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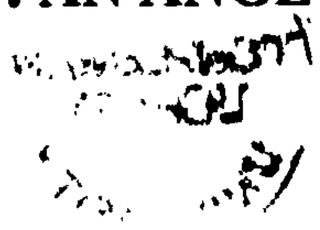
TITLE:

RESPECT FOR HUMAN DIGNITY: AN ANGLO-FRENCH COMPARISON



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Abstract

The thesis analyses the ways in which respect for human dignity is ensured through law. Situated within the framework of comparative legal studies, it examines the place and significance of the principle of respect for human dignity in English and French law within the context of the protection of fundamental rights at both national and European levels (including the European Convention on Human Rights and the law of the European Union).

The introduction sets out the framework of the study. It is here that the comparative nature of the research is presented and the chosen methodology of comparative law justified. The thesis is then divided into two main sections. The first, comprising Chapters 1 and 2, is devoted to the definition of key concepts, notably that of 'dignity' and the 'human person' and to an analysis of the 'juridification' of respect for dignity, that is its insertion into legal sources at both national and supra-national levels and its relationship with other fundamental legal principles and values.

The second part of the thesis, Chapters 3 to 6, comprises a detailed comparative study of instances in which the concept of dignity is applied in France and England. Initially under investigation is respect for dignity at the boundaries of life; that is at its beginnings (Chapter 3) and at its end (Chapter 4). The focus then shifts towards respect for dignity during the course of the human life cycle, looking particularly at violations of physical integrity (Chapter 5) and mental integrity (Chapter 6). The study concludes that while both French and English legal systems have been called upon to respond to potential dignity violations as a result of scientific and technological developments, their responses have varied as a result of their distinct legal cultures. Nevertheless, there is a substantial trend towards *rapprochement* as a result of harmonising influences from Europe.

Discipline

Law – European and comparative public law

Key words

Comparative law; constitutional law; European Convention on Human Rights; European Union law; fundamental rights; human dignity

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Chapters 1 and 2: 'The Value of Human Dignity' in *Values in the Constitution of Europe* eds. Aziz M. and Millns S., (Aldershot: Dartmouth, 2004, forthcoming).

Chapter 3: 'Making "Social Judgments that go Beyond the Purely Medical": The Reproductive Revolution and Access to Fertility Treatment Services' in *Law and Body Politics: Regulating the Female Body* eds. Bridgeman J. and Millns S., (Aldershot: Dartmouth, 1995) 79-104.

'Human Rights and Reproductive Rights' (2001) 54 *Parliamentary Affairs* 475-494.

Chapter 4: 'Death, Dignity and Discrimination: The Case of *Pretty v. United Kingdom* (European Court of Human Rights, [Sect. 4], no. 2346/02, judgment of 29 April 2002)', (2002, 1 October) 3/10 *German Law Journal* (http://www.germanlawjournal.com).

Chapter 5: 'Dwarf-Throwing and Human Dignity: A French Perspective' (1996) 18 *JSWFL* 375-380.

Chapter 6: 'Transsexuality and the European Convention on Human Rights' [1992] *PL* 559-566.

Susan Millns

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ABBREVIATIONS

1. In English

AC	Appeal Cases
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
All ER	All England Reports
BMJ	British Medical Journal
BMLR	Butterworths Medico-Legal Reports
C & P	Carrington & Payne's Nisi Prius Reports (171-173 ER)
CA	Court of Appeal
CJ	Chief Justice
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CMLR	Common Market Law Reports
CML Rev	Common Market Law Review
Col HRL Rev	Columbia Human Rights Law Review
Crim App Rep	Criminal Appeal Reports
Crim L R	Criminal Law Reports
Crim L Rev	Criminal Law Review
ECR	European Court Reports
EHRLR	European Human Rights Law Review
ELJ	European Law Journal
EL Rev	European Law Review
EPL	European Public Law
ER	English Reports
ERPL	European Review of Private Law
EUSSIRF	European Union Social Science Information Research Facility
FCR	Family Court Reports
FLR	Family Law Reports
FLS	Feminist Legal Studies
FSR	Fleet Street Reports
Harv L Rev	Harvard Law Review
HL	House of Lords
HRCD	Human Rights Case Digest
HRQ	Human Rights Quarterly
ICLQ	International and Comparative Law Quarterly
ICR	Industrial Cases Reports
IJLF	International Journal of Law and the Family
ILJ	Industrial Law Journal

Imm AR	Immigration Appeal Reports
JCMS	Journal of Common Market Studies
JEPP	Journal of European Public Policy
JLS	Journal of Law and Society
J Med Ethics	Journal of Medical Ethics
JSWFL	Journal of Social Welfare and Family Law
JSWL	Journal of Social Welfare Law
Lloyd's Rep Med	Lloyd's Reports: Medical
LS	Legal Studies
LQR	Law Quarterly Review
M & W	Meeson & Welby (150-153 ER)
Med L Int	Medical Law International
Med LR	Medical Law Reports
Med L Rev	Medical Law Review
Med Sci Law	Medicine Science and the Law
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
MR	Master of the Rolls
NIQB	Northern Ireland Queen's Bench
NLJ	New Law Journal
NHS	National Health Service
OJ	Official Journal (of the European Community)
OJLS	Oxford Journal of Legal Studies
PL	Public Law
PR	Probate Reports
QB	Queen's Bench
SC	Scots Session Cases
Sch	Schedule
SLS	Social and Legal Studies
SLT	Scottish Law Times Reports
TLR	Times Law Reports
Texas L Rev	Texas Law Review
Web JCLI	Web Journal of Current Legal Issues
Wis L Rev	Wisconsin Law Review
WLR	Weekly Law Reports
Yale LJ	Yale Law Journal

2. In French

AJDA	Actualité juridique Droit administratif
ALD	Actualité législative Dalloz
Ass Plén	Assemblée plénière
Cass	Cour de cassation
CE	Conseil d'Etat
CEDH	Convention européenne de la sauvegarde des droits de l'homme et du citoyen
CIJ	Cour internationale de justice
CJCE	Cour de justice des Communautés européennes
D	Recueil Dalloz
DDHC	Déclaration des droits de l'homme et du citoyen
DR	Décisions et rapports de la Commission européenne des droits de l'homme
Dt Pén	Droit pénal
Dt Soc	Droit social
DUDH	Déclaration universelle des droits de l'homme
Gaz Pal	Gazette du palais
IVG	Interruption volontaire de grossesse
JCP	Juris-classeur périodique (Semaine juridique)
LPA	Les petites affiches
OMS	Organisation mondiale de la santé
ONU	Organisation des Nations Unies
PACS	Pacte civil de solidarité
PIDCP	Pacte international relatif aux droits civils et politiques
PIDESC	Pacte international relatif aux droits économiques, sociaux et culturels
RCJCE	Recueil de la Cour de justice des Communautés européennes
RDP	Revue du droit public et de la science politique
RFAP	Revue française d'administration publique
RFDA	Revue française de droit administratif
RFDC	Revue française de droit constitutionnel
RIDC	Revue internationale de droit comparé
RISJ	Revue internationale de sémiotique juridique
RJC	Recueil de jurisprudence constitutionnelle
R Sc Crim	Revue de science criminelle et de droit pénal comparé
RTDC	Revue trimestrielle de droit civil
RTDH	Revue trimestrielle des droits de l'homme
RUDH	Revue universelle des droits de l'homme
S	Sirey
UMP	Union pour un mouvement populaire

RESUME

While theologians and philosophers have for a long time been concerned with unravelling the meaning and content of the concept of human dignity, it is only relatively recently that legal references to this core value have become more widespread. Thus, it is only in the latter half of the twentieth century that the idea has been taken up in both international and national law and has gone on to contribute towards the evolution of the protection of fundamental rights touching upon many different matters, including those within the domains of public law, private law and criminal law.

The thesis, in its legal analysis of the principle of respect for human dignity, adopts a comparative approach. It examines the principle at national level in two European countries, France and the United Kingdom (UK), while also taking into account influences at the European level, notably the law of the European Union (EU) and that of the European Convention on Human Rights (ECHR). The interest of the study is oriented around a number of major concerns: an observation of whether or not respect for dignity is guaranteed in law; its operation in the light of the differences between the two legal systems under review; and an examination of whether the domestic level of protection is adequate given the requirements of European law.

The thesis proceeds in three major steps. Initially, the introduction sets out the framework of the study. It is here that the comparative nature of the research is presented and the chosen methodology of comparative law justified. In other words, the introduction addresses the rationale for a comparative study of national legal systems (for example, in order to find common solutions to legal problems or to improve upon national law) and also underlines the specific interest of a comparison between France and the UK given the differences in legal culture and legal mentality of the two countries.

The thesis is then divided into two major parts. The first, the object of chapters 1 and 2, is devoted to the definition of key concepts, notably the ideas of 'human' and 'dignity', and to an analysis of the legal sources of respect for dignity. Thus, having

defined the contours of the basic terms of the research in Chapter 1, the second Chapter aims to establish where dignity surfaces in law and the nature of its relationship with fundamental legal principles. This calls for a dual perspective. On the one hand, the supra-national level is considered in order to understand how dignity is integrated into international law and European law; the latter requiring also an examination of two different, yet increasingly linked, legal systems, that of the EU and the ECHR. This is followed by an analysis of the place occupied by human dignity at the level of national law. Here the emphasis is laid particularly upon the constitutional arrangements of the two countries under observation, notably the ways in which they guarantee protection of fundamental rights: in France, via a written Constitution, the Declaration of the Rights of Man of 1789 and the presence of a Constitutional Council, and in the United Kingdom, in the absence of all three of these elements, the recourse to a strong tradition of case law aimed at protecting fundamental rights. That said, a trend will be noted throughout the thesis towards an alignment of the two systems provoked by the introduction in UK law of the Human Rights Act 1998.

The remainder of the thesis, Chapters 3 to 6, comprises a detailed comparative study of the instances in which the concept of dignity is applied in France and in the UK. Taking as a starting point the constitutional arrangements of the two countries, the thesis examines the extent to which human dignity has been protected in France explicitly as a constitutional value, and in the UK more implicitly, through a growing body of case law. Two principal fields of study are used to illustrate the argument. The first is respect for dignity at the *boundaries* of human life; that is at its beginnings (Chapter 3) and at its end (Chapter 4). Thus, the former engages with applications of the dignity principle to beginnings of life issues such as abortion, assisted conception and the use of new reproductive technologies while the latter enters into the controverial terrain of debates over end of life matters such as assisted suicide and euthanasia. The second theme takes as its object of enquiry respect for dignity *during the course of* the human life cycle looking particularly at violations of bodily integrity (Chapter 5) and mental integrity (Chapter 6). While it is acknowledged that the boundary between these two spheres is at times extremely difficult to draw, Chapter 5 engages primarily with an application of the dignity principle to corporal matters such as physical and sexual assaults and medical interventions upon the body, while the

final Chapter investigates applications of the principle to issues of mental integrity, including attacks upon reputation and identity, culminating, inevitably, with an examination of the principles of non-discrimination and equality.

In short, the research seeks to compare the ways in which key aspects of the human life cycle are handled in French and English law when observed through the constitutional lens of the principle of respect for human dignity. The thesis concludes that whereas in the UK both parliament and the judiciary have been more reticent than their French counterparts to invoke explicitly a legal concept of respect for human dignity, their engagement with the concept has been nevertheless implicit, surfacing in combination with the use of more traditional legal values such as autonomy, liberty and self-determination. Furthermore, influenced increasingly by European obligations, a phenomenon of *rapprochement* is evident between the two countries with a common interest in respect for human dignity emerging from its initial crystallisation as an issue of life and death to become a principle of significant application throughout the whole of the human life cycle.

INTRODUCTION

The primary purpose of this thesis is to investigate the meaning of the legal principle of respect for human dignity. The initial problematic questions to which this objective gives rise are numerous given the lack of precise definition of the terms involved. For instance, what does it mean to talk of a legal principle of respect for dignity? Who is bound by it and to what extent? What meaning is to be attributed to the term respect and what content ascribed to the notion of personal dignity? Indeed, who might be defined as a person to whom the principle applies? Such problems of definition and application have generated a considerable body of literature in recent years on the appropriate legal response to the need to respect and protect human dignity providing many useful reference points from which to embark upon the present study.[1] Moreover, it is clear that the subject has a universality that intersects

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[1] In France, the debate over the appropriate relationship between human dignity and French law has been prolific since the early 1990s and has resulted in numerous publications in the field. See, for example, Andorno R., *La distinction juridique entre les personnes et les choses – à l'épreuve des procréations artificielles* (Paris: LGDJ, 1996) chapter 3, 'Le but du droit: garantir la dignité de la personne'; Edelman B., 'La dignité de la personne humaine: un concept nouveau' *D* chron, 1997, 23, 185-188; Hassler T. and Lapp V., 'Droit à la dignité: le retour!' *LPA*, 1997, 14, 12-14; Jorion B., 'La dignité de la personne humaine – ou la difficile insertion d'une règle morale dans le droit positif' *RDP*, 1999, 1, 197-233; Kahn A., 'Préface: quelle dignité pour l'embryon humain?' in *L'embryon humain: approche multidisciplinaire* ed. Feuillet-Le Mintier B., (Paris: Economica, 1996) XIII-XV; Mathieu B., 'La dignité de la personne humaine: du bon (et du mauvais?) usage en droit positif français d'un principe universel' in *Le droit, la médecine et l'être humain: propos hétérodoxes sur quelques enjeux vitaux au XXIème siècle* ed. Sériaux A., (Aix-Marseille: Laboratoire de théorie juridique, 1996) 213-236; Mathieu B., 'La dignité de la personne humaine: quel droit? quel titulaire?' *D* 1996, 33, 282-286; Mathieu B., 'Les droits fondamentaux: les contraintes (?) du droit international et du droit constitutionnel in 'La recherche sur l'embryon: qualifications et enjeux' *Revue générale de droit médical*, special edition, eds. Labrusse-Riou C., Mathieu B. and Mazen N.-J., (Bordeaux: Editions les études hospitalières, 2000) 215-229; Maurer B., *Le principe de la dignité humaine et la Convention européenne des droits de l'homme* (Paris: La documentation française, 1999); Mouthouh H., 'La dignité de l'homme en droit' *RDP*, 1999, 1, 159-196; Pavia M.-L., 'Le principe de dignité de la personne humaine' in *Droits et libertés fondamentaux* eds. Frison-Roche M.-A. and Revet T., (Paris: Dalloz, 2000) 121-139; Pavia M.-L. and Revet T. (eds.), *La dignité de la personne humaine* (Paris: Economica, 1999); Pech T., 'La dignité humaine. Du droit à l'éthique de la relation' *D* 2001, special edition, 20, 90-112; Pontier J.-M. (ed.), *La dignité* (Aix-Marseille: Presses universitaires d'Aix-Marseille, 2003); Rousseau D., *Les libertés individuelles et la dignité de la personne humaine* (Paris: Monchrestien, 1998); Saint-James V., 'Réflexions sur la dignité de l'être humain en tant que concept juridique du droit français' *D* chron., 1997, 10, 61-66.

In the United Kingdom, on the other hand, the debate is more recent and the sources of reference still more limited than in France. See, for example, Beyleveld D. and Brownsword R., 'Human Dignity, Human Rights and Human Genetics' in *Human Genetics and the Law: Regulating a Revolution* eds. Brownsword R., Cornish W.R. and Llewelyn M., (Oxford: Hart Publishing, 1998) 69-88; Beyleveld D. and Brownsword R., *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001); Biggs H., *Euthanasia, Death with Dignity and the Law* (Oxford: Hart Publishing, 2001); Feldman D., 'Human Dignity as a Legal Value – Part I' [1999] *PL* 682-702; Feldman D., 'Human Dignity as a Legal Value – Part II' [2000] *PL* 61-76; Ingram A., 'Rights and the Dignity of Humanity' in *Rewriting*

with fundamental and deep questions going to the heart of human existence and demanding consideration of spiritual,[2] ethical,[3] philosophical[4] and, increasingly, legal issues.[5] It is clear too that, while the concept of human dignity has a long history, its transposition into law, at least its use instrumentally and systematically as a legal tool, has been much more recent. Evident also is the fact that the issue of respect for human dignity will continue to furnish much food for thought in the future as the law seeks to grapple with the development of new technologies, biosciences and the evolution of contemporary society, all of which raise concerns about the respect for and violation of personal dignity.

Given the amplitude of the subject, any study of dignity can be only fragmentary and partial. In seeking to give some precision to the research questions raised in this thesis, the first frame of reference to be drawn around the concept is a legal one. Thus, while Chapter 1 offers some general reflections on the origin and meaning of the concept of human dignity, the thesis is primarily concerned with exploring the legal readings given to the notion and is, therefore, limited to an analysis of its interpretation in law. That said, it is evident that the relationship between dignity and law cannot be understood without reference to external factors such as morality, politics, ethics and both natural and human sciences. Law is incessantly, and quite rightly, required to respond to innovations and developments in other disciplines. What is striking in this regard, however, is the trajectory taken by the principle of human dignity in law, notably its ascendancy as one of the rising stars of constitutional discourse in both national and international arenas. This phenomenon may be observed in particular over the last decade and has to be viewed as a direct legal response to developments in science and technology together with the

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Rights in Europe eds. Hancock L. and O'Brien C., (Aldershot: Ashgate, 2000) 9-23; Oliver D., *Common Values and the Public-Private Divide* (London: Butterworths, 1999) pp. 60-65.

[2] Maurer B., *ibid.*, pp. 30-37; see below, Chapter 1, p. 37.

[3] Lenoir N., Mathieu B. and Maus D. (eds.) *Constitution et éthique biomédicale* (Paris: La documentation française, 1998); Pech T., *supra* n. 1; see below, Chapters 3 and 4.

[4] See, particularly, Gewirth A., *Reason and Morality* (Chicago: University of Chicago Press, 1978); Kant I., *Die Metaphysik der Sitten* Werkausgabe Band VIII, Herausgegeben von Weischedel W., (Frankfurt a M: Surkamp, 1977, first published 1797); and below Chapter 1, pp. 37-38.

[5] See above n. 1, and also for more global perspectives: Dupré C., *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford: Hart Publishing, 2003); Schachter O., 'Human Dignity as a Normative Concept' (1983) 77 *AJIL* 848-854; Whitman J.Q., 'The Neo-Romantic Turn' in *Comparative Legal Studies: Traditions and Transitions* eds. Legrand P. and Munday R., (Cambridge: Cambridge University Press, 2003) 312-344, at pp. 329-343.

reconfiguration of social and moral attitudes accompanying these changes. Of course, there remains much scope for ameliorating legal responses to the external shocks generated by the modernisation of society and the globalisation of communications and information technology; in particular in order to ensure that these questions respond to legal requirements and do not fall beyond the reach of the rule of law. In this respect, it will be argued that human dignity is a fundamental tool which is operationalised at the frontiers of law's engagement with technological progress. In legal terms it is the notion of dignity which has been called upon both to impose limits upon technological developments and to ensure that those initiatives which are allowed to proceed do so in a manner which is respectful of the human person. Of course, this represents an enormous challenge to which there are no easy ethical or legal answers. The rapid speed at which science and technology have evolved at the end of the twentieth and into the twenty-first centuries and the requirement for legal responses to these transformations, has made the challenges of writing a thesis in this area both more complex and ultimately more fulfilling, given that this has widened the initial sphere of enquiry both in its material and legal scope.

Law, therefore, is an important factor in thinking through the concept of human dignity. Yet, here too, invoking a unitary idea of law risks drawing the parameters of the field of study too widely. The collection of essays on *La dignité de la personne humaine* edited by Marie-Luce Pavia and Thierry Revet demonstrates, for example, the enormous complexity of the task of inserting human dignity into legal discourse and fully shows how the concept impregnates all branches of law but in an unsystematic and fairly haphazard manner.[6]

In this Introduction an attempt will be made to explain and to justify the major legal orientations of the thesis and the perspectives which have influenced and directed the research. The study revolves around two major legal axes: public law and comparative law. Synthesising these two orientations, the Introduction seeks to explain the scope of the research project, that is the sphere of investigation of the relationship between human dignity and comparative public law that provides the

[6] The volume edited by M.-L. Pavia and T. Revet, *supra* n. 1, considers the insertion of dignity into French criminal law, administrative law, civil law and labour law and also into international and European law.

framework for subsequent reflections. A further precision, however, needs to be made about the hazy frontiers of this sphere of reference. Although an effort has been made to locate the research project at the intersection of public and comparative law, it is sometimes difficult to separate the application made of the principle of human dignity in these particular branches of law from that used in other areas. In this respect, the habitual classification, particularly in the continental tradition, of legal subjects into separate spheres, notably public and private, is unhelpful and creates an impediment to a more holistic consideration of the dignity principle. It is, for example, practically impossible to speak of dignity within the framework of human rights discourse, without discussing its subsequent implications in areas of civil law, health care law, employment law, public international law and European Union (EU) law. Hence, while the emphasis in this thesis is placed upon the public law dimension of human dignity, this is more in recognition of the fact that fundamental rights (to which dignity is intimately linked) fall squarely within the traditional territory of constitutional law, rather than of a view that the dignity principle is applicable solely in the public sphere.

There is one more clarification which needs to be made with regard to the public law framework of the thesis: this is the evident remark that constitutional law can no longer be confined within the frontiers of individual nation states. Public law matters, including civil liberties and fundamental rights, have to be contextualised in turn within the wider horizons of European and international law. Thus, the framework of reference of the thesis necessarily includes a supra-national dimension, predominantly European, which seeks to address the implications of the creeping 'constitutionalisation' of European law and the strengthening of fundamental rights protection as an essential pillar in the construction of a Constitution for Europe.[7]

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[7] The European constitutional framework is considered with regard both to European Union law and the European Convention on Human Rights (ECHR) both of which have implications for the importation of European norms into domestic systems and have resulted in a degree of national convergence.

In the framework of the EU, the decision of the European Council, as expressed in the Laeken Declaration on the Future of the European Union (Annex I to the Conclusions of the Laeken European Council, 14-15 December 2001, SN 300/1/01 REV 1) to convene a Convention whose remit of deliberating upon the development of the EU was rapidly transformed into the mission of elaborating a Constitution for Europe, has resulted in the preparation of a draft Constitution for Europe, the second part of which contains the EU's Charter of Fundamental Rights. The draft text was presented by the President of the Constitutional Convention, former President of the Republic of France, Valéry Giscard d'Estaing, on 20 June 2003 to the European Council meeting in Thessaloniki 'in the hope', as the

While the subject matter of the research project, therefore, falls broadly within the domain of public law, the *approach* which is adopted is above all comparative. Yet, like the notion of public law, the idea of legal comparison is far from clear-cut. By way of explanation, the following section sets out the comparative methodology employed in the thesis and seeks to justify the particular interpretation of comparative legal studies adopted. This is followed in the final part of the Introduction by an explanation of the interest of a comparative study of the concept of human dignity. Given that dignity is a much disputed notion and that it is difficult to place within a framework of legal norms, it is suggested that some light may be shed on the concept by a comparative enquiry which shows how different legal systems (here the English[8] and the French) approach dignity issues with the constitutional tools furnished by their particular legal traditions but which are not so embedded as to be impossible to transplant from one system to another.

I.1 Comparative law and legal culture

The comparison of laws and legal systems is a well-known method of scientific enquiry which is pursued across all continents. A special issue of the *Revue internationale de droit comparé*, published in 1999, clearly shows the world-wide interest in the activity of legal comparison comprising a global set of examples of the state of comparative legal studies in Europe (Germany, France, the UK, Italy, Spain, Belgium, Finland, Sweden, Hungary and Israel), in America (the United States and

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President put it, 'that it will constitute the foundation of a future Treaty establishing the European Constitution' (CONV 850/03, 18 July 2003). The draft Constitution, unceremoniously rejected, however, at the Inter-Governmental Conference in Brussels on 12-13 December 2003 will be reconsidered under the Irish presidency of the Union in early 2004.

References in this thesis to the draft Constitution for Europe cite the final numbering of the version presented to the European Council on 18 July 2003 (CONV 850/03) (OJ 2003 C169/1). See further, De Poncins E., *Vers une Constitution européenne* (Paris: Editions 10/18, 2003); De Witte B., *Ten Reflections on the Constitutional Treaty for Europe* (Florence: Robert Schuman Centre for Advanced Studies and Academy of European Law, 2003); Duhamel O., *Pour l'Europe: Le texte intégral de la Constitution expliqué et commenté* (Paris: Seuil, 2003); Ziller J. (ed.), *The Europeanisation of Constitutional Law in the Light of the Constitutional Treaty for the Union* (Paris: L'Harmattan, 2003); Ziller J., *La nouvelle Constitution européenne* (Paris: La Découverte, forthcoming).

[8] Given the different constitutional and legal structures which apply in Scotland and Northern Ireland, the legal system which is under primary consideration is that of England and Wales. The thesis does, however, make reference to resemblances and divergences between the ensemble of systems which make up the UK legal order when this facilitates a better understanding of the particular issue under discussion.

Brazil), and in Asia and Australia (Hong Kong, India and New Zealand).[9] However, despite the globalisation of the activity of comparing laws, there remains a distinct lack of consensus as to the aims and the appropriate methods for effective comparison. Comparative legal studies, thus, covers a multitude of enterprises: a discourse on the science of comparative law[10] and the methodology of comparison,[11] an exposition of the '*grands systèmes de droit*'[12] and principal 'legal traditions',[13] a debate over the distinction between the civil law and common law traditions,[14] a technical comparison of national legal rules in a particular area of law,[15] a comparison of 'functions',[16] a study of the place of comparative law amidst the core modules of the legal curriculum,[17] and increasingly a highly developed theoretical perspective[18] which goes well beyond legal positivism to investigate the concept of 'legal culture'[19] and the value of an inter-disciplinary approach to comparison in law.[20] Whatever the

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[9] *RIDC*, 1999, 4, 747-1117. For a summary, see Blanc-Jouvan X., 'Le cinquantenaire de la revue' *RIDC*, 1999, 4, 747-752.

[10] Constantinesco L.-J., *Traité de droit comparé, tome III* (Paris: Economica, 1983).

[11] Gutteridge H.C., *Le droit comparé* (trans. David R.) (Paris: LGDJ, 1953); Lasser M., 'The Question of Understanding' in Legrand P. and Munday R. (eds.), *supra* n. 5, 197-239.

[12] David R. and Jauffret-Spinozi C., *Les grands systèmes de droit contemporains* 11th ed. (Paris: Dalloz, 2002); David R. and Brierley J.E.C., *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* 3rd ed. (London: Stevens, 1985); Esquirol J. L., 'René David: At the Head of the Legal Family' in *Rethinking the Masters of Comparative Law* ed. Riles A., (Oxford: Hart Publishing, 2001) 211-235; Fromont M., *Grands systèmes de droit étrangers* 4th ed. (Paris: Dalloz, 2001).

[13] Glenn H.P., *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000).

[14] Merryman J.H., *The Loneliness of the Comparative Lawyer – and other Essays in Foreign and Comparative Law* (The Hague: Kluwer Law International, 1999). See in particular Part I on the 'civil law and common law', pp. 13-171.

[15] Zweigert K. and Kötz H., *An Introduction to Comparative Law* 3rd ed. (trans. Weir T.) (Oxford: Oxford University Press, 1998). This book comprises a detailed study of the law of obligations across several European jurisdictions. See also, in the area of torts, Van Gerven W., Lever, J. and Larouche P., *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford: Hart Publishing, 2000), particularly pp. 1-12 and pp. 69-74.

[16] Zweigert K. and Kötz H., *ibid.*, p. 34.

[17] Samuel G., 'Comparative Law as a Core Subject' (2001) 21 *LS* 444-459.

[18] Legrand P., 'Comparative Legal Studies and Commitment to Theory' (1995) 58 *MLR* 262-273; Legrand P., 'How to Compare Now' (1996) 16 *LS* 232-242; Legrand P., *Le droit comparé* (Paris: PUF, coll. Que sais-je?, 1999); Legrand P., 'The Same and the Different' in Legrand P. and Munday R. (eds.), *supra* n. 5, 240-311; Peters A and Schwenke H., 'Comparative Law Beyond Post-Modernism' (2000) 49 *ICLQ* 800-834; Samuel G., 'Comparative Law and Jurisprudence' (1998) 47 *ICLQ* 817-836.

[19] Bell J., *French Legal Cultures* (London: Butterworths, 2001); Ehrmann H.W., *Comparative Legal Cultures* (Englewood Cliffs (NJ): Prentice-Hall, 1976); Nelken D. (ed.), *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997). Nelken D. and Feest J. (eds.), *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001).

[20] Legrand P. and Munday R. (eds.), *supra* n. 5; Riles A. (ed.), *supra* n. 12. These collections bring to the comparative study of law perspectives from anthropology, history, sociology, philosophy, politics and literary and cultural studies. The volumes have much in common in so far as they both demonstrate that while comparative legal studies cannot be understood without reference to its historical legacies and the work of its founding fathers, the discipline has, nevertheless, an important future in contributing to contemporary understandings of phenomena such as globalisation and the rise of new technologies.

activity denoted by the term comparative legal studies, it will be argued, in sympathy with the latter two approaches, that the work of the comparatist cannot be carried out satisfactorily without some consideration being given to the contexts in which the law is applied and particular attention being paid to the legal cultures and traditions of the countries that are the objects of enquiry.

I.1.1 The act of comparison: practice and theory

The dispute amongst comparative lawyers as to what they actually do and what (if any) sorts of methods they employ to carry out their research, suggests that some thought needs to be given to the fundamental questions of what comparative legal studies is all about and, indeed, can legal systems be effectively compared when they are, after all, so inherently different. It is evident that the methodology of legal comparison remains relatively unadvanced[21] when viewed alongside more sophisticated comparative studies in related areas such as public administration and political science, suggesting that lawyers have much to learn from these examples.[22] Such studies, in demonstrating the importance of context, show above all else that a simple textual analysis of legal norms will be insufficient to explain differences in the choice and application of particular rules of law. On the contrary, it is necessary to look more closely at both the practice and theory behind the act of legal comparison in order for a more meaningful assessment to be made.

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[21] Zweigert K. and Kötz H., *supra* n. 15, p. 33. The absence of method in comparative law is explained by the authors as resulting from the relatively late discovery of comparative law as a valid object of scientific study.

[22] See, for example, Ziller J., *L'accès à la fonction publique dans les Etats membres des communautés européennes: étude juridique comparative* Thesis in Law: Paris II, 1986, particularly pp. 5-12; Ziller J., *Administrations comparées: les systèmes politico-administratifs de l'Europe des douze* (Paris: Montchrestien, 1993); Badie B. and Hermet G, *La politique comparée* (Paris: Armand Colin, 2001) chapter 1, 'La méthode comparée'; Mény Y. and Surel Y., *Politique comparée: les démocraties: Etats-Unis, France, Grande-Bretagne, Italie, RFA* 6th ed. (Paris: Montchrestien, 2001) pp. 5-25; Widner J., 'Comparative Politics and Comparative Law' (1998) 46/4 *AJCL* 739-749. With regard to sociological methods of comparison, see Feldbrugge F.J.M., 'Sociological Research Methods and Comparative

I.1.1.i The practice of comparison

The starting point for the comparative research on which this thesis is based is the premise that comparative legal studies should be rooted in a degree of practical experience which demands that the comparatist be immersed in the legal systems of the countries which are the focus of comparison, rather than the research being a purely paper exercise aimed at a compilation of national reports outlining legal responses to a similar factual problem.[23] For this reason, one of the most important and influential research activities undertaken for this project was a period of practical work experience in the French legal system. With the financial assistance of two awards, one from the Society of Legal Scholars (formerly the Society of Public Teachers of Law) and the other from the University of Kent's Faculty of Social Sciences Research Committee, a two week placement was carried out in May 1999 at the French *Conseil constitutionnel*, the highest body responsible for adjudicating upon constitutional matters in France. During this period an observation was made of the workings of the institution and a number of formal interviews carried out with four (of the nine) members of the Council together with its Secretary General (responsible for the coordination and direction of its case load).[24] Profiting also from an introduction to the geographically proximate personnel of the *Conseil d'Etat* (the highest administrative court with responsibility also for advising the government on legislative drafting and reforms) one day was spent visiting this institution and an interview conducted with a member of the *section des rapports et des études* (the unit responsible for carrying out research).[25]

Law' in *Inchieste di diritto comparato* vol. 2, ed. Rotondi M., (Padova/New York: CEDAM/Oceana Publications, 1973) 211-224.

[23] It is not denied, however, that this form of comparison may have its merits provided that the research is not simply limited to an exposition of the rules applied in a number of countries and that it contains a synthesis of conclusions.

[24] The Constitutional Council is made up of nine members whose nine year mandate is non renewable, a third of its members being replaced every three years. Three members each are nominated by the President of the Republic, the President of the National Assembly and the President of the Senate. In addition, former Presidents of the Republic are members for life (Article 56, Constitution of 1958). There is no requirement that members have a legal training and, thus, the composition of the body is diverse comprising actors drawn from political, academic, administrative and legal sectors. The result is that the status of the Council (technically not a court) as a legal and/or political body has been the object of much polemical discussion. See, for example, Coulon R., 'Le juge constitutionnel, self-made man du bon usage des droits de l'homme' (1992) V/15 *RISJ* 291-313; and more generally on the role of the Council, Bell J., *French Constitutional Law* (Oxford: Oxford University Press, 1992), pp. 48-56.

The reason for undertaking this practical experience was to try to understand better the day-to-day operation of the Constitutional Council, the mentality of its members, its decision-making procedures and its ways of reasoning. The importance of the exercise lies in the fact that the comparatist, as an outsider to the legal orders which he or she studies, inevitably experiences difficulties in comprehension which a period of concrete exposure to the other system can sometimes help overcome. Of course, the comparatist remains primarily attached to his or her legal system of origin and thereby necessarily views the 'foreign' jurisdiction from this subjective position. Nevertheless, the tendency to measure other jurisdictions by one's own familiar standards can be somewhat mitigated by a better understanding of the legal culture of the other legal system(s) under investigation.[26] Before going on to say a little more about the results of this practical work experience and the insights gleaned into the role of the Constitutional Council, it is first necessary to explain aspects of the motivation behind the placement and interviews and what it was hoped the latter would reveal about French constitutional decision-making processes.

The motivation behind the interviews The six people who were interviewed comprised four men and two women. This distinction on the grounds of sex was viewed as important given that one of the dimensions of the research project was to investigate the relationship between respect for human dignity and the particular situation of women. Thus, one of the key research questions addressed in the interviews was the issue of whether or not female decision-makers reason differently from their male counterparts and whether their interpretation of dignity may as a result be distinct. Finding a satisfactory response to this question in the French legal system was, however, rendered difficult – more so even than in a common law system - given that a 'feminine voice'[27] literally cannot be identified from the text of

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[25] It was requested by the Constitutional Council that the names of interviewees should not be disclosed in the dissemination of research findings for reasons of professional confidentiality.

[26] For further discussion of the importance of recognising subjectivity in the act of legal comparison see below, p. 13 and section I.2.1.ii.

[27] The possible identification of a feminine voice in legal decision-making in the common law system is discussed in McGlynn C., *The Woman Lawyer: Making the Difference* (London: Butterworths, 1998) pp. 184-187, and McGlynn C., 'Judging Women Differently: Gender, the Judiciary and Reform' in *Feminist Perspectives on Public Law* ed. Millns S. and Whitty N., (London: Cavendish Publishing, 1999) 87-106. The question of a feminine model of administering justice in the French civilian legal tradition has, however, yet to be addressed despite the fact that the judiciary in France has of late been feminised to the point of virtual parity (figures for 1999 show that women judges and public prosecutors made up 48.5% of the professions): see Boigeol A., 'Male Strategies in the Face of the Feminisation of a

judgments which represent the view of the court as a whole and do not contain dissenting opinions. Judgments are also extremely brief, often comprising not more than a few paragraphs and thus do not elaborate extensively on the motivation behind any decision.[28] Nevertheless, when during the course of the interviews, the question was asked as to a possible split between men and women in the decision-making process – particularly, for example, in issues of special concern to women such as abortion, contraception, sterilisation and assisted conception – every single interviewee denied the existence of any such division. Moreover, this was not due to a reluctance to admit the possibility of diverging views amongst the members of the Council since two members fully acknowledged that cleavages emerged over other issues, notably resulting from right- or left-wing political persuasions and attitudes for or against Europe.

Clare McGlynn, in her comprehensive gendered analysis of British judicial institutions (and other legal professions), considers the question of whether women judges make a difference. Beginning with a discussion of the work of American psychologist Carol Gilligan suggesting that women have different behavioural traits from men which are inherent to their sex, McGlynn explores whether the presence of more women judges would lead to different laws and a different legal system.[29] Concluding that a judiciary drawn from a broad range of backgrounds and comprising both sexes would bring different experiences to bear on legal decision-making, McGlynn refutes, nevertheless, any attempt to ground this distinction in an essentialist and biological construction of the differences between men and women.[30] Preferring

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Profession: The Case of the French Judiciary' in *Women in the World's Legal Professions* eds. Schultz U. and Shaw G., (Oxford: Hart Publishing, 2003) 401-418. The Constitutional Council needs to be viewed slightly differently as regards this trend towards feminisation in so far as male-female parity has not yet been reached with only three out of the nine current members being women. The gender balance of the Council is, nevertheless, better than that of the House of Lords which welcomed its first and only female member, Lady Hale, in January 2004.

[28] On stylistic differences in legal reasoning see Markesinis B., 'Reading Through a Foreign Judgement' in *Always on the Same Path: Essays on Foreign Law and Comparative Methodology* vol. 2 (Oxford: Hart Publishing, 2001) 79-101.

[29] McGlynn C., *supra* n. 27. Gilligan C., *In A Different Voice* (Cambridge MA: Harvard University Press, 1982).

[30] McGlynn C., *ibid.*, pp. 185-186. The refusal to conceptualise and justify women's participation in judicial decision-making in terms of female difference has been echoed by Kate Malleson who, in putting the case for an increased number of women on the bench, stresses that this is a matter of equity, legitimacy and women's right. See 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 *FLS* 1-24. For a summary of both utility-based and rights-based arguments supporting parity between women and men in decision-making, see Leon M., Mateo Diaz M. and Millns S.,

a more sociological explanation, she suggests that it is the perspectives and views of female judges – as women – that may lead them to reason differently from men. Women judges, drawing upon life experiences which may not have been enjoyed by their male counterparts, are able to introduce fresh approaches into the decision-making process. Moreover, as a matter of procedure, women judges may adopt different styles of decision-making based upon an increased willingness to use conciliatory and negotiation techniques. Thus, women's reasoning in accordance with an 'ethic of care' may allow for a more consensual and relational approach to decision-making while the male 'ethic of justice' is rather more concerned with an adversarial establishment of a hierarchy of rights.[31] Studies of decision-making by female judges carried out in other common law jurisdictions (notably the USA, Canada and Australia) have suggested similar subtle gender differences in judicial reasoning.[32]

In France, however, given the difficulties associated with extracting any individual voices (female or male) from the pronouncements of the Council as a whole, and thereby establishing a difference in approach to the question of respect for human dignity as perceived by female and male adjudicators, a more practical method was adopted seeking to draw such information from the line of questioning in the interviews. In this way it was hoped that a better understanding of the individual perspectives and motivations of the members of the institution might be elicited.

The method and results of the interviews The method used for the interviews was to start in each case with a standard questionnaire which then acted as a springboard for

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'(En)gendering the Convention: Women and the Future of the European Union' Robert Schuman Centre Policy Paper No. 2003/01 (Florence: European University Institute, 2003) pp. 12-13.

[31] An interesting example of women's more mediational approach seemed to emerge from one of the interviews at the Constitutional Council. A female interviewee admitted (and was the only one to do so) that she was sometimes undecided as to the appropriate outcome of a case before going into the meeting to discuss the decision with her colleagues. She also indicated that even when she had decided upon a certain solution beforehand, she might then change her mind as a result of debate in the session. Of course, the extent to which male members may do the same and yet not think to admit to the influence of dialogue with others upon their decision-making, is impossible to assess. It is, nevertheless, suggested that this female perspective may reveal a more relational and discursive approach to decision-making than that adopted by male members.

[32] For Canadian, American and Australian examples see respectively: Wilson B., 'Will Women Judges Really Make A Difference?' (1990) 28 *Osgoode Hall LJ* 507-522; O'Connor S., 'Portia's Progress' (1991) 66 *New York Uni L Rev* 1546-1558; Graycar R., 'The Gender of Judgments: An Introduction' in *Public and Private – Feminist Legal Debates* ed. Thornton M., (Oxford: Oxford University Press, 1995) 262-283.

further discussion depending on the interest expressed by the interviewees in explaining the different aspects of their work.[33] The interviews ranged in length from 30 minutes to two hours and were recorded. The discussions covered a broad range of issues concerning the decision-making function of the Constitutional Council, its style of judicial reasoning, the composition of the body, divisions of opinion amongst members, the distribution of case load, the drafting of decisions and the rationale for not allowing the publication of dissenting opinions. The results of the interviews, somewhat disappointingly (but perhaps not surprisingly given the political, judicial and academic background of the members of the Council), revealed an enormous degree of consensus and satisfaction with the decision-making process. Members repeatedly stressed the importance of the Council giving, and being seen to give, a single, clear and unambiguous response to highly important constitutional questions. In particular, none of the interviewees favoured the introduction of dissenting judgments believing they would demonstrate a lack of cohesion and degree of uncertainty in the decision which might then undermine the credibility of the institution.[34] Indeed, the very posing of this question seemed to be regarded by some as a rather obscure concern provoked by the interviewer's training in the common law tradition. Instead, the members laid much emphasis on the unique role of the Council in the construction of French constitutional law and, rather paradoxically (given the limitations upon the judicial function in France), enthused over its creative capacities to interpret what are often broad statements of principle in the French Constitution. The members were also unashamedly proud of their ability to influence public perceptions of the (constitutional) acceptability of new and controversial pieces of legislation (for example, on abortion and bioethics).

More telling, in fact, than the seemingly rather formulaic responses to the interview questions in comprehending the working methods and decision-making process of the Council was the opportunity to observe members in their usual habitat going about their day-to-day business of preparing decisions, researching relevant legal questions and meeting to deliberate upon their judgments. It was this practical aspect of the observation process which conveyed more than words could ever do a sense of the

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[33] The questionnaire is included below as Annex 1, pp. 352-353.

actual operation of what is a small but highly efficient decision-making body. The fact of being at the heart of its activities, in the library when members were carrying out their personal research (only one interviewee had a research assistant for this purpose), at the fax machine at the moment of a *saisine* (request for a ruling),[35] in the corridors as members conversed informally with one another about cases in hand, was a pivotal experience in helping to understand the workings of the *Conseil.* Of course, these impressions are intangible, highly personal and difficult to relate causally to the outcomes of particular decisions. They did, nevertheless, convey an invaluable sense of the professionalism, the creativity, the camaraderie and the personal enjoyment in their work of the various members whose voices make up the collective whole in this unique constitutional decision-making process.

While confidant, therefore, of the benefits of this type of practical experience in achieving a better understanding of the legal system of the foreign jurisdiction, the comparatist needs, nevertheless, to be aware of a certain colouring of her conclusions by the very subjective nature of the experience. In this respect no comparatist can ever fully escape her own legal culture, meaning that all comparative legal studies are tainted to a greater or lesser extent by subjective judgments about the system of the 'other'. As Pierre Legrand rightly points out: 'even if the comparatist does not make a living out of being judgmental, to compare is always to judge.'[36] Thus, it has to be admitted that the conclusions drawn throughout this thesis, in particular those regarding decisions of the Constitutional Council (whose work has been instrumental in the legal construction of the principle of respect for human dignity in France) are marked by the subjective nature of the activity of comparison. Being schooled, first and foremost, in a common law system, makes it impossible to appreciate fully what French law signifies to a French lawyer. It is impossible to extricate oneself completely from a common law mentality and training and this means that certain

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[34] For a full account of the application of the collegiality principle in French legal decision-making see Bell J., Boyron S. and Whittaker S., *Principles of French Law* (Oxford: Oxford University Press, 1998) pp. 52-53.

[35] The Council may give a ruling on the constitutionality of ordinary (as opposed to constitutional) legislation only if requested to do so by the President of the Republic, the prime minister, the President of the Senate or President of the National Assembly, or a group of 60 deputies or senators. It is obliged automatically to review the constitutionality of legislation dealing with constitutional matters (Article 61, Constitution of 1958).

[36] *'Même si le comparatiste ne fait pas métier de juger, comparer, c'est toujours juger'* (Legrand P., *Le droit comparé* (1999) *supra* n. 18, p. 56).

questions (such as the publication of dissenting opinions) appear glaringly important for a common lawyer when to a civil lawyer who has never been exposed to equivalent practices, they are not at all so.

Evaluating the role of the Constitutional Council The observations in this introduction regarding the Constitutional Council are tentative also in a more general sense in that they are made despite the lack of an established framework of reference for comparative research studies into European judicial decision-making organs. One of the exceptions to the paucity of work in the field, and of particular interest given that the study includes the *Conseil constitutionnel,* is the research on institutions, including constitutional courts, carried out by the political scientist, Alec Stone Sweet, who has identified three key problems that confront comparative researchers when investigating such decision-making bodies.[37] These problems, it is suggested, are of as much relevance to lawyers as to political scientists and for this reason deserve further consideration.

First, according to Stone Sweet, there is no coherent theoretical account of the workings of such institutions. In particular, no conventional framework has been established within which to structure analyses and data, meaning that researchers proceed in an autonomous fashion presenting their research findings without reference to any principal axes or classifications which might otherwise have guided their thought processes and presentation of conclusions. Secondly, there is the problem of the archaic and unhelpful barriers between disciplines which often prevent researchers in one field from penetrating another. It is, however, quite plain that in seeking to compare judicial institutions, political scientists must have some legal knowledge, in particular an understanding of public law, together with an appreciation of international relations and democratic political theory. Thirdly, Stone Sweet highlights the expanding multi-dimensional phenomenon of the Europeanisation of constitutional politics. This escapes any easy characterisation in the familiar

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[37] Stone Sweet A., *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000) pp. 2-3. Without a specific constitutional dimension, but still providing an illuminating account of comparative judicial decision-making, the three-way study of the *Cour de cassation*, European Court of Justice and United States Supreme Court by Mitchel Lasser demonstrates clear differences in argumentative practices, institutional arrangements and conceptual structures employed in the three systems (Lasser M., *Anticipating Three Models of Judicial Control, Debate and*

lexicography of political scientists, so often grounded in the concept of national sovereignty, and presents a substantial challenge for the construction of a theoretical perspective on the incidence of convergence and divergence between European political and judicial institutions. From a *lawyer's* point of view very similar difficulties may be observed: an absence of theoretical cohesion, even discussion, of the core objectives of comparative legal studies, particularly in the area of public law;[38] rigid disciplinary barriers between comparative law and other fields of scientific enquiry;[39] and the difficulty of comprehending and explaining the impact of the Europeanisation of national law which is creating forms of multi-level governance and constitutional pluralism hitherto unknown.[40]

Stone Sweet proposes to overcome the difficulties identified above through a framework analysis of the contribution made by constitutional adjudicating bodies to what he calls the 'judicialization' of social life.[41] His argument unfolds via an exploration of a number of themes linking the role and activities of constitutional institutions to the wider social sphere – notably with regard to parliamentary democracy, judges as producers of law (that is the characterisation of constitutional courts as 'legislative chambers'), the protection of rights, the politics of the judiciary, the construction of a European Constitution and the theory of constitutional politics. Once more, despite the legal rather than political orientations of the present thesis, the need for consideration here of a similar set of themes together with their relationship to broader social concerns is clear. This is especially so because, as will be seen throughout the thesis, the principle of respect for human dignity has been significantly

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Legitimacy: The European Court of Justice, the Cour de Cassation and the United States Supreme Court Jean Monnet Working Paper 1/03 (New York: NYU School of Law, 2003)).

[38] See below, section I.1.ii, for a discussion on the exercise of comparing public law as opposed to private law rules.

[39] As Jacques Ziller has noted in the context of his comparative study of national systems of public administration, it is impossible to comprehend an administrative system without a proper understanding of the system of political power in which it operates (*'il me paraît exclu de comprendre un système administratif sans une connaissance suffisante du système de pouvoir politique dans lequel il s'insère'*) ((1993) *supra* n. 22, p. 12).

[40] See, for example, Armstrong K. and Bulmer S., *The Governance of the Single Market* (Manchester: Manchester University Press, 1998); Walker N., 'Sovereignty and Differentiated Integration in the European Union' (1998) 4 *ELJ* 355-388; Walker N., 'The Idea of Constitutional Pluralism' (2002) 65 *MLR* 317-359; Ziller J. (ed.), *supra* n. 7.

[41] Stone Sweet A., *supra* n. 37, pp. 12-20. See more generally on the functions of the constitutional judge: Bell J., 'The Judge as Bureaucrat' in *Oxford Essays in Jurisprudence* 3rd series, eds. Eekelaar J. and Bell J., (Oxford: Clarendon Press, 1987) pp. 33-56. Interesting for present purposes is Bell's suggestion that among the eight functions of the judge when reviewing constitutionality is the pursuit of a policy of social engineering (pp. 48-49).

moulded by judicial interventions in both national and European courts which have produced a myriad of repercussions in many areas of social discourse.

Thus, Stone Sweet's discussion of the 'judicialization' of social life is particularly helpful in understanding the impact of constitutional decision-making both for comparative lawyers and political scientists and might be usefully applied to a specific study of the Constitutional Council. The term itself is used to denote the resolution of disputes by a third party (otherwise formulated as 'TDR' or 'triadic dispute resolution') where the judge (as third party) develops his or her authority over the normative structures in place in society to the extent that judicial decisions are accepted by litigants and may subsequently influence the behaviour of other individuals in their relationships with one another.[42] While it should be noted that the role of the Constitutional Council is not to determine the outcome of disputes between two parties (as is the case elsewhere, for example, with the US Supreme Court), it is nevertheless possible to view the influence of the Council's decisions upon the behaviour of individuals in society to the extent that many of its judgments constitutionally legitimate acts of the legislature and, in turn, provide the normative framework in which social life takes place.

Taking up some of the more specific themes explored by Stone Sweet and applying them to the experience of constitutional decision-making in France, it is notable, for example, that the concept of parliamentary democracy has been widely promoted by the Constitutional Council. This is evidenced in its unwillingness to review issues which it considers fall within the domain of legislative discretion (such as the question of when life beings)[43] confining itself to a pure review of the compatibility of legislation with the Constitution.

The issue of judicial creativity is also pertinent to constitutional decision-making in France. It will be seen in subsequent chapters of the thesis that, while the role of the *Conseil constitutionnel* is not to 'create' legal norms and certainly not to act as legislator, it does possess a certain entrepreneurial spirit which has led to its

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[42] Stone Sweet A., *ibid.*, pp. 12-13.
[43] Decision no. 74-54 DC of 15 January 1975, *Abortion*; Decision no. 94-343-344 DC of 27 July 1994, *Bioethics*.

clarification, and even expansion, of the fundamental principles lying at the heart of the French Constitution, including those notoriously tricky principles which further the protection of fundamental rights. For example, in its famous decision of 16 July 1971 on the constitutionality of legislation on freedom of association, the Council held for the first time that the preamble to the Constitution of 1958 (containing references to the preamble to the Constitution of 1946 and the Declaration of the Rights of Man and the Citizen of 1789) had a legal status, thus permitting an expansion of the *'bloc de constitutionnalité'* (the constitutional norms to which the Council may refer) to include those fundamental rights guaranteed by the 1946 and 1789 instruments together with rights devolving from the fundamental principles recognised by the laws of the Republic.[44] In this way the Council vastly augmented its role to become a defender of human rights and freedoms against legislative encroachment.[45] More recently still, and directly relevant to the research questions developed in the thesis, the Council's decision in 1994 on the constitutionality of legislation on bioethics evidenced an enormous degree of creativity on its part through the bringing into being of the constitutional principle of safeguarding human dignity via an innovative reading of the preamble to the Constitution of 1946.[46] The implications of this for the debate on the politics of the judiciary are evident in that the decision crystallised (if not created) a principle which had no previous place amongst constitutional norms of reference and the content of which was not at all clear.

As far as the theme of a Europeanisation of domestic constitutional practices is concerned, this too has resonances with French constitutional decision-making. The decision of the Council of 15 January 1975 in which it refused to review the compatibility of French legislation with international law, including the European Convention on Human Rights (ECHR),[47] pushed the other highest national jurisdictions (the *Cour de cassation* and *Conseil d'Etat*) to address questions of

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[44] Decision no. 71-44 DC of 16 July 1971, *Freedom of association*.
[45] See Lavroff D.G., *Le droit constitutionnel et la V^e République* 3rd ed. (Paris: Dalloz, 1999) pp. 244-245; Bell J., Boyron S. and Whittaker S., *supra* n. 34, chapter 5, especially pp. 152-154.
[46] Decision no. 94-343-344 DC of 27 July 1994, *Bioethics*. This decision is discussed further in Chapters 2 and 3 below, pp. 102-103 and pp. 134-136.
[47] Decision no. 74-54 DC of 15 January 1975, *Abortion*.

compatibility between national and European law.[48] The move permitted the insertion and subsequent stabilisation of an externally created catalogue of rights (the ECHR) within the pyramid of French legal norms. More recently, the decisions of the Constitutional Council over the ratification of the Treaty on European Union and the Treaty of Amsterdam have facilitated the introduction of those fundamental rights guaranteed by the European Union into domestic law.[49]

With regard to constitutional politics, and taking again an example which is pertinent to the specific subject matter of the thesis, the *Bioethics* decision of the Council, through its uncovering of a constitutional principle of respect for human dignity, provided the starting point for the incremental diffusion of the principle throughout the entire French legal system. Thus, the role of the Constitutional Council in shaping the normative requirements placed upon social life in the field of new technological developments has been of pivotal significance and its views have provided a guiding light for decision-makers in what is often highly contested terrain. As such, the Council's creative constitutional energy, its instrumentalisation of particular constitutional provisions to achieve specific outcomes and its willingness and courage in pursuing often controversial courses of action, have had demonstrably important consequences for all constitutional, legal, political and social actors.

