016, n. 4, pp. 1060-1075; ID., *EU Regulation No. 2016/1191 and the Circulation of Public Documents between EU Member States and Third Countries* in *Cuadernos de Derecho Transnacional*, 2017, n. 1, p. 342-352.

[88] M. FONT I MAS, *La libera circolazione degli atti pubblici in materia civile: un passo avanti nello spazio giudiziario europeo*, in this *Journal*, 2017, n. 1, pp. 104-125.

[89] Regulation No. 2016/1191, Art. 2(4).

[90] A. ZANOBETTI, (above n. 86), p. 28.

[91] A. VETTOREL, (above n. 87), p. 344.

[92] L.S. ROSSI, *A New Revision of the EU Treaties After Lisbon?*, in L.S. ROSSI, F. CASOLARI (eds.), *The EU after Lisbon*, London, 2014, p. 6.

c) Elements of the Right to Personal Identity: the Right to be Forgotten

Another element of the right to personal identity is the right not to be associated with its past, also defined in terms of 'right to be forgotten.' The right to be forgotten is very important to the negative element of the right to personal identity, in order to understand if a person enjoys the right not to be associated with actions he committed in the past. This is increasingly important since the internet granted the possibility to individuals to search for information concerning other persons without any limitation. Disruptive technologies like blockchain, while granting the possibility to manage securely an extremely high volume of data, considerably worsened the situation. The aggregation of data stored in the database based on the blockchain could, in case of misuse, reveal information associated with the past of a person that were not intended to be made public.

The right to be forgotten came to the honours of the debate thanks to a landmark judgment of the Court of Justice of the European Union.[93] A primitive form of the right to be forgotten was already included in Directive 95/46/EC, where Article 12 was granting individuals the possibility to have their data rectified or erased if appropriate.[94]

In *Google Spain*, the ECJ confirmed that the right to be forgotten is part of the EU legal order, and can be applied to a company that operates a search engine. The national judge asked, in particular, if the provisions of Directive 95/47/EC were to be interpreted as enabling the data subject to require the operator of a search engine to remove from the list of results displayed following a search made based on his name links to web pages published lawfully by third parties and containing true information relating to him, on the ground that that information may be prejudicial to him or that he wishes it to be 'forgotten' after a certain time.[95] The Court held that a data subject may, 'in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results.'[96]

[93] Court of Justice of the EU, judgment of the Court (Grand Chamber) of 13 May 2014, case C-131/12, *Google Spain*, EU:C:2014:317. See A.L. VALVO, *Il diritto all'oblio nell'epoca dell'informazione "digitale"*, in *Studi sull'integrazione europea*, 2015, n. 2, pp. 347-357; I. SPIECKER, *A new framework for information markets: Google Spain*, in *Common Market Law Review*, 2015, pp. 1033-1057; P. KOUTRAKOS, N. NIC SHUIBHNE, *To strive, to seek, to Google, to forget*, in *European Law Review*, 2014, pp. 293-294.

[94] Directive 95/46/CE, Art. 12: 'Member States shall guarantee every data subject the right to obtain from the controller: […] (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data'.

[95] *Google Spain* (above n. 93), para. 89.

[96] *Ibid*., para. 97.

This conclusion reached by the Court had profound consequences on how search engines operate, and marked a substantial difference between the EU legal order and other legal orders, as the US.[97]

However, the right to be forgotten, as introduced by the Court, is not an 'absolute' right. It needs to originate from the fact that the data presented are inaccurate, but can also be applied in the case that the data are 'inadequate, irrelevant, or excessive in relation to the purposes of the processing.'[98] As it has been noted in scholarship, the underpinning value that is protected by the provision is the personal identity of the data subject.[99]

The impact of the first *Google Spain* decision on the right to be forgotten should be analysed in light of the subsequent case law, and in particular of the two other judgments that were given towards the end of 2019.[100]

The first decision, *Google LLC*, arise from a dispute between Google and the *Commission nationale de l'informatique et des libertés* (CNIL) as to how a search engine operator, where it establishes that a data subject is entitled to have one or more links to web pages containing personal data concerning him or her removed from the list of results which is displayed following a search conducted based on his or her name, is to give effect to that right to de-referencing.[101] The CNIL, in a procedure terminated with a sanction of 100,000 EUR to Google, maintained that Google failed to delist personal data of individuals from all the domain names of its search engine.[102] Google, on the other side, held that such an obligation could not be applied to all domain names, without geographical limitation.[103]