I.1.1.ii The theory of comparison

Practical experience and institutional analysis, however, just like the purely formulaic comparison of different national legal rules, are insufficient in themselves to permit meaningful conclusions to be drawn from the act of comparison. To this end, it is necessary to take a more theoretical perspective in order to elaborate an appropriate conceptual framework for the comprehension of legal norms and their practical application. Such a theoretical underpinning to the act of comparison in law pushes the comparatist to go beyond a pure examination of the legal texts themselves and to

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[48] Cass. ch. mixte, 24 May 1975, *Administration des douanes c/ Soc. 'Cafés Jacques Vabre' et SARL J. Weigel et Cie,* D 1975, 497, note by A. Touffait; CE, 20 October 1989, *Nicolo,* Rec. p. 190, conclusions by P. Frydman.

engage in a more critical scrutiny of the place of legal rules within the context of society (be it French, British or European) and in political and moral discourses.[50] This approach is all the more imperative in the subject area of human dignity given that this concept, in its many interpretations, is intimately linked to the historical and cultural development of Western societies as well as to national views on key moral and ethical, life and death, issues.[51]

Stressing the importance of a contextual analysis to comparative law, it is acknowledged, goes against a certain amount of well-established academic writing in comparative legal studies. Some comparatists have expressed the view that any comparison of law should not go beyond the rules themselves as to do so would leave the comparatist at risk of tainting the exercise of comparison by an analysis which is overly political or subjective.[52] As a result, this school of thought advocates that the only successful attempts at comparative legal studies are those carried out in the area of private law, and more narrowly still, the law of obligations.[53] Consequently, according to this view, it is dangerous, if not impossible, to compare public law rules as this branch of the legal system is too intimately linked to the state and to the moral particularities of each country to make an objective comparison viable.

Whilst it is true that many legal comparatists use private law examples to ground their research, there are some who, nevertheless, accept the necessity of a contextual (and

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[49] Decision no. 92-303 DC of 9 April 1992, *Maastricht I*; Decision no. 92-312 DC of 2 September 1992, *Maastricht II*; Decision no. 92-313 DC of 23 September 1992, *Maastricht III*; Decision no. 97-394 DC of 31 December 1997, *Treaty of Amsterdam*.

[50] The importance of situating law in a broader context is discussed in more depth below, pp. 31-33.

[51] As David Feldman accurately observes, dignity is 'a notion which is culturally dependent and eminently malleable' (Feldman D., (1999) *supra* n. 1, p. 698).

[52] Zweigert K. and Kötz H, *supra* n. 15, p. 40. Zweigert and Kötz maintain that most areas of private law are untainted by politics and are, therefore, appropriate for comparative enquiry which will normally reveal similar responses in national systems: 'if we leave aside the topics which are heavily impressed by moral views or values, mainly to be found in family law and in the law of succession, and concentrate on those parts of private law which are relatively "unpolitical", we find that as a general rule developed nations answer the needs of legal business in the same or in a very similar way.' This observation leads the authors to the striking conclusion that if the comparatist, at the end of the study, finds significant divergences between the countries under investigation, this suggests that the research was not properly conducted and should be commenced afresh: 'the comparatist can rest content if his researches through all the relevant material lead to the conclusions that the systems he has compared reach the same or similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he posed his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough' (*ibid.*).

political) dimension to the activity of comparison.[54] Moreover, beyond the realm of private law, there is an increasing awareness amongst public lawyers of the relevance and usefulness of comparative analyses to their work[55] and, following in their footsteps, the objective of this thesis is precisely to break away from the limited perspective that comparative methods are of use only to obligations lawyers and to insist upon their importance in the area of public law.

This insistence is justified by a number of considerations. First, it is not accepted that a clear distinction exists between public and private law giving rise to two distinct and autonomous systems of legal rules. While French legal doctrine is founded upon such a classification of norms, the tradition of the common law has never known this division. A.V. Dicey in his celebrated work on the law of the English 'Constitution' observed French administrative law with fascinated horror and was quite convinced that the English wanted nothing to do with a system which ran so contrary to the rule of law.[56] For Dicey, one of the pillars of the Constitution was a strict application of the principle of equality between state and citizens. No one should be above the law, including public authorities, which should hold no discretionary or arbitrary power. Even if English lawyers speak from time to time about 'public' or 'private' law matters, and the legal system has sought to introduce specialised jurisdictions such as administrative tribunals and the Administrative Court to deal with certain branches of law, the type of binary classification which is known on the continent has never taken hold. Hence, in institutional terms administrative tribunals bear more resemblance to what the French call *les juridictions d'exception* (that is jurisdictions which have competence in a particular specialised field) including for example, employment

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[53] See, for example, the second part of *An Introduction to Comparative Law* by Zweigert and Kötz, *ibid.*, which contains a detailed comparative study of the law of obligations.

[54] See, for example, the work of Pierre Legrand (1995; 1996; 1999; 2003; *supra* n. 18).

[55] See, for example, in the area of Anglo-French comparative public law: Adjei C., 'The Comparative Perspective and the Protection of Human Rights à la Française' (1997) 17 *OJLS* 281-301; Boyron S., 'Proportionality in English Administrative Law: A Faulty Translation?' (1992) 12 *OJLS* 237-264; Picard E., 'Les droits de l'homme et l'"activisme judiciaire"' *Pouvoirs* 2000, 93, 113-143. In a similar vein the American comparatist, Mark Tushnet, has identified three major ways ('functionalism', 'expressivism' and '*bricolage*') in which a comparison of constitutional laws can contribute to an improved understanding of the Constitution of the United States, permitting the national courts to see how the Constitution may be better interpreted following analysis of experiences elsewhere: Tushnet M., 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale LJ* 1225-1309, p. 1228.

[56] Dicey A.V., *An Introduction to the Study of the Law of the Constitution* 10th ed., (London: MacMillan, 1959, revised 1975) pp. 328-465. The author states that: '[i]n many continental countries, notably in France, there exists a scheme of administrative law – known to Frenchmen as *droit*

tribunals (the equivalent of the French *conseils de prud'hommes* which, of course, apply rules of private employment law). Moreover, the Administrative Court is part of the High Court and consists simply of a list of judges who spend part of their time on judicial review.[57] Thus, the common law system, characterised by its unified court structure and uniform application of the principle of equality before the law, demands a rejection of any attempt to establish a rigid distinction between public and private legal measures.[58] Even in France, there is an increasing *rapprochement* between the obligations held by private persons and public authorities, evident, for example, in the area of non-contractual liability for commercial and industrial services.[59] In short, the sharp division drawn by some comparatists between public and private law in order to sustain a refusal to admit the relevance of comparative legal method to public law is unsustainable when viewed from the perspective of a common lawyer.

The second reason for refusing the conclusions drawn by private law comparatists as to the exclusivity of their activities is their false assumption that private law is neutral and beyond political debate. It is necessary only to observe the way in which the law of contracts, with its requirement of good faith and provisions on unfair contractual terms, has sought to mitigate the effects of the liberal ideological assumption that all contracting parties are free to enter into a bargain and negotiate its content irrespective of their respective economic power, to see that the law of obligations has distinct political overtones.[60] Likewise, torts law is replete with examples of the political choices which are made in determining liability for harm.[61] Using a recent

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administratif – which rests on ideas foreign to the fundamental asssumptions of our English common law, and especially to what we have termed the rule of law' (pp. 328-329).

[57] In this respect Dawn Oliver has noted that the Administrative Court cannot be considered an equivalent of the *Conseil d'Etat* whose members are separate from the judiciary and which has its own exclusive jurisdiction, procedures and substantive law: Oliver, D., 'English Law and Convention Concepts' in *Law and Administration in Europe: Essays in Honour of Carol Harlow* eds. Craig P. and Rawlings R., (Oxford: Oxford University Press, 2003) 83-105, at p. 83.

[58] Harlow C., '"Public" and "Private" Law: Definition without Distinction' (1980) 43 *MLR* 241-265; "Oliver D., 'Pourquoi n'y a-t-il pas vraiment de distinction entre droit public et droit privé en Angleterre?' *RIDC* 2001, 2, 327-338; Oliver D., *supra* n. 1; Taggart M., '"The Peculiarities of the English": Resisting the Public/Private Distinction' in Craig P. and Rawlings R. (eds.), *ibid.*, 107-121.

[59] *Tribunal des conflits*, 22 January 1921, *Colonie de la Côte d'Ivoire c/ Société commerciale de l'Ouest africain*, D 1921, 3, 1, conclusions by Matter.

[60] Wightman J., *Contract: A Critical Introduction* (London: Pluto Press, 1996).

[61] Conaghan J. and Mansell W., *The Wrongs of Tort* 2nd ed, (London: Pluto Press, 1999).

French example, there is nothing more political than the decision to award damages to a severely disabled child who asserts that he should never have been born.[62]

Finally, despite their different moral attitudes and diverse national traditions, all modern democratic states today face similar challenges raised by scientific progress, technological innovation, globalisation and the evolution of society, all of which may have an impact upon the fundamental rights of individuals. This commonality is recognised clearly in the steps taken to constitutionalise European law.[63] Whereas the project to elaborate a European Civil Code has been much contested with regard to both procedure and content, not to mention necessity,[64] this has not hindered the far smoother public law enterprise of elaborating a Charter of Fundamental Rights for the European Union.[65] Drafted following a consensual procedure characterised by its openness and transparency,[66] the Charter is testimony to a move towards the harmonisation of fundamental rights provisions in Europe and, in particular, to an

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[62] See further Chapter 3, below, pp. 188-190, for discussion of the *Perruche* case: Cass. ass. plén., 17 November 2000, *Epx X c/ Mutuelle d'assurance du corps sanitaire français et a.*; rapporteur P. Sargos, conseiller à la Cour de cassation; conclusions by J. Sainte-Rose, avocat général à la Cour de cassation; JCP, 2000, II 10438, note by F. Chabas.

[63] See n. 7 and further Allot P., 'The Crisis of European Constitutionalism: Reflections on the Revolution in Europe' (1997) 34 *CMLR* 439-490; Armstrong K., 'Legal Integration: Theorising the Legal Dimensions of European Integration' (1998) 36 *JCMS* 155-174; De Búrca G. and Scott J. (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford: Hart Publishing, 2000); Pernice I., 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited' (1999) 36 *CML Rev* 703-750; Shaw J., 'Constitutionalism in the European Union' (1999) 6 *JEPP* 579-597; Weiler J.H.H., *The Constitution of Europe: Do the New Clothes have an Emperor? And Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999); Weiler J.H.H., 'A Constitution for Europe? Some Hard Choices' (2002) 40/4 *JCMS* 563-80.

[64] Communication from the Commission to the Council and the European Parliament on European contract law of 11 July 2001, OJ 2001 C255/1; Cornu G., 'Un Code civil n'est pas un instrument communautaire' *D* chron, 2002, 4, 351-352; Feiden S. and Schmid C.U. (eds.), *Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU* Working Paper, Law no. 99/7 (Florence: European University Institute, 1999); Hondius E., 'Towards a European Civil Code: The Debate Has Started' (1997) 5 *ERPL* 455-463; Koopmans T., 'Towards a European Civil Code' (1997) 5 *ERPL* 541-547; Legrand P., 'Against a European Civil Code' (1997) 60 *MLR* 44-63; Lequette Y., 'Quelques remarques à propos du projet de Code civil européen de M. von Bar' *D* chron, 2002, 28, 2202-2214; Markesinis B.S, 'Why a Code is not the Best Way to Advance the Cause of European Legal Unity' (1997) 5 *ERPL* 1997, 5, 519-524; Nottage L., *Convergence, Divergence and the Middle Way in Unifying or Harmonising Private Law* Working Paper, Law no. 2001/1 (Florence: European University Institute, 2001); Schmid C., *Legitimacy Conditions for a European Civil Code* Working Paper, Robert Schuman Centre no. 2001/14 (Florence: European University Institute, 2001).

[65] The EU's Charter of Fundamental Rights was 'solemnly proclaimed' by the institutions of the Union at the meeting of the European Council in Nice in December 2000 (OJ 2000 C 364/8).

[66] The Charter was drafted by a body comprising 62 members drawn from four constituent groups: the governments of the member states (15 members), the Commission (1), the European Parliament (16) and representatives from the national parliaments (30). Observer status was given to two representatives from the European Court of Justice and two from the Council of Europe, one of whom was drawn from the European Court of Human Rights. See further De Búrca G., 'The Drafting of the European Charter of Fundamental Rights' (2001) 26 *EL Rev* 126-138.

agreement on their content – something which has so far been impossible to achieve in the area of civil law. Moreover, the debate over the elaboration of the Charter showed a willingness to include different voices and perspectives in a way that the discussion about the adoption of a European Civil Code has not done. As far as the latter is concerned, Pierre Legrand concludes that the European integration project, as exemplified by the effort to codify the law of obligations, is essentially exclusive while making a pretence of being universal.[67] For Legrand, this is because the very idea of a Civil Code is confined to the civil law tradition and not that of the common law. Thus, a European Civil Code would demonstrate the 'tacit exclusion of the common law way of thinking', a way that rejects a universalistic understanding of law and has never been persuaded to mimic the continental preference for codification.[68] This reveals the paradox inherent in the codification debate:

> 'it does the contrary to what it says, it excludes a part of the whole [the common law] while claiming the virtues of totalising harmony ... It is not a pluralist but a singular a way of thinking – the Romanist perspective on life in law – dissimulated under the guise of the universal.'[69]

Contrary to the difficulties associated with a harmonised codification of obligations law across Europe, in the area of public law the impetus towards adopting a catalogue or Charter of fundamental rights is noticeable as much at the national as the European level. The introduction in the UK of the Human Rights Act 1998 has the effect of importing into domestic law a catalogue of rights, despite the common law underpinnings of the legal system, the resistance to codification initiatives and the lack of consensus in the past on the need for a Bill of Rights.[70] Moreover, it may well

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[67] Legrand P., *Le droit comparé*, 1999, *supra* n. 18, p. 100.
[68] *Ibid.*
[69] *'[l]l fait le contraire de ce qu'il dit, il exclut une partie du tout [le* common law*] alors qu'il clame les vertus de l'harmonie totalisante .... [C]'est une pensée non du pluriel, mais de l'unique – la perspective romaniste de la vie dans le droit – dissimulée sous les alibis de l'universel.' Ibid.*, p. 101. It is in order to mount a defence of the common law that Legrand offers a practical justification for his theoretical approach to comparative legal studies (Legrand P., 'The Same and the Different', 2003, *supra* n. 18, p. 311).
[70] The literature on the introduction and implications of the Human Rights Act 1998 is extensive. See, for example, Feldman D., *Civil Liberties and Human Rights in England and Wales* 2nd ed. (Oxford: Oxford University Press, 2002); Klug F., *Values for a Godless Age: The Story of the UK's New Bill of Rights* (London: Penguin, 2000); Wadham J. and Mountfield H., *Blackstone's Guide to the Human Rights Act 1998* 2nd ed. (London: Blackstone Press, 2000); Whitty N., Murphy T. and Livingstone S., *Civil Liberties Law: The Human Rights Act Era* (London: Butterworths, 2001).

be that the possibility of convergence is stronger in the area of public law as there exists in Europe a basic accord over the values of democracy and respect for fundamental rights.[71] This provides evidence of a commonality capable of producing an ever more harmonised pan-European approach to fundamental rights protection which is hardly as yet envisaged in the area of obligations law.

For these reasons it is maintained that the exercise of comparison in public law pursued in a broad social and political context is fully justified. This should not, however, be taken to mean an expectation of similarity in the comparison of constitutional arrangements in France and the UK. While both states have been keen of late to improve upon the legal protection of fundamental rights (through the Human Rights Act 1998 in the UK and the increased role of the *Conseil constitutionnel* in sanctioning legislative incursions upon human rights in France), and while this, in turn, has led to a heightened regard for the principle of respect for human dignity,[72] the objective of comparative legal studies is not simply to point out similarities.[73] On the contrary, it is rather more to uncover and explain differences which are often just as, if not more, instructive than resemblances.[74]

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[71] These are cited in Article 2 of the draft Constitution for Europe elaborated by the European Union's Constitutional Convention as two of the common values upon which the Union is founded (CONV 850/03, 18 July 2003). On the degree of consensus over respect for fundamental rights in both present and future member states, see Millns S., 'Unravelling the Ties that Bind: National Constitutions in the Light of the Values, Principles and Objectives of the Constitution for Europe' in Ziller J. (ed.), *supra* n. 7, 97-120.

[72] In France this is evidenced by Decision no. 94-343-344 DC of 27 July 1994, *Bioethics*. In the UK David Feldman predicted in 2000 that the Human Rights Act would profoundly modify the British conception of dignity which in the past, even if part of the values underlying constitutional arrangements, had been subordinated to other practices which protect parliamentary democracy, such as effective government, ministerial accountability and representativeness. For further discussion of the nature of dignity as a value, see below, Chapter 1, pp. 70-73.

[73] The sweeping conclusion of Zweigert and Kötz, cited *supra* n. 52, that any comparison (in the area of obligations law) which reveals differences rather than similarities must be misguided is, therefore, not shared, not least because it presumes a result which seems to obviate the need for, and interest of, comparative legal enquiry.

[74] In this respect, the view of Pierre Legrand that difference is not indifferent is shared (*'la différence n'est pas indifférente [...] Il y a lieu, en effet, pour le comparatiste, de comprendre que le comparatisme en droit ne saurait avoir pour raison d'être que l'appréhension des différences'*: Legrand P., *Le droit comparé*, 1999, *supra* n. 18, p. 37.) Legrand has gone on to celebrate the 'redemptive, empowering feature of differential thought' in an extensive rejection of the argument that difference is 'divisive and impoverishing', aiming on the contrary to assert its potential to provide 'a vital capacity for action by enabling one to resist the erosion of boundaries between subjects, by allowing one to elude misrecognition or banishment, by permitting one to avoid violent confusions' (Legrand P., 'The Same and the Different', 2003, *supra* n. 18, pp. 241-242). For a not dissimilar critique of the emphasis in post-war American comparative law on similarity at the exclusion of difference, see Curran V.G., 'Cultural Immersion, Difference and Categories in U.S. Comparative Law' (1998) 46 *AJCL* 43-92.

I.1.2 Diversity and convergence of legal cultures

Rooting comparative legal studies in a contextual environment involves not simply seeking to explain differences between legal systems in the light of historical, political and social phenomena, but implies that attention be paid also to the *legal* context in which norms are adopted, amended and applied. In other words, it is necessary to consider the 'legal culture' in which rules operate for it is only with this information to hand that the particularities of national laws can be understood. The investigation of law as 'cultural fabric'[75] does, however, pose a basic problem for the comparatist. Given the evident differences between legal systems (the Anglo-French common law-civil law traditions providing a good example of these), is it viable to attempt a comparison of national laws at all? Are not legal cultures simply too different to be the object of meaningful comparative enquiry? The case for a positive answer to this question is put forcefully by Pierre Legrand who sees not merely difference but rather insurmountable distinctions between national systems and particularly between '*les mentalités juridiques*', that is legal mentalities or ways of thinking about law.[76]

The diversity between systems implies that the comparatist will always find him or herself in the impossible situation of seeking to understand the 'other'. For example, on the one hand, the British comparatist, trained in the common law tradition and used to the application of the doctrine of precedent, will never be able to appreciate fully the civil law tradition in which the judge is prohibited from creating legal rules, being merely *'la bouche de la loi'* or mouthpiece of the legislator.[77] On the other hand, the French comparatist will see as profoundly odd both the British understanding of the notion of 'legal rules' and the importance attributed to 'facts' in cases. As far as rules

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[75] Legrand P., 2003, *ibid.*, p. 278.

[76] Legrand P., 'European Legal Systems Are Not Converging' (1996) 45 *ICLQ* 52-81, pp. 60-64. Legrand uses the expression 'the collective mental programme' to convey his sense of the concept of legal mentality (p. 60). See also Legrand P., 1997, *supra* n. 64.

For a critique of the 'exaggerated stress' placed by Legrand on the study of insurmountable difference rather than similarity, see Nelken D., 'Comparatists and Transferability' in Legrand P. and Munday R. (eds.), *supra* n. 5, 437-466, at pp. 440-446.

[77] Article 5 of the Civil Code makes it clear that the findings of judges in individual cases have no general application (*'[i]l est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises'*) and Article 1351 provides that judicial decisions create no precedent, binding only the parties to the case to which they refer (*'[l]'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui fait l'objet du jugement...'*). On the general question of the specificity of the common law, see Legrand P. (ed.), *Common law d'un siècle l'autre* (Cowansville,

are concerned, the pragmatism of the common law judge, which at times may seem far from requiring an application of strict principles and, thus, may permit a degree of 'invention' of legal rules, is very different from the reasoning of civilian judges who begin with a reference to an established legal norm which is then applied to the case in hand. As for the common law's insistence on the particular facts of cases which may ultimately determine the decision of a judge to follow or depart from an established precedent, this too looks odd from the perspective of lawyers trained in the civilian tradition who are used to giving primary importance to categories of subjective rights and general legal principles. Unlike civil law, the common law appears as a 'seamless web' in which 'no legal decision can be considered independently from the facts upon which it is based'.[78]

Even the core notions of French and English law seem to have little in common. For example, an English lawyer will be trained to see in the idea of a 'contract' an exchange of promises in the sense of a 'bargain', while her French counterpart will be taught to view the notion of *'contrat'* as an '*accord de volontés*' or meeting of minds.[79] The conclusion which must be drawn is that in order to remain faithful to both interpretations, one has to admit the two notions have little in common both in fact and in law. Equally telling of the diversity of legal cultures is the example of delictual civil responsibility which is founded in France upon the principle set out in Article 1382 of the Civil Code according to which any fault which causes damage to another person must be compensated.[80] This is not at all the case in English law where actions in tort are not the object of a general theory and are not founded upon a notion of general obligation, except in the area of negligence. On the contrary, each

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Québec: Les éditions Yvon Blais Inc., 1992); and on the opposite tradition of the civil law, see Glenn H.P., *supra* n. 13, chapter 5, 'A Civil Law Tradition: The Centrality of the Person'.

[78] The term *'réseau sans frontière'* is used by Pierre Legrand to describe the common law in which *'aucune décision judiciaire ne [peut] jamais être considérée indépendamment des faits sur lesquels elle a porté'*: Legrand P., 'Sens et non-sens d'un code civil européen' (1996) 48/4 *RIDC* 779-812, p. 789. See also the discussion of the role of the common law in the context of the legal education of common lawyers in Samuel G. and Millns S., 'L'enseignement du droit en Angleterre' *Cahiers de Méthodologie Juridique* 1998, 13, 1527-1539.

[79] Legrand P., 'How to Compare Now', 1996, *supra* n. 18, p. 234; and *Le droit comparé,* 1999, *supra* n. 18, p. 24.

[80] Article 1382 provides that: *'[t]out fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.'*

cause of action falls within a sub-category of torts law and is governed by independent rules and principles.[81]

In the area of public law too, the absence in the UK of principles of constitutional value in the sense in which these are recognised in France (that is as emanating from constitutional texts) has provoked much more in the way of a 'seamless web' of case law of a broadly constitutional nature than in France.[82] It will be seen in Chapter 1, below, that the fundamental distinction in the approach to legal principle taken by the two systems is highly apparent in the example of inserting human dignity into law. The French legal system has constructed this notion as a key organisational constitutional principle (or *'principe matriciel'*) capable of engendering other legal rights,[83] while in the UK the idea of human dignity has been absorbed into the common law system in a much more indirect and subtle, but less systematic and principled, fashion.[84]

These illustrations provide some evidence to support Legrand's contention that the incompatibilities between legal systems and mentalities make any exercise in comparison hazardous in the light of irreducible differences.[85] That said, the risk is more than worth running – as Legrand's work on comparisons between the common law and civilian law tradition demonstrates - if the result of the comparison is a contribution to the production of knowledge, a heightened sensitivity to the diversity of legal cultures and an awareness of the particularity of both one's own law and that of the other. Moreover, despite Legrand's scepticism about attempts to unify national

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[81] See Samuel G. and Rinkes J., *Law of Obligations and Legal Remedies* 2nd ed. (London: Cavendish Publishing, 2001) pp. 21-23.

[82] This is not to deny the importance of case law in French public law. As Jacques Ziller has accurately pointed out, much Anglophone literature which opposes the common law to the civil law refers uniquely to the French Civil Code and not to French public law. According to Ziller this confusion is a 'harmful cliché' which completely ignores the fundamental difference between French civil and public law: Ziller J., *Administrations comparées: les systèmes politico-administratifs de l'Union européenne* (Paris: Montchrestien, forthcoming) p. 46, manuscript. See also the similar observation made by John Bell: 2001, *supra* n. 19, pp. v-x and pp. 243-257.

[83] Mathieu B., 'Pour une reconnaissance de "principes matriciels" en matière de protection constitutionnelle des droits de l'homme' *D* chron. 1995, 27, 211-212; Mathieu B., *Génome humain et droits fondamentaux* (Paris: Economica, 2000) p. 68.

[84] On the 'indirect' insertion of dignity into English law, see Feldman D., (2000) *supra* n. 1, especially p. 61. See also Chapter 2 below, pp. 112-119.

[85] Legrand P., 'European Legal Systems Are Not Converging' 1996, *supra* n. 76, p. 74. According to Legrand, the 'irreducible differences' between common law and civil law traditions are the result of two distinguishing features of the English system: the inherent power of the judiciary to adjudicate and the subordination of the executive to legislative authority.

legal systems at the substantive level, there is a sense in which a degree of *rapprochement* may be observed as regards French and UK legal sources in the form of a 'textualisation' of the common law (that is an increased insistence upon rules in statutory or written form[86]) and a 'judicialization', to borrow the terminology of Stone Sweet, of the civil law (in the sense of an increased interpretative role for the judiciary[87]). Moreover, this tendency is reinforced by initiatives aimed at a convergence on substance, particularly at the European level.[88] These initiatives include not only the obvious harmonisation measures to achieve completion of the internal market[89] but also, as noted above, the convergence of elements of private law (notably aspects of contract law,[90] non-contractual liability[91] and family law[92]) and public law;[93] the ensemble implying that national legal systems are not inherently incompatible on all fronts, especially when pushed to reconsider their national positions by norms enacted at the European level.

Of course, it deserves to be emphasised that legal convergence and divergence are not necessarily mutually exclusive. In this respect it may well be that convergence can be observed in some areas of law while divergence, or at least respect for difference, is practised in others. This pluralistic approach is certainly evident in the sphere of respect for human dignity where, as will be seen below, what is an agreed common

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[86] As evidenced, for example, in the passage of the Human Rights Act 1998 with its incorporation of a catalogue of rights in the form of the ECHR into domestic law.

[87] This is notable particularly in the area of the law of torts (demonstrated in exemplary fashion by the decision of the *Cour de cassation* to admit a claim for 'wrongful life' in the *Perruche* case, cited *supra* n. 62). It is also apparent in the area of privacy with the absence of constitutional definition of the right to private life in France having led the judiciary to elaborate substantially upon the extent of the application of this right. See Dupré C., 'The Protection of Private Life Against Freedom of Expression in French Law' (2000) 6 *EHRLR* 627-649.

[88] De Witte B., 'The Convergence Debate' (1996) 3 *MJ* 105-107.

[89] These facilitate the free movement of persons, goods, services and capital throughout the European Union. See Craig P. and De Búrca G., *EU Law: Text, Cases and Materials* 3rd ed. (Oxford: Oxford University Press, 2003) chapters 14-18 and Davies G., *European Union Internal Market Law* 2nd ed. (London: Cavendish Publishing, 2003).

[90] Jamin C. and Mazeaud D. (ed.), *L'harmonisation du droit des contrats en Europe* (Paris: Economica, 2001).

[91] Van Gerven W., 'Non-Contractual Liability of Member States, Community Institutions and Individuals for Breaches of a Community Law with a View to a Common Law for Europe' (1994) 1 *MJ* 6-40; Van Gerven W., 'Bridging the Unbridgeable: Community and National Tort Laws After Francovich and Brasserie' (1996) 45 *ICLQ* 507-544; Van Gerven W., Lever J. and Larouche P., *supra* n. 15, pp. 946-956.

[92] McGlynn C., 'A Family Law for the European Union' in *Social Law and Policy in an Evolving European Union* ed. Shaw J., (Oxford: Hart Publishing, 2000) 223-241.

[93] The EU's Charter of Fundamental Rights incorporated into Part II of the Constitution for Europe will certainly produce harmonising effects upon the constitutional systems of member states at least in so

value throughout the European Union[94] is subjected to different interpretations amongst member states made possible by its indeterminate and highly contingent character.

I.2 The interest of a comparative study

Having outlined in Section 1 above the comparative component of the methodology adopted in this study, the purpose of Section 2 of the Introduction is to explain the contemporary interest in a comparative study of the principle of respect for human dignity. Zweigert and Kötz identify four main reasons for engaging in comparative analysis: i) as an aid to the legislator when considering law reform; ii) as a tool of interpretation; iii) as a vital component of legal education; iv) as a contribution to the unification of law.[95] It might be added that the discipline of comparative legal studies also provides useful insights for assessing compliance with international and European norms. All of these aims are applicable to the present comparative study of human dignity. They are explored below, first with regard to the Anglo-French dimension of the study and secondly, to the interest of a comparative analysis of the concept of human dignity.

I.2.1 Comparative Anglo-French legal studies

The interest of an Anglo-French comparison lies particularly in its constitutional dimension. This is because the twin phenomena of the modernisation and the Europeanisation of constitutional law have led to an opening of perspectives on both sides of the Channel. This is particularly evident in the fruitful dialogues now taking place between UK and French lawyers, both in academia and the professions, assisted by the creation of bodies such as the University of the Transmanche (a combined

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far as the protection of fundamental rights in the implementation of EU law is concerned. See further, Millns S., *supra* n. 71.

[94] Article 2, Constitution for Europe (CONV 850/03, 18 July 2003).

[95] Zweigert K. and Kötz H., *supra* n. 15, pp. 15-31. Of course not all comparatists share these views. As noted above (n. 64 and n. 85), for example, some comparatists are extremely sceptical about the aim and prospects of unifying laws. For further discussion of the 'projects' which comparative law as a discipline serves, see Riles A., 'Introduction' in Riles A. (ed.), *supra* n. 12, 1-18, at pp. 11-15.

initiative of the Universities of Kent, Littoral and Lille 1, 2 and 3) and the Franco-British Lawyers Association. Despite the differences between legal traditions, this dialogue points to a coming together, if not complete meeting, of common law and civilian legal minds, together with an increased appreciation of the merits of comparative enquiry.[96] That said, it is worth bearing in mind some of the difficulties and dangers associated with making legal comparisons that may lead to superficial, even false, conclusions and which are exemplified in the case of a comparison between English and French law.

I.2.1.i The value of an Anglo-French comparison

The value of comparing the French and English legal, and specifically constitutional, systems lies primarily in the exploration of their traditional divergences in the light of increasing resemblances. With regard to the former, the habitual distinction made between countries practising the common law and those with a civilian tradition is often reduced to simplifications.[97] The distinction between systems based primarily upon written law (*'droit écrit'*), that is continental countries, and those with an unwritten tradition is reductionist because both written law and case law are in fact sources of legal rules in the two systems.[98] The real difference is that the legislative style (*'style législatif'*) used in common law countries is distinct from that of continental countries to the extent that in the former legislation is often detailed, long and precise, while in the latter it sets out guiding principles without claiming to be exhaustive.[99]

The orientation of law around fundamental principles is not part of the 'mentality' of the common law which has remained largely immune from the influences of Roman

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[96] There is evidence too of an increased willingness on the part of the senior judiciary to engage in legal comparisons to assist their decision-making. See, for example, the judgment of Lord Rodger in *Fairchild v. Glenhaven Funeral Services Ltd* [2002] 3 WLR 89 which contains a comparative study of Roman, French and German law on the question of whether special rules or principles should be adopted to cope with situations in which a claimant cannot establish which of a number of wrongdoers caused his or her injury.
[97] Ziller J., (forthcoming) *supra* n. 82, p. 46, manuscript.
[98] *Ibid.*
[99] *Ibid.*

law.[100] Suffice to recall that the common law system is constructed around forms of action, rather than grand principles, which is profoundly at odds with the Roman legacy. Forms of action as known to the common law are not divided between *actiones in rem* or *in personam* as in the continental tradition such that UK law is not founded upon a scientific classification which distinguishes the law of persons from the law of things. It will be seen below that the impact of this distinction, so crucial to French legal mentality, has been profound in the construction of the concept of human dignity in France.[101] The UK experience, however, shows that a distinction between persons and things, and the rights which are associated with this division (that is the opposition of *'droits personnels'* and *'droit réels'*), has hardly materialised, not even in cases which touch upon human dignity.[102] Moreover, until recently (particularly since the introduction of the Human Rights Act 1998), the very notion of a subjective right (or *'droit subjectif'* in the continental sense) played a very limited role in the common law mentality. Thus, the roots of the two legal systems and their architecture founded upon grand principles (in the French case) and a 'seamless web' of jurisprudence (in the UK) provide a helpful framework for analysis of the evolution of the common concern to protect human dignity. Both the material and personal scope of the concept, together with its interpretation and insertion within the constitutional arrangements of each of the national systems, are instructive markers for thinking through the meanings, implications and possible uses of the concept.

I.2.1.ii The challenges of comparison

Comparative law, like any form of scientific enquiry, has certain pitfalls of which it is helpful for the comparatist be aware and, thus, to seek to overcome. The difficulties associated with subjectivity and context, in the sense of the particular stand-point from which the comparatist observes the systems under investigation, have been mentioned briefly above in the context of the refusal of some comparative private lawyers to admit of the possibility of comparison in the politicised realm of public

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[100] See the discussion above, p. 23, of Legrand's argument that the introduction of a European Civil Code founded upon such general principles is exclusive of the common law way of thinking.
[101] See Chapter 1 below, pp. 47-49; and Andorno R., *La distinction juridique entre les personnes et les choses – à l'épreuve des procréations artificielles* (Paris: LGDJ, 1996).

law. While not of this persuasion, Legrand nevertheless concludes that no one should embark upon comparative legal studies without taking into account the limitations of the exercise.[103] By this he means the confines of the context within which the comparison and the law is situated, as well as the history and culture of the countries being studied. In a similar vein, Jacques Ziller in his book on comparative public administration states that:

> 'Only knowledge of the cultural, economic, historical, political and social context of institutions, procedures, practices and rules in effect allows recognition of similarities which go beyond name and form.'[104]

The context of any particular legal system is, therefore, equally if not more important than the rules of law which are the object of comparison. Likewise, context is of primary importance if one recalls that 'the comparatist cannot escape her subjectivity or her situatedness'[105] in that she inevitably speaks from a particular location - her system and country of origin. This marks a real challenge for the comparative lawyer who must seek to:

> 'overcome the phenomenon of identification with the legal culture, inevitably particular, in which he [or she] has been trained as a national lawyer.[106]

It is only in overcoming this obstacle that the comparatist can attain the 'full measure of his or her critical vocation.'[107] An effort in this direction has been made in carrying out the research for this thesis in the form of the brief period of immersion in the workings of the *Conseil constitutionnel.* Of course, such an activity can never completely sever the tie with the culture of origin, and its value resides, therefore, in enabling the comparatist to draw the benefits of bringing to bear an external

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[102] On the absence of a classification of real and personal rights in the common law, see Samuel G., 'Existe-t-il une procédure de codification du droit anglais?' *RFAP*, 1997, 82, 209-219.
[103] Legrand P., *Le droit comparé* (1999) *supra* n. 18, p. 62.
[104] *'Seule la connaissance du contexte culturel, économique, historique, politique et social des institutions, procédures, pratiques et règles permet en effet de reconnaître des similitudes au-delà de dénominations, voire de formes différentes'*: Ziller J. (forthcoming) *supra* n. 82, p. 6, manuscript.
[105] Lasser M., *supra* n. 11, at p. 219.
[106] *'[Le comparatiste doit] surmonter le phénomène d'identification avec la culture juridique, inévitablement située, dans laquelle il s'est d'abord formé comme juriste national...'*: Legrand P., *Le droit comparé* (1999) *supra* n. 18, p. 65.
[107] Described by Legrand as *'la plénitude de sa vocation critique'* (*ibid.*).

perspective upon the 'foreign' institution or system under investigation. A certain distance between observer and object is, after all, not a bad thing in itself. Indeed, it might be maintained that this distance ensures that the comparatist does not become lost in, or overwhelmed by, the law of the other system and that it assists in ensuring a clearer and more measured perspective.

It should be added, finally, that the subjective light in which comparative legal studies is bathed can be extremely productive in the act of comparison itself, that is at the final stages of analysis and conclusion. This is because comparative law, in order to produce more than a simple juxta-position of facts concerning two or more legal systems, has to involve an analysis by the comparatist of the data gathered. In this respect, the present study of human dignity attempts to go beyond a mere description of the law in France and the UK by seeking to explain the differences and similarities revealed by the study in the context of the legal systems concerned. It is only in carrying out this final act of comparison, which inevitably draws upon the researcher's own perspectives, experiences and legal training, that it can be hoped to offer satisfactory conclusions.

The second obstacle to effective legal comparison, and one which, unlike the issue of context and subjectivity, is often neglected, concerns the problem of language and, by implication, the translation of legal terminology. In seeking to overcome this difficulty it seems prudent to follow the advice of other comparatists which is quite simply to learn not to translate.[108] This is because translation, particularly if carried out literally, will result in a poor understanding of complex legal phenomena which are known only to individual systems. A good example of this would be the translation into French of the concept of the common law as *'le droit commun'* (which in French denotes the application of general rules in the absence of any more specific provision). There are, moreover, some concepts which are simply impossible to translate. For example, the French institution known as the *'Conseil d'Etat'* has no equivalent in the UK system; so to speak of a 'Council of State' would be meaningless. Thus, in order to remain faithful to the subtle nuances of legal terminology, the practice has been adopted in this work to avoid translation if at all

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[108] See Legrand P., *Le droit comparé* (1999, *supra* n. 18, p. 24), citing Sacco R., *Introduzione al diritto comparato* 5th ed. (Turin: UTET, 1992) pp. 40-41.

possible. Where translation from the French was necessary this has been given as a form of explanation in English and placed in brackets following the French term.[109] In this way, it is hoped that the challenges posed by the translation of legal vocabulary have been overcome and the dangers of misunderstanding minimised.

I.2.2 The interest of a comparative study of human dignity

Having noted the interest in an Anglo-French comparison, it is furthermore possible to identify two unifying factors which justify a comparative study of human dignity. First, the global phenomenon of technological advancement which has revolutionised all societies merits comparative analysis for its capacity to impact upon, that is promote and threaten, human dignity. Both France and the UK are experiencing the challenges raised by scientific progress, biotechnological developments and the information society, together with the ethical dilemmas surrounding issues such as assisted conception, animal and human cloning, gene therapy, euthanasia and assisted suicide, to which these advances give rise. Moreover, both countries are increasingly confronted by the potential assaults upon both physical and mental integrity which may be produced by the use of new technologies. The different ways in which the two states have used legal measures to address these challenges provide important insights into the operation of their respective legal cultures together with demonstrating the different interpretations which can be attached to the concept of human dignity depending on the perspective from which it is viewed. Suffice to say at this stage, however, that the common concern to emphasise the value of human dignity in legal terms at this particular moment in history is not accidental. It is precisely the moment at which dignity is most at risk that its status and meaning in law are most in need of clarification.

Just as the challenges of advancement are universal, so too is the obligation to respect human dignity. For this reason one of the key questions raised in this thesis is the extent to which dignity is protected in equal measure in France and the UK. Are there, for example, instances in which it is apparently advanced in one jurisdiction

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[109] This follows the method suggested by Jacques Ziller in *Administrations comparées* (1993) *supra* n. 22, p. 14.

and not in the other; and if so, why? How can a diversity in obligations to respect dignity be explained if dignity is viewed as a characteristic common to all human beings? Are disparities to be justified as a result of differences in the legal systems of the two countries or of differing interpretations of the notion itself? More precisely, from a constitutional perspective, does the absence of a written Constitution in the UK offer fewer guarantees to citizens that their dignity will be respected than in France?

In order to address such important and complex questions the remainder of the thesis measures from a comparative perspective the consistency of the two national legal systems in their responses to the requirement to respect human dignity. Chapter 1 commences by exploring definitions of the fuzzy notion of the legal principle of respect for human dignity, investigating the meaning of its component parts ('dignity' and 'human') together with the content of the obligation to ensure its 'respect'. This is followed in Chapter 2 by an analysis of the phenomenon of 'juridification' of human dignity, that is its insertion into national and supra-national legal systems, particularly at the constitutional level and amongst fundamental rights guarantees. Chapters 3 to 6 comprise studies of the application of human dignity. These cover four core areas which are selected for their capacity to convey a longitudinal perspective of the application of the dignity principle throughout the human life cycle. Chapters 3 and 4, thus, examine the principle as applied at the frontiers of life: its beginnings and its end respectively. The remaining two chapters explore legal responses to violations of personal dignity which occur between these two points in time; Chapter 5 analysing assaults upon bodily integrity and Chapter 6 assaults upon mental integrity.

CHAPTER 1

THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY: DEFINITIONS

The first task of any investigation of human dignity is to attempt to give definition to what is an infinitely slippery concept. With its philosophical and spiritual origins, human dignity has, over the latter half of the 20th century, been of increasing legal interest, yet not surprisingly its meaning in law has been strongly contested and its content never fully determined. Dignity implies many things and changes its meaning depending on who is responsible for the definition. Equally contested are the methods used to guarantee dignity in law. This initial chapter is, thus, concerned with giving broad shape to the fundamental concepts of 'dignity' and the 'human person', together with examining the general idea of 'respect' for dignity in law, through an analysis of the fine distinction between respect and protection, as well as the legal characterisation of dignity as a 'fundamental right', 'principle' or 'value'. For it is only once these basics are established that the comparison of dignity in particular national systems becomes meaningful.

1.1 Defining 'dignity'

In the first section of this chapter the foundations and origins of the notion of human dignity in Western democratic tradition are put forward to demonstrate the underpinnings of the concept through its historical evolution and its philosophical and spiritual components – all of which have profoundly influenced its translation into law. Deriving from the Latin *dignitas*, the word 'dignity' signifies 'worthiness' and 'merit' and designates those qualities which contribute to a dignified existence (such as esteem, honour and nobleness).[1] It denotes the intrinsic value of the human person[2] and signifies that 'Factor X' which makes each and every individual a part of

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[1] Simpson J.A. and Weiner E.S.C. (prepared by), *The Oxford English Dictionary* vol. IV, 2nd ed. (Oxford: Clarendon Press, 1989), pp. 656-657. For a similar definition in French, see Rey A. (ed.), *Le Robert: Dictionnaire historique de la langue française* (Paris: Robert, 1994) p. 604.

humanity.[3] This definition, drawing heavily upon theological and philosophical thought, has been consolidated following practical experience of dignity violations, that is via historical atrocities which have sought to 'dehumanise' and so exclude from the circle of humanity, particular individuals and social groups.

1.1.1 The roots of dignity: theological, philosophical and historical underpinnings

Beginning with Western Judeo-Christian theology, the invocation of dignity departs from the view that all human life is sacred, that it is a gift from God and, as such, should be respected and protected.[4] In this formulation, mankind is created in God's image, implying on the one hand, the application of an anthropological concept of personhood to God and, on the other, the attribution to the human person of the quality of dignity, in other words a sense of the God-given spiritual and moral essence which resides in each human being. It is in this way that the concept of dignity links human beings to God, their creator and that the seeds of the relational quality of dignity – evoking a *rapport* between the human person and another being - start to emerge. The essential point is that individual human beings are not viewed as isolated within the universe; to the contrary, they are part of a greater ensemble to which they are attached by reason of their very humanity.

Beginning with the idea of dignity being intrinsic to the human individual, Kant expresses the concept in terms of the 'absolute inherent worth' of every person which requires that 'he exacts *respect* for himself from all other rational beings in the world.'[5] Such inherent worth is, furthermore, intimately connected to individual freedom, moral individualism and the capacity of each person to think for him or

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[2] Rey A. (ed.), *ibid.*
[3] Fukuyama F., *Our Posthuman Future: Consequences of the Biotechnology Revolution* (London: Profile Books, 2003) p. 149.
[4] See Maurer B., *Le principe de la dignité humaine et la Convention européenne des droits de l'homme* (Paris: La documentation française, 1999) pp. 33-37.
[5] Kant I., *The Metaphysics of Morals* trans. and ed. M. Gregor (Cambridge: Cambridge University Press, 1991) p. 230; *'[Der Mann] besitzt eine Würde (einen absoluten innern Wert), wodurch er allen andern vernünftigen Weltwesen Achtung für ihn abnötigt'*: Kant I., *Die Metaphysik der Sitten* Werkausgabe Band VIII, Herausgegeben von W. Weischedel (Frankfurt a M: Surkamp, 1977, first published 1797) p. 596. See also Kant E., *Fondements de la métaphysique des moeurs* (Paris: Vrin, 1997) pp. 106-107.

herself.[6] Moreover, according to this philosophical tradition, humanity too is to be conceived of as possessing dignity:

> 'Humanity itself is a dignity: for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end'.[7]

Beyleveld and Brownsword characterise this interpretation of dignity as founded upon the duties of the individual, calling it a 'duty-led perspective'.[8] They then oppose this view of dignity with a 'rights-led perspective' grounded in the moral theory of Alan Gewirth.[9] According to the latter interpretation, certain agents – those who have the capacity to act and to choose freely – are bound by the 'principle of generic consistency' (or PGC). This principle stipulates that agents have reciprocal rights and duties as regards respect for the liberty and the well-being of others, and this applies without consideration of the status of the person. Thus, rights are generic, and are also both positive and negative. It is these rights which are of prime importance over any individual interests. Herein lies the difference with Kant's philosophy. For Gewirth, the rights of agents, that is their capacity to act freely within conditions which ensure their self-respect, must be protected, while for Kant dignity is more closely linked to duties than to rights.[10]

It will be seen in many examples discussed in this thesis that it is Kant's perspective on human dignity which penetrates legal discourse. A certain sympathy has to be expressed in this regard given that it is precisely the moment at which the individual is treated as an object and therefore no longer as a human being (as a means rather than an end) that dignity violations occur – even if, in certain cases, this means that

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[6] See Ingram A., 'Rights and the Dignity of Humanity' in *Rewriting Rights in Europe* ed. Hancock L. and O'Brien C., (Aldershot: Ashgate, 2000) 9-23, at pp. 16-19: 'Thinking for oneself gives a reading of what it means for all people to be equal in dignity, namely, they each have the capacity and need for free moral thinking' (p. 18). See also Beyleveld D. and Brownsword R., 'Human Dignity, Human Rights, and Human Genetics' in *Human Genetics and the Law: Regulating a Revolution* eds. Brownsword R., Cornish W.R. and Llewelyn M., (Oxford: Hart Publishing, 1998) 69-88, at pp. 75-77.

[7] Kant I., 1991, *supra* n. 5, p. 255; *'Die Menschheit selbst ist eine Würde; denn der Mensch kann von keinem Menschen (weder von anderen noch so gar von sich selbst) bloß als Mittel, sondern muß jederzeit zugleich als Zweck gebraucht werden'*: Kant I., 1977, *supra* n. 5, p. 600; Kant E., 1997, *supra* n. 5, p. 105.

[8] Beyleveld D. and Brownsword R., *supra* n. 6, p. 70.

[9] *Ibid.* See Gewirth A., *Reason and Morality* (Chicago: University of Chicago Press, 1978).

the duties of an individual inevitably trump a particular right. This, it is suggested, is because dignity represents that essential value inherent in each person which ties him or her to the rest of humanity. The loss of dignity implies dehumanisation; and the legal and moral obligation to prevent this must weigh more heavily than the individual right to exercise free choice in all circumstances.

Given the spiritual and philosophical explanations of the nature of human dignity, it becomes clear why certain events in history, most notably the atrocities carried out during the Second World War, have been viewed as characteristic dignity violations. Marie-Luce Pavia, for example, writes that in these events one can see the *'fait générateur'*, the very genesis, of dignity.[11] For this author, the Nazi project, set on human destruction, had as its primary purpose the exclusion of certain persons from the sphere of humanity, transforming them into sub-humans or animals. Thierry Pech, on the other hand, sees in the Nazi experience only the 'recommencement' of dignity – the sequel to the spiritual history of dignity and its modern foundation in Kantian philosophy.[12] In this view, the atrocities of Auschwitz are but one extreme example of the reduction of human beings to mere objects which, for Kant, marks the threshold of a dignity violation. Pavia too recognises the processes of objectification at work in the Nazi era. For her they lie with those carrying out the atrocities: 'Nazi cruelty', she writes, 'emanates from an industrial apparatus or from man becoming entirely apparatus.'[13] For both authors the massacre of humanity in this period, and without historical precedent, the merging of human and object, of person and thing, is precisely what pushed international organisations to recognise the status and importance of dignity in international law.[14]

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[10] Beyleveld D. and Brownsword R., *supra* n. 6, pp. 79-81.
[11] Pavia M.-L., 'La découverte de la dignité de la personne humaine' in *La dignité de la personne humaine* eds. Pavia M.-L. and Revet T., (Paris: Economica, 1999) 3-34, at p. 6.
[12] Pech, T., 'La dignité humaine. Du droit à l'éthique de la relation' *D* 2001, special edition, 20, 90-112, at p. 93.
[13] *'La cruauté nazie émane d'un appareil industriel ou d'un homme devenu tout entier appareil.'* Pavia M.-L., *supra* n. 11, p. 6.

1.1.2 The reach of dignity

Yet, while respect for dignity can be said to encompass the recognition of each and every person's full humanity, it is not easy to define precisely what this recognition entails. There are two particular aspects to this question which relate to the sphere of application of the concept. First, what is the personal scope of dignity, that is to whom does it apply? Secondly, what is its material scope, in other words its content?

1.1.2.i The personal scope of dignity

Even authors such as Thierry Pech who reject a religious understanding of dignity with its emphasis on the dignity conveyed in the relationship between God and mankind, and prefer a more philosophical grounding of the concept, accept that the relational nature of dignity, that is the link between persons and humanity, between human beings and their community, is of vital importance. Here again, though, any simplistic and unitary vision of dignity as a relational concept fails to convey its full complexity. Dignity, in its personal scope, in fact, implies a dual imperative: to respect the dignity of others but also to respect oneself.

With regard to the requirement to respect others, this has been characterised above as comprising the obligation not to treat other human beings as objects or to cast them from the sphere of humanity, thus depriving them of their very human essence or inherent worth. In reciprocity, each person can expect that others respect his or her dignity. In this way the obligation is mutual, being founded upon the tie which binds individuals together, requiring of them that they live in harmony and do not injure their fellow beings. This formulation comprises the classic elements of individual freedom which have so much inspired Western legal tradition and according to which individual liberty is to be guaranteed to the extent that it does not cause harm to others.[15]

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[14] See below, Chapter 2, pp. 81-82.
[15] Mill J.S., *On Liberty* (London: Penguin, 1974) p. 68.

While this first, relational, aspect of the personal scope of dignity might seem quite evident, this is not necessarily so as regards its second aspect comprising the duty of self-respect. Given that dignity is defined as an intrinsic quality of the human person, it cannot be easily cast aside. Thus, it can (and arguably must) be protected even if to do so means intruding upon personal autonomy and acting contrary to the wishes of an individual who consents to his or her own degradation. A good example of this is provided by the French cases on dwarf-throwing competitions (known as *'lancer de nains'*) in which it has been found that the personal dignity of the dwarf (projectile) could not be compromised by the legitimisation of these events even if he saw no personal degradation in his treatment.[16] Likewise, a useful parallel example is that of the decisions of the House of Lords and European Court of Human Rights regarding the condemnation of a group of homosexual men for injuries caused by sado-masochistic activities pursued with the consent of the victims.[17] In short, respecting human dignity goes beyond the simple freedom to do as one pleases with one's own body, implying that individuals are not entitled to remove themselves from the sphere of humanity by overriding social and legal norms designed to ensure a dignified existence for all.

Some light is shed on this approach to the personal aspect of dignity by Béatrice Maurer who, using Hegel, draws a distinction between dignity 'towards oneself' (*la dignité 'pour soi'*) and dignity 'in itself' (*la dignité 'en soi'*).[18] It is, she suggests, only in passing from the former to the latter that the realisation of one's own personal dignity can be fully accomplished. The first idea, it is explained, consists of the 'understanding that one has of one's own dignity'.[19] Returning to the examples mentioned above, this corresponds to the perspective of the dwarf or the homosexual sado-masochist. For Hegel, however, this first step in conceiving personal dignity has to be transcended in order to attain the second level of dignity 'in itself', that is the

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[16] CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence* Rec. p. 372, conclusions by P. Frydman; D jur. 1996, 177, note by G. Lebreton; JCP 1996, II 22630, note by F. Hamon; LPA 1996, 11, 28, note by M.-C. Rouault; RDP 1996, 536, note by M. Gros and J.-C. Froment. For a commentary in English, see Millns S., 'Dwarf-Throwing and Human Dignity: A French Perspective' (1996) 18 *JSWFL* 375-380.

[17] *R v. Brown* [1993] 2 All ER 75 (HL); *Laskey, Jaggard and Brown v. United Kingdom* (1997) 24 EHRR 39. See the discussion of these cases below, Chapter 5, pp. 266-270.

[18] Maurer B., *supra* n. 4, pp. 40-42.

[19] *'[La] compréhension qu'on fait de sa propre dignité'. Ibid.*, p. 40.

recognition that dignity is absolute, fundamental and universal.[20] In this view dignity is *the* determining quality of the human person; it cannot be appropriated by any individual and given a personal interpretation. The idea of dignity 'in itself', therefore, imposes important limits upon a subjective understanding of the concept and, in this way, restricts the capacity of individuals to compromise their own dignity.

Another helpful insight into the personal scope of dignity is provided by Thierry Pech who explores further the *relational* aspect of the notion.[21] While dignity is characterised by the links it implies between individuals, these are not simply one-way (in the sense of self-respect) or indeed two-way (in the sense of respect for others). Dignity, in fact, is the tie that binds three sets of actors: humanity in its entirety, social groups and the individual. Between these components, the element of dignity which is *'hors de soi'*, that is the part that reaches beyond the individual and into the wider community, is primary. The three-way relationship, with the inclusion of social groups as mediating between the individual and humanity, merely adds another dimension to the legal obligation of individuals not to cut themselves off from the rest of humanity through a violation of their own dignity. This aspect of dignity will be explored further in the final chapter when the nexus between individuals and society is examined in the context of an application of the principles of equality and non-discrimination as components of the requirement to respect human dignity founded upon belonging to a particular social group. Suffice for the moment to illustrate this point with a second reference to the French dwarf-throwing cases in which the issue of precisely whose dignity was at stake was heavily mooted. The answer given by the *Conseil d'Etat* points not simply to a consideration of the dignity of the individual dwarf involved in the competitions, but (and more importantly it seems) to that of the spectators deriving amusement from this form of objectification of a human being and also to that of the wider community of dwarves who may feel debased and humiliated as a result of this behaviour by one of their own kind. The solution reveals clearly that dignity is capable of a far more collectivist, and ultimately paternalistic, reading than might initially be apparent.[22]

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[20] *Ibid.*, p. 42.
[21] Pech T., *supra* n. 12, p. 91.
[22] According to David Feldman, this conception of dignity privileges the dignity of humanity rather than the autonomy of individuals: 'This paternalistic approach is allied to (although not the same as) a form of legal moralism which treats autonomy as an aspect of human dignity but one which can be

1.1.2.ii The material scope of dignity

If the personal scope of dignity is understood broadly, then its material substance is equally so, with the relationship between dignity and the human individual manifesting itself in numerous guises. In brief, these may be summarised as involving two core aspects of the human person: the body and the mind. That is to say, they are linked to both physical and mental (identity and personality) characteristics of the human being.

As far as the physical aspect is concerned, it will be seen below in Chapters 3 and 4 that dignity is brought into play in controversial debates about beginnings of life issues, such as bioethics, assisted conception, abortion and wrongful life claims, as well as end of life concerns, including euthanasia, assisted suicide and the termination of medical treatment which will inevitably bring about death. Dignity is also called upon in the context of activities that touch upon the physical integrity of the person during the course of the human life cycle. These issues, explored in Chapter 5, may threaten the dignity of the body and include questions of non-consensual medical treatment and sexual and other forms of physical violence and degradation.

With regard to the importance of dignity to mental integrity, it will be seen in Chapter 6 that the concepts relate closely in matters of personal identity, impacting upon the ability of individuals to enjoy self-determination and to freely develop their personality, as well as commanding respect for their honour and reputation. Respect for identity also covers acceptance of individual belonging to one or several social groups, applying, for example, to the situation of women, ethnic and religious minorities, homosexuals, the elderly and the young. This aspect of dignity's material scope demonstrates its close connection with legal principles of equality and non-discrimination in the context of differential treatment based upon personal status.

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overridden by reference to the need to maintain respect for the dignity of whole human societies and the human race. ... [H]uman dignity becomes a ground for interfering with human autonomy, achieving results which are more compatible with a collectivist view of liberalism than with an individualistic one.' Feldman D., 'Human Dignity as a Legal Value – Part I' [1999] *PL* 682-702, at p. 702.

1.2 Defining 'human'

The study of human dignity requires not only that a definition of dignity itself be given, but also that some attempt be made to clarify the term 'human' which so often precedes it. Once more, what might appear at first sight a relatively straightforward task is not at all so. Yet, an answer to the question of 'who is human?' is absolutely vital for determining the legal application of the dignity principle. There are two particular and related issues which call for attention. First, how should the notion of 'personhood' be defined? Secondly, who is included within the remit of 'humanity'? The first question is born of the difficulty in establishing the boundaries of human life; notably the points at which it begins and ends. It is also closely related to the distinction drawn between persons and things, the former regarded as possessing dignity and the latter not. The second question raises issues about inclusion and exclusion; that is, whether or not the concept of 'humanity' which seems all-inclusive is, in fact, genuinely universal and able to accommodate everyone, regardless of their personal status or situation in life.

1.2.1 The meaning of personhood

While it has been noted already that the concept of dignity represents a universality and inclusivity and, therefore, evokes a trait common to all human beings, the notion of 'personhood' acts as a dignity filter, drawing a boundary around the human species beyond which dignity does not apply. Inclusion within the category of person, therefore, depends upon an understanding of the outer limits of human life within the confines of which personhood is bestowed and dignity protected.

1.2.1.i The frontiers of life

Without wishing to enter into the moral debate over the hazy contours of human life, it is important to acknowledge that the ethical question of when life begins and ends is inseparable from the legal construction of the human person. With regard to the beginnings of life, while being very careful not to define the precise moment at which

this occurs, law-makers have had to tackle delicate questions about the status and interests of the foetus *in utero*, and more and more frequently given scientific progress, that of the embryo either *in utero* or conserved artificially for the purposes of assisted conception or research. Legal measures in this area are concerned to attribute to the embryo and foetus a progressive juridical status in recognition of their potential for personhood, but without conferring upon them the status of person in law. For example, in both France and Britain, abortions are permitted in certain circumstances, particularly during the first few weeks of pregnancy – in France, twelve weeks[23] and in Britain, twenty-four.[24] The two countries also accept an extension of these periods for exceptional reasons, such as where there is a risk of serious foetal handicap.[25] Of note too, is the fact that in the UK experimentation on embryos is permitted during the first fourteen days of their existence[26] and the status of legal personhood is not conferred until the moment of birth.[27] In France, the law is more protective of the embryo and experimentation upon it is prohibited unless carried out with a therapeutic objective.[28] Furthermore, in both countries the rules on succession apply to the foetus, demonstrating that its existence and potential rights are recognised prior to birth.[29]

The movement to extend foetal rights is also making its presence felt in both France and the UK with a degree of success. For example, in 1999 a decision of the Court of Appeal of Lyon found a doctor guilty of involuntary homicide for provoking the death of a non-viable foetus after a hospital mix-up in which a woman who was six months pregnant and attending hospital for a medical examination was mistaken for a patient of the same name who was due to have a coil removed. The doctor who examined the

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[23] Law no. 75-17 of 17 January 1975 on abortion, modified by Article 2 of Law no. 2001-88 of 4 July 2001 on abortion and contraception.

[24] Section 1, Abortion Act 1967. This statute does not apply to Northern Ireland where abortion remains largely prohibited and is regulated by the common law (see below, Chapter 3, pp. 183-184).

[25] See below, Chapter 3, p. 171, p. 174 and pp. 189-190.

[26] Section 34, Human Fertilisation and Embryology Act 1990.

[27] *Re F (in utero)* [1988] 2 All ER 193.

[28] Article 8 of Law no. 94-654 of 29 July 1994 on the donation and use of elements and products of the human body, medically assisted conception and prenatal diagnosis.

[29] Article 725 of the French Civil Code, as amended by Law no. 2001-1135 of 3 December 2001 on the rights of surviving partners and illegitimate children and modernising various aspects of the law of succession, affirms that in order to inherit a beneficiary should either 'exist' at the moment a bequeath is made or 'having already been conceived be born alive' (see Baudin-Maurin M.-P., '"Etre ou ne pas être" (à propos de la modification de l'article 725 du code civil par la loi no. 2001-1135 du 3 décembre 2001)' *D* point de vue, 2002, 22, 1763). In the UK, section 55(2) of the Administration of Estates Act

pregnant woman pierced her amniotic sac, making a therapeutic abortion necessary. The decision of the appeal court, which was overturned subsequently by the *Cour de cassation* (the highest civil and criminal law court), has been the object of renewed interest since the National Assembly's approval on 27 November 2003 of a measure to introduce a new criminal offence of 'involuntary abortion' where the death of a foetus is caused by imprudence or negligence.[30] On a similar note, in the UK, and despite the lack of recognition of legal personality of the foetus, the High Court in the early 1990s endorsed the carrying out of a caesarean operation upon a pregnant woman despite her refusal to consent to treatment when the life of the foetus was deemed at risk.[31] This decision, heavily criticised because of the judge's failure to take proper account of the woman's personal autonomy, has likewise been overturned by a subsequent ruling in favour of the pregnant woman.[32]

Despite judicial disagreement as to the exact scope of the legal protection due to the foetus, there is in the two countries a common increase in the extent of its recognition as a pregnancy progresses, culminating in the conferral of full legal rights upon the new-born child. This brings with it an acknowledgment in law of the multiplicity of human interests at stake in beginnings of life issues which have somehow then to be reconciled. It points also to the difficulty of determining to whom the principle of respect for human dignity applies at these crucial moments of the life cycle and

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1925 provides that '[r]eferences to a child or issue living at the death of any person include child or issue *en ventre sa mère* at the death.'

[30] CA de Lyon, 13 March 1997, D jur. 1997, 557, note by E. Serverin; Cass. crim., 30 June 1999, D jur. 1999, 710, note by D. Vigneau; D chron. 2000, 181, note by G. Roujou de Boubée and B. De Lamy. See Lévy C., 'De la distinction entre "personne" et "être humain" en droit pénal: l'enfant à naître n'est pas "autrui" au sens du droit pénal' in *La recherche sur l'embryon: qualifications et enjeux* Revue générale de droit médical, special edition, ed. Labrusse-Riou C., Mathieu B. and Mazen N.-J., (Bordeaux: Editions les études hospitalières, 2000) 43-66. The *Cour de Cassation* has confirmed in two subsequent decisions that the crime of involuntary homicide cannot be committed upon a foetus (Cass. ass. plén., 29 June 2001, D jur. 2001, 2917, note Y. Mayaud and Cass. crim., 25 June 2002, D jur. 2002, 3099, note J. Pradel) but may be carried out upon a child born one month prematurely as a result of a traffic accident and which died one hour after its birth (Cass. crim., 2 December 2003, D IR 2004, 251).

Furthermore, *VO*, the woman involved in the *Cour de cassation* decision of 30 June 1999, is currently pursuing a case against France before the European Court of Human Rights on the grounds of an alleged violation of Article 2 ECHR through the refusal of French authorities to classify the unintentional killing of her unborn child as involuntary homicide (*VO v. France* App. No. 53924/00, Grand Chamber hearing on admissibility and merits of 10 December 2003, case pending).

The legislative amendment, put forward by parliamentarian Jean-Paul Garraud (UMP), was adopted by the National Assembly in the course of its second reading of the Perben Bill on the adaptation of justice to the evolution of criminality and will be examined by the Senate in January 2004 (*Le Monde*, 29 November 2003). See further below, p. 175.

[31] *Re S (an adult: refusal of medical treatment)* [1992] 3 WLR 806; see Stern K., 'Court-Ordered Caesarian Sections: In Whose Interests?' (1993) 56 *MLR* 238-243.

demonstrates the importance of the path-breaking decision of the French *Conseil constitutionnel* in its discovery of the constitutional principle of respect for dignity precisely when being asked to consider the introduction of new laws on bioethical matters. The English judiciary, for their part, have paid more attention to dignity issues at the opposite end of the life cycle. In *Airedale NHS Trust v. Bland,*[33] the House of Lords was called upon to determine the legitimacy of ceasing the life-sustaining treatment of a young man in a persistent vegetative state. Deciding in favour of a withdrawal of treatment, the Law Lords regretted Tony Bland's undignified state of existence.[34] Thus, the flip side of dignity, in terms of a degrading and undignified existence, was invoked in order to justify the death of the patient without engaging the liability of the doctors. A person in a persistent vegetative state, therefore, remains a person whose dignity should be respected, even if respect in this sense necessarily results in a loss of that person's life.

1.2.1.ii Persons and things

Having seen how difficult it can be to distinguish between persons, potential persons and unconscious persons for the purposes of applying the legal principle of respect for dignity, it is necessary to note the related problem of clarifying the, at times, fine distinction between persons and things. This is a particular feature of the French debate on the application of human dignity given that, as mentioned in the Introduction, the division made by Gaïus in Roman law between the law of persons and the law of things is replicated in French law, while conversely it remains relatively unknown to the common law. With regard to its application to the dignity debate, however, the distinction is pivotal, as it will be recalled that the Kantian view of undignified treatment lies precisely with the pure utilisation of the human person as an object, thing or means, rather than as an end. Similar terminology is used in the decision of the *Conseil d'Etat* on the prohibition of the spectacle of dwarf-throwing,

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[32] *St George's Healthcare NHS Trust v. S* [1998] 3 WLR 936. See below, Chapter 5, p. 279.
[33] *Airedale NHS Trust v. Bland* [1993] AC 789 (HL).
[34] See the discussion of this case below, Chapter 4, pp. 221-225.

with its instrumentalisation of the dwarf as a 'projectile', in other words a thing not a person.[35]

The distinction is relevant too in beginnings of life issues. If the foetus and embryo are not considered in law as persons, does this mean they are mere things, having no dignity to be respected or violated? In other words is the person-thing division purely binary? This does not appear to be the case in that, as shown above, the boundary between actual and future persons is relatively nebulous and a degree of legal protection, including what might be described as a requirement to respect the potentiality of life, is certainly accorded to some (but not necessarily all) embryos and foetuses. Despite not being accorded full legal rights, both embryo and foetus cannot be regarded in law as mere objects that, consequently, fall within the commercial domain. A telling French example, can be drawn from case law in the area of assisted conception, where it has been held that a contract for the deposit of sperm at the Centre for the Study and Conservation of Eggs and Sperm (the *Centre d'Etudes et de Conservation des Oeufs et du Sperme*, otherwise known as *CECOS*) should not be characterised as a 'deposit' agreement (*contrat de dépôt*), because sperm, as part of the human body, and as a source of human life, lies beyond the commercial domain and, therefore, cannot be the object of such an agreement.[36]

The refusal to view the germs of human life, together with the embryo and the foetus, as mere things generates a problem, particularly in French law, with regard to the application of the dignity principle. It has already been noted that dignity is an inherent quality of all human persons. Given the recognition of human potentiality prior to actual birth, it is important to ask why there is an apparent refusal to accord the full scope of dignity protection, particularly in so far as this includes respect for

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[35] CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence* Rec. p. 372. The conclusions of the *commissaire du gouvernement*, Mr. Frydman, on the case are particularly insistent on the issue of objectification of the dwarf: *'le but du lancer de nains... est... de lancer avec violence, et sans aucun égard pour elle, une personne humaine, qui se trouve ainsi traitée comme un simple projectile, c'est-à-dire rabaissée au rang d'objet.'*

[36] TGI de Créteil, 1 August 1984, *Consorts Parpalaix* c/ *CECOS et autres*, Gaz. Pal. 1984, II, 560-563, conclusions by Lesec. See below, Chapter 3, pp. 144-145. Of course, upon birth, the person-thing distinction becomes much clearer as newly-born infants are viewed in both France and the UK as beyond commerce, meaning that surrogacy agreements are unenforceable: Cass. 1re civ., 13 December 1989, D jur. 1990, 273, rapporteur J. Massip; Cass. ass. plén., 31 May 1991, D jur. 1991, 417, rapporteur Y. Chartier, note by D. Thouvenin; CA de Rennes, 4 July 2002, D jur. 2002, 2902, note by F. Granet; section 2(1), Surrogacy Arrangements Act 1985.

life, to the embryo and foetus. Does this risk a dehumanisation of these entities or imply that they are somehow less than human? Equally the point can be made at the end of the life cycle: does not the withdrawal of medical treatment which is certain to bring about death mean cutting the patient quite literally out of the sphere of humanity?

A response to these questions will be attempted throughout the course of the discussion of the beginnings and end of life issues raised later in the thesis. To summarise at this point, however, it requires stating that, while dignity does indeed represent a common value which unites all persons, it may nevertheless be invoked in the cause of very diverse ends and by individuals whose views over its meaning are in diametric opposition. Is it not the case, for example, that the dignity of the foetus and the embryo (supposing for the moment that they are in possession of this quality) might come into conflict with that of the woman carrying the foetus or that of the sick and diseased who stand to reap the benefits of medical research upon embryos carried out in the hope of finding a cure for a particular illness? It will be observed on many occasions in the thesis that it is often legislators and the judiciary who are called upon to weigh up the merits of the various competing conceptions of human dignity and that often this results in a prioritisation of the dignity of persons in existence over and above that of potential persons. The case is not so clear-cut with regard to end of life issues. Here it will become apparent, for example, that respect for the dignity of an individual in a persistent vegetative state, may need to be reconciled with that of his or her family who suffer through witnessing the tragic state of their loved one and also that of the doctors who, in the face of the hopelessness of continued treatment, seek to carry out their work in as dignified a manner as possible.[37]

1.2.2 The meaning of humanity and risk of exclusion

A final issue which falls to be determined in this section concerns the application of human dignity not simply to potential persons or those who have lost all appreciation

[37] See Biggs H., 'Euthanasia and Death with Dignity: Still Poised on the Fulcrum of Homicide' [1996] *Crim L Rev* 878-888; Biggs H., *Euthanasia, Death with Dignity and the Law* (Oxford: Hart Publishing, 2001); and the discussion below, Chapter 4, p. 224.

of their human existence, but to the living and fully conscious who may, nevertheless, be excluded from humanity as a consequence of their belonging to a particular group in society. The dehumanising practices of the Nazi era, where the dignity of Jews, homosexuals and gypsies was explicitly not recognised, provides a stark example. While, in principle the notion of human person should include all human beings regardless of their status or identity, agreement as to respect for the dignity of women, sexual, ethnic, political and religious minorities, the disabled and the aged cannot simply be assumed.

Much can be learned about the concept of exclusion from feminist scholarship which has questioned in particular the capacity for inclusion of women within law's sphere of application and notably the encompassing of women's rights within the idea of human rights (or, as the French would say, making the point more vividly, *'les droits de l'homme'*).[38] The growing literature on the treatment of women in law[39] and the general importance of this body of work is underlined here because further reference

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[38] See, for example, the critique of international law from a feminist perspective in Bunch C., 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 *HRQ* 486-498; Charlesworth H. and Chinkin C., *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000). See also the feminist critique of the European Convention on Human Rights by Palmer S., 'Critical Perspectives on Women's Rights: The European Convention on Human Rights and Fundamental Freedoms' in *Feminist Perspectives on the Foundational Subjects of Law* ed. Bottomley A., (London: Cavendish Publishing, 1996) 223-242.

[39] See, for example, Atkins S. and Hogett B., *Women and the Law* (Oxford: Blackwell, 1984); Barnett H., *Introduction to Feminist Jurisprudence* (London: Cavendish Publishing, 1998); Bridgeman J. and Millns S., *Feminist Perspectives on Law – Law's Engagement with the Female Body* (London: Sweet and Maxwell, 1998); Conaghan J.C., 'Reassessing the Feminist Theoretical Project in Law' (2000) 27/3 *JLS* 351-385; Graycar R. and Morgan J., *The Hidden Gender of Law* 2nd ed. (Annadale NSW: The Federation Press, 2002); Smart C., *Feminism and the Power of Law* (London: Routledge, 1989).

There is also now available a whole series of works comprising feminist perspectives upon the main branches of law: see Bibbings L. and Nicolson D. (eds.), *Feminist Perspectives on Crime* (London: Cavendish Publishing, 2000); Biggs H. and MacKenzie R. (ed.), *Special Issue: Feminist Perspectives on Obligations* (2000) 8 *FLS*; Bottomley A. (ed.), *ibid.*; Bridgeman J. and Monk D. (eds.), *Feminist Perspectives on Child Law* (London: Cavendish Publishing, 2000); Childs M. and Ellison L. (eds.), *Feminist Perspectives on Evidence* (London: Cavendish Publishing, 2000); Lim H. and Scott-Hunt S. (eds.), *Feminist Perspectives on Equity and Trusts* (London: Cavendish Publishing, 2001); Millns S. and Whitty N. (eds.), *Feminist Perspectives on Public Law* (London: Cavendish Publishing, 1999); Morris A. and O'Donnell T. (eds.), *Feminist Perspectives on Employment Law* (London: Cavendish Publishing, 1999); Richardson J. and Sandland R. (eds.), *Feminist Perspectives on Law and Theory* (London: Cavendish Publishing, 2000); Sheldon S. and Thomson M. (eds.), *Feminist Perspectives on Health Care Law* (London: Cavendish Publishing, 1998).

French legal doctrine, while much less developed in this regard, has begun to engage with feminism at the theoretical level: see, for example, Belleau M.-C., 'Les théories féministes: droit et différence sexuelle' *RTDC*, 2001, 1, 1-39.

will be made to it during the thesis with regard to examples of undignified treatment of women in instances where similar treatment is not experienced by men.[40]

It is, in particular, Catharine MacKinnon who, writing in the context of sexual violations carried out upon women in times of war, has questioned the extent to which international law instruments which protect human rights are capable of addressing violations of women's rights.[41] The rights guaranteed by these texts, it is suggested, are founded upon the experiences of men, addressing violations of rights in the public sphere and, hence, are unable to respond to the particular situation of women: '[w]hat happens to women is either too particular to be universal or too universal to be particular, meaning either too human to be female or too female to be human.'[42] Notably these instruments do not adequately address harms related to female sexuality and procreation. Thus, MacKinnon argues:

> 'Women are violated in many ways that men are not, or rarely are; many of these violations are sexual and reproductive... this abuse occurs in forms and settings and legal postures that overlap every recognised human rights convention but is addressed, effectively and as such, by none. What most often happens to women escapes the human rights net. Abuses of women as women rarely seem to fit what these laws and their enforcing bodies have in mind.[43]

It is in this sense that women are excluded from humanity and their rights, as women, are simply not recognised. However, this radical perspective is not incontestable. A more liberal response suggests that violations of rights in war time are a universal occurrence and that as such they are carried out indiscriminately against men and women, albeit that the act of violation might take a special form, or be experienced

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[40] The 'State of Degradation to which Woman is Reduced' is poignantly described by Mary Wollstonecraft as early as 1792. She writes: 'what were we [women] created for? ... We might as well never have been born, unless it were necessary that we should be created to enable man to acquire the noble privilege of reason, the power of discerning good from evil, whilst we lie down in the dust from whence we were taken, never to rise again.' Wollstonecraft M., *A Vindication of the Rights of Woman* (London: Penguin, 1992, first published 1792) 142-174, at p.154.

[41] MacKinnon C.A., 'Crimes of War, Crimes of Peace' in *On Human Rights: The Oxford Amnesty Lectures 1993* ed. Shute S. and Hurley S., (New York: Basic Books, 1993) 83-109. See also Buss, D.E, 'Women at the Borders: Rape and Nationalism in International Law' (1998) 6 *FLS* 171-203.

[42] MacKinnon C.A., *ibid.*, p. 85.

[43] MacKinnon, C.A., *ibid.*, p. 85.

differently, in the case of women. In this regard, instead of insisting upon women's 'difference', it may be preferable to think in more holistic terms about the introduction of a new right which would better ensure the protection of physical integrity and would be equally applicable to violations of the male and female body.[44]

Even if one does accept the feminist critique of women's exclusion from the discourse of international law, and therefore from the scope of application of human rights law, it is useful to point to a welcome development towards inclusion. In the context of war time rape, the International Criminal Tribunal for the Former Yugoslavia held for the first time in 2001, in the case of *Kunarac, Kovac and Vukovic,* that acts of rape carried out as an official policy of war fell within the definition of crimes against humanity.[45] It is apparent, therefore, that the feminist call for inclusion is, to a degree, being heard, pointing in the right direction towards a more inclusive legal interpretation of the notion of humanity.

1.3 Defining 'respect'

Having considered what is meant by the terms 'human' and 'dignity', next to be clarified is the meaning of their 'respect'. If the definition of human dignity appears complex, then the way in which it is to be guaranteed in law and practice is equally difficult to ascertain. In this section, therefore, the notion of 'respect' for dignity is investigated and, in particular, distinctions are sought between the idea of 'respect' and related concepts of 'protection' and 'safeguard'. These differences are important to the extent that they provoke confrontations between diverse interpretations of dignity, notably between views of dignity rooted in personal autonomy and in state responsibility for ensuring its protection. In this regard it is useful to recall the double facet of dignity - that is the obligation to respect others while also respecting oneself.

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[44] Gibson S., *The Discourse of Sex/War: Thoughts on Catharine MacKinnon's 1993 Oxford Amnesty Lecture* (1993) 1 *FLS* 179-188: 'We must object to the war rape of women on the grounds not that there is anything about rape which is worse or different, more piquant or more thrilling than what routinely happens to men: but on the grounds that rape is a violation of a basic right of bodily integrity' (p. 188).

[45] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* judgments IT-96-23-T and IT-96-23/1-T, (22 February 2001). See Buss D., 'Prosecuting Mass Rape: *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* judgement, IT-96-23-T & IT-96-23/1-T (22 February 2001)' (2002) 10 *FLS* 91-99.

'Respect', may swiftly be reformulated as an obligation to 'defend' dignity, whether the source of attack stems from the conduct of the 'victim' or that of a third party. This section, therefore, seeks first to explore the idea of 'respect' for dignity before going on to examine its slippage in favour of the language of 'safeguard' and 'protection'.

1.3.1 The double meaning of 'respect' for dignity

The call to respect dignity, especially in law, is paradoxical. This is because it is usually made at the precise moments in time when dignity is in danger of being compromised. In other words, legal appeals to dignity are made when political, social and technological practices seem set to undermine it. This was clearly the case when dignity was inserted into international law in the post Second World War period.[46] Violations of dignity, thus, act as a legal provocation and invite reinforcement. This can be seen in national laws too, for example in the German Basic Law of 23 May 1949, the first Article of which states that '[t]he dignity of man is inviolable. To respect and protect it is the duty of all state authority.' The phenomenon can be observed also in the more recent context of the elaboration of Constitutions for states which have emerged from oppressive or totalitarian regimes.[47] For example, Article 2-1 of the Greek Constitution of 9 June 1975 states that '[r]espect for and protection of human dignity constitute the primary obligation of the State'; similarly the first Article of the Portuguese Constitution of 2 April 1976 provides that 'Portugal is a sovereign Republic, based on the dignity of the human person...'; and the Spanish Constitution of 27 December 1978 states in Article 10-1 that '[t]he dignity of the person, the inviolable rights which are inherent, the free development of personality, respect for the law and the rights of others, are the foundation of political order and social peace.'[48]

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[46] See the discussion above on the historical context of the development of dignity, p. 39, and the more detailed account of international law instruments containing guarantees of respect for human dignity, below Chapter 2, pp. 81-82.

[47] Pavia M.-L., *supra* n. 11, pp. 8-9.

[48] Beyond Europe, the South African Constitution of 1996 contains repeated references to human dignity: Article 1(a) identifies it as one of the values upon which the sovereign democratic state of South Africa is founded; Article 7(1) states that the Bill of Rights which constitutes the second chapter of the Constitution affirms the democratic values of dignity, equality and freedom; Article 10 provides

At the present time, however, attacks upon human dignity seem to be coming from a rather different direction: from the advancement of technology, notably in the biosciences.[49] It is hardly surprising, therefore, that a resurgence of the theme of respect for dignity in law can be identified precisely to address the biotechnological revolution. It is squarely in this context that the Constitutional Council's discovery of the constitutional requirement to respect dignity can be situated.[50] Likewise, from a British perspective, there has been an increasing interest in the requirement to respect dignity in medical treatment decisions particularly those where life and death decisions are at stake.[51]

Sceptics, however, have noted that more dignity rhetoric in law might act simply as a mask to legitimate what are in fact dignity violations, particularly that of embryos[52] and patients in a persistent vegetative state.[53] This demonstrates a further aspect of the duplicitous ends to which appeals to dignity are made. While embryos and unconscious patients are, of course, unable to express a view as to their own interpretation of personal dignity, there are others who are ready to step in on their behalf to plead respect for their interests. Diverging interpretations of respect for dignity are more starkly revealed, though, when the subjective experience of what is entailed by respect for a living and conscious person's dignity differs from the views of others which represent a more widely held position and an apparently objective social consensus. For example, it was noted above that, in the case of the dwarf-throwing competitions, the dwarf in question saw nothing degrading in being launched as a projectile. On the contrary, he argued that to prohibit the competitions would cause a violation of his dignity in that he risked losing his job and falling into a state of penury. The *Conseil d'Etat* disagreed and instead privileged its interpretation of the requirement to respect the dignity of the dwarf in the context of the respect due to the dwarf community whose members found the practice offensive and also the need to impart some dignity to the spectators who ought to be prevented from deriving amusement from the degradation of a fellow human being. In short, respect

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that every person has inherent dignity and the right to have this respected and protected. See further Feldman D., 'Human Dignity as a Legal Value – Part I' [1999] *PL* 682-702, at p. 697.

[49] Fukuyama F., *supra* n. 3; Habermas J., *The Future of Human Nature* (London: Polity Press, 2003) p. 37.

[50] Decision no. 94-343-344 DC of 27 July 1994, *Bioethics*.

[51] *Airedale NHS Trust v. Bland* [1993] AC 789 (HL).

[52] Mathieu B., *Génome humain et droits fondamentaux* (Paris: Economica, 2000) pp. 32-33.

[53] Finnis J.M., 'Bland: Crossing the Rubicon' (1993) 109 *LQR* 329-337.

for dignity carries layers of meaning due to the multiplicity of dignities at issue in any one situation. Judicial preference for a more objective or universal interpretation of dignity rather than one based upon subjective and individual experience is not just confined to the dwarf-throwing cases and will be seen in other decisions discussed during the thesis, in particular those in which the 'best interests' of the individual or of society are thought to be promoted by a less subjective interpretation of respect for dignity.

1.3.2 The double meaning of 'safeguarding' dignity

The fact that 'respect' for dignity can in fact mean overriding individual autonomy is a result of its reinterpretation to permit a more interventionist role on the part of authorities whose task it is to uphold dignity in the face of adversity. It is extremely telling that the *Conseil constitutionnel*, in its famous *Bioethics* decision,[54] did not actually use the terminology of 'respect' for dignity. Instead it preferred the word 'safeguard' (*'sauvegarde'*). It is, thus, from a loose reading of the preamble to the Constitution of 1946 that the Council discovered the necessity to ensure the 'safeguard of human dignity against any form of servitude and degradation',[55] the preamble stating that:

> '[f]ollowing the victory brought about by free peoples over regimes which sought to *make servile and to degrade the human person*, the French people proclaim anew that every human being, without distinction of race, religion, or belief, possesses inalienable and sacred rights. …'.[56]

This raises an important question about the difference in meaning between respect and safeguarding dignity, together with a further question about the compatibility of

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[54] Decision no. 94-343-344 DC of 27 July 1994, *Bioethics*.

[55] *'[La] sauvegarde de la dignité de la personne humaine contre toute forme d'asservissement et de dégradation'. Ibid.*

[56] *'Au lendemain de la victoire remportée par les peuples libres sur les régimes qui ont tenté* d'asservir et de dégrader la personne humaine, *le peuple français proclame à nouveau que tout être humain, sans distinction de race, de religion, ni de croyance, possède des droits inaliénables et sacrés. ... '* (emphasis added). The reception of the preamble of the Constitution of 1946 in French law and its legal force are analysed in Koubi G. *et al.* (eds.), *Le préambule de la Constitution de 1946 – antinomies juridiques et contradictions politiques* (Paris: PUF, 1996).

safeguarding dignity with other legal principles such as respect for autonomy, freedom and consent. It will be suggested in the remainder of this section that the more defensive interpretation of a need to safeguard or protect dignity can lead to worryingly paternalistic consequences – some of which have already been noted in the examples cited above (notably the cases on dwarf-throwing and the criminalisation of male homosexual sado-masochists[57]) which show a judicial disregard for the wishes of individuals to do as they please with their own bodies in accordance with personal interpretations of their dignity.

1.3.2.i On liberty

In adopting what is a protectionist view of the need to uphold dignity it is evident that legal interpretations emphasise that collective component of dignity which lies beyond the individual; a conception which is more universal than particular. The oppositional stance which safeguarding dignity can imply is representative of the broader struggle which lies at the heart of our conception of law and its objectives and to explain this conflict in more depth, it is helpful to refer back to the work of political philosophers who have attempted to explain the foundations of law with regard to its relationship to the individual. John Stuart Mill, for example, representing the liberal tradition, famously asserted that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'[58] This view is foundational in guaranteeing individual liberty and fundamental rights against interference by the state. In the absence of harm, individuals should be free to pursue their own destiny according to their personal values and goals. It is apparent, however, that this philosophy is hardly in conformity with the modern interpretation of dignity in law and it needs to be explained, therefore, why liberty should be the primary virtue when other values are at stake and why individual morality is a decisive factor. Liberals defend their position in the name of maximising the well-being of all. Yet, a difficulty lies in the presumption that every conception of individual well-being has equal weight and can be articulated

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[57] CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence,* Rec. p. 372, conclusions by P. Frydman; *R v. Brown* [1993] 2 All ER 75 (HL).
[58] Mill J.S., *On Liberty* (London: Penguin, 1974) p. 68.

with equal force. The abstract equality of rational and autonomous moral agents seems profoundly at odds with social reality which reveals manifest inequalities and suggests that a degree of protection should be afforded the weak against the strong, the minority against the majority.

The critique of liberal thought, following in the footsteps of Kant, calls into question this form of utilitarianism, seeking to demonstrate that empirical principles, such as utility, are unsuitable for sustaining a moral conception of law, as the defence of individual liberty leaves rights vulnerable and, thus, fails to respect human dignity.[59] This confirms the observation made earlier in the discussion of the philosophical origins of dignity: the concept implies duties as well as rights being founded upon the relationships which exists between human beings.[60] Seen in this light, it is clear that the liberal perspective does not recognise the communitarian aspect of dignity. On the contrary, it privileges the dignity of the rational, autonomous agent and may, in the eyes of its critics, result in the utilisation of a person as a means or tool to maximise the happiness of another. Those who subscribe to Kantian philosophy, therefore, reject the liberal approach in so far as it implies a sort of 'privatisation of the concept of dignity'.[61]

In preference to this there has developed an ethic grounded in human rights; suggesting that there are certain rights which are so fundamental that they should never be compromised in the name of the general interest.[62] These rights are prioritised and take precedence even over the common good. The justification for rights is founded, therefore, not on the common good alone, but rather in the framework in which rights, liberties and well-being collectively take shape. Within this framework individuals are free to choose their own values, provided that they respect certain boundaries which include the dignity of the group, the community and other persons.[63]

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[59] See Sandel M., 'Introduction' in *Liberalism and its Critics* ed. Sandel M., (Oxford: Basil Blackwell, 1984) 1-7.
[60] See above, pp. 37-38.
[61] *'[Une] privatisation du concept de dignité'*. Pech T., *supra* n. 12, p. 95.
[62] Rawls J., *A Theory of Justice* (Oxford: Oxford University Press, 1972) chapter 2, particularly pp. 60-61.
[63] See *ibid.*

It is suggested that herein lies the key to the relationship between dignity and law. Dignity is part of the framework according to which individuals may choose their own values and aims, indeed it is a pivotal reference point. But it is this very dignity which, in the end, imposes a limit upon individual behaviour to the extent that individuals cannot place themselves outside of the overall framework. This vision, which is overtly communitarian (or 'relational', to use the words of Pech),[64] is consistent with a reading of the concept of dignity in both French and UK law, to the extent that both jurisdictions reveal how the tension between the individual, as a free, autonomous and rights-bearing agent, and the community, with its commitment to the common good, are at the heart of the struggle over the meaning and extent of respect for human dignity.

1.3.2.ii On paternalism

The question remains, however, as to the moral and legal legitimacy of ensuring that individual dignity is safeguarded (against the express wishes of the person concerned) in the name of a universal conception of communitarian morality. The question is reminiscent of the polemical debate over state paternalism and the extent to which the law should permit public intervention in the private lives of individuals in order to protect the general interest or the interests of a third party. Again, this has been a particular concern of feminists who have challenged paternalism for its legitimisation of significant interferences in women's rights and autonomy.[65] A clear example of this taken from UK employment law is the legislation aimed at excluding women from certain jobs or places of work where chemical toxins may be present in order to safeguard their reproductive health even if the women who wish to take these jobs are unable or have expressed an intention never to have children.[66]

The feminist perspective on paternalism is helpful in understanding how the principle of safeguarding human dignity operates. Like protective employment legislation, the

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[64] Pech T., *supra* n. 12, p. 91.
[65] Morris A. and Nott S., *Working Women and the Law: Equality and Discrimination in Theory and Practice* (London: Routledge, 1991) pp. 31-41.

defence of human dignity stems from a concern to protect the well-being of an individual in order to promote her best interests which are viewed as going hand in hand with the public interest. Both, however, entail vigilance over individual behaviour and provoke conflicts between the individual's and the state's view of best interests. They also carry important political and moral messages about how individuals should conform to socially accepted patterns of behaviour. Paternalist state surveillance of individual behaviour in the name of public morality is a particularly significant component of the French decisions on dwarf-throwing in so far as the *Conseil d'Etat* employed the principle of safeguarding dignity to justify a local mayor's use of administrative police powers to prohibit competitions in the neighbourhood.[67] The introduction of public morality (*'moralité publique'*) as a new justification for the use of the mayor's administrative police powers,[68] demonstrates the extent to which individual behaviour may be curtailed in the name of protecting public morals. It shows too how mayors, as holders of public authority, posses a wide discretionary power over the policing of morality in their locality. From a British perspective, a similar instance of state paternalism can be observed in *R v. Brown*[69] in which the House of Lords' concern to outlaw the undignified conduct of a group of participants in homosexual sado-masochistic activities, thus ensuring respect for public morals, overrode consideration of other legal principles such as individual freedom, autonomy and consent. Implicitly, dignity trumped autonomy in the name of public morality.

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[66] Factories Act 1961; Control of Lead at Work Regulations 1980; Ionizing Radiation Regulations 1985; *Page v. Freight Hire (Tank Haulage) Ltd* [1981] ICR 299. See Thomson M., 'Employing the Body: The Reproductive Body and Employment Exclusion' (1996) 5 *SLS* 243-267, at p. 252.

[67] CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence,* Rec. p. 372, conclusions by P. Frydman.

[68] Public morality has, therefore, become the fourth ground for use of local police powers in addition to the three traditional grounds of ensuring peace (*'tranquillité'*), cleanliness (*'salubrité'*) and public security (*'sécurité publique'*). See Rivero J. and Waline J., *Droit administratif* 18th ed. (Paris: Dalloz, 2000) pp. 428-430.

[69] *R v. Brown* [1993] 2 All ER 75 (HL). Furthermore, the condemnation of the defendants was found not to violate the ECHR: *Laskey, Jaggard and Brown v. United Kingdom* (1997) 24 EHRR 39. See Bibbings L. and Alldridge P., 'Sexual Expression, Body Alteration, and the Defence of Consent' (1993) 20 *JLS* 356-370; Moran L.J., 'Violence and the Law: The Case of Sado-Masochism' (1995) 4 *SLS* 225-251.

1.3.2.iii On relational autonomy

The oppositional tendencies to which present constructions of dignity give rise, suggest that it may be helpful to consider other ways of conceptualising dignity conflicts which do not pit its individual component (linked to personal autonomy) so starkly against its more communitarian dimension (linked to public morality). In this regard, feminist responses to paternalism are again useful in providing a different reading of the notion of autonomy which reduces the emphasis on its individualist aspects and enables a reconciliation of individual and communitarian perspectives. Jennifer Nedelsky, for example, advocates the concept of 'relational autonomy' as a way of bringing together individual autonomy on the one hand and interpersonal relationships on the other.[70] This represents the best of both worlds in that it retains a commitment to respect the individual while recognising that individuals are not free-floating entities but rather that they exist within a web of human relationships which do not have to conflict with personal autonomy. Hence, the idea of relational autonomy recognises the connectedness of women. It is, in this respect, not so far removed from the 'ethic of care' advanced by the psychologist Carol Gilligan (discussed above in the Introduction) which suggests that women bring to moral reasoning a 'different voice', privileging care and concern for others rather than seeking to prioritise competing rights.[71] Relational autonomy raises echoes too of the work of Robin West who argues for recognition of the special 'connection' experienced by women towards others (particularly at certain moments in their life cycle linked to their procreative capacities).[72]

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[70] Nedelsky J., 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' in *Law and the Community: The End of Individualism* eds. Hutchinson A.C. and Green L.J.M., (Toronto: Carswell, 1989) 219-252; Nedelsky J., 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale J of Law and Feminism* 7-36; Nedelsky J., 'Law, Boundaries, and the Bounded Self' (1990) 30 *Representations* 162-189.

[71] Gilligan C., *In A Different Voice* (Cambridge MA: Harvard University Press, 1982). Gilligan's approach has not, however, gone unchallenged, being particularly criticised for privileging a form of biological essentialism which attributes the ethic of care and relational capacity to all women. See MacKinnon C.A., *Feminism Unmodified: Discourses on Life and Law* (Harvard: Harvard University Press, 1987) chapter 2, 'Difference and Dominance: On Sex Discrimination'; Drakopoulou M., 'The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship' (2000) 8 *FLS* 199-226.

[72] West R., 'Jurisprudence and Gender' (1988) 55 *Uni Chicago Law Rev* 1-72, at pp. 2-3: '[Women are] not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women distinctively, are quite clearly "connected" to another human life…'.

The idea of relational autonomy, based upon the connections between human beings, can assist in an understanding of dignity in so far as one of the foundations of dignity is precisely its interpersonal quality.[73] An extension of the relational perspective to take account of both autonomy and the ties that bind the individual to others would seem the best way to reconcile the tensions between individual and community in the sphere of dignity protection. Moreover, even if the notion of relational autonomy is inspired by feminist thought and has, therefore, been used primarily to explain the situation of women in society, it is possible, if one rejects biological essentialism as the foundation of women's 'different voice',[74] to apply the theory to respect for both women and men's dignity.

Using feminist relational theory to explore aspects of law is not a new move and its extension to the sphere of dignity protection would, thus, simply take the doctrine into a new substantive area. The theory has, for example, been applied in the area of contract law to explain the phenomenon of 'relational contracts'.[75] Inspired by a similar desire to take a more extensive and supple approach towards agreements between individuals that fall short of the legal definition of a 'contract', recent scholarship in the area of obligations law shows how relational theory may make it possible to place within the contractual domain (traditionally governed by concepts of freedom and autonomy) relationships which presently fall outside of this sphere and, therefore, beyond the protection of the law.[76]

A second example of applying a more fluid approach to legal responses to interpersonal relationships, and one which brings us closer to the theme of dignity, may be drawn from international law. Through an application of the concept of 'care' to international human rights guarantees, a number of authors have suggested that a more inclusive understanding of their scope might be achieved that goes beyond

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[73] Pech T., *supra* n. 12, p. 91.
[74] That is to say, the idea of women being biologically programmed to give care to others is rejected in favour of an explanation founded upon the socialisation of women to fulfil a caring role. On 'difference feminism' more generally, see Humm M., *Feminisms: A Reader* (Hemel Hempstead: Harvester Wheatsheaf, 1992) pp. 193-226.
[75] Wightman J., 'Intimate Relationships, Relational Contract Theory, and the Reach of Contract' (2000) 8 *FLS* 93-131.
[76] See the critique of the exclusion of certain relationships which notably concern women from the contractual domain in Frug M.-J., 'Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook' (1985) 34 *American Uni L Rev* 1065-1140.

the traditional privileging of individual freedom and autonomy.[77] 'Globalising care' means recognising that fundamental rights are, above all else, founded upon concrete social relations and, thus, ought not to be interpreted in a purely abstract manner. Instead, as Carol Gould argues, they should be envisaged as they arise in factual settings and interpreted dynamically to take account of social and historic changes.[78] Putting human dignity into the framework of analysis offered by a relational perspective – in the sense of recognising that dignity is grounded in the human capacity to give and receive care (to and from others and oneself) - may help generate a better understanding of where the balance should lie between 'safeguarding' dignity (in the sense of imposing a paternalistic defence of moral interests upon the individual) and its 'respect' (meaning the recognition of the importance of personal autonomy situated within a web of interpersonal relationships and evolving social circumstances).

1.4 Defining legal 'principle'

Having considered the various aims – protection or respect – of the recognition of human dignity, in this final section we begin to approach the heart of the problem raised in this thesis, that is the translation of dignity into legal norm. Once more, the complexity of the concept raises important challenges, notably the most appropriate legal form for its implementation and its most suitable place within the sources of law, both pointing to important differences between English and French approaches. First under consideration is the conceptualisation of dignity as a 'right' (subjective or fundamental). This formulation is rejected in favour of a second (French) perspective highlighting a more 'principled' approach according to which respect for dignity is viewed as a foundational and constitutional principle (or *'principe "matriciel"'*[79]) and a third (UK) interpretation of dignity as one of the core 'values' underpinning the entire legal system.

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[77] Robinson F., *Globalizing Care* (Boulder: Westview Press, 1999). See also Sevenhuijsen S., *Citizenship and the Ethics of Care: Feminist Considerations of Justice, Morality and Politics* (London: Routledge, 1998).

[78] Gould C.C., *Conceptualizing Women's Human Rights* Working Paper, Robert Schuman Centre, no. 2002/40 (Florence: European University Institute, 2001).

[79] Mathieu B., *'Pour une reconnaissance de "principes matriciels" en matière de protection constitutionnelle des droits de l'homme' D* chron, 1995, 27, 211-212.

1.4.1 Dignity, rights and principles

In its juridical formulation, dignity does not, in and of itself, constitute a legal right. It does not form part of the *'droit objectif'* in the sense that it is not a general and impersonal norm subjected to legal sanction in case of violation, nor does it constitute a *'droit subjectif'* or personal prerogative belonging to the individual.[80] This, it is suggested, is just as it should be given the salient critiques of rights discourse which point to the need for a cautious approach to the legal characterisation of dignity as a right given the extreme malleability of the concept and the likelihood it may be used to promote the dignity of the powerful in opposition to that of the weak.

In this respect the distinction between legal rights and principles is central to the transposition of dignity into law. While rights are individualistic, principles are broad. The latter are, therefore, capable of embracing many situations in regard to which they generate rights of differing degrees of significance.[81] Given that it has been noted above how dignity is an essential component of each and every human being, its breadth and depth deserve emphasising. Its this respect, viewing dignity as principle rather than right, suggests a capacity to squeeze it into all legal nooks and crannies while at the same time acknowledging its destiny to embrace particular rights such as liberty and autonomy.

Prior to considering dignity as legal principle, however, it first needs to be recalled why 'rights' may not necessarily be the best way to address issues of harm. Two views are explored here that suggest insights into why dignity concerns ought not to be regarded as pure rights questions. The first is that of the American critical legal studies movement offering a general critique of rights discourse; the second represents a feminist perspective which is extended to dignity considerations through the acknowledgment that it is not only women who are marginalised and reduced to the rank of subordinate beings where dignity violations are concerned.

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[80] On the difference between objective law (*'le droit objectif'*) and subjective rights (*'les droits subjectifs'*) see Petit B., *Introduction générale au droit* 5th ed. (Grenoble: Presses Universitaires de Grenoble, 2001) p. 8.

1.4.1.i The critique of rights: a general perspective

The well-established critique of rights put forward by Mark Tushnet raises four key difficulties associated with their use.[82] First (and echoing the point made by Gould in the context of international law, discussed above), rights are relatively unstable to the extent that changes in the social context in which they are exercised may profoundly affect the way in which they are interpreted. Thus, it is insufficient to discuss rights in the abstract with no consideration of the context in which they are applied.[83]

Secondly, to say that a right is grounded in a certain social context does not necessarily imply a determined outcome. Tushnet distinguishes between two types of indeterminacies: 'technical indeterminacy' and 'fundamental indeterminacy'. The absence of technical determinacy implies the need to have recourse to techniques in order to put rights claims to the test and ultimately to accept or reject them. The absence of fundamental determinacy concerns the impossibility of specifying all the details of the social context in which the right may operate due to the general nature of the terminology which circumscribes rights discourse.

Thirdly, the concept of a right is misused if it results in translating into legal abstraction an experience which is, at the end of the day, real, concrete and valid in itself. In this respect, Tushnet argues that the language of rights is seductive as it appears to encapsulate certain profound human experiences. However, he suggests instead that experiences should be seen for what they are – that is political or social phenomena – rather than for their relationship to a particular right. Thus, taking the example of a political demonstration, it would be preferable to consider the context of the demonstration – the solidarity with others, the experience of the crowd, etc. – rather than translating this into a simple exercise of freedom of association.

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[81] Mathieu B., *Génome humain et droits fondamentaux* (Paris: Economica, 2000) p. 68.
[82] Tushnet M., 'An Essay on Rights' (1984) 62 *Texas L Rev* 1363-1403.
[83] Tushnet here cites the example of the 'choice' to reproduce, invoking a distinction between the choice of a woman to expel a foetus from her body and the consequent choice to destroy that foetus. He suggests that if technology permitted the separation of the two choices and guarantees were given that the foetus/baby would be taken care of by society, the legal framework would change radically to become a question of the property right enjoyed by the woman over the foetus (*ibid.*, pp. 1365-1369).

The final difficulty with rights discourse identified by Tushnet is its capacity to impede advances on the part of progressive social movements. Hence, recourse to rights is less useful from a political and pragmatic point of view than one might think and may even generate harmful consequences: particularly privileging those who exercise power in society *vis-à-vis* those who enjoy less protection of their rights. Citing an example from the United States of the upholding of the interests of large commercial firms in cases on freedom of expression, Tushnet shows how advertising practices may have undesirable effects but are, nevertheless, legitimised in the name of providing information to consumers.[84]

The example of freedom of expression and advertising is apt in showing how dignity can be usefully instrumentalised as a principle rather than a right in order better to protect the public from harmful publicity campaigns. Viewed as a general legal principle, dignity has the capacity to trump freedom of expression conceived as an individual right. This perspective was clearly taken by the *Tribunal de grande instance de Paris* in its *Benetton* decision in which the clothing company was held liable for causing harm, in the form of a violation of dignity, to AIDS sufferers through an advertising campaign in which bare human body parts were shown tattooed with the letters HIV.[85]

1.4.1.ii The critique of rights: a feminist perspective

The critique of rights is also an important component of feminist legal scholarship and offers a good explanation of why women's situation may not improve through recourse to law. The perspective is useful in showing that subordinated groups in society should exercise caution in the ways they articulate legal claims, particularly when calling for an augmentation of their rights. Once again this critique suggests why dignity – should minority and disadvantaged groups wish to make use of this

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[84] See below, pp. 69-70, the discussion of the difficult reconciliation of constitutional principles and Drago G., 'La conciliation entre principes constitutionnels' *D* chron, 1991, 39, 265-269.
[85] TGI de Paris, 1 February 1995, D jur. 1995, 572, note by B. Edelman. See also CA de Paris, 28 May 1996, D jur. 1996, 617, note by B. Edelman; and the further discussion of this case below in Chapters 2 and 6, pp. 107-108 and p. 340.

concept - might be better regarded as a pervasive legal principle rather than individual right.

Feminist scholars, such as Elizabeth Kingdom and Carol Smart, have, for reasons similar to those advanced by Tushnet, manifested considerable scepticism over campaigns to enhance 'women's rights'.[86] These authors start from the proposition that formal legal rights, such as those contained in legislation aimed at tackling sex discrimination, are largely insufficient in so far as the introduction of a legal principle of sex equality may not succeed in ameliorating the concrete situation of women who continue to occupy an inferior position at work and in society more generally.[87] In the area of procreation too, for example, a woman, in the absence of financial resources, may have no real 'choice' in contemplating the exercise of her 'right' to a termination or to seek access to medically consisted conception in order to have a child. Moreover, these scholars suggest how recourse to women's rights may produce undesirable consequences as it is likely that the rights invoked will provoke strong opposition on the part of other social movements, such as those representing men, children or the unborn. A backlash results, popularising the view that women already have too many rights and certainly do not need any more.[88] Finally, rights claims are inevitably individualistic and are consequently unsuitable for dealing with pervasive, systemic discrimination which is rooted in the inegalitarian power structures of society rather than the particular situation of individual women.

Thus, the critique of rights outlined above suggests that dignity ought to be viewed as a concept which transcends legal rights. A move in this direction, demonstrating that dignity is not a right in itself (but may be used to inspire an application of other rights), can be seen in the cases of *SW v. United Kingdom* and *CR v. United Kingdom*,[89] decided by the European Court of Human Rights and involving claims by

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[86] Kingdom E., *What's Wrong with Rights: The Problems for Feminist Politics of Law* (Edinburgh: Edinburgh University Press, 1991); Smart C., *Feminism and the Power of Law* (London: Routledge, 1989) chapter 7, 'The Problem of Rights'.