The Court of Justice eventually found a solution that, *prima facie*, seemed to limit the width of the right to be forgotten as previously envisaged in *Google Spain*.[104]

The Court kicked-off its legal reasoning, recognising that "objective of that directive and that regulation is to guarantee a high level of protection of personal data throughout the European Union"[105] and that "a de-referencing carried out on all the

[97] G. RESTA, V. ZENO-ZENCOVICH (a cura di), *Il diritto all'oblio su Internet dopo la sentenza Google Spain*, Roma, 2015.
[98] *Google Spain* (above n. 93), para. 92.
[99] G. FINOCCHIARO, *Il diritto all'oblio nel quadro dei diritti della personalità"*, in *Il diritto dell'informazione e dell'informatica*, 2014, n. 4-5, pp. 29-42, p. 38.
[100] G. BERTELLI, *Google and the Right to be Forgotten: brief summary of a never-ending story* in *Media Laws.eu*, availableathttp://www.medialaws.eu/google-and-the-right-to-be-forgotten-brief-summary-of-a-never-ending-story/.
[101] Judgment of the Court (GrandC hamber) of 24 September 2019, case C-507/17, *Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL)*, EU:C:2019:772, para. 40. See the comment by R. PALLADINO, *Sul diritto all'oblio e la tutela dei diritti fondamentali in internet: ambito di applicazione territoriale e bilanciamento a margine della sentenza Google LLC della Corte di giustizia dell'UE*, in *I Diritti dell'Uomo*, 2019, n. 3, pp. 543-562.
[102] *Ibid*., para. 2.
[103] *Ibid.*, para. 38.
[104] F. FABBRINI, E. CELESTE, *The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection Beyond Borders*, in *German Law Journal*, 2020, 21, pp. 55–65, p.61.
[105] *Google LLC*, cit., para. 54.

versions of a search engine would meet that objective in full."[106] The ECJ decided that the scope of the right of de-referencing in the Data Protection Directive and in the subsequent GDPR was not to impose an unlimited burden on the provider of search engine operators to cancel relevant information from all the domains of the web: "The protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality […]".[107]

The Court, on the balance – more precisely – between the right to be forgotten and freedom of expression ruled that "where a search engine operator grants a request for de-referencing pursuant to those provisions, that operator is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States."[108]

This also results from another decision, *GC and Others v. Commission nationale de l'informatique et des libertés,* released on the same day as Google LLC, that attracted less attention.[109] However, as Fabbrini and Celeste pointed out, another judgment (although not strictly related to the right to be forgotten) on whether a digital platform could be forced to remove world-wide content posted online, which was regarded as defamatory,[110] extended the extra-territorial application of data protection outside Europe again.[111] In this case, the ECJ did not prohibit the national court to impose on the search engine operator to cancel reference to the defamatory content from all the domain names of the search engine.[112] This example, being related to information concerning a criminal proceeding, is particularly delicate. It can be maintained that further case law is necessary to determine if this line of case law is only limited to personal data concerning criminal proceedings.

The analysis presented on the right to be forgotten reinforces the conviction that this right, as a fundamental part of the right to personal identity, can positively contribute towards the protection of personal identity in EU law. It should be ensured that its limits are well identified and that, in the event of a balance to be strike with other fundamental rights (as freedom of expression), the interference with the competing right is proportionate. As I will draw in the Conclusion, this would be another case where the accession of the EU to the ECHR would grant to individuals (not considering the likely length of the proceeding) another possibility to review the decisions of the ECJ and, perhaps, to find a different balance between competing rights.