[87] In the UK it is the Sex Discrimination Act 1975 which has been particularly challenged in this respect. For further discussion in the sphere of employment, see Morris A. and Nott S., *supra* n. 65. More generally, see Bridgeman J. and Millns S., *Feminist Perspectives on Law: Law's Engagement with the Female Body* (London: Sweet and Maxwell, 1998) chapter 2.

[88] Faludi S., *Backlash: The Undeclared War Against Women* (London: Vintage, 1992).

[89] *SW v. United Kingdom* and *CR v. United Kingdom* (1995) 21 EHRR 363. See *R Sc Crim*, 1996, 473, note by R. Keoring-Joulin; and Palmer S., 'Rape in Marriage and the European Convention on Human Rights: *CR v UK, SW v UK*' (1997) 5 *FLS* 91-97.

two men of a violation of their rights following their conviction for marital rape. Their claims revolved around the fact that at the moment of the acts in question, there was no legislation criminalising rape within marriage in the UK[90] and yet their conviction had been upheld by the House of Lords which decided that the marital rape exemption was out-dated in the light of the changed situation of women in contemporary society.[91] The claimants invoked Article 7 of the European Convention on Human Rights (ECHR) which sets out the principle of non-retroactivity of the criminal law. The European Court, however, found that there was no violation of the principle because it was highly foreseeable that the law, given developments that had already been made to protect married women from spousal abuse,[92] would evolve to take account of improvements in women's condition. It made no difference that the change had been introduced by the judiciary rather than parliament. What is interesting in the decision for present purposes, however, is the fact that the Court introduced the idea of respect for dignity to underpin its decision, finding that this fell squarely within the fundamental objectives of the Convention:

> '...the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.'[93]

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[90] According to Sir Mathew Hale, the husband could not be guilty of rape upon his wife as through their mutual consent to the marriage contract, the wife had given herself up to her husband and could not thereafter retract her consent: Hale M. Sir, *History of the Pleas of the Crown* (London: Savoy, printed by Nutt E., Nutt R. and Gosling R., 1736). See Barton J.L., 'The Story of Marital Rape' (1992) 108 *LQR* 260-271.

[91] *R v. R* [1991] 4 All ER 481. Lord Keith found that: 'the status of women, particularly of married women, has changed out of all recognition in various ways... One of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband' (pp. 483-484). See also Lees S., *Ruling Passions: Sexual Violence, Reputation and the Law* (Buckingham: Open University Press, 1997) chapter 6; O'Donovan K., *Family Law Matters* (London: Pluto Press, 1993) pp. 1-9.

[92] From the principle set out in *R v. Clarence* (1882) 22 QBD 23, that a husband is not guilty of a criminal offence where he has sexual relations with his wife knowing that he suffers from a venereal disease, the case law developed to ameliorate the wife's situation such that she could tacitly revoke her consent to sexual relations with her husband under exceptional circumstances, notably following a separation order or when divorce proceedings were underway: *R v. Clarke* [1949] 2 All ER 448; *R v. Miller* [1954] 2 All ER 529; *R v. Reid* [1972] 2 All ER 1350; *R v. O'Brien* [1974] 3 All ER 663; *R v. Steele* [1976] 65 Crim App Rep 22; *R v. Roberts* [1986] Crim LR 188.

[93] *SW v. United Kingdom* and *CR v. United Kingdom* (1995) 21 EHRR 363, paras. 44 and 42 respectively.

Dignity is, hence, to be regarded as the very foundation of the ECHR and not as a particular right or guarantee amongst others. Instead, the concept inspires the whole Convention and must be taken into account when each and every right is under consideration.

A second positive development, from a feminist point of view, can be drawn from this statement by the European Court and relates to the blurring of the distinction between public and private spheres. It is well established in feminist scholarship that the traditional public-private divide is injurious to women in so far as violations of their rights often occur in the private sphere,[94] where human rights instruments are largely inapplicable.[95] In other words, international law recognises only rights violations committed by states (as public actors) while remaining blind to those carried out by private individuals.[96] The decision in *SW* and *CR*, however, shows that the ECHR may be applicable to private sphere activities, if only indirectly, in this instance underscoring the unacceptability of male violence against women whatever the relationship between those concerned.

1.4.2 Dignity as constitutional principle

Like the European Court of Human Rights, the French Constitutional Council has avoided characterising dignity as a right. The latter, upon discovering respect for human dignity in the preamble to the Constitution of 1946, proceeded to construct it as a key constitutional principle. Thus, it has been observed above, the Council's famous decision of 27 July 1994 concerning the constitutionality of two laws on bioethics introduced into law a principle of constitutional value the aim of which is to 'safeguard human dignity against any form of servitude and degradation.'[97]

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[94] O'Donovan K., *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985).

[95] International legal instruments are not, however, completely without 'horizontal' effects. See Clapham A., *Human Rights in the Private Sphere* (Oxford: Oxford University Press, 1993) and the discussion in Chapter 5 below regarding the application of the ECHR to physical assaults carried out by private actors, p. 258 and p. 261.

[96] Charlesworth H. and Chinkin C., *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000). It has been noted above too (in the context of the discussion of the concept of humanity, pp. 50-52) that international law may not even be capable of addressing instances of sexual violence against women in the public sphere, notably acts of rape in times of war.

[97] Decision no. 94-343-344 DC of 27 July 1994, *Bioethics*.

Moreover, one year later, the Council, in a decision on the constitutional conformity of new housing legislation, gave further precision to the enforceability of the principle by qualifying it as an 'objective of constitutional value' (*'objectif de valeur constitutionnelle'*).[98] From this primary objective flowed a second of the same constitutional value designed to maximise 'the possibility for all persons to have decent housing.' Particularly noteworthy is the change in vocabulary employed in this decision with its introduction of a constitutional 'objective' based upon the dignity principle. However, in the context of housing, this was not a wholly novel move, having its roots in a previous *Conseil constitutionnel* ruling which, without using the word objective, had held that 'promoting the accommodation of disadvantaged people is a response to a requirement of national interest.'[99]

Yet, the solution in the housing decision of 1995 is, in fact, weaker than its precedent: an objective, even if it is of constitutional value, does not constitute an obligation to achieve the said aim. This is more than apparent in an area such as housing where social and economic rights are concerned and require a commitment on the part of the state to put them into effect. That said, it is important to see this development of the dignity principle as demonstrative of its dynamism and capacity to inspire the foundation and interpretation of other objectives. In this decision lie the seeds of its influence over constitutional and other French legal norms which demonstrate a spillover effect and an early indication of just how pervasive and all embracing the dignity principle would become throughout the legal order.

However, it is perhaps not surprising to discover within the principle of respect for human dignity a problem that is characteristic of the French legal system and relates to its rigid hierarchical construction. The issue is one of the appropriate place that respect for dignity should occupy amongst other constitutional principles and has no easy solution given the difficulty, and at times impossibility, of reconciling constitutional principles.[100] A conceptual solution has been proposed by the

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[98] Decision no. 94-359 DC of 19 January 1995, *Diversity of habitat.* See further below, Chapter 6, pp. 313-315.

[99] *'[P]romouvoir le logement des personnes défavorisées répond à une exigence d'intérêt national.'* Decision no. 90-264 DC of 22 May 1990, *Housing.* See the discussion in Pavia M.-L., *supra* n. 11, pp. 14-16.

[100] See Drago G., *supra* n. 84.

constitutional lawyer, Bertrand Mathieu, using the metaphor of a 'matrix'.[101] Mathieu explains the complexity of relationships between constitutional principles by suggesting that there exist certain guiding principles (*'principes "matriciels"'*) which provide a matrix or framework according to which legal norms are configured and other rights of different significance and value are engendered.[102] He cites dignity as the example *par excellence* of such a guiding principle, while at the same time, somewhat curiously, characterising it as a 'right':

> 'The right to dignity is the matrix for a certain number of guarantees that are formally legal, but the protection of which is necessary in order to ensure respect for the principle itself.'[103]

The idea of a matrix of dignity once again points to the complexity of the concept. If dignity is not regarded as an end in itself but simply as an inspiration for the consolidation of other objectives, it is important – in order to properly ascertain the latter – to know exactly what are the foundations of the dignity principle. As noted already, interpretations of dignity may be multiple and it is only through examining its underpinnings that an appropriate assessment can be made of how the law should respond with consistency and clarity to dignity violations.

1.4.3 Dignity as core value

While respect for human dignity can now be viewed as well established in the guise of constitutional 'principle' in French law, this does not end the debate over how it should be operationalised. After all, a principle can only be applied with legitimacy if appropriate reasons are given for its use in certain circumstances, which involves knowing something about the foundational values, beliefs and convictions upon which the principle is constructed. It is at this point that a significant difference emerges when comparing French and UK law. In France, dignity is viewed as a pure

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[101] Mathieu B., 1995, *supra* n. 79.

[102] *Principes qui 'engendrent d'autres droits de portée et de valeur différente.'* Mathieu B., *ibid.*, p. 211.

[103] *'Le droit à la dignité est la matrice d'un certain nombre de garanties qui formellement sont légales, mais dont la protection est nécessaire pour assurer le respect du principe lui-même.'* Mathieu B., *ibid.*

legal principle which is perfectly in accordance with the nature of its legal system (as discussed above in the Introduction) but overtly reveals little about the underpinnings of the principle. On the contrary, the common law system, it is suggested, being less attached to the idea of principles *per se*[104] and rather more discursive in its formulation of legal norms, conceives of dignity as a 'value' which is apt to reveal something more of its foundations and rationale. It is, therefore, to a consideration of the implications of seeing dignity as a core value that we proceed, before concluding the chapter with an assessment of the positivist and paternalistic conclusions that may flow from a failure to explain fully its foundational premise, particularly when this is covertly rooted in a particular view of morality.

1.4.3.i Law, values and morals

The insistence in this chapter on the emergence of the principle of respect for human dignity in the context of *French* law is telling to the extent that it suggests an absence in UK law of any equivalent and apparently, therefore, of any object of comparison. It should be noted, however, that this absence in principle does not necessarily mean an absence in practice. The common law system, unused to grand principles, has instead preferred to engage with the idea of dignity rather more implicitly, notably through its development in case law and by reference to legal values.

As well as demonstrating a difference in the construction of the two legal systems, the distinct conceptions of dignity in French and UK law also show an important divergence in the space given to values, and consequently ethical and moral considerations, in law. Despite the great debate in the 1960s between Hart and Devlin[105] on what, if any, should be the appropriate place of morality in law, it is in

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[104] A reservation should be entered here regarding the introduction of the Human Rights Act 1998 which, if not marking the beginnings of a 'principle' of human rights protection in the UK, has nevertheless inspired a new 'culture' of rights. See Clements L. and Young J., 'Human Rights: Changing the Culture' (1999) 26 *JLS* 1-5; Hunt M., 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession' (1999) 26 *JLS* 86-102. The change has been described, furthermore, as heralding a 'rights revolution' (Harvey C., 'Governing after the Rights Revolution' JLS, 2000, 27, 61-97), albeit a 'quiet' one (Klug F., *Values for a Godless Age: The Story of the UK's New Bill of Rights* (London: Penguin, 2000) chapter 1, 'The Quiet Revolution: The UK's New Bill of Rights').

[105] Devlin P., *The Enforcement of Morals* (Oxford: Oxford University Press, 1968); Hart H.L.A., *Law, Liberty and Morality* (Oxford: Oxford University Press, 1968).

the common law tradition that the judiciary reason in pragmatic fashion starting from the facts of the cases before them[106] and this pragmatism cannot help but imply that extra-legal considerations or policy issues are taken into account.[107] This suggests that in the UK there is less concern than in France that the law may be tainted by discussion of morals and ethics. On the contrary, there is in the UK a systematic and shameless reference to values in both public and private law matters.[108] Moreover, dignity takes its place among the core values upon which the entire legal system is constructed. Thus, David Feldman, one of the rare scholars to investigate dignity in UK law, clearly views it as a legal value noting how in this guise it underpins all fundamental rights and constitutional principles.[109]

Dignity is, however, only one value amongst others. Dawn Oliver argues that it takes its place alongside four additional values – autonomy, respect, status and security.[110] In this way dignity as value operates in a similar way to dignity as legal principle, in that it is necessary in both cases to establish a balance, if not hierarchy, of concepts when they conflict. In this regard, Oliver suggests that dignity ought not to be viewed as the primary value. Instead, it should always be interpreted in a manner compatible with the values of autonomy and security which are, she argues, the foundation of key legal concepts such as market regulation and property rights.[111]

In fact, there is nothing surprising in this formulation of dignity in UK law given that the protection of legal rights and interests has historically been ensured by the

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[106] See the Introduction, above, pp. 25-26.
[107] On the relationship between law and public policy see Rose R., 'Law as a Resource of Public Policy' (1986) 39 *Parliamentary Affairs* 297-314.
[108] Cane P., 'Theory and Values in Public Law' in *Law and Administration in Europe: Essays in Honour of Carol Harlow* eds. Craig P. and Rawlings R., (Oxford: Oxford University Press, 2003) 3-21; Craig P., 'Theory and Values in Public Law: A Response' in Craig P. and Rawlings R. (eds.), *ibid.*, 23-46; Oliver D., *Common Values in Public and Private Law and the Public/Private Divide* [1997] *PL* 630-646; Oliver D., 'The Underlying Values of Public and Private Law' in *The Province of Administrative Law* ed. Taggart M., (Oxford: Hart Publishing, 1997) 217-242; Oliver D., *Common Values and the Public-Private Divide* (London: Butterworths, 1999).
[109] Feldman D., 'Human Dignity as a Legal Value – Part I' [1999] *PL* 682-702; Feldman D., 'Human Dignity as a Legal Value – Part II' [2000] *PL* 61-76. The construction of dignity as a core value has also been an important feature of recent constitutional developments in the European Union leading to its inclusion in the preamble and first Title of the EU's Charter of Fundamental Rights together with Article 2 of the draft Constitution for Europe. See below, Chapter 2, pp. 97-100.
[110] Oliver D., 'Common Values in Public and Private Law and the Public/Private Divide' [1997] *PL*, *supra* n. 108, p. 631; Oliver D., 1999, *supra* n. 108, pp. 55-70.
[111] Oliver D., 1999, *ibid.*, p. 56 and p. 59.

common law and by legislation but not by a Bill of Rights.[112] Thus, respect for dignity may be considered as an implicit facet of many other legal concepts, such as the principle of non-discrimination, equality, individual freedom, respect for private life, autonomy, consent and respect for bodily and mental integrity.[113] Instances of conflict between these concepts have then to be resolved by the judiciary in the course of their interpretation of the various legal norms in question in any particular factual circumstances.

It is important to note here too the significance attached to the interpretation of norms *vis-à-vis* background values as a core activity of the judiciary who are by no means simple bureaucrats or *fonctionnaires.*[114] According to John Bell, the judge is, on the contrary, a conduit for the expression of general legal values that subsequently determine the extent of the constitutional review which he or she may carry out and the appropriate notion of justice to be applied. As distinct from bureaucrats, Bell argues, judges are guardians of values and may be placed in situations where they have to adopt and defend their particular interpretation of these values against alternative views taken by other organs of government. In this respect, the function of the judge and the values which he or she must develop are evidently of a political nature. The legitimacy of judicial decisions, therefore, does not emanate solely from the office of judge and the norms which are applied, but also depends upon the values which are promoted and defended by the judiciary.[115] This does not mean that the function of the judge is necessarily political as he or she must always reason according to the law. However, in 'hard cases' politics and values inevitably come into play.[116]

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[112] Zander M., *A Bill of Rights* 4th ed. (London: Sweet & Maxwell, 1997).
[113] D. Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47 *CLP* 41-71.
[114] Bell J., 'The Judge as Bureaucrat' in *Oxford Essays in Jurisprudence* 3rd series, eds. Eekelaar J. and Bell J., (Oxford: Clarendon Press, 1987) 33-56.
[115] Bell J., *ibid.*, pp. 55-56: '[The judges'] very function and the values which they must develop and interpret are in themselves political. ... The legitimacy of decisions cannot rely totally on the office held and the rules applied, but also takes into account the values served by the judges.'
[116] Dworkin R, *Taking Rights Seriously* (Mass, MA: Harvard University Press, 1977) pp. 81-130. See also Rose R., *supra* n. 107, p. 303.

1.4.3.ii Law, positivism and possible responses

Unlike in the UK; in France there exists within the legal order a traditional and veritable fear of values meaning that law and morality should remain forever apart. Resulting from the concern that law may be contaminated by the influence of the Church, this reaction may be traced historically to the period following the Revolution of 1789 and implies particularly that law should be free from spiritual and religious values.[117] Hence, in France, emphasis is placed upon principles – legal and particularly constitutional – which structure the legal system and make no direct reference to religion or morality.

A particular consequence of the French view of an opposition between law and fundamental values is the development of a positivist tendency which, inspired by Kelsen,[118] treats texts as the pre-eminent source of legal norms, including constitutional principles (such as dignity) and the rights which these generate. A particular interpretation of this theory is advanced by Louis Favoreu *et al.* who argue that it is the law alone which provides the source for fundamental rights. A consequence of this view is the construction of rights as mere *'normes de permission'*, that is norms which authorise directly certain conduct and, only in this sense, may be invoked to oppose the use of prerogative state powers by the legislature, executive and judiciary.[119] This controversial account of the underpinnings of fundamental rights, in its insistence upon legal norms as the supreme authority according to which human liberty is granted, makes no distinction between basic rights and other legal norms beyond the fact that rights may be presented in general terms (such as in the form of catalogues) in order to take account of the indeterminate and innumerable situations in which they can arise.[120] The implication is that without law there is no human freedom and no human dignity – a startling conclusion considering how totalitarian states that profess to subscribe to the rule of law have been able to annihilate fundamental rights.

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[117] Without wishing to confuse morality and religion, it is notable, nevertheless, that the history of Catholicism in France has left its imprint on the country's heritage of fundamental rights. See Favoreu L., Gaïa P., Ghevontian R., Mélin-Soucramanien F., Pfersmann O., Pini J., Rouz A., Scoffoni G. and Tremeau J., *Droit des libertés fondamentales* 2nd ed. (Paris: Dalloz, 2002) pp. 37-39.
[118] Kelsen H., *General Theory of Norms* trans. Hartney M. (Oxford: Oxford University Press, 1991).
[119] Favoreu L. *et al.*, *supra* n. 117, p. 80, p. 83 and p. 111.
[120] Favoreu L. *et al.*, *ibid.*, p. 83.

It should be remembered too that a text such as the French Declaration of the Rights of Man of 1789 is just that - a *Declaration* - setting out in black and white a pre-existing account of the rights inherent in all human beings and which are in no sense 'permitted' or 'granted' by a sovereign power. To state the contrary seems to deny the essence of humanity. A 'Declaration' in this sense needs to be clearly distinguished from a Constitution which allows the constituent power to establish legal norms. It is suggested, therefore, that a preferable conception of fundamental rights is one which sees them as existing prior to any legal text. If, according to the French positivist tradition, *'la loi'* provides the authoritative account of law, this deserves to be contrasted with the common law tradition according to which the existence of texts (or legislative measures) does not prohibit the judge from formulating an interpretation of the law which is inspired by the values which impregnate the legal order in its entirety.

Of course, it is not only this positivist account of the relationship between law, values and rights which inspires French constitutional law. Other perspectives exist which seem closer to that of the British; two of which are given here by way of example. First, in the context of a discussion of the (re-)emergence of fundamental rights in France, Etienne Picard evokes the increasing formulation of rights as 'categories' and voices concern that they are on the point of becoming a coherent and formal branch of law in and of themselves.[121] This he argues is undesirable as fundamental rights are just that – original, basic attributes of the human person - and, as such, should provide the inspiration for all law:

> 'Fundamental rights are not a particular category of law but Law itself in its categories, albeit at times uncertain. There is, therefore, no real emergence, or re-emergence, but a continual progression, perpetually renewed, but undetermined in advance – thanks to these rights themselves, and particularly to liberty.'[122]

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[121] Picard E., 'L'émergence des droits fondamentaux en France' *AJDA*, 1998, special issue, *Les droits fondamentaux*, 6-42.

[122] *'Les droits fondamentaux ne sont pas une catégorie particulière du droit mais le Droit lui-même en ses catégories, quelquefois incertaines. Il n'y a donc pas vraiment d'émergence, ni de ré-émergence,*

Such a view suggests the importance of mainstreaming fundamental rights, that is ensuring their impregnation throughout the whole legal system, at all levels and in all forms. The resistance that such a view can provide to the positivist account of French constitutional legal studies is welcome. Of more pressing concern, though, is the observation of a trend towards viewing the law on fundamental rights in the same way as any other branch of law which, as evident in the positivist perspective, fails to do justice to their source which lies not in any text but precisely in the inherent dignity of the human person.

A second example of the French response to legal positivism is taken from the reflections of Marie-Luce Pavia on the notion of a fundamental right.[123] According to Pavia, this concept reflects three major themes in constitutional jurisprudence around which fundamental rights are ordered – liberty, equality and plurality. These, it is argued are also *values* which must inevitably be introduced by the constitutional judge when rendering concrete solutions in particular cases.[124] This sentiment appears not dissimilar to Dawn Oliver's identification of five core values in UK law in that, although the number and naming of values differs in the two accounts, both authors adopt a reflexive approach underlining the important transversal character of values in law and neither seeks to privilege legal rules above such values.

Pavia's argument is interesting too from a comparative perspective in so far as it pays tribute to the significance attached to a *culture* of rights. Pavia notes that 'a collection of values and a body of case law do not alone create a policy and human rights quickly reveal their limits if they are not accompanied by a culture of rights.'[125] It will be seen throughout the thesis exactly how important the creation and nurture of just such a culture of rights has been in the context of the recent UK initiative to insert the ECHR into domestic law through the Human Rights Act 1998.[126] The saturation of UK legal culture by human rights discourse and the values which underpin it is, in this respect, certain to expand the space for discussions over respect for human

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mais un continuel surgissement, toujours renouvelé, mais par avance indéterminé – grâce à ces droits eux-mêmes, et singulièrement à la liberté.' Picard E., *ibid.*, p. 42.

[123] Pavia M.-L., 'Eléments de réflexions sur la notion de droit fondamental' *LPA*, 1994, 54, 6-13.

[124] Pavia M.-L., *ibid.*, p. 13.

[125] *'[U]ne collection de valeurs et une jurisprudence ne font pas seules une politique et les droits de l'homme dévoilent rapidement leurs limites s'ils ne s'accompagnent d'une culture des droits.'* Pavia M.-L., *ibid.*

dignity within the context of fundamental rights protection. It is, thus, following the present chapter's consideration of the myriad aspects of the definition of the principle of respect for human dignity that we move in Chapter 2 towards a consideration of the more precise link between dignity and law, tracing the development of the 'juridification' of the concept in accordance with the different constitutional mechanisms for guaranteeing respect for human rights, constitutional principles and fundamental values in France and the UK.

[126] See *supra*, n. 104.

CHAPTER 2

THE JURIDIFICATION OF HUMAN DIGNITY

The purpose of this chapter is to examine the phenomenon of the 'juridification' of human dignity; that is its insertion into law and crystallisation in the form of legal principle, value and generator of rights and duties. In particular, despite it having been argued in the preceding chapter that dignity is not a right in and of itself, it will be seen that it is closely linked to the systems of fundamental rights protection in both France and the UK as these are constructed by the interpenetration of national, European and international laws. In this regard, the process of juridification of human dignity has clearly contributed to an enhancement of the protection of rights at all levels. What is equally clear, and again demonstrative of the complexity of the concept of human dignity, is that the insertion of dignity into law is not a uniform process: dignity may be found in both national and international legal sources, in texts and in case law, in constitutional and infra-constitutional norms. Moreover, invocations of dignity are often as implicit as they are explicit. All this suggests a multiplicity of legal reference points and, consequently, a difficulty in identifying which are the most important and valid.

The current proliferation of references to dignity in law, however, does not mean that the process of juridification is wholly novel. It was observed in the previous chapter that the principle of respect for dignity was inserted into international law in the wake of the horrors perpetrated during the Second World War.[1] Yet, this marks simply a reinforcement of dignity in law and not its origin. This is because of the distinct contribution made by Roman law to the recognition of dignity through the delict of *iniuria* which was conceptually linked to respect for the human person.[2] Thus, the notion of *iniuria,* which comprised both the personal protection from assaults upon

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[1] Pavia M.-L., 'La dignité de la personne humaine' in *Libertés et droits fondamentaux* eds. Cabrillac R., Frison-Roche M.-A. and Revet T., 6th ed. (Paris: Dalloz, 2000) 121-139, at pp. 122-128.

[2] Zimmerman R., *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996) pp. 1050-1094. See also Whitman J.Q., 'The Neo-Romantic Turn' in *Comparative Legal Studies: Traditions and Transitions* eds. Legrand P. and Munday R., (Cambridge: Cambridge University Press, 2003) 312-344, at p. 331, where it is argued that European dignitary

physical integrity together with attacks upon one's personality, honour and reputation,[3] represents an ensemble which has more or less the same contours as those of the present day incarnation of dignity in law.[4] The four principal forms of the delict in Roman law (*convicium* - insult;[5] *de adtemptata pudicitia* – assault upon the reputation of 'modest' women and young Roman boys;[6] *ne quid infamandi causa fiat* – assault upon personal reputation and honour;[7] and *servum alienum verberare* – the prohibition against striking or torturing a slave one did not own[8]) comprise, therefore, a major part of what we, today, understand by the notion of respect for human dignity, grouping together a triad of legal guarantees: that is, *corpus* (respect for physical integrity), *fama* (protection from insults) and *dignitas* (protection of dignity or honour). From these roots, it is notable that the development of the juridification of dignity goes beyond what was covered in Roman times by the pure notion of *dignitas* to include also protection of the body, reputation and personality. Yet, it is striking to note also how the obligation to respect dignity continues at present, just as under Roman law, to resonate in areas such as property rights,[9] sexual violence,[10] and discrimination against certain groups in society.[11]

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traditions are much older than 1945 and stem from the protection of aristocratic and high-status personal honour (see further Chapter 6 below, pp. 331-332).

[3] Zimmerman R., *ibid.*, pp. 1051-1053.

[4] The dignity aspects of the protection of physical and mental integrity are discussed in detail in Chapters 5 and 6. However, it deserves noting that the protection of the body has become a predominant theme in recent years, particularly in so far as violations of corporal integrity may result from the development of new scientific and technological processes. This development explains why the thesis insists upon the physical component of respect for human dignity and justifies the decision to devote Chapters 3 and 4 to issues concerning the beginnings and end of physical human life. These aspects were evidently of less complexity in Roman times.

[5] In English law terms, *convicium* may perhaps be best viewed as akin to the tort of defamation: Zimmerman R., *supra* n. 2, p. 1054 and pp. 1074-1078. See also the discussion in Chapter 6 below, pp. 297-304, on the protection of honour and reputation in the context of violations of dignity by the media.

[6] Thus, the delict did not protect the reputation of prostitutes: Zimmerman R., *ibid.*, pp. 1054-56.

[7] Zimmerman R., *ibid.*, pp. 1056-57.

[8] Zimmerman R., *ibid.*, p. 1058. Of course, in this case the delict did not so much concern the violation of the physical integrity of the slave, but the insult inflicted upon his owner.

[9] For example, in the context of a right to housing (see Decision no. 94-359 DC of 19 January 1995, *Diversity of habitat* and further, Chapter 6, pp. 313-318).

[10] For example, in the case of sexual harassment (see Commission Recommendation 92/131/EEC of 27 November 1991 on the protection of the dignity of women and men at work) and in the case of rape (see *SW v. United Kingdom* and *CR v. United Kingdom* (1995) 21 EHRR 363). See further, Chapter 5, pp. 258-262 and 282-288.

[11] CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence,* Rec. p. 372, conclusions by P. Frydman; *R v. Brown* [1993] 2 All ER 75 (HL). See below, Chapters 5 and 6, pp. 264-270, p. 328 and p. 342.

If the history of the juridification of dignity dates from Roman times, there is no doubt that dignity discourse has undergone a substantial revival in the post Second World War period, provoking a multiplication of legal references. First international law, followed swiftly by the Council of Europe, called upon dignity as a foundational principle in the construction of human rights guarantees; whereupon the theme was taken up by national legal systems and by the European Union, with an expanding number of references to the concept both in written and unwritten forms of law.

It is, therefore, first to the international and European sources of the legal requirement to respect human dignity that we turn (given that these are, after all, an important aspect of national commitments to respect fundamental rights), noting how the appeal to dignity is habitually made in the form of grand principle or objective. This is followed by an examination of the more jurisprudential and contextual approach to the juridification of dignity in national law which, through comparative analysis, aims to reveal distinctions and similarities between French and UK perspectives, notably in the extent to which they invoke dignity through text or jurisprudential, explicit or implicit, references. The road map of dignity advanced in this chapter (summarised in Table 1 below, p. 124) is designed to highlight the key landmarks and general geography of its juridification in preparation for the more particular discussions of specific applications of the principle in subsequent chapters.

2.1 The juridification of human dignity at the supra-national level

Two aspects of the supra-national impetus behind the drive to ensure respect for human dignity are immediately striking. One is the strength of insistence on inserting dignity into key international and European law texts in the latter half of the 20th century. The second is the generality of the references made to the concept which are formulated in terms of grand principle, objective or value, but without specific content or context. While there are a number of exceptions to this general trend (where dignity is referred to in case law or given a particular context), these remain exceptional and serve only to highlight the overall picture of dignity at the supra-national level as a foundational and symbolic principle with pride of place in the opening paragraphs of core human rights instruments. This phenomenon is as evident

in international law, to which we turn first, as it is at the European level, our second object of enquiry.

2.1.1 Dignity in international law

There exists an accord within the international community that human dignity is the foundation of human rights.[12] This unified approach is manifested in the multiple references to dignity which can be found in international conventions. Thus, the preamble to the United Nations Charter, signed on 26 June 1945, was the first to proclaim the faith of the peoples of the United Nations in 'fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...'. This was followed by the Universal Declaration of Human Rights, adopted on 10 December 1948, which in its preamble states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and continues in Article 1 to affirm that '[a]ll human beings are born free and equal in dignity and in rights.' What is remarkable, however, in the formulation of dignity in these texts is its ambiguous character. With no precise definition, dignity is simply 'announced'.[13] The Universal Declaration, at least, provides that dignity is something 'inherent' in all human beings, but adds little as regards its specific content, seeing it only as the 'foundation' of another right (freedom) and other more general concepts (justice and peace).

It was not until December 1966 and the introduction of the International Covenant on Civil and Political Rights and that on Economic, Social and Cultural Rights that the international community clarified somewhat its conception of dignity. These Covenants, in stating clearly in their preambles that the rights they contain 'derive from the inherent dignity of the human person' elevate respect for dignity to the status of a general objective which is the cornerstone of human rights. Nevertheless, even if the principle is clearly stated, this still gives little idea as regards both its scope and its

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[12] Benchikh M., 'La dignité de la personne humaine en droit international' in *La dignité de la personne humaine* eds. Pavia M.-L. and Revet T., (Paris: Economica, 1999) 37-52, at p. 38.
[13] Benchikh M., *ibid.*, p. 38.

relationship with the rights which derive from it. Thus, while Marie-Luce Pavia is right to comment that international law in the post-war period has gradually gone on to inspire, national and supra-national European systems with the aim of unification,[14] the lack of precision at international level has, on the contrary, facilitated a proliferation of interpretations of dignity in both European and national laws. This is not helped by two further factors. First, the texts of international law are presented in the form of 'Charters', 'Declarations' and 'Convenants', the legal impact of which can be highly ambiguous. The Charter of the United Nations, for example, which simply 'proclaims' human dignity, is more important for its symbolic than legal effects. Secondly, the significance of references to dignity in international instruments and their likely impact is more widely linked to the status of international law *vis-à-vis* national law. While in France the monist approach to international law, set out in Article 55 of the Constitution, requires its integration into the hierarchy of norms and confers upon it a superior status to primary legislation (requiring that this be set aside in cases of conflict), the position is not so clear-cut in the UK. There, the dualist approach suggests that national rather than international law should be applied in situations of incompatibility. In adopting this perspective, the influence of international law with its worthy pronouncements on respect for dignity may be diluted by weaker national provisions.

2.1.2 Dignity in European law[15]

It might be imagined that the problems raised above in relation to international law would not apply at the European level given the difference in style (particularly the specificity) of European law texts and the different way in which both European Union law and the ECHR have been received into national law (at least in the UK through the specific introduction of the European Communities Act 1972 and the Human Rights Act 1998).[16] This presumption, however, would be false, for two

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[14] Pavia M.-L., 'La découverte de la dignité de la personne humaine' in *La dignité de la personne humaine* eds. Pavia M.-L. and Revet T., *supra* n. 12, 3-34, at pp. 7-8.

[15] For an American perspective on the particularly 'European' construction of human dignity, see Whitman J.Q., *supra* n. 2, 329-343.

[16] In France the remit of the reference to the supremacy of international law in Article 55 of the Constitution of 1958 includes both European Union law and the ECHR. See the conclusions of the *commissaire du gouvernement*, Mr. Frydman, in CE, 20 October 1989, *Nicolo*, Rec. p. 190.

reasons. First, the insertion of the concept of dignity into the ECHR and into European Union law has been just as vague and ambiguous as in international law. Secondly, despite the Human Rights Act 1998, the reception of the ECHR into domestic UK law continues to be subordinated to the doctrine of parliamentary sovereignty[17] and the true extent of the protection of fundamental rights via European Union law, particularly under the Charter of Fundamental Rights, is ambiguous given the uncertainties over the Charter's legal status and place within a Constitution for Europe.[18] That said, both European systems are capable of producing a myriad of ripple effects in the national legal orders given that both France and the UK have accepted the supremacy of European Union law[19] and regard themselves as obliged to interpret domestic law in accordance with ECHR guarantees.[20] For this reason it is important to insist upon the juridification of dignity at the European level as this provides an important indicator of how national systems should adjust to the developing pan-European system of human rights protection, for which dignity is a key reference point.[21]

To this end, it will be suggested below that, while neither the ECHR nor (until very recently) European Union law have made any explicit appeal to the notion of human dignity in their foundational texts, this does not mean that they are unconcerned by the concept – quite the contrary. Dignity has impregnated European Union law in a subtle and nuanced fashion, most notably through secondary legislation and non-

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[17] See Ewing K.D., 'The Human Rights Act and Parliamentary Democracy' (1998) 62 *MLR* 79-99; Feldman D., 'The Human Rights Act 1998 and Constitutional Principles' (1999) 19 *LS* 165-206; Jowell J., 'Judicial Deference and Human Rights: A Question of Competence' in *Law and Administration in Europe: Essays in Honour of Carol Harlow* eds. Craig P. and Rawlings R., (Oxford: Oxford University Press, 2003) 67-81.

[18] The final draft of the Constitution for Europe submitted by the Praesidium of the Constitutional Convention places the Charter in Part II of the Constitution (CONV 850/03, 18 July 2003). This has the advantage of heightening the visibility of fundamental rights by locating them at the heart of the Constitution, rather than, as had been mooted, positioning the Charter in a protocol annexed to the main text, or retaining it as a totally separate document. See De Búrca G., 'Fundamental Rights and Citizenship' in *Ten Reflections on the Constitutional Treaty for Europe* ed. De Witte B., (Florence: Robert Schuman Centre for Advanced Studies and Academy of European Law, 2003) 11-44.

[19] Section 2, European Communities Act 1972; *Factortame Ltd v. Secretary of State for Transport (No. 2)* [1991] 1 AC 603; Cass. ch. mixte, 24 May 1975, *Administration des douanes c/ Soc. 'Cafés Jacques Vabre' et SARL J. Weigel et Cie,* D jur. 1975, 497, note by A. Touffait; CE, 20 October 1989, *Nicolo,* Rec. p. 190, conclusions by P. Frydman.

[20] Section 3(1), Human Rights Act 1998. See further Bennion F., 'What Interpretation is "Possible" under Section 3(1) of the Human Rights Act 1998' [2000] *PL* 77-91. In France this obligation results from Article 55 of the Constitution.

binding recommendations. Furthermore, it is likely that human dignity will be soon consolidated at the constitutional level as a core and foundational value of the Union. The ECHR, too, has made use of dignity implicitly in conjunction with a number of Convention guarantees, demonstrating its significance as a principle capable of reinforcing the protection of other rights and freedoms.

2.1.2.i Dignity and the ECHR: an implicit objective

Given the explicit insertion of dignity in international law instruments it appears surprising that there is no overt mention of the concept in the ECHR. Nevertheless, it can be inferred that the protection of the fundamental rights and freedoms in the Convention is founded, as in the case of international law, upon the necessity to respect human dignity. This is because the Convention appears covertly to encompass many dignity considerations, especially if we use as a benchmark their formulation in the delict of *iniuria* under Roman law.[22] This view is echoed by Louis Edmond Pettiti, a former judge at the European Court of Human Rights, who has observed that 'in reality dignity has been used more and more often as a term giving reinforcement to the protection of the rights guaranteed.'[23]

Thus, it is apparent that the process of juridification of human dignity in Europe has been greatly assisted by the work of the European Court of Human Rights. This is not only with regard to its interpretation of particular Articles of the Convention (discussed below) but, perhaps more importantly, is due to its view that the Convention is a 'living instrument',[24] capable of evolving to accommodate social change. In this regard it has given enormous impetus to the growing concern to respect human dignity through a reading of the Convention as constructed squarely

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[21] The development of a pan-European system for human rights protection will be consolidated further should the European Union seek accession to the ECHR, as is proposed by Article 7-2 of the draft Constitution for Europe (CONV 850/03, 18 July 2003).

[22] For a detailed study of the application of the principle of respect for human dignity in the context of the ECHR see Maurer B., *Le principe de la dignité humaine et la Convention européenne des droits de l'homme* (Paris: La documentation française, 1999). For a more pragmatic and judicial assessment see Pettiti L.E., 'La dignité de la personne humaine en droit européen' in *La dignité de la personne humaine* eds Pavia M.-L. and Revet T., *supra* n. 12, 53-66.

[23] *'En réalité la dignité a été de plus en plus souvent utilisée comme terme servant de renforcement à la protection des droits garantis.'* Pettiti L.E., *ibid.*, p. 55.

[24] Renucci J.F., *Droit européen des droits de l'homme* 3rd ed. (Paris: LGDJ, 2002) p. 214.

upon this objective. Thus, as was seen in the previous chapter, in the joined cases *SW v. United Kingdom* and *CR v. United Kingdom*[25] the Court recognised explicitly that dignity, while not a right *per se*, is a consideration which impregnates the ensemble of rights and freedoms guaranteed by the Convention. Dignity, thus becomes the inspiration for the interpretation of all Convention rights.

The extent of this inspiration is explored in the following section with regard to the guarantees in the ECHR which implicitly address the need to respect dignity. Notably, this is the case of Article 2 that guarantees the right to life and Article 3 which, starting from a negative conception of dignity, prohibits any form of 'inhuman or degrading treatment', in other words any *undignified* treatment. Also tightly interconnected with human dignity are other rights and freedoms protected in Article 8 (respect for private and family life), Article 9 (respect for thought, conscience and religion), Article 10 (freedom of expression, including freedom of information) and Article 14 (the principle of non-discrimination).

Before analysing the instrumentalisation of these specific guarantees in the juridification of human dignity in Europe, a number of observations deserve to be made. First, the very imprecision of the relationship between dignity and the rights which are derived from it permits a lack of uniformity and an impossible systematisation of the ECHR's application to dignity concerns. Instead, human dignity appears capable of being instrumentalised on a needs basis. Equally, the concept may be conveniently side-stepped if the conclusions to which it might lead are not sought in the context of a particularly controversial issue.[26]

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[25] *SW v. United Kingdom* and *CR v. United Kingdom* (1995) 21 EHRR 363. See above, pp. 66-68 and further below, p. 288.

[26] The example of the persistent refusal by the European Court of Human Rights over many years to recognise the new gender of post-operative transsexuals in the UK (with the dignity violations this implies) is telling. Having found that the failure to allow an amendment to the transgendered person's birth certificate to show his or her new sex did not amount to a violation of the right to respect for private life given that the birth certificate represented a state of affairs at the moment of birth (*Rees v. United Kingdom* (1986) 9 EHRR 622; *Cossey v. United Kingdom* (1990) 13 EHRR 622; *Sheffield and Horsham v. United Kingdom* (1999) 27 EHRR 163) the Court finally reversed its jurisprudence in the recent cases of *Goodwin v. United Kingdom* (2002) 35 EHRR 18 and *I v. United Kingdom* [2002] 2 FCR 613 in a concession to changing social attitudes. See the discussion in Chaper 6 below, pp. 326-327.

Furthermore, Convention rights do not all have the same status as regards the capacity of the state to interfere in those rights, meaning some dignity violations may be justified while others may not. The guarantees in Articles 2 and 3, for example, are the most strictly applied with very few possibilities to legitimate a violation.[27] Articles 8, 9 and 10, however, allow interference in the rights in question when this is prescribed by law and necessary in a democratic society for a legitimate purpose, such as to protect the rights of others, national security or public health. Moreover, these rights are always susceptible to a restrictive interpretation according to the doctrine of proportionality and the state's margin of appreciation. The guarantee offered by Article 14 is more precarious still as this Article has no autonomous status and may only be invoked in conjunction with an alleged violation of another Convention right.[28] It is, therefore, necessary to explain the extent of the Convention's application to dignity matters by reference to a number of concrete examples.

Beginning with Article 2 and the right to life, the concept of dignity, even if it is not mentioned directly, is implicitly connected to respect for human life, and has particular resonance in beginnings and end of life issues.[29] As regards the former, the European Commission of Human Rights has given two decisions in the area of abortion which are telling in their refusal to pronounce upon the extent of the application of Article 2 to the life of the foetus. Instead, the Commission has responded by reference to Article 8's right to private and family life, finding national laws compatible with the Convention. Thus, in the first case, *Brüggeman and Scheuten v. Federal Republic of Germany*, a limitation on the right to have an abortion was deemed legitimate given that the right to respect for the private life of

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[27] Article 2 permits four restrictions on the right to life: (1) in the execution of a sentence of a court following conviction of a crime for which this penalty is provided by law; (2) in defence of any person from unlawful violence; (3) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (4) in action lawfully taken for the purpose of quelling a riot or insurrection. See Renucci, J.-F., *supra* n. 24, pp. 89-92. Article 3, on the other hand, permits no exceptions.

[28] The adoption of protocol no. 12 (open for signature since 4 November 2000) would give autonomous standing to Article 14 enabling it to be invoked in a claim of pure discrimination. The protocol, however, has yet to be ratified by the requisite number of countries in order to take effect. See Moon G., 'The Draft Discrimination Protocol to the European Convention on Human Rights: A Progress Report' (2000) *EHRLR* 49-53; and Lord Lester, 'Equality and United Kingdom Law: Past, Present and Future' [2001] *PL* 77-96.

[29] See below, Chapters 3 and 4, p. 174 and pp. 180-181 (regarding abortion) and pp. 211-213 (regarding assisted suicide). On the complex application and interpretion of the 'right to life' in bioethical matters, see Puigelier C., 'Qu'est-ce qu'un droit à la vie?' *D* chron, 2003, 41, 2781-2789.

the woman concerned was not absolute.[30] The second case, *Paton v. United Kingdom*, also required the Commission to strike a balance between the rights of the protagonists. In this instance, the Commission refused Mr Paton's request seeking to prevent his wife from having an abortion because the guarantee of respect for her private life was found more compelling that that of respect for the family life of her husband.[31] Important to note, too, is the extent to which national jurisdictions have adopted similar positions to that of the European Court of Human Rights. The *Conseil d'Etat* has found that French Law no. 75-17 of 17 January 1975 on abortion is compatible with the ECHR.[32] In England, the judiciary, without invoking the ECHR (because prior to the Human Rights Act 1998), had also refused to uphold Mr Paton's claim (hence his petition to the Strasbourg institutions) and went on to apply the same solution in the similar case of *C v. S*, which this time involved a non-married couple.[33] It remains to be seen, however, whether these solutions will be retested in the new Human Rights Act era when British judges may be asked to rule upon the compatibility of the Abortion Act 1967 with Convention rights.[34]

At the other end of the life spectrum Article 2 was invoked by Diane Pretty who, terminally ill, sought an assurance from the Director of Public Prosecutions that her husband would not be charged should he assist her to commit suicide. Article 2, she argued, founded her claim of a right to die with dignity; the right to life, including a right to control the moment and process of her death. The House of Lords[35] and the European Court of Human Rights[36] found unanimously that Article 2 contained no

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[30] *Brüggeman and Scheuten v. Federal Republic of Germany* (1981) 3 EHRR 244.
[31] *Paton v. United Kingdom* (1981) 3 EHRR 408.
[32] CE, 21 December 1990, *Confédération nationale des associations familiales catholiques*, and CE, 21 December 1990, *Association pour l'objection de conscience à toute participation à l'avortement, Association des médecins pour le respect de la vie*, D jur. 1991, 283, note by P. Sabourin.
[33] *Paton v. Trustees of British Pregnancy Advisory Service* [1978] 2 All ER 987; *C v. S* [1987] 1 All ER 1230. In accordance with British law, the *Paton* case was determined by the absence of any legitimate interest on the part of Mr Paton to prevent the abortion as, under the Abortion Act 1967, the putative father has no rights, indeed no role, with regard to the decision to have a termination. It was further held that Mr Paton had no grounds to intervene on behalf of the foetus to protect its rights – the foetus having no legal status before birth (*Re F (in utero)* [1988] 2 All ER 193). A similar reasoning was applied in *C v. S*, the court adding this time that the abortion was in no sense unlawful in that the foetus of 18 weeks was not yet viable.
[34] Examples of possible violations are discussed below in Chapter 3, pp. 178-185. See further Millns S., 'Human Rights and Reproductive Rights' (2001) 54 *Parliamentary Affairs* 475-494.
[35] *Pretty v. Director of Public Prosecutions* [2002] 1 All ER 1 (HL). See Biggs H., 'A Pretty Fine Line: Life, Death, Autonomy and Letting it B: *R (on the application of Pretty) v. DPP* [2002] 1 All ER 1 and *Re B (Adult: Refusal of Medical Treatment)* [2002] 2 All ER 449' (2003) 11 *FLS* 291-301.
[36] *Pretty v. United Kingdom* (2002) 35 EHRR 1.

such objective. The right to life did not include a right to choose to die, no matter how dignified that death might become, and any other interpretation would go against the very spirit of the right in question. Thus, the dignity component of respect for life under the Convention was far more compelling than that suggesting a right to a peaceful death.[37]

Article 3 shows too how important dignity considerations underpin the application of Convention rights. Its scope to prohibit the degradation of individuals was found in the *Soering* case,[38] for example, to extend to the extradition of a national of a signatory state to the United States where he risked having the death penalty imposed upon him. Hence, the European Court found that there existed a real possibility of torture or inhuman or degrading treatment resulting from the long period of time and extreme hardship the claimant would have to endure on death row.[39] Article 3 has been relied upon too by claimants who have suffered inhuman and degrading treatment during a period of detention[40] and been invoked in cases concerning corporal punishment in schools[41] and in the family.[42] The risk to dignity in these cases touches upon physical rather than moral integrity; a violation of the body rather than the mind. That said, the scope of Article 3 extends also to assaults upon mental integrity such as, for example, the psychological abuse of detainees.[43]

While Articles 2 and 3 seem the most apt Convention guarantees upon which to pin dignity concerns, they do not stand alone. Article 8, in particular, may be invoked to protect personal and private life which are important components of respect for dignity. The Article has been used to protect victims, for example, in cases of physical assault, notably sexual violence, and even with regard to acts committed by

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[37] See further Millns S., 'Death, Dignity and Discrimination: The Case of *Pretty v. United Kingdom* (European Court of Human Rights, [Sect. 4], no. 2346/02, judgment of 29 April 2002)', (2002, 1 October) 3/10 *German Law Journal* (http://www.germanlawjournal.com).

[38] *Soering v. United Kingdom* (1989) 11 EHRR 439.

[39] The Court has further extended the Strasbourg jurisprudence regarding the death penalty, finding that its mere imposition regardless of the probability of its implementation and the duration of the stay on death row, amounts to a violation of Article 3 (*Öcalan v. Turkey* App. No. 46221/99, judgment of 12 March 2003 (unpublished)).

[40] *Tyrer v. United Kingdom* (1978) 2 EHRR 1.

[41] *Campbell and Cosans v. United Kingdom* (1982) 4 EHRR 293; *Costello-Roberts v. United Kingdom* (1982) 19 EHRR 112.

[42] *A v. United Kingdom* (1999) 27 EHRR 611.

[43] *Ireland v. United Kingdom* (1979) 2 EHRR 25. See further the discussion of assaults upon physical integrity in Chapter 5 below, pp. 251-252.

private individuals.[44] The European Court has, thus, attributed to the Convention a certain horizontal dimension in rendering its guarantees applicable between individuals, so creating a positive obligation for the state to adopt national measures to criminalise individual acts of this kind.

Article 8 has also been used to protect intimate aspects of an individual's personality, such as sexual orientation, from punitive national legislation, showing how personal identity issues are bound up with dignity as an issue of respect for privacy.[45] This aspect of the juridification of dignity is, nevertheless, contestable as it privileges the subjective component of dignity – linked to the identity of an individual or particular social group (such as homosexuals) - rather than the more objective facet of dignity as an inherent quality of all humanity. This is perhaps why the interpretation of rights associated with sexual expression was nuanced in the *Laskey* case when the European Court refused to find the criminal conviction of a group of participants in homosexual sado-masochistic activities a violation of Article 8.[46] Implicitly, in taking account of the need to ensure respect for the human person, especially that of the younger (albeit consenting) participants, the Court envisaged dignity in its objective guise and was unconvinced by a more subjective interpretation which would have permitted a finding of a violation of respect for private life when the participants themselves saw nothing degrading in their private sexual activities.

In the area of bioethics, Article 8 is of relevance too for its application to privacy matters associated with the use of new reproductive technologies. Thus, for example, in the context of medically assisted conception by donor, it has been questioned whether a child created by this process should have the right to know its origins and the identity of both its biological parents. In the UK, the Department of Health has recently decided that the present prohibition on this information being made available should be revised, with the change expected to come into force in April 2005.[47]

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[44] *X and Y v. The Netherlands* (1986) 8 EHRR 235. See also the more detailed examination of violations of dignity in the context of sexual violence in Chapter 5 below, pp. 282-286.
[45] *Dudgeon v. United Kingdom* (1982) 4 EHRR 149; *Norris v. Ireland* (1991) 13 EHRR 186; *Modinos v. Cyprus* (1993) 16 EHRR 485.
[46] *Laskey, Jaggard and Brown v. United Kingdom* (1997) 24 EHRR 39. See the discussion of this case below in Chapters 5 and 6, pp. 267-270 and p. 328.
[47] The prohibition results from section 31(5), Human Fertilisation and Embryology Act 1990 with the donation of gametes creating no obligation or parental responsibility on the part of the donor towards a child born as a result of the use of these gametes. Correlatively, there exists a presumption of

Considerations such as the difference of treatment *vis-à-vis* adopted children (who do have the right to trace their biological parents), the right to health and the need to know one's medical family history in order to prevent the transmission of genetic or hereditary diseases, prompted the change and demonstrate a shift in the balancing of privacy rights away from those of donors and towards those of children conceived using donated gametes.[48]

Article 9 may also serve to guarantee aspects of human dignity in the sphere of respect for identity and individual personality, this time in connection with respect for the beliefs and convictions of an individual. Here there is a neat link with the earlier theme of respect for life, more precisely the issue of abortion. While the Strasbourg Court has not yet had to deal with the issue, a British commentator has raised the possibility of an incompatibility between Article 9 and the law on abortion in Great Britain which permits medical personnel to raise a conscientious objection to carrying out abortions.[49] The issue is debatable, however, as the capacity to raise a conscientious objection has been held to extend only to those persons who are *directly* implicated in the termination, such as the doctors, but not to any other more peripheral actors. Doubtless, other persons who indirectly participate, for example in cleaning premises where abortions have taken place or in writing letters of appointment, may also wish to object for reasons of conscience. Yet, it presently remains untested

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anonymity of donors. A first round battle was, however, won in the High Court in July 2002, when Mr Justice Scott Baker ruled that, while the court had not yet decided if the present law breached the Human Rights Act and the European Convention, society was now more open and secrecy something that had to be especially justified (*R (Rose and another) v. Secretary of State for Health and another* [2002] 3 FCR 731). The UK government subsequently delayed a decision on whether or not to end anonymity, confirming meanwhile that children born from donations after 1990 would have the right to non-identifying pen-portraits of their genetic parents when they turn 18: Meikle J., 'Decision Deferred on Tracing "Donor" Parents', *The Guardian*, 29 January 2003. See further Dyer C., 'Shortage of Sperm Donors Predicted When Anonymity Goes' (2004) 328 *BMJ* 244.

[48] The proposed change has led to concern that the number of willing sperm donors will decline and that a public awareness campaign will be necessary to try to encourage donors to come forward: Dyer C., *ibid.* By way of contrast, however, with the UK's increased concern to enable individuals to trace their biological parentage, the European Court of Human Rights in the case of *Odièvre v. France* [2003] 1 FLR 621 (D IR, 2003, 739; JCP 2003, II 10 049) found that the French principle of *'accouchement sous X'*, that is the possibility for a woman to give birth without her identity being made known, did not violate Article 8 ECHR. France had not exceeded the state's margin of appreciation due to the complex and delicate questions involved and to the fact that new legislation, Law no. 2002-93 of 22 January 2002, enabled individuals wishing to trace their mother to make a request that her identity be revealed which would be granted if she consented. See Malaurie P., 'La Cour européenne des droits de l'homme et le "droit" de connaître ses origines – l'affaire *Odièvre*' *JCP*, 2003, 13, I 120.

whether to oblige them to take part constitutes a lack of respect for their dignity in the sense of inhibiting their capacity to act freely in accordance with an intimate aspect of their conscience.

Likewise, as regards Article 10 of the ECHR, the subject of abortion generates a link between dignity and the Convention, this time with regard to freedom of expression. The European Court of Human Rights has thus been asked to ascertain the compatibility with Article 10 of an injunction placed upon an Irish association concerned with women's health preventing it from distributing information about the availability of abortion in Great Britain.[50] The Court's finding of a violation of Article 10 can be viewed as supporting the dignity of Irish women through the vehicle of their right to receive information, ultimately enhancing their capacity to enjoy respect for choices they make in their private life. This solution is compatible, too, with the solutions of the European Commission discussed above in the context of Article 2, in demonstrating that the life (and dignity) of the foetus is not primordial.

Finally, Article 14 which prohibits discrimination also reveals a particular facet of the implicit dimension of dignity within the Convention. Given that human dignity is linked to the respect accorded to identity, discriminatory treatment based upon sex, race, religion, political association or any other personal status, may constitute an assault upon dignity. However, this assertion deserves qualifying. First, as mentioned earlier, Article 14 cannot be invoked alone which considerably reduces its impact. The Court, in particular, has a tendency, when finding a violation of another Convention guarantee, to deem it unnecessary to enquire further into an additional violation of Article 14.[51] The introduction of protocol no. 12 could end this practice, making a complaint of discrimination admissible in and of itself. That said, the prospects of signature of this protocol appear distant.[52] The UK government, for example, is of the view that the obligations it contains are unclear, notably the extent

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[49] Section 4, Abortion Act 1967. See Hammer L., 'Abortion Objection in the United Kingdom within the Framework of the European Convention on Human Rights and Fundamental Freedoms' (1999) *EHRLR* 564-575.

[50] *Open Door Counselling and Dublin Well Woman Centre Ltd and Others v. Ireland* (1993) 15 EHRR 244.

[51] In the case of *Dudgeon v. United Kingdom* (1982) 4 EHRR 149, for example, the Court, having found a violation of Article 8 ECHR held it was unnecessary to examine further whether there was an additional violation of Article 14.

[52] Moon G., *supra* n. 28.

of the principle of non-discrimination itself which may be invoked in connection with the application of *any* normative measure of national or international origin.[53]

A second problematic aspect of the principle of non-discrimination is its very interpretation. It was noted in the context of discussion of Article 8 ECHR that different identities, such as homosexuality, may give rise to a divergence of opinion as to the appropriate respect to be accorded to such a status. Thus, even if the principle of non-discrimination were to become autonomous, the interpretation of its scope would not be made significantly easier.[54]

2.1.2.ii Dignity and the European Convention on Human Rights and Biomedicine: an explicit objective

While the Council of Europe, through the ECHR, has sought to operationalise human dignity in an indirect manner, it has gone on to make a more express commitment to this end in the area of biomedicine where, as already observed, the potential for dignity violations is particularly acute. Thus, the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine was signed on 4 April 1997, with the key objectives of guaranteeing patients rights and establishing a framework for the regulation of medical research, assisted conception, gene therapy and organ transplantation.[55] The Convention has been cited as 'exemplary' in the area to the extent that it is the first legal instrument to establish the relationship between fundamental rights and biomedicine.[56] In addition, it is remarkable in its explicit reference to the obligation to protect human dignity, not only in the title, but on four further occasions in the text,

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[53] Lord Lester, *supra* n. 28, pp. 79-80.

[54] The issue of non-discrimination and equal treatment as a facet of respect for human dignity is discussed further in the final chapter of the thesis in the context of the discussion on assaults upon moral integrity, pp. 318-344.

[55] DIR/JUR (97) 1. See Meulders-Klein M.T., 'Biomédecine, famille et droits de l'homme: une même éthique pour tous?' *RTDH*, 2000, 429-452; Monnier S., 'La reconnaissance constitutionnelle du droit au consentement en matière biomédicale: étude de droit comparé' *RTDC*, 2001, 2, 383-288, at pp. 386-387.

[56] Maurer, B., *supra* n. 22, p. 83.

notably in the first article which states that the parties 'shall protect the dignity and identity of all human beings'.[57]

Furthermore, on 6 November 1997, an additional protocol prohibiting human cloning was adopted which again makes explicit reference to human dignity, setting out in its preamble that 'the instrumentalisation of human beings through the deliberate creation of genetically identical human beings is contrary to human dignity and thus constitutes a misuse of biology and medicine.'[58] The amplification of the references made to human dignity throughout the Biomedicine Convention and the protocol is most welcome in giving precision to the foundation and the scope of the principle, at least in the particular area of biomedicine – detail which is missing from the ECHR.

2.1.2.iii Dignity and the European Union: a core value

Given the multiplicity of implicit references to dignity in the ECHR, plus the explicit reference in the Biomedicine Convention, the introduction of a third layer of dignity protection at the European level - in European Union law – might appear disconcerting, even superfluous. While such concern may be well founded, to the extent that the net of dignity is being cast far and wide with little attempt at a coherent consolidation of its relationship to a proliferating, pan-European system of fundamental rights protection,[59] the recognition of the importance of the concept in grounding human rights guarantees within the Union is, nevertheless, a welcome signal.

The juridification of dignity within European Union law, in a similar way to Council of Europe initiatives, demonstrates a complex pattern of implicit and, increasingly explicit, references, but again with little concrete substance being given to the content of dignity protection. Unlike the Council of Europe's framework for guaranteeing

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[57] Fraisseix P., 'La protection de la dignité de la personne et de l'espèce humaines dans le domaine de la biomédecine: l'exemple de la Convention d'Oviedo' *RTDC*, 2000, 371-473. See also Maurer, B., *ibid.*, pp. 81-82.
[58] DIR/JUR (97) 14.
[59] Dupré C., 'La dignité dans l'Europe constitutionnelle: entre inflation et contradictions' in *The Europeanisation of Constitutional Law in the Light of the Constitutional Treaty for the Union* ed. Ziller J., (Paris: L'Harmattan, 2003) 97-120.

fundamental rights (in the form of international Conventions), however, the European Union has begun to instrumentalise dignity to explicitly constitutional ends, rendering it a key building block, if not the pinnacle, of plans for a Constitution for Europe and consolidating its importance as a foundational value of the Union.

Before considering the implications of moves to constitutionalise dignity at the European level, it is first useful to note two earlier developments which highlight the importance of dignity considerations and their material scope in specific areas falling with the competence of the European Community. Given the notorious lack of references to fundamental rights in the founding texts of the European Union,[60] it is unsurprising to find no references there to human dignity, and instead to note that it is through a combination of soft law, secondary legislation and the case law of the European Court of Justice, that dignity has been brought within the sphere of the Union's activities.

The first notable step in this regard is in the domain of employment law and concerns the harassment of workers. While the links between dignity and work may at first sight seem tangential; they are, in fact, in the words of Thierry Revet, 'as close as they are ambivalent'.[61] For example, in 1988 the European Community adopted an additional protocol to the European Social Charter of 1961, which in Article 26 envisaged a new right to dignity at work and was aimed at the protection of employees from psychological or sexual harassment.[62] A further step was taken with the adoption of a Recommendation by the European Commission on 27 November 1991 on the 'protection of the dignity of women and men at work' from sexual

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[60] This historic absence is attributed to the founding conception of the European Communities, with their aim of creating a common market, as having no impact upon fundamental rights. Case law of the ECJ (*Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel* Case 11/70 [1970] ECR 1125 and *Nold v. Commission* Case 4/73 [1974] ECR 491) has told a different story with the Court finding that respect for fundamental rights forms part of the general principles of Community law. Jurisprudential developments have since been consolidated by the inclusion of fundamental rights among the foundational principles of the Union in Article 6 of the Treaty on European Union. See Renucci J.F., *supra* n. 24, pp. 18-29; and Craig P. and De Búrca G., *EU Law: Text, Cases and Materials* 3rd ed. (Oxford: Oxford University Press, 2003) chapter 8.

[61] Revet T., 'La dignité de la personne humaine en droit du travail' in *La dignité de la personne humaine* eds. Pavia M.-L. and Revet T., *supra* n. 12, 137-157, at p. 137. The relationship between human dignity and work is explored further below in Chapter 6, pp. 306-309.

[62] Renucci J.-F., *supra* n. 24, pp. 351-368, especially p. 364.

harassment[63] and this has been consolidated by the revised Equal Treatment Directive of 23 September 2002 which now includes both general harassment and specifically sexual harassment within its remit, defining them as discrimination and again linking them to the concern to respect dignity.[64] From these initial moves it is apparent that European Community law, which is above all concerned with economic matters, can nevertheless impact upon, and require the protection of, dignity.

A second example of the link between European Community law and human dignity has arisen in the sphere of biotechnologies through Community competence to enact harmonisation measures intended to establish the internal market. The intervention came in the area of patent law in the form of Directive 98/44 EC on the legal protection of biotechnological inventions and requires member states to protect such inventions involving plants, animals or the human body as the Community requires to be patented.[65] This is with a view to ensuring the free movement of biotechnological products that are the object of a patent. The relationship to dignity is made plain in the preamble to the Directive which contains two mentions of the requirement that patent law respect dignity.[66]

Not convinced, however, by the formal mention of human dignity in the Directive, the Netherlands sought its annulment, on the ground, *inter alia*, that it failed to respect fundamental rights and, in particular, was contrary to dignity as it permitted patents to be issued for elements isolated from the human body. The Court of Justice disagreed, however, finding that the Directive provided substantial guarantees that neither the

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[63] Commission Recommendation 92/131/EEC of 27 November 1991 on the protection of the dignity of women and men at work, OJ 1992 L49/1.

[64] Article 3, Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002 L269/15. Article 2 of the Directive defines harassment as 'unwanted conduct related to the sex of a person' and sexual harassment as 'any form of unwanted verbal, non verbal or physical conduct of a sexual nature' which occurs 'with the purpose or effect of violating the dignity of a person'. See also Directive 2000/43 EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L180/22, and Directive 2000/78 EC of 27 November 2000 establishing a general framewok for equal treatment in employment and occupation, OJ 2000 L303/16, both of which prohibit *inter alia* harassment in employment as a matter of dignity.

[65] Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions, OJ 1998 L 213/13. See Gold E.R. and Gallochat A., 'The European Biotech Directive: Past as Prologue' (2001) 7/3 *ELJ* 331-366.

[66] Recital 16 provides: 'Whereas patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person; ...' and recital 38 states: '...whereas processes, the use of which offend against human dignity... are obviously also excluded from patentability.'

human body itself nor the simple discovery of one of its elements may be patented, nor may inventions whose commercial exploitation would be contrary to morality.[67] Although the conclusion led to a finding of no violation of human dignity, it is important to note the way in which the Court accepted a role for itself in assessing the compatibility of acts of the institutions to 'ensure that the fundamental right to human dignity and integrity is observed.'[68] In doing so, the Court explicitly cites dignity as a right which forms part of the 'general principles of European Community law'.[69] From this starting point the decision provides a platform for the further expansion of dignity discourse within the jurisprudence of the Court. Until this happens, however, the absence of any reflection by the Court upon the *positive* content of respect for dignity makes it distinctly unclear what would constitute a dignity violation in the context of the European Union's regulation of biotechnological matters.

What is particularly striking in the Court's judgment is its failure to refer to the European Union's Charter of Fundamental Rights which had been solemnly proclaimed at the European Council summit in Nice in December 2000.[70] This is despite the fact that Advocate General Jacobs, in his opinion on the case, had grounded his finding that the Directive did not violate fundamental rights precisely on the Charter.[71] The reason for the Court's 'stony silence' must be put down to its unwillingness to give credibility to the political compromise which the Charter constitutes, having been solemnly proclaimed by the European Union's institutions, but (as yet) 'constitutionally rejected as an integral part of the Union legal order'.[72]

That said, the Charter has been constitutionally regenerated and has been a key factor in discussions on the elaboration of a draft Treaty establishing a Constitution for Europe with it being proposed that the Charter should form Part II of the text, directly

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[67] Case C-377/98 *Netherlands v. European Parliament and Council* [2001] ECR I-7079, paras. 71 and 72. See Galloux J.-C., 'La directive sur la brevetabilité des inventions biotechnologiques confortée' *D* jur, 2002, 38, 2925-2928.
[68] *Ibid.*, para. 70.
[69] *Ibid.*, para. 70.
[70] OJ 2000 C364/8.
[71] Opinion of 14 June 2001: 'The right to human dignity is perhaps the most fundamental right of all, and is now expressed in Article 1 of the Charter... It must be accepted that any Community instrument infringing those rights would be unlawful' (para. 197).
[72] Weiler J.H.H., 'A Constitution for Europe? Some Hard Choices' (2002) 40/4 *JCMS* 563-80, p. 575.

following the Union's main constitutional provisions in Part I.[73] For this reason it is opportune to consider both the Charter and the draft Constitution's abundant provisions on dignity which will have the undoubted capacity to promote the use of this concept in the future development of a European human rights policy. What is important to note at the outset is that both texts elevate respect for dignity to the status of a foundational value of the Union, before (in the case of the Charter) going on to explain its relationship to fundamental rights.

Taking the Charter first, the importance attached to dignity is set out initially in the preamble, in which it is stated that the Union is founded upon the four 'indivisible, universal' values of 'human dignity, freedom, equality and solidarity'. This opening pronouncement follows the example of international instruments in introducing dignity as a universal objective,[74] the precise nature of which is given more shape in Title I, entitled 'Dignity'. Here, in the very first Article (II-1) it is stated that 'Human dignity is inviolable. It must be respected and protected.' There then follows an enumeration of the interesting selection of rights that flow from dignity. Some of the rights are already well known from the ECHR system to have a dignity component: the right to life (Article II-2), the prohibition of torture and inhuman or degrading treatment or punishment (II-4), and the prohibition of slavery and forced labour (II-5). These traditional rights are, however, amplified by new rights that are designed to cope with potential dignity violations sparked by technological advances in the area of medicine and biology (and in this respect they echo the initiative of the Council of Europe's Biomedicine Convention[75]). Thus, Article II-3 on the right to the integrity of the person guarantees in subsection 1 that 'Everyone has the right to respect for his or her physical and mental integrity'. It proceeds in subsection 2 to provide that in the particular fields of medicine and biology the key principle of free and informed consent must be respected and imposes three prohibitions on particular activities -

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[73] CONV 850/03, 18 July 2003 (OJ 2003 C169/1). See further De Búrca G., 'Fundamental Rights and Citizenship' in *Ten Reflections on the Constitutional Treaty for Europe* ed. De Witte B., (Florence: Robert Schuman Centre for Advanced Studies and Academy of European Law, 2003) 11-44. Subsequent references to provisions of the Charter use the numbering system proposed in the draft Constitution for Europe.

[74] Benoît-Rohmer F., 'La Charte des droits fondamentaux de l'Union européenne' *D* chron., 2001, 19, 1483-1492, at p. 1486.

[75] Article II-3 follows the example of the Biomedicine Convention which prohibits the commercialisation of the human body and eugenic practices and makes consent a key aspect of any intervention upon the body.

eugenic practices, particularly those aimed at the selection of persons; commercialisation of the human body; and the reproductive cloning of human beings.

This ensemble, which is specifically directed at the potential abuse of dignity within the realm of bioscience, represents an important and dynamic step on from more traditional human rights guarantees and is particularly apt given that, as has been shown above, European Union competence can extend to the field of biotechnology, if only as yet to the extent that it impacts upon the single market.[76] Problems remain, of course, many of which replicate those of definition already experienced under the ECHR. For example, Article II-2 gives no indication of what is meant by 'life' and it is, therefore, unclear whether it applies to the foetus or human embryo.[77] It would seem that in the absence of an answer to this question it will continue to be a matter for national legislators, in disagreement amongst themselves, to debate.[78] Equally, while Article II-3-2 prohibits reproductive cloning, it says nothing of the question of therapeutic cloning, which again is left to national authorities to decide.[79] There remains also the more general problem of the personal scope of the Charter which is applicable only to the institutions of the Union and to member states when implementing EU law (Article II-51). As noted above, the law of the European Union claims competence over biotechnological issues related to the internal market, but it is unclear how far this creeping and undefined competence may yet extend.

Beyond the application of the principle of respect for human dignity in the areas cited in the first Title of the Charter, dignity also appears in subsequent Titles III and IV on 'Equality' and 'Solidarity' in ever more nuanced forms. Thus Article II-25 refers to the Union's recognition of 'the rights of the elderly to lead a life of dignity' and Article II-31, echoing the identification above of a relationship between dignity and

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[76] A further example of the relationship between biotechnology and the single market has been advanced by the English Court of Appeal in the case of *R v. Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 60 All ER 687, in which it was held that the applicant, as a European Union citizen, had the right to receive assisted conception services (construed as medical services) in another member state. See further Chapter 3 below, pp. 155-156.

[77] Both foetus and embryo have already been brought within the scope of European Community competence through their relationship with the free movement rights of European Union citizens. See Case C-159/90 *SPUC (Ireland)* v. *Grogan* [1991] ECR I-4685 and *R v. Human Fertilisation and Embryology Authority, ex parte Blood, ibid.*

[78] Benoît-Rohmer F., *supra* n. 74, p. 1486.

work, states that '[e]very worker has the right to working conditions which respect his or her health, safety and dignity.' Finally, Article II-34-3 provides that, in the sphere of social security and social assistance, the Union recognises and respects 'the right to social and housing assistance so as to ensure a decent existence for all those who lack resources...'. However, this subsection goes on to add that the right applies 'in accordance with the rules laid down by Union law and national laws and practices.' If the extent of the dignity provision in Title I is imprecise, therefore, the subsequent references to a 'life of dignity' and a 'decent existence', falling largely in the area of social and economic rights, are even more so, and simply leave a multitude of interpretations possible for national decision-makers to adopt.[80]

The Charter's initiative in underlining the importance of human dignity concerns within the sphere of European Union law has, however, now been reiterated at the constitutional level, with the concept being indelibly imprinted as a foundational value of the Union in the draft text of the Constitution for Europe.[81] This document places respect for human dignity in pole position among the Union's core values set out in Article 2.[82] Its inclusion here is of both symbolic and legal importance. Symbolically, the list of values is designed to make the peoples of Europe feel part of the same Union and denotes a common commitment to the fundamental guarantees of a peaceful and democratic society. Moreover, to leave dignity out would have been a serious omission in the light of the expressions of respect for human dignity contained in the national Constitutions of member states.[83] Legally, the inclusion of dignity is paramount as the Constitution refers to its values both as the criteria for the accession of new countries and also, in the case of current members, provides a sanction in the

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[79] In this respect the UK government has proceeded to adopt the Human Fertilisation and Embryology (Research Purposes) Regulations 2001, Statutory Instrument, 2001, no. 188 which permit human therapeutic cloning.

[80] The relationship between dignity and social and economic rights is explored further in Chapter 6 below in the context of discussion on the principle of non-discrimination and assaults upon mental integrity, pp. 305-318.

[81] *Supra* n. 73.

[82] Article 2 reads: 'The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination.' The values referred to in Article 2 expand upon the Union's foundational principles set out in Article 6 of the Treaty on European Union which include liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. See further, Millns S., 'The Value of Human Dignity' in *Values in the Constitution of Europe* eds. Aziz M. and Millns S., (Aldershot: Dartmouth, 2004, forthcoming).

[83] See Millns S., 'Unravelling the Ties that Bind: National Constitutions in the Light of the Values, Principles and Objectives of the New European Constitution' in Ziller J. (ed.), *supra* n. 59, 97-120.

form of the suspension of the rights of member states in the case of a clear risk of a serious breach of one of the values listed. What is important too is the breadth of the measure: sanctions may be introduced even if the risk of a breach takes place in a field of the member state's autonomous action and, thus, *outside* the sphere of the European Union's activities.

Concluding on this high note, it will be recalled that the purpose of the initial part of this Chapter has been to give an indication of the ways in which the universal concern of respect for human dignity has been mapped onto law at the supra-national level, imparting binding obligations for France and the UK. As has been seen, the juridification of dignity at this level has occurred often in textualised form and in the guise of general objective, before being contextualised among founding principles or values capable of giving rise to other rights and fundamental freedoms. However, the generality of the references and the lack of precision as to content, together with the often limited authority and scope of international law agreements, leaves a number of holes in effective dignity protection at the supra-national level. It is the national systems' capacity to plug these gaps that forms the object of enquiry in the second section of this Chapter. Here, it will be noted how a similar process of juridification of dignity is underway at the national level through the introduction of written texts and jurisprudential interpretation. Interesting in this respect, however, is the fact that while France is traditionally depicted as a country attaching paramount importance to written law, it is largely through the development of case law that the notion of human dignity has been elaborated. On the contrary in the UK, in spite of the common law tradition, dignity is being more systematically juridified since the introduction of legislation in the form of the Human Rights Act 1998.

2.2 The juridification of human dignity at the national level

The juridification of dignity at the national level cannot, of course, be viewed totally separately from supra-national considerations. It is increasingly the case that legal references to human dignity overlap and interconnect as a result of the interpenetration of national, European and international laws. That said, the purpose of this section is to provide the road map for the particular process of the juridification

of dignity in national law through an examination of the combined efforts of constitutional norms, legislation and case law to bring this about. The analysis suggests the complexity and diversity of dignity references in national law, in both written and unwritten forms, and the difficulty of giving definition to a concept which as soon as it is grasped in one substantive area erupts with a whole new meaning in another.

An initial observation of the French and UK systems reveals a common effort to concretise the process of inserting dignity into law, meaning that in both countries the concept is beginning to take on a more material and substantial form. Thus, before pinpointing divergences in the two systems, the extent of the resemblance in the reinforcement of dignity protection at the national level (mirroring the supra-national trend) deserves to be stressed. This common approach is not surprising given that, as noted in the Introduction, the universal impact of new technologies with their capacity to infringe human dignity means that states increasingly have to find solutions to similar problems. In response both France and the UK have made efforts towards the reinforcement of fundamental rights protection in general terms. A paradox, however, lies in the fact that in France these efforts have been largely jurisprudential, coming from the increasing role of the *Conseil constitutionnel* in ensuring human rights guarantees,[84] while in the UK they have been legislative with the notable introduction of the Human Rights Act 1998.[85] The importation of dignity into law mirrors this general trend. It is, therefore, first to France that we turn with its instrumentalisation of dignity through the creative judicial manipulation of core constitutional texts, before going on to look at the position in the UK, characterised by a move from the implicit introduction of dignity in case law to a more explicit engagement with the concept in legislative form.

[84] See above, Introduction, p. 17.
[85] See above, Introduction, p. 23 and Chapter 1, p. 71.

2.2.1 From written to unwritten norms: the French example

French law really began its process of juridification of human dignity at the moment it made its safeguard a principle of constitutional value.[86] It is not surprising – in a country with a civilian legal tradition - that this took the form of introducing into national law a legal principle. That said, the *process* of introducing the principle is interesting in that the text from which it was drawn (the preamble to the Constitution of 1946) required a good deal of creative reading by the Constitutional Council in order to bring about its genesis. Thus, while there are a substantial number of references to dignity in French legal texts, at both constitutional and legislative levels, the major developments with regard to the principle have been indicated by the judiciary which has applied the notion with much relish.

2.2.1.i The juridification of dignity in the written text: creative beginnings

It has been remarked above that many states view respect for human dignity as a constitutional commitment.[87] There is nothing surprising, therefore, in the fact that in French law too the matter has been treated as one of constitutional significance and that dignity has been juridified at the very summit of the hierarchy of norms. This has not prevented, however, the emergence of a process of impregnation of dignity into other written norms, notably at the legislative level. Both sources will, therefore, be investigated in turn.

The constitutional source of human dignity: a voyage of discovery There is an important difference between France and other states which have introduced dignity into their Constitutions, which is that in France no express mention is made of the term in the Constitution of 1958. Initially, therefore, one might align the French and UK approaches given that in the latter too there is no explicit constitutional guarantee that dignity should be respected. The two countries part company, however, in 1994 as a result of the Constitutional Council's *Bioethics* decision and its inspired reading

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[86] See above, Introduction, p. 17 and p. 18 and Chapter 1, pp. 55-56.
[87] See above, Chapter 1, p. 53.

of the opening phrase of the preamble to the Constitution of 1946 which revealed the existence of the concept of dignity in French constitutional law.[88] From this humble beginning a legal principle was born.

In introducing the principle in this way the Constitutional Council operated in a similar manner to the European Court of Human Rights in its decisions *SW v. United Kingdom* and *CR v. United Kingdom.*[89] That is to say, the Council made respect for dignity an objective of universal value, meaning in the French context, that it should be taken into account in the interpretation of all the rights and freedoms which make up the 'block of constitutionality'.[90] The *Bioethics* decision can, therefore, be seen as bringing about the mainstreaming of dignity, inserting it at the heart of French law, from which point it is disseminated as a key bench mark for the interpretation of all legal norms.

With gathering momentum, the Council went on to pursue the juridification process by introducing dignity into the more controversial area of social rights in the sphere of housing law, developing the objective of constitutional value that everyone should enjoy decent accommodation.[91] This step nicely illustrates how the principle of respect for human dignity can mushroom from an initial concern to uphold fundamental civil rights (regarding matters of life and death in the bioethics context) to the more controversial domain of social and economic rights. The Council confirmed its approach in 1998 in a second decision demonstrating the importance of dignity in the context of second generation rights, ruling this time upon the constitutionality of a framework Bill on the fight against social exclusion which in its first article sought to guarantee effective access for everyone to fundamental rights in

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[88] Decision no. 94-343-344 DC of 27 July 1994, *Bioethics.* The Constitutional Council in this case reviewed the constitutionality of two out of three legislative proposals on bioethics: Law no. 94-653 of 29 July 1994 on respect for the human body and Law no. 94-654 of 29 July 1994 on the donation and use of elements and products of the human body, medically assisted conception and prenatal diagnosis. Law no. 94-630 of 25 July 1994, modifying Book II *bis* of the Code on Public Health, on the protection of individuals who take part in biomedical research was not referred to the Council for constitutional review.

[89] *SW v. United Kingdom* and *CR v. United Kingdom* (1995) 21 EHRR 363. See above, Chapter 1, pp. 66-68.

[90] For an explanation of the composition of the 'block of constitutionality', see above, Introduction, p. 17.

[91] Decision no. 94-359 DC of 19 January 1995 *Diversity of habitat.*

a number of social domains such as employment, health, justice, education, culture, family protection, and once again housing.[92]

The Council's line of case law linking dignity to social rights continued further in its decision on the proposed legislation to introduce a form of civil partnership for unmarried persons (the Civil Solidarity Pact (*Pacte civil de solidarité* or *PACS*)).[93] Asked to decide upon the question of whether or not the possibility for one party to unilaterally break the agreement infringed human dignity, the Council responded that this was contrary 'neither to the principle of human dignity nor to any other principle of constitutional value'. The choice of vocabulary here is noteworthy in that it marks an extension of the terms of the 1994 *Bioethics* decision, even a 'new writing' in the words of one commentator.[94] This is because the principle of dignity was no longer described as of only 'constitutional value' suggesting that the Council was happy to consent to its diffusion into other branches of law at the infra-constitutional level.[95] Moreover, the principle was no longer linked specifically to instances of servitude or degradation.[96] The extension of the principle in this way has, thus, cemented its application to more controversial areas of social law in a way that was unenvisaged when the concept was first introduced in 1994. That said, there has been a return to the link between dignity and the ethics of life in a more recent decision of the Constitutional Council concerning an amendment to the 1975 law on abortion.[97] The Council, without seeking to pronounce upon the question of when life begins, found that the extension from ten to twelve weeks of the period in which a woman in a 'situation of distress' could freely choose a termination, was conform to the Constitution and did not infringe human dignity.

The expansion of dignity within the framework of French constitutional law has not, however, been an isolated experience. In fact, in its consideration of dignity issues within the context of the block of constitutionality, the Constitutional Council has

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[92] Decision no. 98-403 DC of 19 July 1998, *Fight against exclusion.*
[93] Decision no. 99-419 DC of 9 November 1999, *PACS.* See Stychin C.F., *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford: Hart Publishing, 2003) chapter 3.
[94] Pavia M.-L., 'La dignité de la personne humaine' in *Libertés et droits fondamentaux* eds. Cabrillac R., Frison-Roche M.-A. and Revet T., 6th ed. (Paris: Dalloz, 2000) 121-139, at p. 134.
[95] See the discussion of jurisprudential developments in this Chapter below, pp. 106-112.
[96] Pavia M.-L., 2000, *supra* n. 94, p. 134.
[97] Decision no. 2001-446 DC of 27 June 2001, *Abortion and contraception I.* This decision is discussed further in Chapter 3 below, pp. 176-178.

been singing in harmony with the French legislature which has also sought to augment regard for dignity in a growing number of spheres. These infra-constitutional initiatives are marked at once by their diversity and specificity and it is towards providing a schematic overview of their development that we now turn.

Infra-constitutional sources of human dignity: a diversity and specificity of measures The year 1994 was not only important for seeing the introduction of dignity into French constitutional law. A sequence of measures adopted by the French parliament introducing dignity into legislation began in precisely the same year and marks a similar concern about potential violations of human dignity at this particular moment in time, characterised by intense technological development, social change and new war-time atrocities on a European and world-wide scale.[98]

First, and following swiftly on from the Constitutional Council's decision in the *Bioethics* case, a new Chapter was introduced into the French Civil Code entitled 'Respect for the Human Body' (*'Du respect du corps humain'*). The amendment, comprising a newly enacted Article 16, states that 'legislation guarantees the primacy of the person, prohibits any infringement of his or her dignity and guarantees respect for the human being from the moment that his or her life begins.'[99] It is clear that the challenges posed by scientific advancement, such as those represented by the new technologies for assisting conception, pushed the legislature to insist in this Article upon the primacy of the person. Article 16 is not, however, unambiguous on this point as it contains no statement as to when life begins. It is unclear, therefore, whether the embryo is included within the definition of person, although further legislative provisions go on to permit the destruction of frozen embryos if not used within a five year period, a process which might be considered profoundly undignified if the embryo is construed as a person rather than an object.[100]

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[98] The 1990s were marked notably by the civil wars in the ex-Yugoslavia and in Rwanda. It was also during this period that much public debate took place in France on the criminal liability of those responsible for the perpetration of war crimes during the Second World War, culminating in the sentencing of Maurice Papon in 1998 to 10 years imprisonment for his complicity in crimes against humanity. See further below, Chapter 6, p. 339.

[99] *'La loi assure la primauté de la personne, interdit toute atteinte à la dignité de celle-ci et garantit le respect de l'être humain dès le commencement de sa vie.'*

[100] Article 9 of Law no. 94-654 of 29 July 1994 on the donation and use of elements and products of the human body, medically assisted conception and prenatal diagnosis. The life of such embryos, however, benefits from no constitutional protection as the Constitutional Council has failed to find the

While developments in the civil law linked human dignity to bioethics questions, the new Penal Code which entered into force on 1 March 1994 introduced in Book II a broad series of offences touching upon dignity, grouped under the heading of 'crimes and delicts against the person'. Title 1 on 'Crimes Against Humanity' covers in Chapter 1 genocide (Article 211-1) and in Chapter 2 other crimes such as deportation, slavery, summary executions, kidnapping followed by disappearance, torture and inhuman acts against the person (Article 212-1). A second Title is given over to 'Assaults on the Person' including in Chapter 2 'Assaults upon the Physical or Mental Integrity of the Person' and in Chapter 5 'Assaults on Human Dignity', comprising in particular a first section on discrimination entitled 'Conditions of Work and Accommodation Contrary to Human Dignity'.

This ensemble demonstrates a quite intense preoccupation on the part of the legislature in the early 1990s to reinforce dignity protection through statute law and coincided nicely with the Constitutional Council's heightening the profile and legitimacy of the concept through its interpretation of the preamble to the Constitution of 1946. The proliferation of textual references to dignity, however, does not tell the whole story of its dissemination in French law. In fact, even if the hierarchy of norms tends to privilege legislation over case law, it is in fact in the latter that the most dynamic aspects of the process of juridifying dignity are to be found.

2.2.1.ii The juridification of dignity in case law: a multiplication (or banalisation) of references

Rather than speaking of the 'juridification' of human dignity in France it might appear more apt to reintroduce Stone Sweet's idea of 'judicialization', to capture the insertion of dignity into law through judicial decision-making. The French judiciary has seized the concept with gusto, employing it as an active tool for the resolution of disputes across civil, criminal and administrative jurisdictions alike. In fact, it is precisely the enthusiasm of the judges which has created a danger of a proliferation,

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pre-implanted embryo a bearer of constitutional rights. See Mathieu B., 'Bioéthique: un juge constitutionnel réservé face aux défis de la science' *RFDA*, 1994, 10/5, 1019-1032, at pp. 1026-1029.

or rather banalisation, of the concept such that it risks losing its special quality, being no longer reserved in its application to the most important events in the human life cycle.

The extensive application of dignity through case law The diffusion of dignity through all areas of French law and in a huge range of scenarios during the 1990s is testimony to the potency and flexibility of the concept. The key moments in this history are outlined here to give a linear sense of the major legal landmarks in the 'judicialization' process. The examples will then be referred to again in more detail in the context of their factual circumstances as these relate to the subject matter of subsequent chapters.

First, in the area of civil law, and once again immediately following the 1994 *Bioethics* decision of the Constitutional Council, the judiciary began to make reference to the necessity of safeguarding human dignity. Thus, on 1 February 1995, the *Tribunal de grande instance de Paris* gave its judgment in the famous *Benetton* case.[101] As mentioned in the preceding chapter, this case concerned the legitimacy of Benetton's advertising campaign depicting a bare human torso, lower abdomen and buttock stamped with the words 'HIV'. The plaintiffs, who included AIDS sufferers, claimed damages for an invasion of privacy arguing that the company had abused its freedom of expression. Rejecting the first part of their argument based upon Article 9 of the Civil Code[102] (as this granted only individual and not collective protection of private life), the court found that there had been an abuse of freedom of expression through the degradation of the human body contained in the image. It was found that the case raised particularly sensitive issues regarding the fear associated with AIDS and that the advertisement was 'capable of provoking, whether consciously or not, acts of exclusion or rejection, even hostility.'[103] The discourse of exclusion used by the civil law judiciary echoes perfectly the decision of the Constitutional Council, rendered only two weeks previously, in the *Diversity of habitat* case which had

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[101] TGI de Paris, 1 February 1995, D jur. 1995, 572, note by B. Edelman.

[102] Article 9 reads: 'Everyone has the right to respect for his or her private life. ...'. (*'Chacun a droit au respect de sa vie privée... '.*)

[103] *'[La publicité était] susceptible de provoquer, de manière plus ou moins consciente, des manifestations d'exclusion ou de rejet, voire d'hostilité.' Supra* n. 101.

developed the scope of human dignity through its link to the objective of ensuring decent housing for all and, hence, combating social exclusion.

Moreover, the *Benetton* decision makes an important connection between respect for dignity in the 1990s and its historic underpinnings. It will be recalled how the horrors of war half a century previously had given rise to an intense effort towards the juridification of dignity at the international level. At the national level, the *Benetton* judgment reflects back upon the legacy of Nazism with the court remarking that to associate AIDS with portions of naked human flesh through the medium of the HIV inscription, evoked 'Nazi barbarism or the branding of meat'.[104] This strong expression of the risk that degrading treatment may deprive the human body of its very humanity is an extremely significant step in the development of the civil law approach to dignity for two reasons. First, it gives a more precise content to human dignity within the civil law context beyond its only previous incarnation in the sphere of bioethics. Secondly, it shows the limits of freedom of expression (as exercised through advertising) *vis-à-vis* the requirement to respect dignity. On appeal, the *Cour d'appel de Paris* confirmed that the advertisement abused the freedom of expression being a 'degrading stigmatisation for the dignity of persons suffering inconsolably in their flesh and their being, such as to provoke or accentuate, to their detriment, a phenomenon of rejection.'[105]

Following swiftly on from this judicial development in the civil law's construction of human dignity, the notion was next applied in the field of administrative law. Again just one year on from the *Bioethics* decision, the principle was introduced in the controversial context of dwarf-throwing competitions.[106] The *Conseil d'Etat*, sitting in its largest and most important formation, the *Assemblée du contentieux*, ruled that the refusal by local mayors (using their general police powers) to allow such

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[104] *'[A]ssocier par le biais d'une inscription apposée en divers endroits non dénués de signification symbolique, ce mal redoutable, à des portions de chair humaine dénudées, évoque la barbarie nazie ou le marquage de viande.' Ibid.*

[105] *'[Une] stigmatisation dégradante pour la dignité des personnes atteintes de manière implacable en leur chair et en leur être, de nature à provoquer à leur détriment un phénomène de rejet ou de l'accentuer.'*: CA de Paris, 28 May 1996, D jur. 1996, 617, note by B. Edelman. See further, Pavia M.-L., 'La découverte de la dignité de la personne humaine' in *La dignité de la personne humaine* eds. Pavia M.-L. and Revet T., *supra* n. 12, 3-34, at pp. 136-137.

[106] CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence* Rec. p. 372, conclusions by P. Frydman.

competitions was lawful in order to protect human dignity. The decision is highly creative in introducing the principle of safeguarding human dignity as a new component of public order considerations for the purposes of local policing and for permitting this justification to be used without the mayor having to demonstrate that particular local circumstances necessitated his or her action. In his conclusions on the case, the *commissaire du gouvernement* (the autonomous legal adviser in administrative law cases), Patrick Frydman, stressed the legitimacy of this extended reading of police powers given the degradation involved in the instrumentalisation of the dwarf's body and the seriousness of exploiting a physical handicap with the express purpose of treating a human being as a means rather than an end.[107]

The *Conseil d'Etat* has gone on to give a second important interpretation of the notion of human dignity, this time in a case involving death. It has been seen above that the Constitutional Council, in its initial juridification of dignity, oriented the concept around human life and that, within the context of bioethics, this concerned beginnings rather than end of life issues. In the context of the latter, however, the *Conseil d'Etat* in its *Skyrock* decision was required to determine the legality of statements made by a broadcaster who on four occasions expressed enthusiasm at the news of the death of a police officer killed during an exchange of gun fire with a suspected criminal.[108] Like the civil law court in the *Benetton* case, the *Conseil d'Etat* had to balance the various interests at stake: on the one hand the violation of the dignity of the deceased, and on the other freedom of expression. Again, like its civilian predecessor, the court found in favour of upholding dignity: the articulation of this kind of opinion, it was held, surpassed the freedom of expression guarantees in Article 11 of the Declaration of the Rights of Man of 1789 and Article 10 of the ECHR, these being limited in order to ensure respect for human dignity, itself a specific obligation under the Law of 30 September 1986 on audio-visual communication.[109]

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[107] It will be recalled that the Kantian understanding of respect for human dignity requires the treatment of human beings as ends in themselves and never purely as means. See above, Chapter 1, pp. 37-38.
[108] CE, 20 May 1996, *Société Vortex* (*Skyrock*).
[109] The first Article of the Law of 30 September 1986 provides for the freedom of audio-visual communication which may only be limited to the extent that this is necessary to respect human dignity, the freedom and property of others, the plurality of expression of thought and opinion, and public order (*'la communication audiovisuelle est libre. L'exercice de cette liberté ne peut être limité que dans la mesure requise, d'une part, par le respect de la dignité de la personne humaine, de la liberté et de la propriété d'autrui, du caractère pluraliste de l'expression des courants de pensée et d'opinion et, d'autre part, la sauvegarde de l'ordre public'*).

What is remarkable in this jurisprudential history of the crystallisation of dignity in French law around the mid-1990s is the extent to which all branches of the judiciary are implicated and indeed appear to have found a guiding light (or extra prop) to assist in their interpretation of an extensive range of legal issues. The judges appear almost to have been waiting in hope for the advent of such a principle and to feel finally liberated when given authorisation by the Constitutional Council to put it to the test. Yet, from these grand beginnings, with applications in cases of extreme importance touching upon life, death, bodily integrity and exclusion from humanity, there is a more recent trend afoot in the implementation of dignity discourse of a rather different order. This suggests an excess and even banality in its use by the courts with little sense of quite where the limits of such a meritorious ideal should be drawn.

The risk of banalising dignity Given the lack of definition of human dignity it is little wonder that the frontiers of its juridification lack clarity also. The concept has an apparent capacity to spill over from one material concern to another, from one legal branch to the next, with little sense of direction and overall purpose. As the Constitutional Council extended its application from bioethics to housing, from civil to social rights, the concept has moved away from its original meaning in Roman law concentrated upon bodily integrity and personal reputation, or at least has begun to imply a particularly broad interpretation of the latter to include what may appear more peripheral challenges to an individual's personality, life style or identity.

In the area of employment law, for example, there has been an extensive application, if not a 'veritable ravaging', of the principle of respect for dignity.[110] This has been demonstrated in judgments to the effect that the dignity of shop workers is violated by the requirement that they keep to hand receipts for any items in their possession, as well as the practice of encouraging surveillance of one worker by another in the absence of any hierarchical working relationship between the two persons concerned.[111] This is not to deny that the dignity of workers is important. It has

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[110] Picard E., 'L'émergence des droits fondamentaux en France' *AJDA*, 1998, special issue, *Les droits fondamentaux* 6-42, at p. 41.

[111] CA d'Orléans, 21 March 1996 (Juris-data no. 045426); CA de Dijon, 1 April 1997 (Juris-data no. 040374); Mathieu B. and Verpeaux M., 'Chroniques de droit constitutionnel' *JCP*, 1997, I 4066, no. 34 and *JCP*, 1997, I 4023, no. 21. See also Mathieu B., 'Force et faiblesse des droits fondamentaux

already been noted above, in the context of harassment, that the dignity of employees may be compromised by an intimidating working environment that threatens bodily or mental integrity. Yet, given that the factual circumstances at issue here lie at one end of the dignity spectrum, it deserves to be asked whether there might not be other legal mechanisms more suited to remedy less threatening aspects of workplace behaviour without the need for recourse to the profound notion of human dignity.

A second example of the banalisation of human dignity results directly from the dwarf-throwing cases. As a consequence of the finding that dignity is now a component of public order for the purposes of local policing, mayors are entitled to invoke the concept to ban any activity they consider an infringement of dignity from taking place in their particular locality. This has led to decisions by mayors prohibiting people from wearing bathing costumes in the streets of particular tourist locations, preventing begging in public and imposing night-time curfews on children.[112] Yet, if one returns to the view of dignity as a universal and objective value, it becomes difficult to justify these highly particular and local interpretations of the concept. More worrying still is the way in which the decisions demonstrate a wide discretion on the part of local authorities to police public order and morality in the *commune* and to use this as a way to enforce a particular view of (un)desirable public conduct.

The problem comes back to the difficulty raised earlier regarding the failure to account for the normative foundation of dignity. While the judges employ this *'principe "matriciel"'* without explaining its root or the ethical values upon which it is based, it may apparently be employed to justify any solution in any context. This is far removed from the initial constitutional employment of the concept to assist in the legal interpretation of measures affecting the most fundamental aspects of human life. It is no doubt correct that the judiciary has a role to play as *conduit* between values and law, between society and norms, and that the judges 'relativise' the absolutism of

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comme instruments du droit de la bioéthique: le principe de dignité et les interventions sur le génome humain' *RDP*, 1999, 1, 93-111, at p. 104; and Picard E., *ibid.*

[112] 'Un arrêté municipal proscrit les torses nus et maillots de bain en ville', *Le Monde*, 30 July 1996. Tribunal administratif de Pau, 20 November 1995; 'L'illégalité d'une interdiction de la mendicité' *RFDA*, 1996, 12/2, conclusions by J.Y. Madec. Subsequently, the *Cour administrative d'appel de Marseille* declared three 'anti-begging' measures lawful insisting that they did not compromise

rights.[113] However, it is precisely through this process of interpretation and mediation that a risk is generated of diluting the principle of respect for human dignity or, worse still, proving the veracity of the saying that *'trop de droit tue le droit'*.

2.2.2 From unwritten to written norms: the UK example

Given the history of the juridification of human dignity since the end of the Second World War in international law and in national Constitutions, there is nothing startling in the discovery in French law of a similar principle amongst its constitutional sources. Founded upon a text which emerged precisely from this epoch, the surprise is rather more the way in which the principle has taken off once placed in the hands of the judiciary – a phenomenon which seems more in tune with the common law than civilian tradition. What then of the common law itself? Has UK law, with its historic lack of written constitutional text or Bill of Rights, been able to match the French relish for jurisprudential interpretation of human dignity?

In answering this question it can first be observed that there exists a key difference between French and UK legal approaches to dignity with French law making far more explicit reference to the concept compared with the implicit references which pepper UK law. Thus, while the latter does indeed have a history of recognising dignity concerns, there has been no attempt to elaborate a grand principle in its honour with instead a more pragmatic perspective being adopted, just as one would expect from the common law system. Yet, while dignity has been covertly developed through case law, this is not to the wholesale detriment of legislative action on dignity issues which again has transpired in a rather oblique manner. In fact, it is through an act of the legislature, the Human Rights Act 1998, that the systematic juridification of dignity has been most recently pursued, although as in France, the diffusion of the concept through this mechanism risks producing similar uncertainties over its content.

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fundamental rights and freedoms (*Le Monde*, 23 December 1999). Legrand A., 'Couvre-feu pour les mineurs', commentary on CE, 9 July 2001, *D* jur. 2002, 20, 1582-1585.

[113] Paria M.-L., 2000, *supra* n. 94, p. 139.

2.2.2.i The implicit juridification of dignity through the common law

Given the disdain of the common law culture for the systematisation of fundamental or constitutional principles, it comes as no surprise that the UK legal system lacks anything quite akin to the French principle of constitutional value to safeguard human dignity. David Feldman comments, for example, that dignity is more a 'desirable state' and an 'aspiration' than a legal concept.[114] A resemblance with the French position, however, lies in the common (negative) premise that dignity is not a 'right' in either country. That said, as in France, UK law recognises that the protection of fundamental rights may augment the prospects of respect for dignity materialising in practice.[115]

There is similarity also in that, while the UK does not characterise dignity as either a right or principle *per se*, there is an acknowledgement that dignity concerns can be instrumentalised through the use of other legal principles and doctrines. In France too, although respect for dignity is a fundamental principle, it has to coexist with other legal rules. Maria-Luce Pavia, thus, argues that respect for dignity in France is not *the* principle of which all human rights are the corollary, nor does it make redundant the need to use other explanatory principles.[116] Rather, she argues, dignity exists in conjunction with other rights and norms such as individual freedom (particularly as regards the private status of the individual in areas of family law and marriage) and the principle of plurality (involving the relational status of the individual in cases of information and communication rights).[117] In the UK dignity, despite its lack of legal autonomy, is placed at the very centre of a network of other legal principles. Dawn Oliver recognises this in her description of dignity as one of the *values* which underpin UK law[118] and notes its diffusion throughout both private and public law.[119] This too marks a similarity with French law where, as seen above, the principle of

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[114] Feldman. D, 'Human Dignity as a Legal Value – Part I' [1999] *PL* 682-702, at p. 682.
[115] As Feldman notes, 'human rights, when adequately protected, can improve the chances of realising the aspiration' (*ibid.)*.
[116] Pavia M.-L., 2000, *supra* n. 94, p. 138.
[117] *Ibid.*
[118] Oliver D., *Common Values and the Public-Private Divide* (London: Butterworths, 1999) pp. 60-65.
[119] It should be noted that the terminology used here to characterise this binary division of law is not that of Oliver who has refuted the existence of such a distinction in English law: see Oliver D., 'Pourquoi n'y a-t-il pas vraiment de distinction entre droit public et droit privé en Angleterre?' *RIDC*, 2001, 2, 327-338 and Oliver D., *supra* n. 17.

respect for dignity has straddled both public and private spheres. The absence of textual and principled references to dignity in the common law does not, therefore, suggest a lack of interest in the concept. There has been a steady historic recognition of its importance, particularly in the area of torts law which, while in the beginning of an implicit and incidental nature, has recently become a rather more pointed and pressing concern.

The historical implicit development of dignity in the common law While there may be nothing astonishing in the absence of an explicit principle of respect for human dignity in the common law, it is paradoxical that the inspiration for its development is drawn from Roman law, the foundation of the civilian tradition. Thus, in UK law the idea of personal dignity is often linked to the law of torts and to the criminal law. Dignity is present, in particular, in torts which concern the protection of an individual's corporeality and personality – exactly those areas covered by the act of *iniuria* in Roman law. The history of torts law, therefore, comprises the development of a series of actions known as 'dignity torts' which can be broadly understood in the Roman sense to include assaults upon individual physical and mental integrity.

First and foremost, torts law guarantees bodily integrity. Thus, the common law has developed an established case law around the notion of 'trespass to the person', in other words bodily assaults. In this respect, to lay one's hand upon the body of another without permission constitutes an assault where this goes beyond the acceptable limits of day to day interpersonal contact. This point is well illustrated in the case of *Collins v. Wilcock* in which a police office attempted to arrest a woman suspected of prostitution.[120] In seizing her arm to restrain her, a measure which according to the court went beyond an acceptable way of attracting a person's attention, the police officer had acted beyond the course of duty and thus unlawfully. Furthermore, to address acts which go beyond inappropriate touching (including, for example, blows and slaps), the common law has developed the tort of 'battery' and, at the other end of the scale, where there is no personal contact but a threat (particularly of a verbal nature) of bodily contact, the tort of 'assault' exists to deal with harms caused by an immediate apprehension and fear of violence.[121]

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[120] *Collins v. Wilcock* [1984] 1 WLR 1172.
[121] Conaghan J. and Mansell W., *The Wrongs of Tort* 2nd ed. (London: Pluto Press, 1999) pp. 163-171.

In addition to the protection of bodily integrity, torts law has also developed a system for protecting mental integrity. This is, in particular, through the tort of defamation which aims to safeguard the reputation and honour of a person and addresses assaults in both written (libel) and unwritten (slander) forms.[122] In linking dignity concerns to existing legal principles, Peter Birks notes how the reparation of injury caused by defamation is founded upon a right to equality of respect[123] and, showing the flexibility of the common law approach, he concludes from this the development of a tort of 'contemptuous harassment'.[124] This might cover, for example, the case of a famous actor and director who sought, and obtained, damages for the harm caused to him by a press article in which he was described as 'manifestly ugly'.[125]

It is, however, in a much more serious context that the common law regarding torts has developed a remedy to deal with instances of harassment, in both its physical and verbal forms. In 1993, in *Khorasandjian v. Bush* it was decided that to harass a woman by following her everywhere, telephoning her and leaving messages, amounted to a tort of harassment.[126] Following on from this, the Court of Appeal in *Burris v. Azadani,* went on to grant a temporary injunction (in advance of a decision on the substance of the case) to a woman who was being harassed by a man in order to prevent him from pestering her further.[127] The link made in these cases between harassment and personal dignity is implicit rather than explicit. However, it has been seen above that, at the supra-national level, the European Union has explicitly connected harassment and dignity, at least in the sphere of employment. At national level, given that a plaintiff cannot secure an injunction unless he or she has an interest to protect, it seems fair to deduce that the Court of Appeal was ready to countenance that there exists in the law of torts a right not to be harassed.

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[122] Zimmerman R., *supra* n. 2, pp. 1074-1078. The torts of libel and slander have much in common, both requiring a defamatory statement which has the effect of lowering an individual in the eyes of society. See Kaye J.M., 'Libel and Slander – Two Torts or One?' (1975) 91 *LQR* 524-539.
[123] Birks P., *Harassment and Hubris: The Right to an Equality of Respect* (Dublin: Faculty of Law, University College Dublin, 1999). Cited by David Feldman, 1999, *supra* n. 114, p. 684 and p. 687.
[124] Birks P., *ibid.*
[125] *Berkoff v. Burchill* [1996] 4 All ER 1008.
[126] *Khorasandjian v. Bush* [1993] 3 All ER 669. See Bridgeman J. and Jones M., 'Harassing Conduct and Outrageous Acts: A Cause of Action for Intentionally Inflicted Mental Distress' (1994) 14 *LS* 180-205; Conaghan J., 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' (1996) 16 *OJLS* 407-431; Conaghan J., 'Harassment and the Law of Torts: *Khorasandjian v. Bush*' (1993) 1 *FLS* 189-197.
[127] *Burris v. Azadani* [1995] 4 All ER 802. See Conaghan J., 'Equity Rushes in where Tort Fears to Tread: The Court of Appeal Decision in *Burris v. Azadani*' (1996) 4 *FLS* 221-228.