[106] *Ibid.,* para. 55.
[107] *Ibid.,* para. 60.
[108] *Ibid.,* para. 73.
[109] Judgment of the Court (Grand Chamber) of 24 September 2019, case C-136/17, *GC and Others v. Commission nationale de l'informatique et deslibertés (CNIL),* EU:C:2019:773.
[110] Judgment of 3 October 2019, Case C-18/18, *Eva Glawischnig-Piesczek v. Facebook*, EU:C:2019:821.
[111] F. FABBRINI and E. CELESTE, cit., p. 62.
[112] *Eva Glawischnig-Piesczek v. Facebook,* para. 49.

d) Elements of the Right to Personal Identity: the Case Law of the Court of Justice of the EU

The last part of this section analyses the case law of the Court of Justice of the EU that does not touch upon what was previously examined. Preliminarily, it can be noted that, as it happens in various exploratory areas of EU law, the case law draws widely on opinions from Advocate Generals. The very same wording of 'personal identity,' that is largely indebted to the German, Austrian, and the Italian legal experience, it is used very rarely. It is evidence of the fact that the Court is moving on uncertain terrain, perhaps conscious of the importance and power of words as 'identity.'

The analysis of the case law of the ECJ departs from the landmark *Konstantinidis* case,[113] where, in its Opinion, Advocate General Jacobs wrote down the famous '*civis Europeus suum*' statement.[114] In the same Opinion, he conducted what it appears now to be the only analysis in the ECJ case law of the right to personal identity in the ECHR and in the national constitutional legal orders.[115]

It is possible to infer from the above provisions, in particular, and from the constitutional traditions of the Member States in general, the existence of a principle according to which the State must respect not only the physical well-being of the individual, but also his dignity, moral integrity, and sense of personal identity.[116]

The wording style used by Jacobs points directly at what is now Article 6 TEU, which mentions the role of the ECHR legal principles as general principles of EU law.[117]

In a later Opinion of Advocate General Maduro, *Spain v. Eurojust,* it is stressed how language is a fundamental part of the personal identity of an individual: "My motherland is the Portuguese language". That famous statement by Pessoa, taken up by numerous men of letters, such as Camus, clearly expresses the link which may exist between language and a sense of national identity. Language is not merely a functional means of social communication. It is an essential attribute of personal identity and, at the same time, a fundamental component of national identity.[118]

Advocate General Stix-Hackl, in its Opinion in the landmark *Omega* judgment, discussed the importance of human dignity and self-determination in the formation of the identity of an individual.

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[113] Judgment of the Court of Justice of 30 March 1993, *Konstantinidis*, case C-168/91, EU:C:1993:115.
[114] Opinion of the Advocate General Jacobs delivered on 9 December 1992, case C-168/91, *Konstantinidi*s, EU:C:1992:504, para. 46.
[115] *Ibid.*, paras. 34-38.
[116] *Ibid.*, para. 39.
[117] Art. 6 (3) TEU: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.
[118] Opinion of Advocate General Maduro delivered on 16 December 2004, case C-160/03, *Kingdom of Spain v. Eurojust,* EU:C:2004:817, para. 36.

All in all, human dignity has its roots deep in the origins of a conception of mankind in European culture that regards man as an entity capable of spontaneity and self-determination. Because of his ability to forge his own free will, he is a person (subject) and must not be downgraded to a thing or object.[119]

The Opinion in *Omega* then continues with the importance of the link between autonomy, self-determination, and personal identity. This analysis was equally performed by the ECHR in its case law that was previously mentioned along with this paper: "That link between the concept of dignity and those of the self-determination and freedom of mankind clearly shows why the idea of the dignity of man also often finds expression in other concepts and principles that have to be safeguarded, such as personality and identity."[120]

Jacobs' Opinion in *Konstantinidis* is mentioned as well by Eleanor Sharpston, the last British Advocate General of the ECJ. In *Zambrano*, she adds the important precision that personal identity and its respect are fundamental for the preservation of the free movement: The importance of fundamental rights in the classic context of free moment was put most eloquently by Advocate General Jacobs in *Konstantinidis*, a case involving a Greek masseur working in Germany who claimed that the official transliteration of his name breached his rights under EU law. Advocate General Jacobs' approach to the existing *Wachauf* case-law had far-reaching consequences. *Konstantinidis* ceased to be merely a case about discrimination on grounds of nationality and became a case about the fundamental right to personal identity. […] If that were not the case, he might be dissuaded from exercising those rights to freedom of movement.[121]

In another Opinion, Advocate General Sharpston confirmed the importance that the case law on Article 8 ECHR has in the EU legal order. This is, however, one of the last mentions of Article 8 in the case law of the ECJ, perhaps because at the time of delivery of the judgment, there was still relative optimism concerning the accession of the EU to the ECHR.

In the same Opinion, there is also an important reminder that an inextricable relationship bounds personal identity and personal data.

The Strasbourg Court has already held that a legal person (as well as a natural person) may invoke Article 8 ECHR and that its protection extends to professional and business activities. […]. The Strasbourg Court has likewise held that private life includes personal identity, such as a person's name, and that the protection of personal data is of fundamental importance to a person's enjoyment of his right to respect for private life.[122]

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[119] Opinion of Advocate General Stix-Hackl delivered on 18 March 2004, case C-36/02, *Omega Spielhallen*, EU:C:2004:162, para. 78.
[120] *Ibid.,* para. 79.
[121] Opinion of Advocate General Sharpston delivered on 30 September 2010, case C-34/09, *Gerardo Ruiz Zambrano*, EU:C:2010:560, para. 83.
[122] Opinion of Advocate General Sharpston delivered on 17 June 2010 in joined cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR*, paras. 71-72.

Again, Sharpston, whose Opinion, in this case, was followed by the ECJ itself,[123] pointed out in the important *A, B, and C* judgment that sexual orientation is part of one person's identity, where an asylum seeker's likely persecutions on the ground of his or her sexual orientation were not considered in granting the status of refugee.

It is common ground amongst those submitting observations to the Court that a person's sexuality is a highly complex issue that is integral to his personal identity and the sphere of his private life. Furthermore, all parties agree that there is no objective method of verifying an averred sexual orientation. However, there are different views as to whether the competent authorities of a Member State should verify whether an applicant is homosexual and is therefore a member of a social group within the meaning of Article 10(1)(d) of the Qualification Directive.[124]

This is, again, confirmed by the ECJ in *F*, a later judgment on an application for international protection examined without duly taking into account the possible persecutions that the applicant would undergo if sent to his or her country of origin.

It follows that, although it is for the applicant for international protection to identify his sexual orientation, which is an aspect of his personal identity, applications for international protection on the basis of a fear of persecution on grounds of that sexual orientation may, in the same way as applications based on other grounds for persecution, be subject to the assessment process provided for in Article 4 of that directive.[125]

Advocate General Kokott, in *Achbita (G4S)*, confirms that religion, in the ECJ case law, is also part of one person's identity in the EU constitutional legal order: On the one hand, it must be recognised here that, for many people, religion is an important part of their personal identity. […] Accordingly, the values expressed by the freedom of religion also have repercussions, at least indirectly, on private employment relations. Within the scope of Directive 2000/78, it is important to take due account of those values, from the point of view of the principle of equal treatment, when seeking to strike a fair balance between the interests of employers and employees.[126]

In *Valcheva,* it is Advocate General Tanchev that reminds that also the relationship with grandparents is part of the personal identity of children and that national legislation should take into account the right of grandparents to establish a relationship with their grand-children.

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[123]Judgment of the Court of Justice of 2 December 2014, joined cases C-148/13 to C-150/13, *A, B and C,* EU:C:2014:2406 para. 69: 'However, having regard to the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset'.

[124] Opinion of Advocate General Sharpston delivered on 17 July 2014, joined cases C-148/13, C-149/13 and C-150/13, *A, B and C*, EU:C:2014:2111, para. 36.

[125] Judgement of the Court of Justice of 25 January 2018, case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal*, EU:C:2018:36, para. 29.

[126] Opinion of Advocate General Kokott delivered on 31 May 2016, case C-157/15, *Achbita*, EU:C:2016:382, para. 113.