As in France, it is not only UK civil law which has responded to the need to enhance the protection of dignity interests. The criminal law has also developed to take account of acts of harassment committed over the telephone. Thus, the court in *R v. Ireland* found that when telephone calls create a fear of immediate and unlawful violence and cause damage of a psychiatric nature, the act constitutes an assault upon the person characterised by its gravity as either an 'assault occasioning actual bodily harm' or 'grievous bodily harm' contrary to sections 18, 20 and 47 of the Offences Against the Person Act 1861.[128] Feldman has suggested that, in line with the implicit historical development of dignity in the common law, this case recognises dignity in an indirect fashion, derived from the legal protection accorded to physical and moral integrity.[129] Thus, the case demonstrates the incremental nature of the progression of dignity concerns through judicial interpretation and, as a result, an extension of rights to protect personal integrity in the field of criminal law.[130]

The recent more specific development of dignity in the common law As in French law, it is in the last decade that dignity has become of more interest to UK law; notably since 1993, that is just one year earlier than the French Constitutional Council's *Bioethics* decision. This interest too is linked to developments in biomedicine and technology. There are, however, two important differences between UK and French positions. While the Constitutional Council decision of 1994 was orientated around beginnings of life issues, in the UK developments have concerned notably the opposite end of the life cycle, that is the moment of death. This very important difference in perspective can be explained by the distinct attitudes in the two countries of scientists on the one hand and doctors on the other. In France, the reinforcement, or safeguarding, of dignity in law has been precipitated by progress in the life sciences, especially that involving technologies of human reproduction, giving rise to polemical debates about respect for the dignity of all concerned, including embryos. In the UK, however, it is the relationship between law and medicine, or more specifically between law and the medical profession, which has characterised developments. This relationship is built upon legal deference to medical views as to

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[128] *R v. Ireland* [1998] AC 147.
[129] Feldman D., 'Human Dignity as a Legal Value – Part II' [2000] *PL* 61-76, at p. 64.
[130] As is often the case following a judicial development of this magnitude, the legislature subsequently intervened adopting the Protection from Harassment Act 1997 which deals with the matter as both one

how law should evolve in response to new medical treatments and techniques.[131] Thus, the evolution of the triangular relationship between law, dignity and death in the UK has to be viewed in the wider context of the diffusion of the influence of medicine upon law.[132]

The second difference concerns the interpretation of dignity itself. There exists in the UK a much more personal, subjective and individualised conception of dignity than in France where a more objective formulation has tended to privilege respect for the dignity of the whole human species rather than that of particular individuals. The result is that the UK is demonstrably more concerned to protect personal dignity, for example, in the area of consent to medical treatment.[133] This perspective would tend to reinforce the suggestion made earlier that respect for dignity in UK law is capable of dissemination through reference to other legal principles such as individual liberty and personal autonomy.

The particular development regarding respect for dignity which occurred in 1993 in the UK context required a 'tragic choice' to be made – one quite literally between life and death.[134] Tony Bland, a young man who had been seriously injured as a result of being crushed by the crowd in a football stadium, remained alive (in that his brain stem continued to function) but otherwise had lain unconscious in a persistent vegetative state for four years. He might have continued in this way for many years, sustained by medical treatments to feed and hydrate his body. The House of Lords, however, in a path-breaking and unanimous decision, decided that he might be allowed to die in order to put an end to his *undignified* existence meaning that his hydration and feeding, characterised as medical treatments, could cease should a responsible and competent body of medical opinion find that this was in his best

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of civil and criminal law. See Conaghan J., 'Enhancing Civil Remedies for (Sexual) Harassment: S. 3 of the Protection from Harassment Act 1997' (1999) 7 *FLS* 203-214.

[131] The medicalisation of law is discussed further below in Chapter 3 in the context of abortion, pp. 173-174.

[132] This relationship is explored below in Chapter 4 on dignity and death.

[133] *Re T (an adult) (consent to medical treatment)* [1992] 4 All ER 649. This case, concerning a refusal to consent to medical treatment by a Jehovah's Witness, is considered alongside a factually similar French case (CAA de Paris, 9 June 1998, *Mme X,* D jur. 1999, 277, note by G. Pellissier) in Chapter 4 below, p. 203.

[134] On the making of 'tragic choices' in the sphere of medical law, see Morgan D., *Issues in Medical Law and Ethics* (London: Cavendish Publishing, 2001) chapter 3, 'Biomedical Diplomacy: Tragic Choices and the Risk Society' and chapter 11, 'Tragic Choices and Modern Death: Some *Bland* reflections'.

interests.[135] In this decision, the introduction of a discourse of (in)dignity in UK law is apparent, revealing a highly individualistic approach when compared to that of the French. Thus, the individual patient is elevated to primary position and his interest (in a dignified existence) is placed above wider considerations of the sanctity of human life. Dignity has, therefore, to be taken into account by those who make decisions on behalf of an individual who is incapable of giving effective consent. In this formulation, it is accepted that there are certain modes of behaviour which may constitute undignified treatment of those who exist in a state of dependency – a conclusion which ultimately means that respect for dignity ends in death.

Linking the case to differences in legal culture, the *Bland* case also provides an effective example of the common law in action. The particular facts of the case are analysed without any systematic or fundamental principle being drawn from them in a way which is quite different from the French approach. The consequence of this fact-based approach is that any decision to discontinue the treatment of a patient in a persistent vegetative state must be referred to the High Court on an individual basis.[136]

The trend towards recognition of dignity concerns which may result in death, is demonstrated in a second and profoundly disturbing UK case involving the separation of conjoined twins.[137] The twins, born joined in a number of their core body parts, existed in a state where one twin, Jodie, supported the life of the other, Mary. Contrary to the wishes of the parents, who normally have the right to give or refuse consent to treatment of their child,[138] doctors wished to separate the twins in order to safeguard the life of Jodie, the strongest twin. Without surgical intervention neither twin could survive. The Court of Appeal again deferred to medical opinion, permitting the operation to go ahead in the knowledge that Mary's death was an inevitable consequence.

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[135] *Airedale NHS Trust v. Bland* [1993] AC 789; Finnis J., '*Bland*: Crossing the Rubicon' (1993) 109 *LQR* 329-337.

[136] The *Bland* decision has been followed in later cases. See, for example, *Frenchay Healthcare NHS Trust v. S* [1994] 2 All ER 403; *Re G* [1995] 2 FCR 460; *Swindon and Marlborough NHS Trust v. S* [1995] 3 Med LR 84. See further Keown J., 'Beyond *Bland*' (2000) 20 *LS* 66-84.

[137] *Re A (Children) (Conjoined Twins)* [2000] 4 All ER 961. For further discussion of both *Bland* and *Re A*, see below, Chapter 4, pp. 219-230.

[138] The decision to give or refuse consent by those who exercise parental authority is decisive except where it is in manifest contradiction with the opinion of the medical team treating the child which must take account of its best interests: *Re T* [1997] 1 All ER 906; *Re C* [1998] 1 FLR 384.

The application of respect for dignity in this case is highly ambiguous. As in *Bland*, it could be said to lie in the death of the weakest twin in order to end her undignified suffering given her inability to survive independently from her sister. It might be said to triumph also in the continued life of the surviving twin who, without the operation, would remain a mere instrument supporting the life of another, in other words a means rather than an end in herself. Above all, it is evident once more that a highly individualised notion of dignity prevails, in the sense that the specific tragic circumstances of the existence of these children demanded a response which was entirely particular to the facts of the case with no attempt being made to elicit a grander principle of respect for dignity from this context.

That said, it remains to be seen how such a piecemeal approach can be sustained in the wake of the change in legal culture effected by entry into force of the Human Rights Act 1998 in October 2000.[139] Given that UK human rights law is now grounded in a written text and a positive articulation of rights, this changes the frame of reference for dealing with fundamental rights (and, as a consequence, dignity) claims. It is, therefore, with the further juridification of human dignity resulting from this development in the written law, uncharacteristic as it is of the common law tradition, that the remainder of this chapter is concerned.

2.2.2.ii The explicit juridification of dignity through the written text

As noted already, the Human Rights Act 1998, with its insertion of the ECHR into domestic UK law, has brought about a change in legal culture to the extent that it mainstreams fundamental rights through a process of embedding them at the very heart of the legal system.[140] The transformation which this implies has, it is suggested, two main implications for the comparative study of human dignity. One is that the UK system is moving towards a more continental approach in the recognition that (European) legal texts of constitutional magnitude have serious implications for

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[139] A period of two years elapsed before the Act took effect in England, Wales and Northern Ireland allowing for a process of judicial education as to its effects. In Scotland, however, the Act came into force earlier in May 2000 (see Loux A. and Finnie W. (eds.), *Human Rights and Scots Law – Comparative Perspectives on the Incorporation of the ECHR* (Oxford: Hart Publishing, 2000)).
[140] See above, p. 71.

the handling of dignity issues in national law. The second is that embedding human rights within UK legal culture cannot, however, help but take account of the legacy of the common law tradition. In this regard, it is anticipated that the development of the relationship between the guarantees to be found in the ECHR and existing common law principles will continue to provide much work for the courts, just as in France it has been shown that a textual foundation for human rights does not put an end to judicial creativity.

The influence of the Human Rights Act 1998 It will be recalled from the earlier part of this chapter that the ECHR contains a number of Articles which are relevant to the legal construction of human dignity and these will clearly have an impact at the national level.[141] Primarily, the Human Rights Act requires that the UK judiciary take account of the case law of the Strasbourg institutions, meaning that they should give due regard to the statement of the European Court of Human Rights in the cases of *SW v. United Kingdom* and *CR v. United Kingdom* that dignity is the very foundation of the European Convention.[142] This, of course, raises questions about the compatibility of UK law and Convention rights in the sphere of dignity protection and this issue could play out in a multiplicity of domains relating to matters of life and death as well as those concerning respect for physical and mental integrity.

In order to illustrate the extent of some of these issues it is helpful to return to the two cases discussed earlier of Tony Bland and the conjoined twins – both of which resulted in judicial permissions to end life (in the case of the former by an omission to provide treatment and in the latter through the positive act of surgical intervention). It deserves to be asked, if only for future reference, to what extent these decisions are compatible with the Article 2 ECHR guarantee that everyone has the right to life. While the European Commission may have hesitated in deciding whether Article 2 applies to the life of a foetus,[143] the cases of the conjoined twins and *Bland* concern newborn infants and an adult, all of whom quite clearly fall within the personal scope of the Article 2 guarantee. Given also that the cases do not appear to raise issues which fall within the list of permissible exceptions to the state's negative obligation to

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[141] Feldman D., 2000, *supra* n. 129, p. 61.
[142] *SW v. United Kingdom* and *CR v. United Kingdom* (1995) 21 EHRR 363.

guarantee life, it remains to be asked whether there might, conceivably, be a distinction drawn between the action required to end life in the case of the conjoined twins and the omission entailed in bringing about the death of a patient in a persistent vegetative state, suggesting that it is only in the former case that the state acts in violation of its obligations under the Convention. This conclusion seems sound in the light of the recent decision of the Family Division of the High Court in *Re B* which, drawing on *Bland*, held that Ms B, a competent adult who, as a result of a devastating illness had become tetraplegic and sought to end her life in a dignified and painless manner, should be allowed to have the life-sustaining treatment (a ventilator) keeping her alive withdrawn, with no apparent violation of Article 2 ECHR.[144]

What is clear for the future is that a much more explicit consideration of Convention rights and freedoms is required by the judiciary in making life and death decisions and any failure to ensure that the common law develops in a way which is compatible with ECHR guarantees may place the courts, as public authorities, at risk themselves of being guilty of a lack of respect for the Convention.[145] This suggests, in turn, that the process of constitutionalising fundamental rights in the UK is not only a question of giving effect to the new letter of the law. It means, in addition, that the interpretation of the text remains crucial and that the Convention, as a new source of law, can both help and complicate matters.

The continued importance of case law The role which remains for the judiciary in the interpretation of dignity questions as filtered through the ECHR is, therefore, substantial. In particular, given the capacity of dignity to pull in all directions, attention must be paid to the way in which Convention rights and freedoms are balanced. While the application of the Human Rights Act is still in its infancy, an important indicator of some of the difficulties which lie ahead has been demonstrated in the case of *R v. A.*[146]

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[143] *Brüggeman and Scheuten v. Federal Republic of Germany* (1981) 3 EHRR 244; *Paton v. United Kingdom* (1981) 3 EHRR 408.
[144] *Re B (Adult: Refusal of Medical Treatment)* [2002] 2 All ER 449.
[145] Section 6(3), Human Rights Act 1998. See further Oliver D., 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act' [2000] *PL* 476-493.
[146] *R v. A* [2001] 3 All ER 1. See Murphy T. and Whitty N., 'What is a Fair Trial? Rape Prosecutions, Disclosure and the Human Rights Act' (2000) 8 *FLS* 143-167.

The House of Lords, being asked to determine the ECHR compatibility of national legislation protecting victims of sexual assault from being required to give evidence of their previous sexual relationships except with the leave of the court, created a dilemma in terms of having to prioritise the competing needs of protecting victims against attacks on their reputation by the introduction of irrelevant evidence and of ensuring due respect for the rights of the defendant. Giving judgment in favour of the latter, the Law Lords decided that the legislation could amount to a violation of the Article 6 ECHR right to a fair trial. While the motivation behind this conclusion is clear – defendants have a right to be judged in the full light of the circumstances of the case – it is, nevertheless, disturbing to note that in privileging the rights of the defendant over the importance of ensuring that rape complainants are protected from harassment during the rape trial, the House of Lords may have failed to give due regard to the explicit statement of the European Court of Human Rights (in a case which was, after all, concerned with sexual violence) that respect for dignity is a fundamental objective of the Convention. While the judicial balancing of competing rights required in this case provides evidence of the difficulties associated with the new rights paradigm, it demonstrates clearly that in hard cases the letter of the law may run out and its spirit can only be left to judicial interpretation.[147]

In conclusion of this chapter, and in order to illuminate the discussion of particular spheres of dignity in subsequent chapters, a number of points deserve highlighting with regard to the dignity road map here presented. First, the difficulty of defining human dignity, with its hugely variable and infinitely vast content, renders the process of its juridification complex and challenging. Operating within a broadly constitutional framework, in the sense that respect for dignity is linked to the normative protection of fundamental rights, the diffusion of dignity in legal discourse seeps beyond the public law domain to penetrate all branches of law at both national and supra-national levels. Secondly, there is a discernible tension between written texts which found dignity as a general and universal objective and the adaptation of these through more widespread usage of the notion in case law. In this regard, there is

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[147] Dworkin R., *Taking Rights Seriously* (Mass, MA: Harvard University Press, 1977) chapter 4. It is perhaps somewhat inexact to say that the law runs out in such instances. It is necessarily the case that judges will look to fundamental legal principles, such as liberty and autonomy, for inspiration in the resolution of the hard cases before them, meaning that even where judicial choices have to be made

a discernible *rapprochement* of French and UK legal systems (suggesting a degree of flexibility in their very different legal cultures): both take their inspiration from written and unwritten sources in order to further the insertion of respect for dignity into law. Having, thus, identified some of the key issues around which the comparative and constitutional, national and European framework of the thesis has been constructed, the four remaining chapters of the thesis offer a series of comparative analyses of a more precise nature, each one investigating a specific application of dignity discourse in the French and UK legal orders as these span across the human life cycle.

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between competing interpretations of the law, any choice which is eventually made must be justifiable by reference to respect for legal principle.

Table 1: Mapping the juridification of human dignity

International Law	European Law		French Law	UK Law
	Council of Europe	European Union		
	Texts		**Texts**	**Texts**
United Nations Charter (1945) Universal Declaration of Human Rights (1948) International Covenant on Civil and Political Rights (1966) International Covenant on Economic, Social and Cultural Rights (1966)	ECHR (1950) - Art. 2 - Art. 3 - Art. 8 - Art. 9 - Art. 10 - Art. 14 Bio-medicine Conven-tion (1997)	Rec. on the protection of dignity at work (1992) Dir. on patenting of biotech. inventions (1998) Charter of Fund. Rights (2000) Equal Treatment Directive (2002) Draft Const. for Europe (2003)	Preamble to the Constitution of 1946 Civil Code - Art. 16 (revised 1994) New Penal Code (1994) - Book II, Title 2, Chapter 5 'Assaults on human dignity'	Human Rights Act 1998 (ECHR, esp. Art. 3)
Case law			**Case law**	**Case law**
SW v. UK *CR v. UK* (1995) *Pretty v. UK* (2002)	*Nether-lands v. EP and Council* (2001)		**Constitutional Law** *Bioethics* (1994) *Diversity of habitat* (1995) *Fight against exclusion* (1998) *PACS* (1999) *Abortion and contraception I* (2001) **Administrative Law** *Dwarf-throwing spectacles* (1994) *Skyrock* (1996) **Civil Law** *Benetton* (1995 (TGI) and 1996 (CA))	*Bland* (1993) *Re A* (2000) *Re B* (2002)

CHAPTER 3

DIGNITY AND LIFE

Having investigated in the preceding chapters both the definition and the process of juridification of human dignity, the remainder of the thesis moves on to consider in more detail how the principle of its respect is applied in a number of key areas. This is with a view to determining, from a comparative perspective, the consistency and coherence of references to what is, after all, a universal objective. The thematic progression of the remaining four chapters is oriented around the concept of human life and takes a longitudinal approach. Thus, first under consideration is the role of dignity in law at the frontiers of human life, that is at its beginnings (Chapter 3) and its end (Chapter 4).[1] This is followed by a analysis of dignity in the course of the life cycle itself, involving a consideration of assaults upon the person which can occur at any point in time and with a particular focus on threats to physical and mental integrity (Chapters 5 and 6 respectively).

The remaining discussion revolves, therefore, around two principal axes and two classic distinctions: that between life and death, and that between the body and the mind. This should not be taken to mean, however, that a rigid distinction is sought between these categories. Any definitions of the moments at which life begins and ends are, of course, open to challenge. Likewise, the concepts of mind and body are intimately related (both may be involved, for example, in cases of rape, harassment and inhuman and degrading treatment) and the use of this dualism should not imply that an assault upon the body cannot also constitute a violation of mental integrity. However, the classifications are adopted because, even if their boundaries are blurred, there remain important parts of the concepts of life, death, body and mind which are sufficiently independent and identifiable to form the object of precise enquiry. In addition, each concept may be viewed as the location of key clusters of dignity

[1] For a similar longitudinal approach applied to the relationship between law and biomedicine at the two extremes of the human life cycle, see Pédrot P., 'Aux deux seuils de la vie' *D* 2001, special issue, 20, 69-77; and more generally, Feuillet-Le Mintier B. (ed.), *Normativité et biomédecine* (Paris: Economica, 2003).

concerns and, as such, each provides a useful landmark around which related issues can be grouped.

Equally, the ordering of the chapters seeks to propose a hierarchical classification of the subject matter. The discussion, therefore, develops from a consideration of what are, it is suggested, the most important dignity issues in law (passing from life to death) to the less important (moving from physical to moral assaults upon the person). Such an ordering is perhaps better characterised as a series of concentric circles, with applications of dignity passing from a hard core of matters related to the beginnings and end of life (where dignity is perceived as an expression of the sanctity of life) to a periphery constituted by issues of respect for bodily and personal integrity. The closer one gets to the outer circle, the more fluid and subjective perceptions of dignity violations become. It is in this sphere that the application of the dignity principle appears most contestable and at times difficult to justify. Consequently, it will be argued that when conflicts provoked by multiple interpretations of human dignity arise, these more marginal aspects should give way to more central (fundamental) concerns. Thus, aspects of dignity which relate to the freedom to develop one's personality and identity may be subordinated to the requirements of society and a more objective (communitarian) conception of dignity. Throughout the discussion it will be apparent that those conflicts linked to diverging interpretations of dignity present the most pressing legal and ethical challenges of all. What is important to note, however, is that interpretations change over time as the law adapts to social, economic, political and technological developments. It is precisely these changes, as mediated in law through an increased appeal to respect for human dignity, that are the focus of this enquiry.

We begin, therefore, at the epicentre of dignity: the concept of life. It has been noted above in Chapter 1 that the principle of respect for dignity is closely linked to notions of human life and humanity. More precisely, given the intrinsic quality of personal dignity, it is because each person belongs to the human race that his or her dignity should be respected. Yet, it has been noted too that the very definition of human life is uncertain and it is obviously at the frontiers of life that discussion on this point becomes most animated. The legal interpretation of respect for dignity can, therefore, at these moments quite literally be viewed as a matter of life and death.

Crucial from a comparative perspective, however, and important to underline from the outset, is the fact that, while France and the UK have both accepted the need to guarantee respect for dignity at the boundaries of life, in France this has meant recognising dignity through law at the early stages of human existence (as evidenced in the Constitutional Council's *Bioethics* decision)[2] while in the UK recognition has occurred at precisely the opposite end of the life cycle, that is in death (as in the *Bland* case).[3] A further difference lies in the type of law employed to resolve disputes in these areas. While the Constitutional Council viewed dignity from a constitutional perspective, the House of Lords in *Bland* placed it in the domain of the law of obligations and the criminal law, notably with regard to the responsibility of doctors to decide when life-sustaining treatment may be withdrawn. That said, the importance of fundamental rights issues is evident in both instances. Thus, while the emphasis in this chapter may seem to point to an intensified French concern for dignity protection in life and that in Chapter 4 to a particularly British concern to ensure respect for dignity at the point of death, both legal systems have been similarly called upon to deal with beginnings and end of life issues as these are affected by the external shocks of technological and scientific progress.

The heart of the present chapter focusing on beginnings of life issues lies with the unresolved question of when human life commences and, thus, when respect for dignity should begin. The question has long troubled the minds of lawyers, required to consider of the status of the foetus and the legality of abortion, and more recently has found a new focus of attention in developments in the life sciences, especially those concerning the creation, conservation and status of human embryos. The juridical questions for resolution in the case of both foetus and embryo, however, are similar revolving around their legal classification as persons or property.[4] While it has been noted in Chapter 1 above that in both France and the UK neither embryo nor foetus have the status of human person, but that they may acquire a series of interests as the gestation period progresses, there are some quite remarkable differences between the legal systems in the sphere of bioethics.

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[2] Decision no. 94-343-344 DC of 27 July 1994, *Bioethics*.
[3] *Airedale NHS Trust v. Bland* [1993] AC 789.
[4] A good *résumé* of the issues is provided in Andorno R., *La distinction juridique entre les personnes et les choses – à l'épreuve des procréations artificielles* (Paris: LGDJ, 1996). See further, Edelman B., 'De la propriété-personne à la valeur-désir' *D* chron, 2004, 3, 155-160, at p. 155 and p. 157.

Again taking a longitudinal approach to human life, the first part of this chapter considers the place of the embryo in law, beginning with the divergent histories of the introduction of legislation on bioethics in France and the UK and the distinct approaches to respect for human dignity which these imply. Notably, it will be suggested that there exists a diversity in the degree of protection accorded to the embryo, particularly in the preliminary stages of its existence, but that patterns of convergence emerge around the issue of medically assisted conception which increasingly raises considerations of a European dimension.

Following this discussion of the relationship between the embryo, human dignity and law, the second part of the chapter turns to the situation of the foetus *in utero* and again comparative resemblances and divergences in its legal treatment will be revealed. While France and the UK have adopted relatively similar approaches to the decriminalisation of abortion in accordance with certain legislative criteria, this reveals, nevertheless, a quite different interpretation of the place accorded to human dignity in the abortion debate. Secondly, yet still linked to the legitimacy of abortion, consideration is given to the particular issue of children who are born with such a degree of handicap that they seek damages for their 'wrongful life'. Again, important differences emerge between the two systems, which seem to contradict traditional interpretations of their respective legal cultures, especially in terms of their reliance upon legislative and judicially constructed norms to resolve the matter.

3.1 Law, dignity and the embryo

The questions raised by the relationship between law and the embryo are extensive.[5] The focus here, however, is the particular application of the concept of human dignity to this relationship. Here too, though, the scope of the matter is difficult to grasp given the rapidity of technological progress in the realm of bioethics and the multi-dimensional interconnections between law and embryo to which these give rise. That said, there is evidence in both France and the UK of the development of a branch of

[5] For an overview see Andorno R., *ibid.*; Feuillet-Le Minter B. (ed.), *L'embryon humain: approche multidisciplinaire* (Paris: Economica, 1996); Morgan D. and Lee R.G., *Blackstone's Guide to the Human Fertilisation and Embryology Act 1990* (London: Blackstone Press, 1991).

law which might be called 'biolaw' (or *'biodroit'*)[6] governing the application of legal principles to new phenomena generated by biotechnologies, such as donor insemination, assisted conception, research upon embryos and human cloning. In this respect, there has been a veritable transformation of the processes and possibilities for human reproduction. It is precisely this reproductive revolution, with its capacity to both create and destroy human life, that demands an important effort on the part of legislators and other decision-makers to understand its significance and respond to its consequences.

It is not surprising, therefore, that both French and UK law during the 1990s introduced legislation on bioethical issues, generated by concerns to regulate the application of new technologies. In the words of the *Conseil d'Etat* in its 1988 report entitled 'From Ethics to Law', 'without legislation, nothing is unlawful.'[7] Thus, it was deemed important in the two countries that clear limits be placed upon the activities of scientists and researchers in order to protect the protagonists in this new drama (the embryo, the couple seeking assisted conception, the doctor, and even the scientist) from the risks of unregulated technological progress. Despite this common aim, notable differences emerged in the approaches taken to legislative action. While in France a perspective was adopted which founded bioethical questions squarely upon a consideration of human dignity, this formulation was distinctly lacking in the British debate which favoured a more medicalised and scientific approach. Consequently, the systems diverge with regard to legal protection of the embryo and, notably, the question of respect for its dignity in the context of research and experimentation. An exploration of these different foundations will be followed by a comparative examination of the regulation of assisted conception in the two countries, it being argued that, while the legislative provisions introduced differ in their detail, their objectives (notably, upholding a traditional view of family life) are remarkably similar.

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[6] Beyleveld D. and Brownsword R., *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001); Feuillet-Le Mintier B., 'La biomédecine, nouvelle branche du droit?' in Feuillet-Le Mintier B., *supra* n. 1, 1-11; Neirinck C. (ed.), *De la bioéthique au biodroit* (Paris: LGDJ, 1994).

[7] *'Sans la loi, rien n'est hors la loi.'* Conseil d'Etat, *De l'éthique au droit* (Paris: La documentation française, 1988) pp. 50-51.

3.1.1 Dignity and the 'life' of the embryo: diverging legal histories

The histories of the French and UK legislation adopted in response to challenges posed by bioethical concerns merits consideration as it is only in understanding these legacies that the differences of approach and consequences which flow from them can be understood. In order to fill the legal void which existed in this area at the beginning of the 1990s, the UK parliament adopted the Human Fertilisation and Embryology Act 1990. In France, four years later, parliament passed three new laws on bioethics.[8] If there is a resemblance in the adoption of these legislative measures at the same period in time and following an extensive period of consultation in the two countries, their subject matter is, nevertheless, rather distinct. Moreover, the constitutional traditions of each country provoked different consequences regarding the possibility of judicial review of the measures adopted and, thus, the opportunity to verify their respect for fundamental rights. It is, therefore, to an examination of the distinct legislative and jurisprudential approaches that we now turn.

3.1.1.i Distinct legislative approaches

The situation of legal uncertainty which pertained in France and the UK at the end of the 1980s regarding the rapid evolution of new reproductive technologies led to decisions in both countries to set up special commissions charged with discussing the legal and ethical implications of the technological revolution and putting forward suggestions to regulate scientific progress in the field. The establishment of these commissions opened up bioethical questions to public debate for the first time and the issues they considered concerned not only assisted conception but also the creation of embryos for research purposes and their eventual destruction, together with other matters such as surrogacy and the definition of legal parenthood. The creation of the commissions shows too that the governments of both countries, pushed by public concern and the continual new initiatives of doctors and researchers, accepted that a

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[8] Law no. 94-630 of 25 July 1994, modifying Book II *bis* of the Code on Public Health, on the protection of individuals who take part in biomedical research; Law no. 94-653 of 29 July 1994 on respect for the human body; Law no. 94-654 of 29 July 1994 on the donation and use of elements of the human body, medically assisted conception and prenatal diagnosis.

debate on the substance of bioethical questions was needed and that this was as much at the level of morality and ethics as law.

Thus, in the UK the Committee of Inquiry into Human Fertilisation and Embryology was established in 1982 to deal with bioethical questions and in particular the effect of developments in the area of assisted conception. This Commission, under the direction of Dame Mary Warnock, published its report in 1984 and this effectively formed the basis for the Human Fertilisation and Embryology Act 1990.[9] In France, the debate on the new technologies followed a similar trajectory, except that there it was not simply one single commission that was established, but rather a number. Amongst the most important was the National Consultative Committee on Ethics for the Life Sciences and Health (*Comité consultatif national d'éthique pour les sciences de la vie et de la santé*) created in 1983 whose mission was to give an opinion on the moral problems raised by research in the areas of biology, medicine and health.[10] The progression from debate on the moral implications of such research to that on law reform was precipitated by the 1988 report of the *Conseil d'Etat*, 'From Ethics to Law',[11] and by a number of successive interventions such as those of the Braibant Commission in 1989 and the influential report by Noëlle Lenoir in 1991.[12] The lengthier discussion in France culminated eventually in three Bills which were put before the National Assembly at the end of 1992, but then delayed by the change of government in 1993.[13] Nevertheless, four years after the UK law was passed, three French laws on bioethics were finally adopted in July 1994.[14]

Yet, while there is a similarity in the consultative processes which led to the new legislative measures on each side of the Channel, the laws which were introduced reveal a number of important differences. At the formal level, their number is obviously not

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[9] Warnock M., *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* (Oxford: Basil Blackwell, 1984).
[10] Article 1 of Decree no. 83-132 of 23 February 1983, creating a National Consultative Committee on Ethics for the Life Sciences and Health.
[11] Conseil d'Etat, *supra* n. 7.
[12] Lenoir N. (with the collaboration of Sturlèse B.), *Aux frontières de la vie: une éthique biomédicale à la française* Tome 1 (Paris: La documentation française, 1991); Lenoir N. (with the collaboration of Sturlèse B.), *Aux frontières de la vie: paroles d'éthique* Tome 2 (Paris: La documentation française, 1991).
[13] In 1993, at the request of the new prime minister, Edouard Balladur, a report on bioethics was presented by Jean-François Mattei, *La vie en question: pour une éthique biomédicale à la française* (Paris: La documentation française, 1994).

the same. Equally their content is diverse, particularly with regard to their consolidation (or not) of the legal principles which would inspire the operation of the legislation.

Unity or plurality of legislation It may seem banal to point out that in the UK only one piece of legislation was enacted as compared to the three laws on bioethics in France. However, this fact is not without interest in that it reflects the prior workings of the various commissions in the two countries. In the UK the one law on human fertilisation and embryology resulted from the efforts of the single body charged with discussion of the issues with its unique report forming the basis of the Bill eventually introduced by the government. In France, however, the diversity of discussions which took place across a number of bodies and over a ten-year period, gave rise to a multiplicity of reports and opinions. This pluralistic approach was pursued further as the ministries of social affaires, justice and research were all three called upon to prepare draft legislation; resulting in the Bianco Bill (on the donation and use of elements and products of the human body, medically assisted conception and prenatal diagnosis), the Sapin Bill (on respect for the human body) and the Curien Bill (on the use of data for research purposes in the area of health).

Yet, while on a formal level the number of laws *stricto sensu* is different in the two countries, the actual number of measures they contain is the same. The UK law of 1990 has 49 sections and four annexes. The text is long and complex. The French laws, on the other hand are specific and short. For example, the law on respect for the human body contains only ten sections in total. Overall, the *quantity* of legislation is of a similar order.

Diverse contents at the level of principle The three French laws cover quite distinct areas of bioethics. The first, on respect for the human body, regulates the genetic study of the characteristics of a person, donation of organs and gametes, protection of the embryo, legal parenthood and surrogacy. Moreover, and precisely in accordance with French legal tradition, the law begins with a series of general principles which provide the framework in which the law operates. These ground the concepts of respect for the human body and the protection of genetic patrimony in a fine list of

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[14] See *supra*, n. 8.

principles comprising: the primacy of the person, respect for dignity from the moment life begins, respect for the body, its inviolability and its non-patrimonial character, the protection of bodily integrity except in cases of therapeutic necessity, consent, the integrity of the human species, the nullity of any contract related to the body, and the principles of gratuity and anonymity. The elaboration of such a framework of fundamental principles in the area of bioethics constitutes a huge development when contrasted with the UK legislation which remains fixed upon the detailed matters in hand and nowhere states their underpinnings or the values which should inspire their operation. The second French law on the donation and use of elements and products of the human body, assisted conception and prenatal diagnosis, seeks to ensure that the human body is not treated as an object divorced from consideration of the person to whom it belongs, and establishes a regulatory framework for assisted conception and organ transplantation together with organising the licensing regime for establishments carrying out these practices. Finally, the third piece of legislation (the constitutionality of which was not referred to the Constitutional Council) concerns the processing of data for research purposes. The whole ensemble comprises, therefore, a multiplicity of measures which comprehensively group together all areas of bioethics and, furthermore, explicitly provide the legal principles, including human dignity, which govern their application.

The amplitude of the areas covered by the 1990 UK statute is evident in its very title 'The Human Fertilisation and Embryology Act'. This is broad and inclusive, permitting reference to a multitude of matters in the sphere of bioethics: the conditions for research upon embryos and for providing hospitals with authorisation, the legal status of mother and father, personal data, surrogacy, conscience objection by hospital personnel and civil liability for children who are born with disabilities. While this package resembles in good part the French legislation, there is one aspect which is noteworthy for the fact that it is neither covered in the French legislation nor is it connected to the title of the 1990 Act, having nothing in fact to do with either fertilisation or embryology. Its inclusion, however, demonstrates the links that are easily made in popular debate between bioethics matters and other issues of public health care. The matter in question is that of abortion and its introduction at this legislative juncture was a result of political convenience given the mounting concern amongst the medical profession that the time limit for most abortions should be

reduced from 28 to 24 weeks reflecting foetal viability at this earlier stage.[15] What is remarkable in the UK legislation, however, is the absence of any guiding principles upon which the law is founded. The workings of national legal cultures are perhaps evident here in the sense that, as argued in the preceding chapter, the expression of grand legislative principle is not part of the common law tradition which instead puts its faith in the judiciary to apply statutory provisions in accordance with established notions of freedom and personal autonomy.

3.1.1.ii Distinct jurisprudential approaches

In France, nevertheless, the task fell to the Constitutional Council of reviewing the constitutionality of two of the three French laws on bioethics in order to determine their compatibility with the block of constitutionality.[16] In carrying out this control, it has already been noted that the Council made explicit the link between bioethics and human dignity from a constitutional point of view. There is nothing remotely similar in the UK approach. In the absence of any constitutional review of legislation, the 1990 Act was not verified for its compatibility with fundamental rights and freedoms. That said, it is possible to identify in both cases a certain regard in the legislation for the status of the embryo and its special potential as future person in possession of something intrinsic linking it to humanity. While this quality is not called dignity in either country (in the sense that the term applies to a fully born human being) the implications of its recognition have, nevertheless, meant that the judiciary on both sides of the Channel has been called upon to grapple with the thorny question of when life, and therefore respect for human dignity, begins.

The timidity of the French Constitutional Council, in this regard, is apparent in its refusal to engage with ethical questions already determined by parliament. It is particularly evident in the way it dealt with the arguments put forward by members of

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[15] Section 37 of the Human Fertilisation and Embryology Act 1990 amends the Abortion Act 1967 by creating a 24 week time limit for abortions on the grounds of injury to physical or mental health. See further Morgan D. and Lee R.G., *supra* n. 5, chapter 2, and the discussion below, pp. 170-171.
[16] Decision no. 94-343-344 DC of 27 July 1994, *Bioethics*. See above, Chapter 2, pp. 102-103.

parliament (the primary authors of the constitutional challenge)[17] concerning the legislation's compatibility with the right to life, the principle of equality and the principle of respect for personal integrity. These arguments required, in fact, that the Council pronounce upon the legal status of the embryo, as the parliamentarians suggested that it was *vis-à-vis* the embryo that the violations occurred. More precisely, the question was one of whether or not the embryo was a human being to whom these principles applied.

The arguments put forward by the members of parliament are both imaginative and complicated. First, it was suggested that Article 9 of the law on assisted conception violated the right to life through its provision that embryos in existence at the date of promulgation of the law, and which were not required by the couple who had created them, may be given up for use by another couple and, where this were not possible, may be destroyed after a period of five years. The process of destruction of embryonic life, it was argued, constituted a constitutional violation: embryos were persons not things. Furthermore, Article 12 of the same law permits prenatal diagnosis with the aim of detecting *in utero* any condition of a particularly serious nature, and Article 14 allows diagnosis in certain cases on embryos *in vitro.* According to the members of parliament, these measures would have the effect of encouraging abortion were abnormalities to be discovered which, consequently, would bring about the death of the unborn.

The parliamentarians claimed in addition that Article 9 violated the principle of equality. This was interpreted to mean equality between embryos to the extent that some would receive a different treatment depending on the date of their creation (before or after promulgation of the law) and depending on whether or not the gamete donors or another couple wanted to use them. This would necessarily entail a selection between embryos. Furthermore, it was claimed that Article 8 of the law violated the principle of equality in permitting research on the embryo to be carried out in exceptional circumstances where necessary for medical purposes. The members of parliament sustained that Article 8 was, thus, contrary to the principle of respect for personal and bodily integrity.

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[17] A second request for a constitutional ruling on the bioethics legislation was made by the President of the National Assembly who did not put forward any specific allegations of unconstitutionality but

It is in its response to these arguments that the reservation of the French constitutional judge is revealed. The Constitutional Council, in fact, refused to determine the question of the status of the embryo. Instead, it simply held that these alleged constitutional violations were ill-founded because the matter lay beyond its remit given the strict separation of powers between itself and parliament.[18] Hence, it was entirely appropriate for the legislature to take a view in the light of current technical and scientific knowledge that neither the principle of respect for the human person from the moment its life begins nor the principle of personal integrity applied to embryos. No effective challenge could, therefore, be made to counter the proposition that while these two principles had been explicitly introduced in the revision to Article 16 of the Civil Code (brought about by Articles 2 and 3 of the law on respect for the human body), they were, in parliament's view, inapplicable in the case of the embryo, as was also the principle of equality.[19] Deciding in this way, using a form of review characterised by Bertrand Mathieu as 'restrained' and 'particularly limited',[20] the Council neatly avoided pronouncing upon the delicate question of when life begins by refusing even to afford it the merit of a constitutional question: the consequence being that parliament retains a considerable margin of appreciation in this domain.[21]

Looking across the Channel, a not dissimilar picture is revealed in the UK judicial position on embryonic life. In a constitutional climate where the doctrine of legislative

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rather requested that the Council express its view on the overall conformity of the laws to the 'block of constitutionality'.

[18] An argument based upon the principle of separation of powers had in fact been introduced by the parliamentarians themselves in a wholly different context. They had suggested that the principle was violated by Article 8 of Law no. 94-654 which states that research upon embryos may only be carried out with the authorisation of the National Commission for Medicine, Reproductive Biology and Prenatal Diagnosis (*la Commission nationale de médecine et de biologie de la reproduction et du diagnostic prénatal*) a new body created by Article 11 of the same law. The authors of the constitutional challenge claimed that the legislature had renounced its legislative authority in favour of an executive organ and thereby violated the principle of the separation of powers in the area of fundamental rights which under Article 34 of the Constitution of 1958 is one of exclusive legislative competence. A further violation of the principle lay in the fact that the executive was responsible for determining the composition of the Commission. The Constitutional Council refused to accept these arguments finding nothing unconstitutional in parliament's delegation of such matters to the new Commission.

[19] The claims relating to the unconstitutionality of Articles 12 and 14 of Law no. 94-654 were equally held to be without foundation. According to the Constitutional Council, Article 12 created no new measures authorising abortion and Article 14 concerned only the taking of cells from the embryo and was, thus, also unrelated to the termination of a pregnancy.

[20] Mathieu B., 'Bioéthique: un juge constitutionnel réservé face aux défis de la science' *RFDA*, 1994, 1019-1032, at p. 1024. See also Mathieu B., 'La place des norms dans le droit de la bioéthique' in Feuillet-Le Mintier B., *supra* n. 1, 67-77, at pp. 71-72.

sovereignty reigns, it is indeed parliament which is competent to decide upon the issue and the UK legislature also refused to give legal status to the embryo in the Human Fertilisation and Embryology Act 1990. This position is in conformity with case law which has addressed the status of the foetus. For example, in *Re F (in utero)*, a local authority request to make a foetus a ward of court in order to protect its safety (for the reason that the woman carrying the child had a history of drug abuse and led an unstable life) was considered.[22] The Court refused the request, declaring that the foetus had no legal status and, therefore, could not be made a ward of court. Hence, without determining when human life beings, UK law explicitly accepts that the foetus, and thus by deduction the embryo, has no legal personality until the moment of its birth.

3.1.2 The dignity of the embyro and consequences of a diversity of approach

From these distinct legislative and jurisprudential approaches to the relationship between law and embryo, there ensue a number of consequences for the way in which any dignity interests of the embryo may be constructed. In the UK, where the embryo clearly does not have the same status or interests as a human being, there is less reluctance to admit interventions upon it and thus, what might be construed as dignity violations. In France, however, despite the Constitutional Council's ruling, there is a markedly more reserved approach. Thus, the two legal systems may be distinguished both with regard to the question of research upon embryos and also that of their creation and use for specific purposes.

3.1.2.i Dignity and research upon embryos

The Constitutional Council in its *Bioethics* ruling found that the principle of safeguarding human dignity was positively respected by the new French legislation given that this clearly set out a number of principles such as the primacy of the

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[21] Luchaire F., 'Le Conseil constitutionnel et l'assistance médicale à la procréation' *RDP*, 1994, 1647-1662, at p. 1657.
[22] *Re F (in utero)* [1988] 2 All ER 193.

person, respect for human beings from the moment their life begins, and respect for the integrity of the body and the human species.[23] It is noteworthy that this approach, together with the introduction of the new principle of constitutional value of respect for human dignity, was being pursued at the same moment in time (July 1994) as the Council of Europe adopted its Convention on Biomedicine. As seen in the previous chapter, according to the Convention dignity is an essential value which must be respected throughout the sphere of biomedical practices. This points to a consistent liaison between dignity and bioethics at both national and supra-national levels. The position taken in the UK, however, demonstrates resistance to this approach. The principle of human dignity is not articulated at all in the Human Fertilisation and Embryology Act 1990. In fact, the omission of any grounding principle means that the Act treats each aspect of its subject matter quite distinctly. It makes no attempt to impose an overall ethical framework and demonstrates no obvious commitment to respect for dignity either in general terms or as regards the embryo in particular.

The question, nevertheless, of the dignity of the embryo, in the sense of the preservation of its integrity, is an important one in the domain of bioethical research and embryo experimentation and herein lies a key distinction between French and UK approaches. The French parliamentarians, in their constitutional challenge, had criticised Article 8 of the law on assisted conception for allowing research upon the embryo in exceptional circumstances. Nevertheless, these circumstances are clearly limited to the pursuit of therapeutic objectives and require the consent of the couple responsible for the creation of the embryo. The UK legislation is, however, distinctly less restrictive. Drafted in a negative way, section 3(4) of the 1990 Act prohibits medical research upon embryos after the fourteenth day of their creation. This makes it possible for interventions to be carried out before this moment, and even permits the creation of an embryo and its destruction purely for research purposes.

The difference between French and UK approaches is stark. In the absence of principles revealing the underpinnings of the 1990 Act, there is nothing in the legislation to explain why early embryo experimentation should be permissible for non-therapeutic purposes. There is no equivalent of the French overt recognition that their legislation is bounded by

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[23] These principles are ensured by Articles 2 and 3 of the law on respect for the human body which should

principles of respect for personal integrity and dignity. Given this vacuum, the UK parliament has adopted a more scientific and medicalised perspective than in France.[24] For example, parliament accepted scientific data indicating that it is on the fourteenth day of its creation that the embryo's first 'human' or 'primitive' streak emerges. It is only at this moment, and implicitly, that the UK legislature recognises a role for respecting the integrity and dignity of the embryo. Before this point, without human face, the embryo has no dignity to violate.[25]

3.1.2.ii Dignity and the creation and use of embryos for specific ends

Yet, it is not simply with regard to experimentation upon embryos that controversy abounds. Other matters concerning their creation and use for specific purposes have also troubled the legislatures on both sides of the Channel. In this regard, the UK parliament, like its French counterpart, has imposed certain limits and therein lies evidence of the beginnings of a protective approach (always more implicit than explicit in the British case) towards the embryo, as it comes to be viewed in terms of its human potential. Two recent debates illustrate the point: the first concerns the selection of particular gametes with a view to creating a 'designer' baby, the second is that of reproductive cloning.

'Designer' embyros In the absence of therapeutic objectives, such as the quest to avoid transmission of a genetic disease, neither France nor the UK permit a couple to

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be viewed alongside Article 16 of the Civil Code.

[24] It is interesting to note the concern expressed by Bertrand Mathieu over the growing predominance of scientific interests in France where scientists are heavily represented on ethics committees. From a comparative perspective, however, French law, both as enacted by parliament and interpreted by the judiciary, still appears less deferential to medical and scientific discourses than its UK counterpart. See Mathieu B., 'Force et faiblesse des droits fondamentaux comme instruments du droit de la bioéthique: le principe de dignité et les interventions sur le génome humain' *RDP*, 1999, 1, 93-111, at p. 103.

[25] In France, the National Consultative Committee on Ethics has recommended that a less restrictive approach be taken towards the conditions governing the use of human embryos as research material (Opinions 52 and 53 of 11 March 1997). See further the objections of Bertrand Mathieu in this regard given the potential for an increased objectification of the embryo: *ibid.*, at p. 102. See too the more general debate on revision of the 1994 bioethics laws (Conseil d'Etat, *Les lois de bioéthique: cinq ans après* (Paris: La documentation française, 1999); Feuillet-Le Minter B. (ed.), *Les lois 'bioéthique' à l'épreuve des faits: réalités et perspectives* (Paris: PUF, 1999)) and proposals disussed by the Senate on 30 January 2003 (Byk C., 'Bioéthique – législation, jurisprudence et avis des instances d'éthique' *JCP*, 2003, 19, I 132; Malauzat M.-I., 'Le projet de loi "bioéthique"' *D* chron, 2001, 35, 2688-2695; Mistretta P., 'Le projet de loi relatif à la bioéthique' *JCP*, *Actualité*, 2003, 25, 306).

select the particular characteristics of an embryo.[26] Thus, the making of choices regarding, for example, sex or other physical characteristics such as hair and eye colour, are unlawful. The reasons for this prohibition are manifestly clear and can be reconciled squarely with the aim of respect for dignity, interpreted as a universal property of the human species. More specifically, the issue of selection is linked to the principle of non-discrimination. Allowing would-be parents to 'customise babies' risks fuelling attempts to create the 'perfect human' with all that this implies in terms of eugenics, discriminatory practices and the privileging of certain social groups above others.[27]

With regard to sex selection in particular, it is well documented that parents often prefer boys to girls.[28] Countering this tendency, however, the question of choosing to have a girl rather than a boy, and the illegality of this, has been confirmed in the case of a Scottish couple, the Mastersons, who sought genetic testing in order to add a daughter to their family of four boys.[29] There is, however, a sense in which globalisation and the market in reproductive services are outstripping national legislative provisions. Again countering the preference for boys, it was reported in November 2003 that a British woman who had travelled to Spain for treatment to select the sex of her next child (having four sons already she longed for a daughter) had given birth to twin girls.[30]

Also in 2003 the debate on the creation of 'saviour siblings' hit the headlines as Britain saw the birth of Jamie Whittaker, its first 'designer baby', created for his genetic match with his older brother who suffers from a rare form of anaemia; it being hoped that blood cells from Jamie's umbilical cord will regenerate the production of his brother's red blood cells.[31] While the Whittakers had originally been refused

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[26] See Mathieu B., 1999, *supra* n. 24, pp. 106-111; Morgan D., *Issues in Medical Law and Ethics* (London: Cavendish Publishing, 2001) pp. 129-151.
[27] Galton D., *Eugenics: The Future of Human Life in the 21st Century* (London: Abacus, 2001) pp. 36-55; Rifkin J., *The Biotech Century: How Genetic Commerce Will Change the World* (London: Phoenix, 1998) pp. 139-144.
[28] Corea G., 'Sex Determination: A Question of Gynicide' in *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* ed. Corea G., (London: The Women's Press, 1985) 188-212.
[29] See Scott K., 'Bereaved Couple Demand Right To Baby Girl', *The Guardian*, 5 October 2000.
[30] 'Twins For Mother After Girls-Only IVF', *The Times*, 3 November 2003.
[31] Allison R., 'New Designer Baby Row as Watchdog Rejects Family's Plea for Treatment' *The Guardian*, 2 August 2002.

permission in the UK to test embryos in order to ensure a genetic match (in accordance with the Human Fertilisation and Embryology Act 1990), they were referred to a clinic in Chicago where this was carried out. The creation of a child deliberately in order to save the life of another is highly contestable when viewed through the prism of respect for dignity. It represents a perfect example of the commodification of human life, the treatment of a person as a means rather than an end. Adding fuel to the fire, the Human Fertilisation and Embryology Authority (which regulates procedures under the 1990 Act) in a decision which has been confirmed by the Court of Appeal, granted permission for pre-implantation testing to Shahana and Raj Hashmi whose son, Zain, suffers from a rare blood disorder and for whom a sibling with an exact genetic match is sought.[32] In giving permission because the test would also reveal whether the new child had the same condition, and with the assurance from Lord Justice Schiemann that the Authority's decision 'does not mean that parents have a right to in vitro fertilisation for social selection purposes', a rather 'spurious distinction'[33] is generated between the permission to test for *inheritable* blood diseases (as in the Hashmi case) and the refusal to test for *non-inheritable* diseases (such as anaemia from which the elder Whittaker sibling suffers).

Reproductive cloning The second example of a relatively uniform cross-Channel approach to dignity and bioethics lies with respect to the matter of human reproductive cloning which effectively represents an extension of the 'designer baby' debate: for how better to ensure the 'perfect child' with a set of genes that works well, than to create offspring with one's own genetic profile? It is not surprising, given the many arguments against cloning,[34] that neither UK nor French law permits this. UK

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[32] *R (Quintavalle) v. Human Fertilisation and Embryology Authority* [2003] 2 FCR 193 (CA). This decision overturned a High Court ruling on 20 December 2002 that the HFEA had acted outside its powers in giving permission for testing to be carried out (*R (Quintavalle) v. Human Fertilisation and Embryology Authority* [2003] 2 All ER 105 (HC, Admin)). See Dyer C., 'Couple at Centre of IVF Controversy Begin Treatment' (2003) 326 *BMJ* 1106.

[33] Harrington J., 'When Science Outpaces Law' *The Blanket: A Journal of Protest and Dissent*, 29 June 2003 (http://ark.phoblacht.net/science.html: accessed 1 July 2003).

[34] Emily Jackson puts forward seven arguments against cloning (safety, dignity, identity, family relationships, diversity, slippery slope and confidentiality) all of which she rejects apart from the argument based upon safety. The argument based upon dignity (that the creation of 'sibling saviours' treats people as means not ends) is rejected on the grounds that the child which results is seldom created for this motive alone and would be loved and cherished in its own right, and that people have many less honourable reasons for deciding to reproduce, such as to save a failing relationship. Jackson goes on to make one chief argument in favour of reproductive cloning: the increase in reproductive choice for those who might not otherwise be able to have children: Jackson E., *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001) pp. 247-258.

law is, however, rather more explicit on the point, with parliament having passed the Human Reproductive Cloning Act 2001 precisely to prohibit this form of cloning. Conversely and controversially, the government at the same time has authorised therapeutic cloning.[35] Such legal developments provide, nevertheless, a good illustration of how law must continually respond to technological advances revealing the extent to which legislation introduced little more than ten years ago is clearly now outdated and in need of regular revision.

The new legislative measures demonstrate also the importance of prohibitions with regard to new scientific processes which may jeopardise respect for the human person.[36] The violations of human dignity which are arguably apparent in the technique of reproductive cloning cover the dignity of all concerned: the person from whom the clone is generated (whose integrity is violated), the clone (who is instrumentalised for this purpose), indeed that of the human species as a whole (debased by the limitation of genetic diversity). It is at this point that legislatures in both France and the UK, followed by European institutions too,[37] have acted to prohibit the manufacture of immortality through cloning techniques the effects of which are to reduce human beings to means rather than ends.

3.1.3 Dignity and assisted conception: similar objectives

In both France and the UK, the legislation passed in the early 1990s on bioethical matters introduced new forms of regulation of assisted conception services. To speak of a 'right to reproduce' or 'right to have a child' through the use of such techniques would be false as there is nothing in either national or international law which supports any such claims.[38] Nevertheless, the question of regulation is important as

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[35] Human Fertilisation and Embryology (Research Purposes) Regulations 2001, Statutory Instrument, 2001, no. 188.
[36] Sfez L., *Le rêve biotechnologique* (Paris: PUF, coll. Que sais-je?, no. 3598, 2001) pp. 40-45.
[37] Council of Europe, Additional protocol on the Prohibition of Cloning Human Beings, 6 November 1997, to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, 4 April 1997; European Union Charter of Fundamental Rights, Article II-3-2.
[38] Andorno R., *supra* n. 4, pp. 91-93; Meulders-Klein M.T., 'Le droit de l'enfant face au droit à l'enfant et les procréations médicalement assistées' *RTDC*, 1988, 3, 663-672; Sérieux A., 'L'enfant comme don' in *Le droit, la médecine et l'être humain: propos hétérodoxes sur quelques enjeux vitaux au XXIème siècle* ed. Sériaux A., (Aix-Marseille: Presses universitaires d'Aix-Marseille, 1996) 11-28. In the UK, however, in *Re D (a minor) (wardship: sterilisation)* [1976] 1 All ER 326, p. 332, Heilbron J. stated, in

much in the domestic as European sphere. More precisely, national laws have to be viewed in the light of developments in European law in this area, suggesting an increasing need for a common approach between European countries. This is for two reasons. First, as noted in Chapter 2, there are now requirements at the European level to ensure that fundamental rights and human dignity are respected in this area. Secondly, from a practical perspective, the rise in the phenomenon of 'procreative tourism' (as demonstrated above by the example of a British woman travelling to Spain to choose the sex of her child and below by the case of Diane Blood who travelled to Belgium in order to be inseminated with her dead husband's sperm[39]), is being pursued by many as a way of circumventing restrictive national practices. While it is not suggested that a common regime has been actively sought, there is undoubtedly a sense in which legislation and case law in France and the UK have undergone processes of convergence. What is less clear, however, is the extent to which the regimes in place can be said to respect human dignity, particularly with regard to the question of access to treatments. In both countries access has been limited to certain women to reflect both financial considerations (public resources not being infinite) and moral concerns (that some women may not be suitable for motherhood). Thus, while both systems have been concerned to construct a legislative profile of the 'ideal woman' to whom assisted conception services should be provided, it is argued that this may contribute to a lack of respect for the dignity of women who are excluded.

3.1.3.i Similar legislative and jurisprudential histories

During the 1980s, in the absence of express legislation on human fertility and embryology on both sides of the Channel, it fell to the judiciary to develop solutions to the cases presented to them involving individuals starting to make use of emerging assisted conception techniques, notably *in vitro* fertilisation.[40] As a result, judges in both countries have been instrumental in the construction of the 'ideal type' of woman

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the context of the prospective sterilisation of a young woman with learning disabilities, that '[t]he type of operation proposed is one which involves the deprivation of a basic human right, namely the right of a woman to reproduce, and therefore it would, if performed on a woman for non-therapeutic reasons and without her consent, be a violation of such right.'

[39] *R v. Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 60 All ER 687.

to whom procreative medical assistance should be given and it is to a comparison of these national profiles that we turn first. Subsequently, it will be suggested that legislation has largely consolidated judicial constructions with, however, a certain tendency in the French case to impose restraint upon prior judicial leniency.

Establishing ideal types through case law What is striking from a comparative perspective is the legal framework in which debates on assisted conception were initially constructed in French and UK: in the former, the domain being private law and in the latter, public law. Thus, investigating the application of the law of contracts in France and that of judicial review in the UK leaves the comparatist with a sense of comparing apples and pears. This is not quite so, however, as the substantial problem raised is broadly similar: who should be allowed to benefit from medical assistance to conceive?

Beginning with the situation in France prior to the 1994 legislation, the use of assisted conception services was raised in the famous *Parpalaix* case.[41] Following the death of her husband, Corinne Parpalaix asked the Centre for the Study and Conservation of Eggs and Sperm (CECOS) to hand over to her a sample of her husband's sperm deposited before his death, in order that she might have their child. The *Tribunal de grande instance de Créteil* upheld her claim, founding its decision upon the contract concluded between Alain Parpalaix and CECOS which it defined as a 'specific contract comprising the obligation for CECOS to conserve and to restore the sperm to the donor or the person to whom it was destined.'[42] This solution was perfectly admissible in the eyes of the court given the absence of regulation in the area and the view taken that the solution would not be contrary to natural law.[43] Furthermore, the court emphasised the 'parental project' (*'projet parental'*) of the couple, that is their intention to start a family together, and the fact that their commitment to one another was evidenced by their marriage just days before Alain's death. It is clear, therefore, in this case that, in the absence of any

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[40] Louise Brown, the first 'test-tube baby' was born in 1978.

[41] TGI de Créteil, 1 August 1984, *Consorts Parpalaix c/ CECOS et autres*, Gaz. Pal, 1984, II, 560, conclusions by Lesec; Gaz Pal, 1984, II, 20321, note by S. Coronne; JCP 1984, II 20321, note by S. Coronne; RTDC 1984, 703, note by J. Rubellin-Devichi.

[42] *'... un contrat spécifique comportant pour le CECOS obligation de conservation et de restitution au donneur ou de remise à celle à qui le sperme était destiné'* (*Consorts Parpalaix, ibid.*).

[43] *'... ni les conditions de conservation ou de remise du sperme d'un mari décédé, ni l'insémination de sa veuve ne sont interdites ou même organisées par un texte législatif ou réglementaire. D'autre part, elles ne heurtent pas le droit naturel...'* (*Consorts Parpalaix, ibid.*).

legislative prohibition, the court, through a creative reading of contract law, was able to facilitate the creation of a child, one of whose parents was dead at the moment of conception. The *Parpalaix* case was subjected to fierce criticism,[44] and it will be seen below how the French legislature sought to take account of this when it decided to prohibit posthumous insemination.

In the UK there was also judicial activity on the question of assisted conception prior to the introduction of the Human Fertilisation and Embryology Act 1990. One decision in particular, *R v. Ethical Committee of St Mary's Hospital (Manchester), ex parte Harriott*,[45] helped establish a profile of the ideal mother, in this instance regarding a refusal to treat a former prostitute. Contrary to the French perspective, this case fell within the domain of public law as Harriott sought to overturn the decision of the hospital's ethics committee which was the source of the refusal to allow her access to assisted conception services. Without examining the merits of the case, the court decided that the request was inadmissible on the grounds that the denial of treatment stemmed from the individual decision of the doctor and a mere opinion of the ethics committee, neither of which were reviewable by the court. However, this did not prevent the judge from noting Harriott's dubious past and the fact that her local authority had refused to allow her to adopt for this reason.[46]

Establishing ideal types through legislation It is in the light of this jurisprudential setting that French and UK parliaments were required to provide the new legislative framework for regulating assisted conception. Although the judicial approaches are quite distinct, the resulting legislative measures are rather similar in the profiles of the ideal mother they establish. Who, therefore, is this mythical figure to be granted treatment and who, her foil, to be denied it?

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[44] For example, the justification of the decision on the basis of natural law is called into question by Alain Sériaux, 'Droit naturel et procréation artificielle: quelle jurisprudence?' *D* chron., 1985, 10, 53-60.
[45] *R v. Ethical Committee of St Mary's Hospital (Manchester), ex parte Harriott* [1988] 1 FLR 512.
[46] *Ibid.*

a. The profile of the 'ideal mother'

While there is a notable difference in the written style of the French and British legislative provisions governing access to assisted conception, their overall effect is remarkably similar. The profile of the ideal mother established by the UK legislation is less overtly detailed than its French counterpart. The end result in both cases, though, is a rather conservative reading of family life.

Beginning with the UK,[47] the Human Fertilisation and Embryology Act 1990 devolves decision-making over access to assisted conception services to hospitals which are licensed to provide treatment by the Human Fertilisation and Embryology Authority. The criteria to be applied are set out in section 13(5) of the Act which states that:

> 'A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.'

Despite this statutory base, practices can vary enormously between hospitals. A study carried out into the rationing of health care resources for assisted conception services in England and Wales has revealed, for example, how access can depend upon a multiplicity of both clinical and social factors including infertility, age, the number of children a woman already has, the stability of the couple, and sexual orientation.[48] The criteria, however, are circumscribed by the Code of Practice introduced by the Human Fertilisation and Embryology Authority to assist the application of the 1990 Act (now in its 5th edition, 2001 and with a 6th edition due to come into force on 1 March 2004). The Code, which constitutes a form of 'soft law' of the kind, according to Bertrand Mathieu, that is more and more visible in the area of bioethics,[49] provides notably that the opinion

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[47] For a more detailed analysis of this profile, see Millns S., 'Making "Social Judgments that Go Beyond the Purely Medical": The Reproductive Revolution and Access to Fertility Treatment Services' in *Law and Body Politics: Regulating the Female Body* eds. Bridgeman J. and Millns S., (Aldershot: Dartmouth, 1995) 79-104; and Millns S., *Un droit à la maternité? Le droit et la procreation médicalement assistée en France et en Grande-Bretagne* DEA Diss. in Law: Paris I, 1995.

[48] Plomer A., Smith I. and Martin-Clement N., 'Rationing Policies on Access to *In Vitro* Fertilisation in the National Health Service, UK' (1999) 7 *Reproductive Health Matters* 60-70.

[49] Mathieu B., 1999, *supra.* n. 24, p. 96. On the role of 'soft law' as an instrument of public policy more generally, see Rose R., 'Law as a Resource of Public Policy' (1986) 39 *Parliamentary Affairs*

of all those at the treatment centre who have been involved with the prospective parents should be taken into account and that the decision whether or not to offer treatment should be made in the light of all available information.[50]

The striking feature of section 13(5) of the 1990 Act is its lack of attention to detail. There is no precision given to the concept of the 'welfare of the child'[51] nor to the 'need of that child for a father'. The section does, though, have its origins in the Warnock Report to which it is useful to refer in understanding the motivation behind the provision. According to the Report, the difficulty of the question over access suggested that a uniform solution should be avoided.[52] Thus, in conformity with the UK's legal tradition of incremental development, the Warnock Committee rejected the need for firm and concrete criteria. Instead, it preferred to place responsibility for selecting women in the hands of consultants who would decide according to their own conscience. Moreover, the Committee accepted that these decisions would be taken according to social as well as clinical criteria.[53] The doctor is assisted, however, by the Code of Practice which states that treatment centres must avoid the adoption of any policy or criteria which may appear arbitrary or discriminatory[54] and that a number of factors might be taken into account including: the commitment of the prospective parents to having and bringing up a child; their ability to provide a stable and supportive environment; their medical histories and that of their families; their health and consequent future ability to look after a child; their ages; their ability to meet the needs of a child or children, including the implications of any possible multiple births; any risk of harm to a child, including the risk of inherited disorders or transmissible diseases, problems in pregnancy or abuse of the child; and the effect on any existing children.[55]

297-314; and Rose R. and Page E.C., *Lawmaking Through the Back Door* (London: European Policy Forum, 2001).

[50] Human Fertilisation and Embryology Authority, *Code of Practice* 5th ed. 2001, paras. 3.25 and 3.27.

[51] For an analysis of the notion of the 'welfare of the child', see Douglas G., 'Assisted Reproduction and the Welfare of the Child' (1993) 46 *CLP* 53-74.

[52] 'This question of eligibility is a very difficult one, and we believe that hard and fast rules are not applicable to its solution. We recognise that this will place a heavy burden of responsibility on the individual consultant who must make social judgments that go beyond the purely medical...': Warnock M., *supra* n. 9, para. 2.12.

[53] Warnock M, *ibid.*

[54] Human Fertilisation and Embryology Authority, *Code of Practice* 5th ed. 2001, para. 3.3.

[55] *Ibid.*, para. 3.13.

The cumulative effect of section 13(5) and the Code of Practice is to require the doctor to weigh up the balance of interests between the couple and the future child.[56] Of course, should the consultant make a wrong assessment, then the decision is very difficult to challenge, as shown in the *Harriott* case above, demonstrating the reticence of judges to interfere in such decisions and their general deference to medical opinion. In short, nevertheless, it may be deduced from the legislative package that the ideal mother is part of a couple (with a man), and that this couple should be stable and of an age to reproduce naturally. Of course, this construction results more from the Code than the legislation (the former being more rigid than the latter), yet taken together, their combined effect is to allow doctors to legally exclude those women who do not correspond in key respects to the ideal type. This is entirely in accordance with the findings in practice of the study carried out by Aurora Plomer *et al.* on the application of section 13(5) criteria.[57]

Moving on to the position in France, a similar legislative concern to restrict treatments can be noted in the 1994 legislation. The difference, however, lies in the formulation of criteria which are far more express and precise. Thus, Law no. 94-654 of 29 July 1994, Article 8, sets out the conditions for access. This provision adds a Chapter II *bis* to Title 1 of Book II of the Code on Public Health, including a new Article L. 152-2 in the Code which stipulates that:

> 'Medically assisted conception is destined to respond to the request of a couple for parenthood.
>
> Its object is to remedy infertility of which the pathological character has been medically diagnosed. It may also have as its object the avoidance of transmission of a serious disease to the child.
>
> The man and woman forming the couple must be living, of an age to procreate, married or able to prove they have lived a communal life for at least two years;

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[56] The terms of reference which frame this balance appear strange in themselves. The question may well be posed as to what circumstances can be envisaged in which the interests of a future child would lie in not being born at all. In other words, are there potential parents who are really so dreadful that their children would be better off never having been brought into existence? The infinitely delicate matter of when a life is or is not worth living is revisited in the context of a child's 'right not to be born' below, pp. 185-194.

[57] Plomer A., *et al.*, *supra* n. 48.

and must have given prior consent to the transfer of embryos or to insemination.'[58]

This Article is extremely precise as to the criteria required of future parents. Their life style is highly important: they must form a couple, have been living together for two years and be of a certain age. Moreover, the Article requires that assisted conception should only be used for reasons of infertility or in order to avoid the transmission of a serious disease to the child. The effect is to include within the French ideal type the criteria of ill heath which is something lacking from the UK profile, at least at the strict level of the legislative provision, in that its criteria simply speak of the provision of 'treatment services' without elaborating upon their aim or beneficiary. The use of the word 'service' implies *a priori* that assistance can be given in the UK to women who are not infertile, notably single women and lesbians. However, the express requirement to consider the needs of the child for a father, has the counter effect of including a preference towards women who, as part of a heterosexual couple, are affected by infertility. Thus, the use of fluid terminology does not ultimately render the UK provisions any less strict in practice than the French. Both paint a portrait of the ideal woman seeking motherhood: infertile and leading a socially acceptable and traditional family life style.

b. The rejection of the atypical mother

If French and UK legislation has constructed, explicitly or implicitly, the ideal mother, then this leaves many women excluded from their frames of reference. The purpose of the present section is, therefore, to investigate further who exactly is marginalised by this construction. Conclusions are easier to draw from the French example given the more exact legislative profile and the inference that anyone not matching these criteria is automatically excluded; they are harder in the case of the UK where the use of implicit

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[58] *'L'assistance médicale à la procréation est destinée à répondre à la demande parentale d'un couple. Elle a pour objet de remédier à l'infertilité dont le caractère pathologique a été médicalement diagnostiqué. Elle peut aussi avoir pour objet d'éviter la transmission à l'enfant d'une maladie d'une particulière gravité.*
L'homme et la femme formant le couple doivent être vivants, en âge de procréer, mariés ou en mesure d'apporter la preuve d'une vie commune d'au moins deux ans et consentants préalablement au transfert des embryons ou à l'insémination.'

criteria places a considerable degree of discretionary power in the hands of doctors. However, as with the ideal type, despite the differences in legislative drafting style, the categories of the marginalised are similar in both countries with exclusion being based upon both clinical and social factors.

Clinical factors and physical inadequacy for motherhood Clinical factors relating to the physical characteristics of women most likely to be denied access to treatment services cover a number of issues including health and physical disability, age, and even ethnicity.

With regard to health, it has been noted how in France the law explicitly excludes women who are fertile or pose no risk of passing on a genetic disorder to the child. The UK profile includes an implicit similar requirement. The practical effect is to exclude healthy single or lesbian women who cannot provide a male role model for their child.[59] This exclusion persists despite evidence showing that what is important for child development is a stable and loving environment and that this can be provided by single women just as effectively as by a heterosexual couple.[60] Similarly, concerns about the negative effects on children of being brought up by a homosexual couple (such as teasing by peers or confusion over their own sexuality) would seem to be disproven by evidence to the contrary.[61] Infertility to one side, women who themselves suffer from physical handicap may also find it difficult to obtain treatment. While neither the French nor UK laws explicitly deal with the issue, doctors may take a decision that the best interests of the child are served by having an able-bodied mother and thus use physical disability as a reason for exclusion.[62]

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[59] Quite how long this state of affairs may persist is seriously open to question since Suzi Leather, Chairman of the Human Fertilisation and Embryology Authority, expressed the view that this 'anachronistic' aspect of the law should be amended in order to reflect changes in society, particularly the fact that one in four families in Britain is now headed by a single parent (Laurance J., 'Fathers No Longer Required: Fertility Chief Signals an IVF Revolution', *The Independent*, 21 January 2004).
[60] Radford J., 'Immaculate Conceptions' (1991) 21 *Trouble and Strife* 8-12.
[61] Golombok S. and Rust J., 'The Warnock Report and Single Women: What about the Children?' (1986) 12 *J Med Ethics* 182-186.
[62] See Finger A., 'Claiming all of our Bodies: Reproductive Rights and Disabilities' in *Test-Tube Women: What Future for Motherhood?* eds. Arditti R. *et al.*, (London: Pandora Press, 1984) 281-297; and Saxton M., 'Born and Unborn: The Implications of Reproductive Technologies for People with Disabilities' in Arditti R. *et al.* (eds.), *ibid.*, 298-312.

The second type of woman who is marginalised by the legislative criteria on access is the older woman. In France this is explicit given the requirement that the man and woman who form the couple be of an age to procreate. No age limit is, in fact, given, leaving open the question of whether women who have undergone an unusually early menopause are covered by the exclusion. In the UK no age criteria is imposed in the legislation. However, the Code of Practice does suggest an age limit for sperm and egg donation (45 and 35 respectively).[63] The question of an upper limit for the receipt of assisted conception services has become the focus of popular and legal debate on a number of occasions. On 25 December 1993 a British woman aged 59 gave birth to twins after having been refused treatment in the UK but having sought it successfully at the clinic of Dr Severino Antinori in Rome.[64] Subsequently in 1994 in *R v. Sheffield Health Authority, ex parte Seale*,[65] a decision to refuse treatment to a woman aged 37 was upheld. The judge found that the application of an age criterion, fixed at 35, was neither irrational nor unreasonable in the light of clinical data indicating a decline in the success rate of treatments in women over 35. This decision suggests that women above the age of menopause are unlikely to be successful in seeking treatment, although recent reports of three women aged 60, 56 and 58 receiving services in the private sector once again point to a diversity of practice and to the flexibility of the UK provisions if patients can finance their own treatment.[66] The issue raises incidental but important questions too about the reasons why some women may wish to delay motherhood until later in life. Answers, which often relate to the desire to build a career, suggest that women face continuing difficulties in combining family and employment commitments and that the provision of medically assisted conception services offers one, albeit fairly drastic, way of reconciling work and family life.[67]

Thirdly, women of colour can face difficulties in obtaining access to assisted reproductive services. While at first sight it may appear that ethnicity is not a relevant concern, access issues have been raised with regard to coloured women requesting to

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[63] Human Fertilisation and Embryology Authority, *Code of Practice* 5th ed. 2001, paras. 4.20 and 4.21. Paragraph 3.4 of the Code confirms that where gametes are taken from women over 35 and men over 45 they should only be used for their own treatment or the treatment of their partner.
[64] *The Times*, 28 December 1993.
[65] *R v. Sheffield Health Authority, ex parte Seale* (1994) 25 BMLR 1. See Plomer A. *et al.*, *supra* n. 48, p. 68.
[66] Branigan T., 'Woman, 58, Set to Give Birth', *The Guardian*, 29 January 2003.
[67] This difficulty is discussed in Morris A. and Nott S., 'The Law's Engagement with Pregnancy' in *Law and Body Politics: Regulating the Female Body* eds. Bridgeman J. and Millns S., *supra* n. 47, 53-78.

be implanted with white women's gametes. The question was raised first of all in Italy when in January 1994 a woman of colour (whose male partner was white) was implanted with the gametes of a white woman and gave birth to a white child. In France, the situation would seem unlikely to occur given that the 1994 legislation specifies that the couple should receive only embryos created from their own gametes. However, it does go on to provide that in cases where this is impossible, a donated embryo may be used,[68] in which case the question is open as to whether this could include an embryo created by the gametes of persons of a different ethnic origin to the couple. In the UK, following the Italian case, the Human Fertilisation and Embryology Authority reacted by saying that such treatment would not be authorised in Britain.[69] However, *The Independent* newspaper went on to reveal the next day that a treatment centre in Cambridge had decided to implant gametes from a white woman in a woman of colour who was married to a man of mixed race.[70]

The question remains as to why coloured women may wish to use white gametes instead of those reflecting their own ethnic background. One answer is the shortage of gametes from donors of non-white ethnic origins. This was the case in the British example where it was also considered relevant that the child would be of mixed race anyway whether the eggs came from a white or coloured donor. However, in the Italian example, the woman in question stated that her preference for a white child was because it would be less likely to suffer discrimination than a child of colour. This argument has important social and eugenic implications and raises similar issues to the question of sex selection discussed above, where it might be similarly suggested that to choose a boy rather than a girl ensures that the child will enjoy better opportunities in life. Yet, the production of designer babies cannot be viewed as the solution to systemic sex or race discrimination. The specification of desirable characteristics in this way can only enhance social divisions and perpetuate discriminatory attitudes. In fact, the French legislation is remarkably clearer in outlawing such practices than its UK counterpart. The 1994 law on respect for the human body provides in Article 3 (which inserts a new Article 16-4 into the Civil

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[68] Article 8 of Law no. 94-654 adds Article L. 152-5 into the Code on Public Health to this effect.
[69] *The Independent*, 2 January 1994.
[70] *The Independent*, 3 January 1994.

Code) that 'any eugenic practice which lends itself to the organised selection of persons is prohibited.'[71]

There is, however, no guarantee against hospital errors resulting in a woman being implanted with sperm or embryos which are not hers or her partner's or indeed do not belong to someone of their own ethnic origin. The question of what to do about such blunders, which were clearly never envisaged by legislation, has arisen in the UK when in February 2003 a white woman gave birth to mixed race twins after a mistake which resulted in the sperm of a coloured man who was also seeking treatment with his wife, being injected into the white woman's eggs. Asked to decide who was the twins' legal father, their black biological father or the white husband who had sought treatment with his wife, Dame Elizabeth Butler-Sloss, president of the High Court's Family Division, ruled that it was the former.[72] However, given that the twins were happily settled with the white couple, their rights could be sufficiently protected by court orders, including an adoption order, which would confer legal parenthood on the woman's white husband. Stressing the importance of securing the twins' welfare, Dame Butler-Sloss found that this was best done by their remaining with the family into which they were born, adding that it was through no fault of their own that they had been born children of mixed race; the mistake being impossible to rectify. That such errors should not happen in future has been underlined by the Human Fertilisation and Embryology Authority which immediately issued guidance on tightening procedures at all infertility clinics.[73]

Social factors and inadequacy for motherhood It is not only physical characteristics which may ground a denial of access to new reproductive technologies. Social factors, notably marital status, being single or widowed, can also provide a basis for granting or refusing such services.

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[71] *'...toute pratique eugénique tendant à l'organisation de la sélection des personnes est interdite.'*

[72] *Leeds Teaching Hospital NHS Trust v. A and others* [2003] 1 FCR 599. Section 28 the Human Fertilisation and Embryology Act which provides that the partner of a woman who undergoes treatment services with her becomes the legal father of any resulting children did not, therefore, apply. See Miola J., 'Mix-ups, Mistake and Moral Judgment: Recent Developments in UK Law on Assisted Conception: *Leeds Teaching Hospital N.H.S. Trust v. A and Others* [2003] EWCH 259; *Evans v. Amicus Healthcare Ltd., Hadley v. Midland Fertility Services Ltd.* [2003] EWHC 2161; Human Fertilisation and Embryology (Deceased Fathers) Act 2003' (2004) 12 *FLS*, forthcoming.

[73] Dyer C., 'Judge Backs Adoption of IVF Mix-Up Twins', *The Guardian*, 27 February 2003.

Single women, in particular, may face difficulties in obtaining treatment services. As noted above, the requirement that a woman be infertile or at risk of passing on a genetic disease to the child, is a relevant factor in the decision to treat, meaning healthy single women often fall outside the treatment zone.[74] In fact, however, neither the UK nor the French legislation make marriage an explicit criterion. In the latter, it is stated that the couple should be 'married or able to prove they have lived a communal life for at least two years'. The relationship must, therefore, be stable and serious. In the UK, while no express marriage criterion is imposed, section 13(5) requires that consideration be given to the needs of the child for a father. This formulation has its origins in the Warnock Report which found that:

> 'To judge from the evidence many believe that the interests of the child dictate that it should be born into a home where there is a loving, stable, heterosexual relationship and that, therefore, the deliberate creation of a child for a woman who is not a partner in such a relationship is morally wrong.'[75]

The authors conclude that in general it would be better for children to be born into a family composed of two parents, male and female, despite the fact that it is impossible to predict how lasting such a relationship might be.[76] In short, the UK position suggests that a heterosexual relationship is to be preferred although its durability may be uncertain, while the French presumes that stability results from having lived a communal life for two years.[77] More recently in the UK too attempts at single parenthood have

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[74] Single women and lesbians, indeed any woman who is refused treatment and is prepared to take a risk, may now simply bypass the health service and obtain sperm through the internet. The fact that 'internet spermbanks' do not fall within the regulatory powers of the Human Fertilisation and Embryology Authority because the sperm provided is fresh, raises concerns that the sperm donor may not have been adequately screened for inheritable diseases and also that he may be considered to be the child's legal father (although this point has yet to be tested in law). That women are prepared to run these risks has been confirmed by the announcement of the birth of the first internet sperm bank baby in August 2003 and the news that a further 19 women are pregnant having used the service provided by 'ManNotIncluded.com': Boseley S., 'Birth of First Internet Sperm Bank Baby', *The Guardian*, 20 August 2003.

[75] Warnock M., *supra* n. 9, para. 2.9.

[76] Warnock M., *ibid.*, para. 2.11.

[77] In the UK, the position of unmarried women was highlighted by media interest in the case of Jean Gibbins in May 1993. Ms Gibbins who had received treatment in her local hospital to stimulate ovulation (a procedure which does not require authorisation by the Human Fertilisation and Embryology Authority) went on to give birth to six children. Normally such an incident would give rise to national congratulations from the press. However, Jean Gibbins, unmarried and with a partner with whom she did not cohabit, was demonised as a single mother who would be a drain on state support services. See *The Independent*, 24 and 25 May 1993, and *The Times*, 24 May 1993.

been opposed by the finding that the breakdown of a relationship and subsequent withdrawal of consent to treatment by men who had previously used assisted conception services together with their partner is sufficient to prevent women from using embryos created from the gametes provided by these men.[78]

The issue of marital status raises a further question related to the position of widows. In this regard, it was noted above that the French *Parpalaix* case upheld the claim of a widow to have access to her husband's sperm for insemination purposes based upon the contractual obligations of CECOS, the gametes storage centre. This case, however, was decided before 1994 and would certainly be determined differently today given that the 1994 legislation requires that both members of the couple be 'alive'. In this vein, the *Cour de cassation* has rejected a plea by a widow to overturn a decision denying her request for *post mortem* embryonic transfer.[79]

In the UK, on the other hand, the law does not prohibit treatment after the death of the father-to-be. While the Warnock Report expressed reservations on using the sperm of the deceased, it did recommend that the right to use or dispose of embryos following the death of a husband should revert to his wife.[80] Thus, the absence of a father figure through death is not, apparently, viewed as quite so undesirable as there having never been any father figure at all. One can presume that the image of the dead father continues to play a symbolic role in the construction of the family created through posthumous insemination.

This indeed seems to be the attitude adopted by the Court of Appeal in the case of Diane Blood.[81] Initially refused permission by the Human Fertilisation and Embryology

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[78] *Hadley v. Midland Fertility Services Ltd and Hadley* [2003] 4 All ER 903 and *Evans v. Amicus Health Care Ltd and Johnston* [2003] 4 All ER 903.

[79] Cass. 1re civ., 9 January 1996, D jur. 1996, 376, note by F. Dreiffus-Netter; JCP 1996, II 22666, note by C. Neirinck; RTDC, 1996, 4, 359, observations by J. Hauser. On this decision, see also the discussion by Lamboley A., 'L'enfant' in *Libertés et droits fondamentaux* eds. Cabrillac R., Frison-Roche M.-A. and Revet T., 6th ed. (Paris: Dalloz, 2000) 209-231. The possible revision of Law no. 94-654 of 29 July 1994 on the donation and use of elements of the human body, medically assisted conception and prenatal diagnosis on this point is discussed in Chabault C., 'A propos de l'autorisation du transfert d'embryon *post mortem*' *D, point de vue*, 2001, 18, 1395-1397.

[80] Warnock M., *supra* n. 9, paras. 10.9 and 10.12.

[81] *R v. Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 60 All ER 687, note by Bergé J.S., 'Procréation médicalement assistée et droit communautaire: qualification et solution' in 'La recherche sur l'embryon: qualifications et enjeux' *Revue générale de droit médical*, special edition, eds. Labrusse-Riou C., Mathieu B. and Mazen N.-J., (Bordeaux: Editions les études hospitalières, 2000)

Authority to export the sperm of her dead husband to Belgium for treatment (having also been refused assisted conception services in the UK on the grounds that her husband had not consented to his sperm being taken, the process having been completed during his dying moments), the Court of Appeal went on to uphold Mrs Blood's claim based upon her rights as a citizen of the European Union. These entitled her to benefit from Community law provisions on the freedom to provide (and receive) services, interpreted to include medical services, in another member state.[82] The economic rationale of the decision founded upon the law of the internal market did not, however, prevent the judiciary from commenting upon the suitability of Mrs Blood as a future mother. She was presented as a young widow, of religious convictions, who had lived an ideal and stable married life and had, like Corinne Parpalaix in France, planned to start a family with her husband. Moreover, she had, it is noted, worked for a company advertising baby products![83] Without this Madonna-like profile,[84] it may be wondered whether the decision to allow her to export the sperm to Belgium would have been quite so easy to reconcile with Community law restrictions upon free movement for reasons of public interest.[85]

For women who are married, but whose husbands are infertile, a final question remains as to the use of donor insemination, it being suggested by some that the interjection of a 'third party' in the process of reproduction introduces an adulterous component into the marital relationship.[86] The point has been tested in the Scottish case of *Maclennan v. Maclennan*,[87] in which it was decided that assisted conception is not a form of adultery as to commit this act both parties must be physically present. The same solution is

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109-114; Biggs H. 'Madonna Minus Child or Wanted: Dead or Alive! The Right to have a Dead Partner's Child' (1997) 5 *FLS* 225-234; Hervey T., 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 *OJLS* 207-233; Morgan D. and Lee R.G., 'In the Name of the Father? Ex parte Blood: Dealing with Novelty and Anomaly' (1997) 60 *MLR* 840-856; Sefton-Green R., 'La procréation médicalement assistée entre droit national et droit communautaire: la controverse devant les cours anglaises' in Labrusse-Riou C., Mathieu B. and Mazen N.-J. (eds.), *ibid.*, 101-107.

[82] The Court of Appeal followed the decisions of the European Court of Justice in *Luisi and Carbone v. Ministero del Tesoro* Cases 286/82 & 83 [1984] ECR 377 and *SPUC (Ireland) v. Grogan* Case C-159/90 [1991] ECR I-4733.

[83] See the exposition of the facts of the case by Sir Stephen Brown P in the judgment given at first instance: *R v. Human Fertilisation and Embryology Authority, ex parte Blood* [1996] 3 WLR 1176, at p. 1178.

[84] Biggs H., *supra* n. 81.

[85] Hervey T., *supra* n. 81, pp. 221-225.

[86] Adorno R., *supra* n. 4, p. 92; Sériaux A., 'La procréation artificielle sans artifices: illicéité et responsabilités' *D* chron 1988, 26, 201-207.

[87] *Maclennan v. Maclennan* [1958] SC 105.

apparent in the French legislation of 1994 which accepts sperm and embryo donation under restricted conditions without considering it to be an adulterous act.[88] This solution would seem entirely consistent with the firm emphasis placed upon marriage in French and UK practice as an important aspect of the profile of any woman seeking assisted conception services.

Thus, it has been argued that legislative and medical controls are placed on the requests of women who seek assistance to reproduce and that these contribute to the establishment of an 'ideal mother' figure who is more likely to be allowed access to treatment. However, given the possibility of discrimination which the operation of such selection criteria entails, does this not suggest a possible violation of the dignity of those women who wish to become mothers but who are denied the opportunity to try based upon an external perception of their unsuitability for parenthood?

3.1.3.ii Dignity and the ideal type

In France, the constitutional review of the 1994 bioethics legislation, including the measures on assisted conception, did not raise the issue of human dignity from the perspective of the woman seeking treatment, but rather concentrated on respect for the embryo.[89] In this regard, the Constitutional Council, reviewing the ensemble of the legislative measures and not finding any constitutional incompatibility, might be said to have contributed to the legitimation of the establishment of the ideal profile and to have implicitly underlined the importance of a certain interpretation of the family in the context of assisted conception. So, while it will be recalled that the *Conseil constitutionnel* was cautious in its refusal to call into question parliament's view on when life begins, it is suggested that its members were no more adventurous in their approach to the definition of family life. The UK legislation, for its part, contributes to the legal construction of the family generated through use of assisted conception services, providing a definition of who are the legal parents of any children born. Thus, it is argued in this section that both the Constitutional Council and the UK

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[88] This aspect of the legislation is considered above with regard to women of colour, pp. 151-153, and below with regard to its constitutionality, pp. 159-160.
[89] Decision no. 94-343-344 DC of 27 July 1994, *Bioethics*.

parliament have interpreted the notion of the family in a traditional manner. This has the effect of both reinforcing the profile of the ideal couple seeking treatment and contributing to violations of the dignity of some women through the operation of discriminatory selection criteria.

Defining the 'family' and reinforcing the ideal type While there is a substantial amount of feminist scholarship which has contested the use of new reproductive technologies (for the risks they generate, the medicalisation of reproduction and the deference shown to (male) scientific experts),[90] there is a counter position which stresses the advantages of the technologies in terms of their capacity to challenge traditional conceptions of family life and parenthood.[91] According to this latter view, the new possibilities created by the technologies permit a hitherto unknown distribution of reproductive tasks meaning that a child may have a number of different mothers: biological (the woman who provides the egg); gestational (she who carries the child in pregnancy); and social (the woman who brings up the child).[92] The 'deconstruction' of motherhood in this way facilitates an extension of the notion of the family as it breaks with tradition in admitting that reproduction and the raising of children may occur beyond the context of the nuclear family.[93] The enlargement of the traditional view of family life in law is visible, to a certain extent, in both France and the UK without, however, ultimately dispensing with tradition in its entirety.

a. The family: a French perspective[94]

The arguments put forward by the French parliamentarians in their constitutional challenge to the 1994 bioethics laws played upon the idea of a 'natural' family unit. Thus, the members of parliament lamented the unconstitutionality of the rupture of

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[90] Corea G. *et al.* (eds.), *Man-Made Women: How Reproductive Technologies Affect Women* (London: Hutchinson, 1985); Corea G., *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (London: The Women's Press, 1985); Dworkin A., *Right-Wing Women* (London: The Women's Press, 1983) pp. 174-188.

[91] Stanworth M., 'The Deconstruction of Motherhood' in *Reproductive Technologies: Gender, Motherhood and Medicine* ed. Stanworth M., (Cambridge: Polity, 1987) 10-35.

[92] Stanworth, *ibid.*, p. 16

[93] Stanworth, *ibid.*

the link between embryo and its natural (genetic) parents. This, it was suggested, amounted to an interference in the right to family life, to health and to the free development of one's personality,[95] together with constituting a violation of the (supposed) principle of protecting genetic patrimony[96] and that of individual responsibility.[97] Taking each of these in turn, it can be seen that the Constitutional Council did not adopt an absolutely traditional and 'natural' view of the family, but rather made some space for its redefinition in the light of new reproductive technologies.

Taking the right to family life first, Article 8 of the law on assisted conception provides *inter alia* that an embryo may only be created *in vitro* using the gametes of at least one of the members of the couple seeking treatment. However, exceptionally, a couple which is unable to reproduce without assistance from a donor may acquire an embryo from another couple. The parliamentarians argued that this was contrary to the right of the child to a 'natural' family life. Moreover, the provision would have the effect of encouraging donors to 'abandon' their biological children. The Council refused to accept these arguments, demonstrating its view that there was no denaturalisation of family life through the simple transfer of embryos from one couple to another. In this way a traditional view of family life, linked to biological origins, was avoided.

With regard to the rights to health and to the development of one's personality, a similar naturalistic construction was also circumvented. Article 8 of Law no. 94-654 provides that where one couple receives the embryo of another the parties should not know their respective identities. This, the parliamentarians claimed, would have the effect of preventing children from knowing their true identity, thus violating their rights. Again, the Council rejected the argument maintaining its interpretation of the family constructed upon social rather than strictly genetic identity.

Thirdly, and once more demonstrating their attachment to the genetic origin of the embryo, the members of parliament asked the Council to recognise a (new) principle of

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[94] See the general discussion of the concept of family life in French law in Boulanger F., 'La vie familiale' in *Libertés et droits fondamentaux* eds. Cabrillac R., Frison-Roche M.-A. and Revet T., *supra* n. 79, 191-208.
[95] These rights are guaranteed under the preamble to the Constitution of 1946.
[96] The parliamentarians recognised that such a principle did not yet exist but sought its creation and transformation into a principle of constitutional value.
[97] The constitutional basis of this principle is discussed below, p. 160.

constitutional value of 'protecting genetic patrimony'. Once established, they suggested that the principle had been violated by Article 9 of the law on assisted conception in so far as this allows an embryo to be given to a couple other than that which created it, implying an unlawful attempt by gamete donors to reject their own genetic heritage. The Council, not surprisingly, refused to recognise the principle which was not present in any constitutional text. Thus, the claim was unfounded and the genetic origin of the embryo did not generate a constitutional violation on this point.

Finally, the principle of personal responsibility was raised by the parliamentarians in conjunction with the Law of 16 November 1912 on the establishment of natural paternity and Article 1382 of the Civil Code.[98] It was suggested that Article 10 of the law on respect for the human body violated the principle as it provides that in cases of assisted conception by donor, no parental link would be established between the donor and any resulting child. Thus, no action for responsibility could be brought against the donor. According to the authors of the constitutional challenge, this provision was unlawful as one cannot renounce responsibility for one's actions; to do so would be contrary to Article 1382 of the Civil Code. The Council responded, rather evidently, that the Law of 1912 was not meant to deal with assisted conception and that the renouncement of personal responsibility was not in and of itself unconstitutional. Thus, the wholesale rejection of the parliamentarian's claims suggests that the protection of the genetic bond between donor and child was not a priority in the reasoning of the Constitutional Council. 'Family' was not only to be interpreted in a natural, purely biological, sense.

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[98] Article 1382 of the Civil Code provides that individuals who through their own fault cause damage to another, are obliged to make good any loss ('*[t]out fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.*'). The principle does not have constitutional standing. However, the Law of 16 November 1912 might be considered as comprising a

b. The family: a UK perspective

As far as the UK is concerned, the construction of the family resulting from assisted conception has been defined by the legislature in a relatively clear manner.[99] The Human Fertilisation and Embryology Act 1990 devotes a whole chapter to the parental status of those using new reproductive technologies. This chapter offers a definition of the family which is similar to that elaborated by the French Constitutional Council. Thus, section 27(1) defines the legal mother as '[t]he woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs' while section 28 defines the legal father as her partner, provided that he consented to the process. As in France, the UK legislature has avoided a formulation of legal parenthood which is rooted in biological attachment, permitting the development of the notion of the family to take account of technological advances.

The UK definition, however, does have its limits, as has been demonstrated, for example, in the case of a 'family' comprised of the individuals X, Y and Z.[100] X, a female to male transsexual, brought an action under the ECHR together with his partner Y and their child Z (conceived through donor insemination) arguing that the refusal to register X as Z's legal father constituted a violation of their Convention right to respect for family life (the recognition being impossible under UK law as X remained female according to his birth certificate).[101] The European Commission of Human Rights found a violation of Article 8 ECHR, demonstrating an interpretation

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fundamental principle guaranteed by the laws of the Republic and could, therefore, form part of this component of the 'block of constitutionality' (see above, p. 17).

[99] This definition may, however, have to be rethought in the context of circumstances unimagined at the time the law was drafted, such as those in the examples discussed above of the parental status of internet sperm donors and that of donors whose gametes are used by mistake to treat other couples.

[100] *X, Y and Z v. United Kingdom* App. no. 21830/93, 27 June 1995.

[101] In English law, the birth certificate indicates the sex of an individual and may not be subsequently modified, even in the case of transsexuals: *Corbett v. Corbett* [1971] PR 83. The position might, now be reversed, however, due to the most recent findings of the European Court of Human Rights in the cases of *Goodwin v. UK* [2002] 35 EHRR 18 and *I v. UK* [2002] FCR 613 which, overturning previous rulings of the Court (see p. 85 above), found that the rule in *Corbett*, viewed in the light of changing social circumstances, did indeed violate Articles 8 and 12 ECHR. The response of the House of Lords in *Bellinger v. Bellinger* [2003] 2 All ER 593, declaring that English law on marriage (which stipulates that only two members of the opposite sex may marry and that sex for these purposes is determined at birth) is indeed incompatible with Convention rights, suggests evidence of a change in national judicial attitudes towards the legal determination of sex albeit that the responsibility for changing the law has now been handed from the courts to parliament. See Cowan S., '"That Woman is a Woman!" The Case of *Bellinger v. Bellinger* and the Mysterious (Dis)appearance of Sex: *Bellinger v. Bellinger* [2003] 2 All ER 593' (2004) 12 *FLS*, forthcoming, and further below p. 327.

of the notion of the 'family' which went beyond the UK legal definition of family ties.[102] However, once before the European Court, this finding was reversed and a more traditional reading of family life given, allowing the UK a considerable margin of appreciation to determine the law in this area in the light of a lack of European-wide consensus on both transsexualism and the use of new reproductive technologies.[103] That said, the UK legislature has been quicker to recognise the paternity of sperm donors in the case of *post mortem* assisted conception with the enactment of the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 permitting the deceased's name to appear on the birth certificate of any resulting children and further legitimating single parenthood in cases such as that of Diane Blood where the ghost of a father figure completes the nuclear family, on paper at least.

In conclusion, both UK and French systems demonstrate a formulation of family life which goes some way towards breaking with the traditional view of families constructed through marriage and biological ties, in recognition of the scientific advances being made in the area of assisted conception. That said, access to the new technologies, and thus the possibility of creating a non-traditional family unit, is circumscribed by the conditions which establish the profile of the ideal couple. In this regard, what remains to be investigated is the extent to which these constructions of the family, motherhood and fatherhood might constitute violations of the dignity of those discriminated against for their failure to live up to the ideal.

Defining the 'family' and respecting dignity Actions which without legitimate justification have the effect of selecting certain people over others for special treatment, may constitute discrimination. In view of this, it is suggested that the above constructions of family life in the context of assisted conception reveal practices which may violate respect for human dignity to the extent that it is viewed as a *'principe "matriciel"'* encompassing a prohibition on discrimination.[104] This is particularly so in the case of those women who do not fit the ideal profile for

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[102] *X, Y and Z v. United Kingdom* App. no. 21830/93, 27 June 1995.
[103] *X, Y and Z v. United Kingdom* (1997) 24 EHRR 143.
[104] For more general consideration of the relationship between the principle of non-discrimination and that of respect for human dignity, see Chapter 6 below. In this chapter, the discussion of the principle of non-discrimination is confined to the context of bioethical matters.

motherhood and are thus deselected. That said, it is apparent that, while the Constitutional Council and the UK parliament have been protective to some extent of the dignity of the human embryo, they have been far more cautious with regard to possible infringements of the dignity of women seeking motherhood.

a. Women's dignity: the French response

In its *Bioethics* decision, the Constitutional Council made no mention of the possibility of discrimination against certain women generated by the 1994 legislation. The conclusions which can be drawn about alleged dignity violations are, therefore, based upon a reading of the *lacunes* in the decision, that is what is not said or rather not contested in the legislation and, therefore, apparently accepted as constitutional.[105] While the principle of non-discrimination is not specifically identified by the authors of the constitutional challenge, they do employ its counterpart, the principle of equality, together with associated rights to family life, health and the freedom to develop one's personality. Such rights are, of course, entirely appropriate in any discussion of the legitimacy of new reproductive technologies. However, the parliamentarians instrumentalise them only partially – in so far as they apply them to the embryo or in their terminology the 'child' – and do not explore their impact on the other protagonists of the reproductive revolution, namely those seeking treatment. Consequently, nothing is said about the rights to equality, family life and personal development of those women refused access to services.

This silence reflects the orchestration of the constitutional debate around the pro-life concerns of the members of parliament. It should not, however, be taken to mean that no constitutional questions are in fact posed by practices of selection. It is possible, for example, to argue that Article 8 of the law on assisted conception and the conditions which it attaches to requests for maternity (being part of a heterosexual couple, in a stable relationship, of an age to procreate and infertile or capable of passing on a genetic disorder) constitute discriminatory practices. The Constitutional Council said nothing on the matter and yet, this is not because it is incompetent to explore issues which are not

put to it explicitly by those seeking a ruling. In this respect, the very principle of safeguarding human dignity introduced in the *Bioethics* decision was not suggested in any of the submissions of the constitutional challengers. Speculating on why the Council remained silent on the issue of the selection criteria to be operated between women seeking assisted conception and, thus, failed to explore the impact of these upon their dignity, it appears that the Council was reluctant to open up its new Pandora's box of human dignity. Most probably recalling the controversy which followed the *Parpalaix* decision and taking account of the lengthy parliamentary discussions which had preceded agreement on the law on assisted conception, together with being anxious that the vociferous claims being made by the parliamentarians on behalf of the foetus should be answered, the Council was reluctant to explore further the impact of its new principle, leaving untouched questions related to the right to family life and to the freedom to develop one's personality of those women who are excluded from treatment. While it did seek to establish a balance between the principle of individual freedom and other constitutional principle (notably that of safeguarding human dignity), no mention is made of freedom to access medical treatments. In emphasising respect for dignity (of the embryo) above individual liberty, the Council thus implicitly gave its stamp of approval to the legislative depiction of the heterosexual family unit as the most desirable destination for a child born of the new technologies.

A further, and more legal, explanation for the Council's timidity on this point may be found in its habitually narrow construction of the principle of equality which has been applied in the past only where there is no material difference between the situation of the individuals concerned.[106] Of course, what amounts to a material difference is not clear cut and may suggest a degree of deference to parliamentary views of appropriate differential treatment. The Council clearly does not view its role as one of protecting social minorities against the majority, as shown in its refusal to find any violation of the principle of equality in different legislative approaches to sexual offences committed by homosexuals and heterosexuals.[107] The acceptance of differential treatment based on sexual orientation might suggest why it is constitutionally legitimate to exclude lesbians from assisted conception services. It does not immediately explain, however, why the

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[105] Other *lacunes*, notably resulting in a lack of protection of the embryo, are explored by Bertrand Mathieu, 1994, *supra* n. 20, p. 1024.

[106] Bell J., 'Equality in the Case-Law of the Conseil Constitutionnel' [1987] *PL* 426-446, at p. 427.

exclusion of other social groups such as single women and older women is similarly lawful.

This reading of the Council's silence suggests that having created the principle of safeguarding human dignity, it was then reluctant to give it full force and explore its further applications in the bioethics context. It demonstrates an unawareness of the principle's dynamic potential and explains why its subsequent diffusion in French law has been so fluid and extensive with the lack of constitutional definition providing no means to reign in the excesses of the lower judicial orders. It suggests too the beginnings of the principle's interpretation as a universal and objective value linked more closely to respect for the dignity of humanity (as represented by the fate of all embryos) than for that of the individual human person seeking to satisfy her own personal desire for motherhood.

b. Women's dignity: the UK response

Unlike the French bioethics laws, the UK's Human Fertilisation and Embryology Act 1990 underwent no form of constitutional review or check upon its human rights compliance prior to its entry into force. While the judiciary are able to examine the legality of individual decisions taken under the 1990 Act in review actions such as those discussed above in the cases of *Seale* and *Blood*, this is really no substitute for wholesale constitutional review. Yet, the fact that this did not occur in 1990 does not mean that it is impossible in the future. The constitutional horizons of UK law have been transformed by the introduction of the Human Rights Act 1998 and it seems appropriate, therefore, to verify the conformity of the law on assisted conception with the rights and freedoms set out in the ECHR many of which, it has been noted above,

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[107] Decision no. 80-125 DC of 19 December 1980, *Repression of rape.*

are broadly concerned with respect for human dignity.[108] The question is, therefore, one of what happens when the reproductive revolution meets the rights revolution?[109]

There are, in fact, a number of potential incompatibilities between the 1990 legislation, notably the selection criteria established by section 13(5), and Convention rights, particularly Articles 8 (respect for family life), 12 (the right to marry and found a family)[110] and 14 (the principle of non-discrimination). In speculating what the UK judiciary might make of such claims of incompatibility it should be recalled that they are obliged to interpret legislation as far as possible in accordance with the decisions of the Strasbourg institutions. Looking at this in the context of reproductive technologies, it is helpful to return to the decisions of the European Commission and Court in the case of *X, Y and Z.*[111] It will be recalled that the European Commission of Human Rights had found that a familial relationship existed between the parties and the Court accepted that the claimants were a *de facto* family even if it did not agree with the Commission's finding of a violation of the right to family life on the basis that knowledge in the area of transsexuality and biotechnologies was in a state of flux and the use of the latter still sufficiently new and innovative to justify giving states a wide margin of appreciate to regulate as they saw fit. It is clear, however, that the factual situation surrounding this case with its exotic combination of transsexualism and biotechnology is not repeated in many disputes over access to assisted conception services and that such an extensive margin of appreciation might not be as appropriate in other less inhabitual circumstances. Moreover, times change. Not only has the European Court recently revised its attitudes towards the rights of transgendered persons,[112] but the year 2003 marked the 25th anniversary of the birth of the first test-tube baby and it is, therefore, hardly appropriate to continue to speak of these

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[108] From a comparative point of view it should be noted that the review of the compatibility of national legislation with international legal norms does not fall within the remit of the functions of the Constitutional Council which is competent only to review the conformity of legislation with those norms making up the 'block of constitutionality': Decision no. 74-54 DC of 15 January 1975, *Abortion.*

[109] See further Millns S., 'The Human Rights Act 1998 and Reproductive Rights' (2001) 54 *Parliamentary Affairs* 475-493, and below, pp. 178-185, regarding the conformity of UK legislation on abortion with the Human Rights Act 1998.

[110] The European Commission of Human Rights has left open the possibility that these rights might be separable: *X v. Belgium and the Netherlands* 1977, DR 7, p. 75. See the discussion of the dissociation of marriage and reproduction by Renucci J.-F., *Droit européen des droits de l'homme* 3rd ed. (Paris: LGDJ, 2002) p. 152. It is accepted that the argument of an alleged violation of Article 12 may be less convincing than that of a violation of Article 8 in so far as the right to marry and found a family is guaranteed only in accordance with national laws governing the exercise of these rights.

[111] See above pp. 161-162.

techniques as innovative. Thus, judges faced in future with a claim by a single, aged, lesbian or disabled woman of discriminatory treatment and a consequential violation of Convention rights will have to take this seriously and consider it in the light of changing technological and social circumstances. Furthermore, it deserves to be reiterated that discriminatory acts which have the effect of operating an unjustifiable selection between persons may well undermine the dignity of those who are thereby marginalised and excluded. The fact that respect for dignity is one of the fundamental objectives of the ECHR means that it has to be read into an interpretation of all Convention rights. When reviewed alongside these shifts in perspective, section 13(5) starts to look less constitutionally secure in terms of its compatibility with fundamental rights than it did when first introduced in 1990.

3.2 Law, dignity and the foetus

It may appear that it is bioethical issues which have tended to monopolise dignity discourse in law, given that they have been, at least in the French case, the point of departure for the wider diffusion of dignity into the legal system. However, the debate on dignity does not stop with a consideration of its respect *vis-à-vis* the embryo. Legal discussion on beginnings of life issues commenced well before the introduction of new reproductive technologies, being conducted in the context of questions related to the status of the foetus, the legal protection accorded to it and the consequent possibility of lawful abortion. This area too reveals important concerns about respect for human dignity given that, as has been seen earlier in this chapter, a key component of the principle is precisely the safeguarding of the fundamental right to life. Moreover, the question of when life is sufficiently developed to merit legal protection becomes more important when applied to the foetus rather than the embryo due to its being at a further stage of development and thus closer to achieving its potential status of full human being.

Yet, the question of respect for foetal dignity remains problematic since the foetus does not develop independently and, therefore, any right or interest it holds has to be

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[112] See *supra* n. 101.

balanced with the rights of the woman in whose body it lives and whose dignity also deserves respect. The remainder of this chapter, therefore, considers the extent of the relationship between law, abortion and human dignity, first of all with regard to the conditions attached to lawful abortions in France and the UK, and secondly in the more specific context of 'therapeutic' abortions in so far as these interrelate with 'wrongful life' claims made by severely disabled children who argue that they should never have been born at all.

3.2.1 Abortion

In the UK and France abortion is lawful provided certain conditions are met. However, while partial decriminalisation of abortion may be a common feature, there remain important distinctions in the legal approaches adopted by the two countries. As in the case of bioethics, the UK perspective is intimately linked to a medical and scientific view of abortion. In France, however, this is not the case, particularly as far as early abortions are concerned. Instead, as one might expect from a country with a strong tradition of safeguarding constitutional rights, the discourse is orientated around individual freedom, notably that of the woman. First under consideration, therefore, are the differences between the legislative and jurisprudential conditions for abortion in the two countries. These are then examined for their variable impact upon respect for human dignity.

3.2.1.i Diverging legislative and jurisprudential histories

Considering abortion within the framework of this chapter, it goes without saying that abortion is envisaged in the context of respect for life in so far as this is understood as an essential component of respect for human dignity. That said, neither French nor UK law explicitly accepts that the foetus benefits from any special protection of its dignity, although both attribute to it a number of interests which augment during the course of its development. This resemblance, however, cannot hide the major differences between the two countries with regard to the ways in which the foetus is legally protected and which are in perfect harmony with their respective legal

cultures. On the one hand, UK law, with its lack of grand constitutional principles, demonstrates a tendency on the part of legislators and the judiciary to defer to medical and scientific opinion on the question of foetal viability and has made this a key moment with regard to foetal protection, thus augmenting the power of doctors and diminishing female autonomy.[113] On the other hand, in France, there is less deference by law to science and a greater attachment to legal principles such as individual liberty and the respect for life from the moment it begins. This fundamental difference between the two countries is founded in their legislation and confirmed in their case law.