With regard to grandparents specifically, is not that uncertainty disconcerting considering that, in principle and subject to the best interests of the child, contact between grandparents and their grandchildren, in particular in an ever-changing society, remains an essential source of stability for children and an important factor in the intergenerational bond which undoubtedly contributes to building their personal identity?[127]

Concluding this analysis of the ECJ case law on elements of personal identity, it is interesting to note a recent judgment of the General Court that quotes, again, extensively the ECHR case law on personal identity: "It is clear from the case-law of the European Court of Human Rights on the application of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, that a person's right to protection of reputation is part of the right to respect for private life (ECtHR, 21 September 2010, *Polanco Torres and Movilla Polanco v. Spain*, CE:ECHR:2010:0921JUD003414706, § 40, and 7 February 2012, *Axel Springer AG v. Germany*, CE:ECHR:2012:0207JUD003995408, § 83). A person's reputation forms part of his personal identity and psychological integrity, which fall within the scope of his private life (ECtHR, 25 February 1992, *Pfeifer and Plankl v. Austria*, CE:ECHR:1992:0225JUD001080284, § 35). The same considerations apply to personal honour (ECtHR, 4 October 2007, *Sanchez Cardenas v. Norway*, CE:ECHR:2007:1004JUD001214803, § 38, and 9 April 2009, *A. v. Norway*, CE:ECHR:2009:0409JUD002807006, § 64)."[128]

This reminds us that, a few years after the Opinion of the ECJ that declared the Agreement on the Accession of the EU to the ECHR not compatible with the Treaty framework,[129] the ECJ never ceased to take into account the case law of the ECtHR.

The preliminary result of this analysis shows that, although not developed as the ECtHR case law, the ECJ has convincingly argued, although mainly with the words of its Advocate Generals, for the recognition of many different elements of the right to personal identity in the EU legal order.

5. Conclusion: the Anniversary of the Convention as the Occasion to Re-open the Debate on Relationship between the EU and the ECHR?

This paper discussed to which extent the EU and the ECHR legal system are equipped in cases of violation of the right to personal identity perpetrated via the use of disruptive technologies as blockchain. The result of this analysis is that both legal

[127] Opinion of Advocate General Tanchev delivered on 12 April 2018, case C-335/17, *Valcheva*, EU:C:2018:242, para. 32.
[128] Judgement of the General Court of the 27 November 2018, joined cases T-314/16 and T-435/16, *VG v. European Commission*, EU:T:2018:841, para. 100.
[129] Opinion of the Court of Justice of 18 December 2014 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454.

systems seem, although in different ways, prepared to take over the challenge of the review of the respect of personal identity. The fact that the ECJ and the ECtHR continue to develop – in parallel – very similar case law, as revealed by sections 3 and 4 above, is an indication of the opportunity to re-open the debate on the mutual relationship.[130] It would perhaps be a powerful sign of commitment and coordination between the highest European legal orders on fundamental rights to re-open the dialogue on the respective relationship. This, especially, in light of the symbolic 70th anniversary of the signature of the ECHR and of the Schuman Declaration. As it is well known, the formal re-opening of the talks for the accession of the EU to the ECHR would entail a sign of political commitment that is extremely delicate under the current circumstances. The key point of the accession, however, is the relationship between the ECJ and the ECtHR. On the occasion of the 70th anniversary of foundational dates for the European legal order, the two Courts could lead by example expressing a commitment to a more formal relationship. It could take the form, as a way of mere proposal, of a memorandum of understanding or of a protocol on mutual cooperation underlining an essential list of mutual efforts to increase the coordination of the respective case law, while preserving the autonomy of the respective legal orders. And while the European jurisdictions are threatened by menaces as Brexit, violations of the rule of law, and the reaction to the omnipresent pandemic, the re-discovery of the logic of cooperation would eventually benefit both legal orders.

ABSTRACT: This paper explores the protection offered by the EU and the ECHR to the right to personal identity. The need to protect personal identity arises from the use of disruptive technologies (as blockchain) that allow the management of a considerable amount of data that identify a specific person (personal data). The paper explores the protection to the right of personal identity via the analysis of the case law of the ECJ and the ECtHR. The analysis of the protection offered to personal identity in the European legal order is especially critical in the occasion of the 70th anniversary of the ECHR signature and the Schuman Declaration, which could be the occasion to re-open the debate on the relationship between the EU and the ECHR.

KEYWORDS: blockchain – fundamental rights – EU – ECHR – personal identity.

[130] The influence of the ECtHR case law over EU law is regulated by Article 6 TEU, that grants to the fundamental rights expressed in the ECHR the status of general principles of EU law.