Legislative approaches with differing foundations It has been observed above that one aspect of the Human Fertilisation and Embryology Act 1990 was to modify the law on abortion in Britain.[114] This surprising inclusion shows, however, how both sides of the reproductive coin – seeking maternity and trying to avoid it – are ultimately linked. In both the reform of abortion law and the new legislative measures on reproductive technologies, parliament was seduced by the medical discourses which frame the opposing poles of human procreative choices.

Thus, section 37 of the 1990 Act, modifying the Abortion Act 1967, introduced a regime which is both more and less restrictive than that which it replaced: more restrictive in reducing the time limit in which most abortions can be performed (to 24 weeks), and less restrictive with regard to the rest (which are possible up until the moment of birth). In order to understand properly the motivation and the effects of this reform, it is necessary to revisit the Abortion Act 1967 which decriminalised abortion and marked a turning point in the history of its regulation in Britain.[115]

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[113] See Sheldon S., *Beyond Control: Medical Power and Abortion Law* (London: Pluto Press, 1997).

[114] See pp. 133-134.

[115] The Abortion Act 1967 does not apply in Northern Ireland where abortion remains a criminal offence in most cases. The situation is governed by the common law as established in the case of *R v. Bourne* [1939] 1 KB 687, according to which abortion is permissible only if performed in good faith in order to save the life of the woman (as *per* section 1(1) of the Infant Life (Preservation) Act 1929) in terms of averting the risk that without a termination the woman would become a 'physical or mental wreck'. A judicial review application brought by the Family Planning Association before the Northern Irish High Court challenging the clarity of this requirement for its capacity to elucidate properly when terminations are legal under the common law rules, was unsuccessful, the court finding that while the law was difficult to apply it was not in itself unclear: *Family Planning Association Of Northern Ireland, Re An Application for Judicial Review* [2003] NIQB 48. See Fegan E.F. and Rebouche R., 'Northern Ireland's Abortion Law: The Morality of Silence and the Censure of Agency' (2003) 11 *FLS* 221-254, at pp. 226-237.

Before this time, abortion was criminalised by a combination of two laws: the Offences Against the Person Act 1861, which sanctions any act intended to procure a miscarriage, either by the woman herself (section 58) or by another (section 59), and the Infant Life (Preservation) Act 1929 which creates the offence of 'child destruction'. Section 1(1) of the latter is important in that it establishes the definition of the offence as the intentional destruction of the life of a child 'capable of being born alive'.[116] This phrase is amplified in section 1(2) which provides that if a woman has been pregnant for 28 weeks or more this is *prima facie* proof that the child is capable of being born alive.[117] The presumption is rebuttable in that proof may be brought that a child of *less* than 28 weeks is, nevertheless, so capable. It is, therefore, at this point that the crystallisation of British abortion law around the notion of foetal viability begins.

That said, the Abortion Act 1967 does not mention the word 'viability'. This is hardly surprising given UK legal tradition. There is no attempt in the 1967 Act to introduce any general or foundational principle in the style of French legislation with its core commitment to the principle of protecting life from the moment it begins. The legislature, instead, was content to set out the situations in which abortion would be decriminalised. Thus, in 1967, the conditions for lawful abortion were inscribed in section 1(1) of the Abortion Act which provided that terminations were legitimate when authorised by two registered medical practitioners who were of the opinion that one of a number of justificatory circumstances existed: (i) that the risk to the physical or mental health of the woman would be greater were she to continue the pregnancy than to abort; (ii) that there was a risk to her life; and (iii) in case of serious foetal handicap. These conditions had to read in conjunction with the laws of 1861 and 1929, as beyond their restrictive circumstances, abortion remained unlawful. Once again at this point the idea of viability reappeared. In practice, when the pregnancy had progressed beyond its 28th week, abortion was always unlawful under the earlier legislation.

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[116] Section 1(1) reads: '...any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of a felony, to wit, of child destruction...'.

[117] Section 1(2) of the Infant Life (Preservation) Act 1929 Act states that: 'For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive.'

Subsequently, as a result of the progress of medicine and science, foetal viability became possible at an earlier stage in pregnancy, around 24 weeks, and it was to accommodate this progression that the law was modified in 1990. Hence, the 1990 amendment expressly introduced the 24 week time limit as the period in which abortion would henceforth be lawful where the continuance of the pregnancy involved risk, greater than if it were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family.[118] Beyond these circumstances, abortion remains possible in three cases and may be performed up until the moment of birth: (i) to prevent grave permanent injury to the physical or mental health of the woman;[119] (ii) in case of risk to her life;[120] or (iii) where there is a substantial risk of serious foetal handicap.[121] Furthermore, the reform did not affect the condition of medical agreement to the abortion. The doctor remains protagonist of the affair, retaining decision-making power with regard to both clinical factors, such as the health of the foetus, as well as social indicators. In this legislative approach, therefore, there is little space for a discourse founded upon the individual freedom of the woman or even for rights discourse at all.

Viewed alongside the medical model of the British legislation, the French legislation on abortion presents a stark contrast. This is because Law no. 75-17 of 17 January 1975 contains in its very first article, the general principle upon which the law is founded: that of respect for life from its beginnings. One might immediately think that the legislation is in this respect somewhat misleading. After all, if its founding principle is that of respect for life, how can abortion be lawful at all? The answer lies in the fact that no definition of the moment at which life begins is given. Instead, the statute, like its British counterpart, goes on to outline the legal conditions for abortion demonstrating a compromise between the interests of pregnant woman and foetus. In the French case the balance, at least in the early weeks of pregnancy, swings in favour of the woman[122] leaving commentators to suggest that the legislation has 'placed the

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[118] Section 1(1)(a), Abortion Act 1967, modified by section 37, Human Fertilisation and Embryology Act 1990.
[119] Section 1(1)(b), Abortion Act 1967.
[120] Section 1(1)(c), Abortion Act 1967.
[121] Section 1(1)(d), Abortion Act 1967.
[122] On the right to refuse to reproduce in France, see Robert J. and Duffar J., *Droits de l'homme et libertés fondamentales* 7th ed. (Paris: Montchrestien, 1999) pp. 239-246.

decision to abort in the field of the woman's private life.'[123] The contextualisation of abortion in the domain of fundamental rights in France is, therefore, profoundly different from the medical framework which encircles the British legislation.

In France, a woman may choose an abortion during the first 12 weeks of pregnancy where she deems herself to be in a situation of 'distress'.[124] Again this demonstrates a difference of approach compared to Britain, with the woman in France being much more mistress of her own destiny that her cross-Channel counterpart – it is she alone who assesses her situation. Even if there is a requirement that she be medically informed and socially advised,[125] she cannot be prevented from carrying out her decision to terminate a pregnancy either by a doctor or the putative father. Hence, although the Code on Public Health provides for the optional participation of both members of the couple in the consultation and decision-making process, its object is not to prevent an adult woman from determining herself if her situation justifies the termination.[126] The final decision remains hers alone. She is not submitted to the same degree of medical control as a British woman seeking a termination who may be delayed or prevented from pursuing her aim by the actions of a consultant who refuses to confirm the necessity of the abortion. French women, thus, benefit from a greater capacity to make their own reproductive choices during this preliminary phase of pregnancy in which the discourse of individual liberty prevails. This conclusion deserves to be tempered, however, with the observation that the discourse of fundamental rights shifts towards a more medicalised approach in the case of foetal handicap. In this case, French law, like the British, reverts to a consideration of the

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[123] Robert J. and Duffar J., *ibid.*, p. 242.

[124] The Law of 1975 introduced a 10 week time limit in which a termination could be performed upon a pregnant woman who found herself in a situation of distress. The limit was extended to 12 weeks by Article 2 of Law no. 2001-588 of 4 July 2001 on abortion and contraception which modifies Article L. 2212-1 of the Code on Public Health. See below, pp. 176-178, for discussion of the constitutionality of this reform.

[125] Article 4 of Law no. 2001-588 of 4 July 2001 on abortion and contraception has revised Article L. 2212-3 of the Code on Public Health to the effect that during her first medical visit the woman is to be given information (a '*dossier-guide*') on the implications of continuing with the pregnancy. Article 5 of the same law abolishes the obligation to undergo counselling, at least for adults (see further below, p. 178). Following the work of Michel Foucault, Dominique Memmi makes some interesting observations on this question, arguing that the decriminalisation of abortion has been accompanied by other procedural measures (such as medical consultations and social interviews) which constitute a more subtle form of state control or 'surveillance' over the body: Memmi D., 'Faire parler: une nouvelle technique de contrôle des corps? L'exemple de l'avortement' *D* 2001, special issue, 20, 78-89.

[126] CE, Ass., 31 October 1980, Rec. 403, D jur. 1981, 38, conclusions by B. Genevois.

views of medical experts who, in the final instance, determine the gravity of the handicap.[127]

Jurisprudential approaches which confirm the differing foundations The diverse legislative approaches to abortion discussed above are confirmed in judicial decisions in cases concerning abortion in the two jurisdictions. Thus, in Britain, there is a continued deference shown by the judges to medical opinion and in France, a preference for applying fundamental rights and the principle of respect for life, but again with no attempt made to define when this starts.

With regard to the medicalised approach demonstrated in British case law on abortion, there are two decisions in particular which show judicial submission to medical knowledge. In the discussion above on the development of the British law on abortion before 1990, it was noted that abortions were lawful only when carried out at the pre-viability stage and that viability, according to the Infant Life (Preservation) Act 1929, is presumed at the 28th week of pregnancy. Yet, it should be recalled that the presumption is rebuttable and doctors, prior to the legislative amendment of 1990, had begun to wonder about their criminal liability were they to terminate a pregnancy of less than 28 weeks duration where the foetus was, nonetheless, thought to be viable.

It is evident that judges, faced with the question of the legality of abortions carried out before the 28th week of pregnancy, have shown considerable concern to respect the views of doctors on the issue of viability.[128] Thus, in the case of *C v. S*,[129] the Court of Appeal, following an earlier ruling refusing to allow a putative father to prevent his former girlfriend from having an abortion, held that the termination would in any event be lawful as the foetus was in its 18th week of development and was not yet

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[127] This aspect of the medicalisation of French law is revisited below, p. 185 and p. 191, in the context of the disputed right of a severely disabled child not to be born.

[128] To be lawful, a consultant's decision must be in accordance with 'a responsible body of medical opinion': *Bolam v. Friern HMC* [1975] 2 All ER 18. See further the discussion by Sally Sheldon of the way in which this opinion may be constructed in opposition to women's interests: '"A Responsible Body of Medical Men Skilled in that Particular Art...": Rethinking the *Bolam* Test' in *Feminist Perspectives on Health Care Law* eds. Sheldon S. and Thomson M., (London: Cavendish Publishing, 1998) 15-32.

[129] *C v. S* [1987] 1 All ER 1230.

viable according to medical opinion. The same approach is to be found in *Rance*.[130] Asked to determine whether the claimant, the mother of a child born handicapped as a result of negligence by doctors in failing to ascertain that her foetus was suffering from spina bifida, was entitled to damages from the Area Health Authority, it was found that she was not so entitled given that the ultrasound scan which had been carried out to discover the abnormality had taken place at about 26 weeks by which time an abortion would have been unlawful.[131] Consequently, the British judiciary, in the absence of any guiding general legal principle, have based their decisions upon medical views as to foetal viability, rendering this a decisive factor in determining the outcome of cases on abortion.

Turning now to the French judicial approach, again it can be noted that this has developed hand in hand with the legislative construction of abortion based upon a discourse of fundamental rights. Moreover, the approach is uniform across the different constitutional, administrative and criminal jurisdictions which have been called upon to decide issues concerning abortion and the legal status of the foetus. First of all, from a constitutional perspective, the Constitutional Council was asked in 1975 by a group of parliamentarians to examine the constitutionality of the newly proposed legislation on abortion, it being argued that the law violated the right to respect for life of the unborn child (a claim which was founded upon Article 2 ECHR).[132] The Council, in denying the claim, found that the legislation was compliant with the Convention given that its first Article set out the principle of respect for human life. Nevertheless, the Council refused to pronounce directly upon the constitutionality of the legislative conditions permitting abortion and, thus, on the question of the relative superiority of the ECHR *vis-à-vis* the statute. On the contrary, it was found that the task of ensuring respect for Article 55 of the Constitution (which sets out the principle of superiority of international over national law) did not fall within the remit of the constitutional review of legislation (as *per* Article 61 of the Constitution).

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[130] *Rance v. Mid Downs Health Authority* [1991] 1 All ER 801.

[131] On this point it should be noted that the 1990 reform has extended the possibility of abortion in the case of serious foetal handicap up until the moment of birth (section 1(1)(d), Abortion Act 1967, modified by the Human Fertilisation and Embryology Act 1990). Prior to 1990, the threshold of viability, presumed at 28 weeks, as the criterion for a legitimate termination applied to abortions on all grounds.

[132] Decision no. 74-54 DC of 15 January 1975, *Abortion*.

The Council went on subsequently to confirm the constitutionality of Articles 37 and 38 of Law no. 93-121 of 27 January 1993 which repealed provisions in the Penal Code criminalising women who procured their own miscarriage. Giving as its justification the principle of constitutional value of respect for all human beings from the moment life begins (set out in the 1975 decision), the Council in Decision no. 92-317 DC of 21 January 1993 confirmed that the decriminalisation of abortions carried out by women upon themselves did not violate constitutional principles.

Beneath the level of constitutional law, the *Conseil d'Etat* has confirmed that the distribution and administration of RU 486, the 'abortion pill', is not contrary to Article 2 ECHR.[133] In rendering this decision, the highest administrative court has shown the extent to which French abortion law is compatible with fundamental rights, notably the individual liberty of the pregnant woman. Moreover, the criminal chamber of the *Cour de cassation* has adopted a similar approach in refusing to view the foetus as a legal subject. As noted above, the court overturned a decision of the *Cour d'appel de Lyon* of 13 mars 1997, which found a doctor guilty of involuntary homicide (under Articles 319 of the old, and 221-6 of the new, Penal Code) for negligently provoking an abortion, one of the conditions required by Article 221-6 being that the victim should have legal personality. The foetus, it was decided, did not have this status as it was not yet born.[134]

In conclusion, both French judges and legislature, like their British counterparts, have acted in harmony to ensure that national discourses on abortion are oriented around a single axis. In the French case, the discourse of fundamental rights and, notably the individual liberty of the woman, has largely prevailed. On the contrary, in Britain, medical discourse fills the vacuum left by the absence of any foundational principle in the 1967 and 1990 legislation. The consequences of this diversity of approach are noteworthy with regard to their impact upon the requirement to respect human dignity. The founding of the French legislation upon the principle of respect for life

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[133] CE, 21 December 1990, D jur. 1991, 283, note by P. Sabourin; RUDH, 1991, 13, note by H.R. Ruiz Fabri.

[134] CA de Lyon, 13 March 1997, D jur. 1997, 557, note by E. Serverin; Cass. crim., 30 June 1999, D jur. 1999, 710, note by D. Vigneau; D chron. 2000, 181, note by G. Roujou de Boubée and B. De Lamy. The approach has been confirmed by later cases: Cass. ass. plén., 29 June 2001, D jur. 2001, 2917, note by Y. Mayaud and Cass. crim., 25 June 2002, D jur. 2002, 3099, note by J. Pradel. See above, pp. 45-46.

from the moment it begins is strictly in accordance with the dignity principle in so far as this encompasses a commitment to the sanctity of human life. It is, however, difficult to identify a similar component in British law, deferential as it is to medical power and authority. It is, therefore, to a consideration of the dignity issues raised by the divergent Anglo-French approaches to abortion law that we now turn.

3.2.1.ii Dignity and the foetus: the consequences of a diversity of approach

As in the case of bioethics, the link to dignity in the sphere of abortion lies in the respect accorded to human life, whether that of embryo or foetus, both of which can be viewed for their (potential) belonging to humanity. The link can be made too with regard to other actors notably, in the case of abortion, the pregnant woman whose dignity interest lies in respect for her personal autonomy and capacity to determine her own reproductive future. The constitutional significance of the relationship between law, abortion and dignity deserves also to be highlighted given the construction of dignity as an entry point into human rights discourse which has resulted from constitutional review of legislation in France and which may now result from the review processes of a similar (albeit more implicit) nature carried out in the UK context under the Human Rights Act 1998. To what extent, therefore, do French and British laws on abortion respect human dignity when this is constructed as a matter of constitutional importance and human rights compliance?

Dignity, abortion and French constitutional law The Constitutional Council has affirmed the constitutionality of French abortion law when checking the constitutional conformity of Law no. 2001-588 of 4 July 2001 on abortion and contraception which modified the 1975 abortion law by augmenting from 10 to 12 weeks the period in which an abortion may be carried out for reason of the distressed state of the pregnant woman.[135] In Decision no. 2001-446 of 27 June 2001, the constitutional judges found

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[135] Decision no. 2001-446 DC of 27 June 2001, *Abortion and contraception I.* See Nicolas G., 'Constitutionnalité de la loi allongeant le délai légal d'interruption volontaire de grossesse' *D* jur, 2002, 24, 1948-1949. The request for a ruling was made by a group of senators on the basis of Article 61 of the Constitution. This did not prevent an attempt to secure a ruling by a group of members of the National Assembly on 29 June 2001. The Constitutional Council, however, having already given its judgment in the case of the senators, refused to examine this second request: Decision no. 2001-449 DC of 4 July 2001, *Abortion and contraception II.*

explicitly that the extension did not destabilise 'the balance which respect for the Constitution imposes between, on the one hand, safeguarding human dignity from any form of degradation and, on the other, the freedom of the woman which results from Article 2 of the Declaration of the Rights of Man and the Citizen.'[136] Moreover, the Council found that the legislation introduced no eugenic practices (characterised as practices designed to organise selection between individuals) and that the legislature had avoided any abusive interpretation of legal principles such as respect for human life from its beginnings.

The decision of the Council gives a clear response to the suggestion of the senators, authors of the constitutional challenge, that the increase from 10 to 12 weeks risked bringing about eugenic practices. The modification, it was suggested, touched upon an important stage in the development of the foetus, marking the point at which it passed from being an embryo to an unborn child. At this moment the foetus became a 'potential person' (*'personne humaine en puissance'*) and entitled to benefit from increased legal protection. From a comparative perspective, it is interesting to note the way in which the Constitutional Council, contrary to the British approach, rejected this form of argument grounded in biology and medical knowledge, preferring to remain firmly in the legal sphere of human rights guarantees. The Council also refused to accept the senators' rather contradictory argument that an application should be made of the precautionary principle, in the guise of constitutional objective, arising from the obligations incumbent upon the legislature to exercise caution in the absence of medical consensus on these issues. The argument is confusing in that, on the one hand, it is based upon the statement of a biological reality as to the stages of foetal development while, on the other, accepting an absence of agreement in medical opinion on this point. In fact the Constitutional Council avoided all medicalised discussion entirely in refusing to recognise the precautionary principle as an objective of constitutional value. Instead, it remained firmly wedded to the reasoning set out in its abortion decision of 1975 confirming once again the constitutionality of the principle of respect for all human life as set out in Article 1 of the 1975 abortion law.

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[136] *'[L'extension du délai ne romp pas] l'équilibre que le respect de la Constitution impose entre, d'une part, la sauvegarde de la dignité de la personne humaine contre toute forme de dégradation et,*

It is not, however, only the dignity of the embryo which needs to be considered here. Implicitly, the dignity of the woman seeking an abortion is respected through the constitutional protection of her freedom to choose a termination which accords with the guarantee of individual liberty in Article 2 of the Declaration of the Rights of Man and the Citizen of 1789. The introduction in Article 4 of the new legislation of a *'dossier–guide'* to be given to the woman during her first medical visit was, according to the Council, compatible with the woman's freedom in so far as it merely provided information on the rights, benefits and advantages guaranteed by the law to families, to mothers (single or married) and to their children, together with the possibilities of adoption. Moreover, Article 5 of the legislation regarding the 'social' consultation, offered prior to the taking of the decision on whether or not to terminate, was merely 'proposed' to adult women and only a requirement in the case of minors. Thus, the legislative changes continued to respect the necessary constitutional balance between the rights and interests of the foetus and pregnant woman.

The Constitutional Council showed, in this decision, therefore, not a deference to medical opinion, but rather to that of the legislature. It reconfirmed its view that it did not have the same powers when reviewing legislation as had parliament in adopting it and that it was incompetent to call into question legislative decisions taken on such matters.[137] This view demonstrates also a neat distinction in the margin for manoeuvre left to the French constitutional judges and that given to the UK judiciary since the introduction of the Human Rights Act 1998 in challenging the views of parliament. The latter, disposing of the power to declare legislation incompatible with the guarantees of the ECHR,[138] are now able to call into question legislation such as the Abortion Act 1967 in cases of non-compliance with human rights.

Dignity, abortion and the Human Rights Act 1998 It seems unlikely that the medicalised approach to abortion law adopted in the UK can be maintained in the wake of the changes brought about by the Human Rights Act 1998 which demand that closer attention is paid to the compatibility of UK legislation with fundamental rights.

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d'autre part, la liberté de la femme qui découle de l'article 2 de la Déclaration des droits de l'homme et du citoyen.' Ibid.

[137] Decision no. 74-54 DC of 15 January 1975, *Abortion*; Decision no. 94-343-344 DC of 27 July 1994, *Bioethics*; Decision no. 2001-446 DC of 27 June 2001, *Abortion and contraception I.*

[138] Section 4, Human Rights Act 1998.

It might be anticipated, therefore, that the medical framework will give way to an approach which is more like that adopted in France, founded upon principle and requiring the resolution of cases based specifically upon an interpretation of the human rights issues which they raise.[139] It is inevitable, given the controversial nature of the subject matter, that the judiciary will shortly be required to address the issue of the compatibility of abortion law with the rights guaranteed in the ECHR.[140] This in itself is not uncontroversial given that it means the judiciary can call into question measures which have been adopted following the democratic legislative process, raising longstanding issues about the politicisation of the judiciary and a lack of deference towards parliamentary authority through increased powers of judicial review.[141] What is striking from a comparative perspective above all else, is that the commitment to parliamentary sovereignty in the UK is able to accommodate this type of judicial intervention, while the Constitutional Council in France (whose very task is to review the constitutionality of parliamentary legislation) has drawn limits upon the extent to which it may interfere in matters falling squarely within parliamentary discretion.

However, given that this represents the new reality in the Human Rights Act era, then it is important to consider the extent to which current abortion law is compatible with ECHR requirements and all that these may entail in terms of respecting the rights which flow from considerations of human dignity. While it was noted above that, in

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[139] This is not to deny the importance of admitting a scientific perspective upon the evolution of regulatory measures in the area of biomedicine and human reproduction. Nevertheless, it is suggested that this perspective should be but one among many and, thus, ought not to be privileged to the extent that it is at present.

[140] Keith Ewing and Conor Gearty mooted this eventuality as early as 1992 following the decision of the European Court of Human Rights in *Open Door Counselling and Dublin Well Woman Centre Ltd and Others v. Ireland* (1993) 15 EHRR 244: Ewing K. and Gearty C., 'Terminating Abortion Rights (1992) 142 *NLJ* 1696-1698. The recent decision of the High Court to give the go-ahead for a judicial review action to be brought against a decision by the police not to prosecute doctors involved in a late abortion carried out on a woman whose foetus had a cleft palate (thus questioning whether this form of disability constitutes a 'serious handicap' under the Abortion Act), may be the first step in this process. See Dobson R., 'High Court Reverses Police Decision not to Prosecute over Abortion' (2003) 327 *BMJ* 1307 and also below, p. 182.

[141] McColgan A., *Women Under The Law: The False Promise of Human Rights* (Harlow: Pearson, 2000) pp. 29-31. Jeffrey Jowell contends that it is now no longer exact to envisage judicial deference to parliament as a matter of the courts' obligation to bow to the legislature on issues of public interest simply in recognition of the latter's superior constitutional status. In the new constitutional order, while it is suggested that judges are still correct to defer to parliament on matters of public policy and expediency, the question is rather now one of relative institutional competence; i.e. not '"Do the people want it?" but rather: "Does democracy need it?"'. See Jowell J., 'Judicial Deference and Human

France, the national courts (*Conseil d'Etat* and *Cour de cassation*) found no incompatibility between French law and the ECHR (especially Article 2), a similar solution may not necessarily flow from a UK examination of the compatibility between the Abortion Act and the Convention because, of course, the national legislation in the two cases is different. In certain respects the British legislation is more permissive (with regard to time limits, for example) while in others it is more restrictive (the need for two doctors to agree to the abortion and the territorial exclusion of Northern Ireland from the scope of the legislation). What might be anticipated, therefore, from an examination of the human rights compliance of the 1967 Act and how are dignity concerns to be measured in this analysis? The question touches notably upon the dignity of the foetus (through its right to life), that of the pregnant woman (through her right to respect for private life) and also that of other actors such as the putative father (through his right to respect for family life) and the personnel involved in the operation (through their right to respect for thought and conscience). Thus, the compatibility of abortion law with the Convention may be challenged on a number of fronts: an interference in (female) personal autonomy; unreasonable time limits; the contested legality of 'therapeutic abortions'; the unrecognised interests of putative fathers and conscientious objectors.

First, as far as personal autonomy is concerned, it might be argued that there is a violation of this fundamental liberty resulting from the necessity to obtain the consent of two registered medical practitioners to the abortion. Emily Jackson notes that this requirement is out of line with core doctrines of health care law such as self-determination and patient autonomy.[142] From a human rights perspective the question clearly raises issues about the extent of the right to respect for the private life of the pregnant woman, as discussed in the *Brüggeman* decision of the European Commission.[143] Moreover, it could be maintained that the requirement for authorisation, constructed in an absolute manner and applying, therefore, to first trimester abortions, is disproportionate to the interference in the woman's right. This line of reasoning is not so far removed from that of the Constitutional Council in its decision of 27 June 2001 on the reform of the French abortion legislation in which it

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Rights' in *Law and Administration in Europe: Essays in Honour of Carol Harlow* eds. Craig P. and Rawlings R., (Oxford: Oxford University Press, 2003) 67-81, at p. 80.

[142] Jackson E., 'Abortion, Autonomy and Prenatal Diagnosis' (2000) 4 *SLS* 467-494.

was held that the liberty of the woman prevailed over the principle of respect for life in the first 12 weeks of pregnancy.

Secondly, concerning time limits for abortions in Britain, it may be suggested, in favour of foetal dignity this time, that these are incompatible with Article 2 guaranteeing the right to life. Apart from abortions carried out for less serious health and social reasons which are subjected to a 24 week time limit, all other abortions based upon risk of serious and permanent injury to the woman, risk to her life, or serious foetal handicap, may be effected to term. Yet, it might be sustained that the nearer the decision to abort comes to the final stages of pregnancy, the greater the interests of the foetus and that after a certain point in time these become paramount over those of the woman.

This argument is particularly sensitive in the case of foetal handicap where there might not only be a violation of Article 2 (should foetal life fall within the scope of the provision) but also Article 14. This is on the basis that the possibility of a 'therapeutic' abortion in case of serious foetal handicap constitutes a form of discrimination against disabled persons.[144] Such abortions may be interpreted as a sign of the lack of value accorded to the disabled in society and might be a source of discriminatory attitudes towards all disabled people. Again a French analogy can be found in the decision of the *Conseil d'Etat* in the dwarf-throwing cases in which the *commissaire du gouvernement,* Mr. Frydman, underlined the importance of prohibiting the events to ensure respect for dignity and prevent a lowering of the esteem in which handicapped persons were held in society.[145] A further question concerns the nebulous interpretation of the requirement for 'serious' foetal handicap in order to justify a termination. The lack of clarity of British law on this point is currently the object of a judicial review action before the High Court in the context of

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[143] *Brüggeman and Scheuten v. Federal Republic of Germany* (1981) 3 EHRR 244.

[144] The arguments for and against this proposition are resumed by Lynn Gillan who remains unconvinced that there exists a violation of the principle of non-discrimination for the reason that it is impossible to establish a lack of respect for the handicapped through the practice of therapeutic abortions: Gillan L., 'Prenatal Diagnosis and Discrimination Against the Disabled' (1999) 25 *J Med Ethics* 163-171.

[145] CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence*, Rec. p. 372, conclusions by P. Frydman.

the supposed illegality of a late-term abortion carried out upon a foetus with a cleft palate.[146]

Thirdly, there may be a violation of Convention rights with regard to the position of a putative father who seeks to prevent a termination from taking place. Such claims in the national courts have fallen on deaf judicial ears in the past, notably in the cases of *Paton* and *C v. S*,[147] where it was held that the putative father had no role to play in the abortion decision and, therefore, had no legal rights in this regard. Viewed through the lens of the ECHR too, the European Commission, when called upon by Mr Paton to find an interference in his Convention rights, found that there was no violation of the right to respect for family life under Article 8 given the limitations upon this right, notably to protect the rights of others, such as those of the woman.[148] Given this case law history and the fact that no amendment was made to the British legislation in 1990 with regard to putative fathers' rights, it seems unlikely that the UK judiciary if asked to determine similar cases in future have any reason to amend their earlier position.

More open to dispute, however, is the question of the Abortion Act's compliance with the Article 9 guarantee of freedom of conscience. Under section 4 of the 1967 Act a person may not be obliged to participate in treatments authorised by the legislation where he or she conscientiously objects to the practice, except in a case of emergency.[149] This has been interpreted to include any person who participates directly in the abortion, such as the doctor and nurse,[150] but not ancillary personnel who are only indirectly concerned.[151] It has been suggested that it is with regard to this latter group of people that a challenge founded upon Article 9 might be brought.[152] This is on the grounds that there is little difference from the point of view

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[146] See *supra* n. 140. It is perhaps not without significance that the applicant, Reverend Joanna Jepson, has herself had a series of operations for congenital jaw abnormality.
[147] *Paton v. Trustees of British Pregnancy Advisory Service* [1978] 2 All ER 987; *C v. S* [1987] 1 All ER 1230.
[148] *Paton v. United Kingdom* (1981) 3 EHRR 408.
[149] Article 4 states that 'no person shall be under any duty whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection...'.
[150] *Royal College of Nursing v. Department of Health* [1981] 1 All ER 545.
[151] *Janaway v. Salford Health Authority* [1988] 3 All ER 1079.
[152] See Hammer L., 'Abortion Objection in the United Kingdom within the Framework of the European Convention on Human Rights and Fundamental Freedoms' (1999) *EHRLR* 564-575.

of the person expressing their objection between physical participation in the abortion itself and alternative types of assistance given at other stages in the process. Any involvement, in whatever form, would constitute a betrayal of one's conscience and belief.

Looking at the matter comparatively, Article L. 162-15 of the Code on Public Health which prohibits the imposition of obstacles to abortion, is reputed to be compliant with Articles 9 and 10 ECHR as these may be limited by measures necessary to protect health and the rights of others.[153] Similarly, in the British context, any limitation on the freedom guaranteed by Article 9 might be justified. The British legislation also aims to protect the freedom of women seeking to have an abortion, and the measure concerning the limited possibility of objection on the part of physical participants is designed to secure this objective. This is doubly important in Britain given the already more difficult access route to abortion resulting from the requirement to obtain the consent of two doctors. The legislation, thus, represents a balance between the rights and interests of all concerned arrived at as a result of parliamentary consensus. The fact that both freedom of belief and the right to private life might be interpreted as aspects of personal or individual dignity (rather than that of humanity in more general terms), both relating to the freedom to develop one's personality and ensure respect for identity and life choices, does not help matters since it merely demonstrates once more the capacity of dignity claims, like rights claims, to pull in all directions. It might well be that the difficult balance between these competing claims having been struck by parliament, the judiciary will be reluctant to reopen the issue and address the balance afresh.

There remains one final aspect of the law on abortion in Britain which might be challenged for its compatibility with the ECHR guarantees. This is the fact that the legislation does not apply in Northern Ireland where abortion has always been unlawful under the Offences Against the Person Act 1861, except in order to save the life of the woman.[154] The question is whether this situation, which results from Northern Ireland's particular cultural traditions, is compatible with the agency and

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[153] Robert J. and Duffar J., *supra* n. 122, p. 240.
[154] *R v. Bourne* [1939] 1 KB 687. See *supra* n. 115.

freedom of women living there, and thus their right to respect for private life.[155] It might be countered that the particular measures are necessary in a democratic society in order to protect morals in accordance with the second paragraph of Article 8. Nevertheless, the European Court of Human Rights refused to follow a similar argument in the context of the criminalisation of male homosexuality in Northern Ireland when it was lawful in the rest of the UK.[156] It would, therefore, seem that any argument which is founded upon the particularity of moral sentiment in Northern Ireland is outdated, in which case the Abortion Act may be arguably contrary to Article 8 on this point.[157]

The balance of this analysis of Convention compliance is mixed. On the one hand, some aspects of the abortion legislation seem too permissive and thus potentially violate the Convention: time limits which go beyond 28 weeks and foetal viability notably. Other aspects appear too restrictive which might also generate Convention violations: for example, the requirement of consent from two doctors and the situation in Northern Ireland. From a comparative perspective what is notable is the uncertainty and, therefore, fragility of the British position compared with the French. This results from the power of the judiciary to now question measures which have been established following substantial parliamentary debate together with the lack of clarity and prioritisation of the principles which frame this aspect of public health care law. While the Constitutional Council decided clearly that there was no violation of human dignity in the French abortion legislation, the comparatist can identify in the British approach only implicit inferences to the dignity of those concerned. Hence, although the conclusion of the Constitutional Council that there is no lack of respect for the dignity of the foetus might be contested on ethical grounds, its legal

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[155] The reconceptualisation of abortion as a matter of women's agency is advocated by Eileen Fegan and Rachel Rebouche as a way to move the Northern Irish abortion debate forwards, steering it away from its present polarisation as a matter of either foetal rights or women's reproductive health and towards proactively encouraging women to speak out in order to challenge the marginalisation of the pro-choice community: Fegan E. and Rebouche R., *supra* n. 115.

[156] *Dudgeon v. United Kingdom* (1982) 4 EHRR 149.

[157] Of course, in terms of practical politics, the difficulty of actually finding a 'victim' in Northern Ireland who would be willing to run with this argument before the courts and so expose herself to inevitable hostile public reaction should not be underestimated. This obstacle, along with those of the costs and delay involved in court action, lead Fegan and Rebouche to express no surprise at the lack of attempts to test the law before either the domestic courts or the European Court of Human Rights: *supra* n. 115, p. 230.

foundation in the principle of respect for human life, and thus the frame of reference for the juridical debate on abortion, is made abundantly transparent.

Yet, while French law provides a model in this regard, it is distinctly less clear in another area which touches upon abortion, individual freedom and discrimination. This is the highly controversial matter of 'wrongful life' actions or, in the terms often employed by the French debate, the 'right not to be born' which has been claimed by seriously handicapped children in order to obtain damages for the fact of their birth. In this area UK law appears a model of clarity when compared to the turbulent history reflected in the French approach. Thus, the final section of the present chapter concludes with a consideration of this sensitive issue in which the dignity concerns raised by the abortion debate generally are intensified and consolidated.

3.2.2 Wrongful life

Wrongful life actions are linked to the consideration of foetal life in so far as they involve a claim by a disabled child, represented by his or her parents, for damage caused as a result of a lack of information given to the parents regarding the existence or extent of foetal handicap during pregnancy. The suggestion is that had the mother known that the foetus suffered from a disability, she would have had an abortion. Thus, the issue relates more generally to the circumstances in which abortions are lawful for therapeutic reasons.[158] While both France and Britain admit abortion on this ground, the approach they have taken to the question of wrongful life actions has been very different. This perhaps explains why the subject has generated much interest amongst comparative lawyers.[159] In fact, comparing France and the UK, a

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[158] In France, these conditions, unlike those applying to abortion for reasons of the distressed state of the woman, are highly medicalised. See Sargos P., 'Réflexions "médico-légales" sur l'interruption volontaire de grossesse pour motif thérapeutique' *JCP*, 2001, I 322.

[159] Van Gerven W., Lever J. and Larouche P., *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford: Hart Publishing, 2000) p. 97; Markesinis B., *Always on the Same Path: Essays on Foreign Law and Comparative Methodology* vol. 2 (Oxford: Hart Publishing, 2001) pp. 79-101; Markesinis B., 'Réflexions d'un comparatiste anglais sur et à partir de l'arrêt *Perruche*' *RTDC*, 2001, 1, 77-102. The example of wrongful life actions, situated as it is at the heart of the law of obligations, demonstrates the difficulty of any attempt to harmonise national laws on civil liability. This would suggest support for Pierre Legrand's view, discussed in the Introduction above, that the harmonisation of private law is impossible given the differences in legal culture and traditions of the

paradox is revealed in the debates on wrongful life actions when viewed in the light of their respective legal traditions. While in France, contrary to the civilian tradition, the judiciary has been extremely active, in the UK it is parliament which has led the way with little judicial engagement. If ultimately, the conclusion reached in the two countries is the same – the handicapped child cannot succeed – the contorted route to achieve this in France demonstrates some of the difficulties associated with judicial activism in the civilian legal tradition and also suggests a multiplicity of dignity interests underpinning the debate.

3.2.2.i Diverging legislative and jurisprudential histories

Unlike 'wrongful birth' actions, that is those claims made by parents in order to compensate for the costs associated with the upbringing and education of a handicapped child, 'wrongful life' claims are notoriously tricky involving an assumption that the life of the handicapped child is not worth living and ought never to have been brought about. Given what this implies for the value placed upon human life, such claims need to be viewed in a broad moral and political context which might suggest that the most appropriate forum for debate is the legislative, rather than the judicial, arena. In the face of a legislative refusal to act, however, the history of wrongful life actions in France demonstrates something of the politics behind judicial activism which, for a time, resulted in wrongful life claims being accepted in the courts in order to respond to the overall concern that adequate social and financial provision should be made for handicapped children. Swiftly provoked by these highly controversial findings, the legislature intervened to clarify that wrongful life actions would not result in an award for damages, a conclusion which had long been arrived at in the UK, where a legislative prohibition on such actions, this time in harmony with jurisprudential pronouncement, had meant a much less heated and less complex disposal of the matter. Considering, first of all, the divergent backgrounds to the refusal to admit wrongful life claims in the two countries, the present chapter concludes by exploring their implications with regard to respect for the dignity of all concerned.

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common law and civil law (Legrand P., 'European Legal Systems are not Converging' (1996) 45 *ICLQ*

The UK approach: legislative and judicial harmony The prohibition in principle of wrongful life claims in the UK is born of a clear judicial and legislative consensus demonstrating a process of legislative consolidation of jurisprudential history. The Court of Appeal, in the case of *McKay and another v. Essex Area Health Authority*[160] was asked to uphold a claim for the wrongful life of Mary McKay, born severely disabled following the failure of doctors to diagnose the handicap, despite Mrs McKay having had rubella during the first weeks of pregnancy. The Court refused to do so reasoning that, while the doctor owed a duty to the pregnant woman to provide her with all information and to facilitate an abortion if necessary, he or she owed no correlative duty to the foetus to end its life.[161] The introduction of any such obligation would be contrary to public policy and would fail to respect the sanctity of life. In addition the Court added that the child had suffered no damage recognised in law through the fact of her birth.[162] The calculation of damages would, therefore be impossible.[163] Underlining approval of this solution in democratic form, the UK parliament one year later adopted the Congenital Disabilities (Civil Liability) Act 1976 which clearly confirms the inadmissibility of wrongful life actions.[164]

The French approach: legislative and judicial conflict There could be no better contrast to the harmonious picture painted by the UK approach to wrongful life claims than the French. Beginning, however, not dissimilarly to the UK position, an absence of legislation pushed the judiciary to intervene. It should be recalled, though, that the civilian legal tradition, unused to overt judicial activism, and having no equivalent of the explanatory decision-making techniques of the common law system (not to mention the possibility of airing dissenting opinions) demonstrated itself ill equipped

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52-81).

[160] *McKay and another v. Essex Area Health Authority* [1982] QB 1166.

[161] Whitfield V., 'Common Law Duties to Unborn Children' (1993) 1 *Med L Rev* 28-52.

[162] The harm was formulated as 'entry into a life in which her injuries [were] highly debilitating and [caused] distress, loss and damage' (*supra* n. 160, p. 1168).

[163] The Court found that it was impossible to quantify the damage resulting from living life as a disabled person (as opposed to having never been born).

[164] See Fortin J., 'Is the "Wrongful Life" Action Really Dead?' (1987) *JSWL* 306-313. There exists, however, an exception to the general principle in the case of medically assisted conception. Section 1A of the 1976 Act (introduced by section 44(1) of the Human Fertilisation and Embryology Act 1990) provides that civil liability may be engaged in cases of negligence resulting from the placing of an embryo or gametes in the uterus of a woman. See Morgan, *supra* n. 26, pp. 124-126.

to explain fully (both to lawyers and to the public at large) its rationale in permitting wrongful life actions.[165]

In a factual context which largely resembled that of the *McKay* case, the *Cour de cassation* found, for the first time, in its *Perruche* decision that a handicapped child should be compensated for the damage suffered as a result of his wrongful life.[166] Condemning the decision to the contrary of a 'rebellious' Court of Appeal,[167] the full assembly of the *Cour de cassation* sought to impose order and clarity upon the matter, but succeeded instead in causing controversy and attracting criticism both from lawyers (for the paucity of its legal reasoning),[168] and from doctors and the media (for the discriminatory and morally and socially unacceptable consequences of its decision).[169] Burying its head in the sand, the highest civil law jurisdiction went on to confirm the *Perruche* decision in a series of later cases, clarifying that the action was based upon Article 1382 of the Civil Code.[170] The message to the medical profession

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[165] See the observations of Basil Markesinis to this effect in 'Réflexions d'un comparatiste anglais sur et à partir de l'arrêt *Perruche*', 2001, *supra* n. 159, p. 88 and p. 96.

[166] Cass. Ass. Plén., 17 November 2000; *Epx X c/ Mutuelle d'assurance du corps sanitaire français et a. (affaire Perruche)*; rapporteur P. Sargos, conseiller à la Cour de cassation; conclusions by J. Sainte-Rose, avocat général à la Cour de cassation; JCP 2000, II 10438, note by F. Chabas. The literature on the case is extensive. See, for example, Aubert J.-L., 'Indemnisation d'une existence handicapée qui, selon le choix de la mère, n'aurait pas dû être (à propos de l'arrêt de l'Assemblée plénière du 17 novembre 2000)' *D* chron 2001, 6, 489-491; Aynès L., 'Préjudice de l'enfant né handicapé: la plainte de Job devant la Cour de cassation' D chron 2001, 6, 492-496; Cayla O. and Thomas Y., *Du droit de ne pas naître – A propos de l'affaire Perruche* (Paris: Gallimard, 2002); Edelman B., 'L'arrêt "*Perruche*": une liberté pour la mort?' *D* chron, 2002, 30, 2349-2352; Labrusse-Riou C. and Mathieu B., 'La vie humaine peut-elle être un préjudice?' *D* 2000, 44, III-IV; Mémeteau G., 'L'action de vie dommageable' *JCP*, 2000, I 279; Rancé P., 'Naissance, handicap et lien de causalité: interview de Denis Mazeaud' *D* 2000, 44, V-VI; Saint-Jours Y., 'Handicap congénital – erreur de diagnostic prénatal – risque thérapeutique sous-jacent (à propos de l'arrêt "P..." du 17 novembre 2000)' *D* chron, 2001, 16, 1263-1264; Salas D., 'L'arrêt Perruche, un scandale qui n'a pas eu lieu' *D* 2001, special issue, 20, 14-20; Terré F., 'Le prix de la vie' *JCP*, *Actualité*, 2000, 50, 2267-2268; Viney G., 'Brèves remarques à propos d'un arrêt qui affecte l'image de la justice dans l'opinion – Cass. Ass. Plén., 17 novembre 2000' *JCP*, 2001, I 286.

[167] Salas D., *ibid.*, p. 14. See also Florence Bellivier's comprehensive account of the chronology of the case law in this area: Bellivier F., 'Chronologie du contentieux relatif à la naissance d'un enfant handicapé' in 'La recherche sur l'embryon: qualifications et enjeux' *Revue générale de droit médical*, special edition, eds. Labrusse-Riou C., Mathieu B. and Mazen N.-J., (Bordeaux: Editions les études hospitalières, 2000) 67-87.

[168] See, for example, Labrusse-Riou C. and Mathieu B., *supra* n. 166.

[169] Salas D., *supra* n. 166, p. 14. The title of Salas's article is designed to show the extent to which the *Cour de cassation*, in spite of the opposition of public and legal opinion to its decision, refused to accept that its judgment constituted a 'scandal'. A view to the contrary, however, is expressed by Yves Saint-Jours, *supra* n. 166.

[170] Cass. ass. plén., 13 July 2001; *Epx X c/ M Y et autres* (Juris-Data no. 010621); *Epx X c/ M Y et autres* (Juris-Data no. 010622); *Consorts X c/ M Y et autres* (Juris-Data no. 010623); rapporteur Blondet, conseiller à la Cour de cassation; conclusions by J. Sainte-Rose, avocat général à la Cour de cassation. See JCP, *Actualité*, 2001, 30, 1482; D jur. 2001, 2325, note by P. Jourdain and 'La cour de cassation confirme sa "jurisprudence Perruche" tout en la nuançant', *Le Monde*, 14 July 2001, p. 8. In

was that a failure to advise the pregnant woman correctly as to the health of her foetus would result in a finding of liability.

Criticisms of the *Perruche* decision were formulated as much in legal as in ethical terms. From a legal point of view, a problem lay with the conditions for engaging civil liability (as identified clearly by the Court of Appeal in *McKay*). What exactly was the 'fault' of the doctor, the 'damage' to the child, and the causal connection between them? The *Cour de cassation*, in its extremely brief decision, simply stated that:

> 'once the faults committed by the doctor and the laboratory in the execution of the contracts concluded with Mrs X prevented her from exercising her choice to have a termination in order to avoid the birth of the handicapped child, the latter may claim reparation of the damage resulting from this handicap and caused by the said faults.'[171]

Thus the fault, a failure by the doctor in the duty to provide information, is linked to the damage suffered by the child, resulting from the handicap rather than the birth. Formulated in this way, the Court refused to admit that the harm lay with the fact of being born and, on the contrary, awarded the indemnity for the harmful consequences of the birth, thus converting a 'shocking logical impossibility (to rectify an unfortunate birth) into a credible juridical link between credit and debt'.[172]

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the three cases, the *Cour de cassation* refused to grant indemnities to the handicapped children as, contrary to the *Perruche* case, it was required that each child prove that the handicap was in direct causal relation to the faults of the doctor in executing the medical contract with the mother and that these had prevented her from exercising her choice to terminate the pregnancy. Furthermore, a reminder was issued that abortion for reason of therapeutic necessity had to comply with the medical conditions set out in Article L. 2213-1 of the Code on Public Health. In all three cases, the *Cour de cassation* held that the lower courts of appeal, having found that such requirements had not been properly satisfied, were right to reject the claims. See also Cass. ass. plén., 28 November 2001; *Epx X c/ Dr Y* (Juris-Data no. 00-11.197); *Epx X c/ Dr Y et autres* (Juris-Data no. 00-14.248).

[171] *'...dès lors que les fautes commises par le médecin et le laboratoire dans l'exécution des contrats formés avec Mme X avaient empêché celle-ci d'exercer son choix d'interrompre sa grossesse afin d'éviter la naissance de l'enfant atteint d'un handicap, ce dernier peut demander la réparation du préjudice résultant de ce handicap et causé par les fautes retenues.'* Cass. ass. plén., 17 November 2000; *Epx X c/ Mutuelle d'assurance du corps sanitaire français et a. (affaire Perruche).*

[172] *'[Transformant une] impossibilité logique choquante (celle de réparer une naissance malheureuse) en un rapport juridiquement pensable de créance et de dette'.* Salas D., *supra* n. 166, p. 15.

The reasoning of the Court, reduced to the assertion of a clinical line of cause and effect, may seem shocking to a common lawyer more used to seeing in judicial decisions an often long and tortuous explanation of the facts and legal issues posed together with the logic of their resolution.[173] Interesting from a comparative perspective, however, is a similar outrage amongst French lawyers at the shallowness of the Court's reasoning which made the decision impossible to comprehend in legal terms.[174] Of course, the *Perruche* judgment is really founded upon the worthy policy objective of providing support for handicapped children, but the attempt to hide this under the thin veneer of a literal reading of Article 1382 of the Civil Code made a mockery, some suggested, of the image of justice in France.[175] In an attempt to restore this image, to quell the audacity of the *Cour de cassation* and to end legal, political and moral controversy, the government swiftly intervened in March 2002 by including in new legislation on the rights of patients an unequivocal prohibition on wrongful life claims, thus certifying that the *Perruche* decision is now dead and buried.[176]

3.2.2.ii Dignity and the consequences of diverging approaches

The routes pursued and arguments used to resolve wrongful life actions in France and the UK produce different effects with regard to respect for fundamental rights, including those which are generated by a concern to respect human dignity. In both cases, however, the dignity connection – even the connection with fundamental rights – is hardly rendered explicit by either legislators or the judiciary. In the French case, this may well be a result of the brevity of the *Cour de cassation*'s decision which largely reduces the matter to one of liability under Article 1382 of the Civil Code. In the UK, the lack of attention to dignity in the context of wrongful life actions might be explained by a more general lack of consideration of dignity in the common law in

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[173] See, for example, the conclusions of Basil Markesinis on the case, 2001, *supra* n. 159.
[174] Salas D., *supra* n. 166, p. 19.
[175] Viney G., *supra* n. 166.
[176] The legislation provides that handicapped persons should receive financial assistance through 'national solidarity': Title 1 on 'Solidarity towards handicapped people', Law no. 2002-303 of 4 March 2002 on the rights of patients and the quality of the health system. The *Conseil d'Etat* in an opinion of 6 December 2002 (App. no. 250167) upheld the validity of the prohibition (*JCP, Actualité*, 2002, 554) and the new law has since been applied in the courts (CAA de Paris, 13 June 2002, D jur. 2002, 2156, note by M.-C. de Montecler; CE, 14 February 2003, JCP 2003, II 10 107).

the 1970s (prior to its rise to prominence following the technological revolution of the 1980-90s) together with, as in the French case, a consideration of the matter as one of torts law and not human rights (resolved long before the introduction of the Human Rights Act 1998).

Dignity concerns imbue the subject matter, nevertheless, as this is a question, after all, of the value of human life. As always, though, this is not the sole dignity interest and a number of facets are revealed, pertaining both to the handicapped child and to the pregnant woman. Thus, dignity's double edge is rendered visible in the balance which has to be drawn between respect for the woman (through her freedom to choose an abortion in full knowledge of the circumstances of her pregnancy) and respect for the child (through the value attributed to its life). What must be balanced too is the individual interpretation of respect for the dignity of the child (seeking damages for harm caused to him or herself) and a more universal approach concerned with respect for the dignity of all disabled persons, indeed of human life in general. It was noted earlier in the chapter that the possibility of abortion in cases of foetal handicap might result in discriminatory attitudes towards people with disabilities. Fears are expressed too that it may ultimately bring about eugenic practices with systematic abortion in cases of foetal handicap.[177] The problem, or rather the solution, is nevertheless one of a practical dimension. The *Cour de cassation* sought to provide assistance for a particular severely handicapped child in order to protect him from impoverishment resulting from his disability. While this economic factor provides the explanation for accepting a wrongful life claim, the difficulty remains that it sends out a more general message that the lives of the disabled are less valuable than those of the able-bodied.

Hence, the decision in *Perruche* may be seen as reformulating the human dignity interest from being one of respect for the human person *in general* to one of respect for the particular child who claims it should never have been born.[178] Such a reading,

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[177] This conclusion is not universally admitted. Monsieur Sargos, *conseiller à la Cour de cassation* and *rapporteur* in the *Perruche* case, has argued that Articles L. 2211-1 to 2223-2 of Code on Public Health clearly distinguish between abortion during the first weeks of pregnancy for reasons of the woman's distress and that carried out for therapeutic motives requiring the fulfilment of strict medical conditions relating to the gravity of the handicap and the incurable future condition of the future child. Given the latter, it would, he suggests, be unlikely that abortion would become commonplace for minor malformations of the foetus (*supra* n. 158, p. 1044).

[178] Salas, D., *supra* n. 166, p. 18. Salas argues that the court in *Perruche* reverses the argument accusing it of a lack of respect for human dignity by affirming, to the contrary, its attachment to the

however, is far from conform with that adopted by the *Conseil d'Etat* in the dwarf-throwing cases. Here it had been argued by Mr Wackenheim, the dwarf in question, that his personal dignity was, in fact, violated through the ban on dwarf-throwing competitions as this meant he would lose his employment and be reduced to a state of poverty. Such a view was not accepted by the court which preferred instead to adopt a wider reading of dignity to include that of the community of handicapped persons as well as the spectators.[179] The *Cour de cassation,* on the contrary, through its award of damages, sought to protect the handicapped youngster from a future state of penury. Thus a conflict is generated between equity and dignity, between the desire to give satisfactory compensation to an unfortunate individual and to respect the dignity of the human person in a fuller sense.

While the resolution of wrongful life claims in favour of the handicapped child might raise doubts about the respect accorded to the community of disabled persons, it also raises concerns with respect to the dignity of the child's mother. An important aspect of human dignity, it has been argued above, relates to respect for private life. From this perspective, it is important that the pregnant woman be fully informed of the circumstances of her pregnancy in order to make an effective choice whether to abort or not. A lack of information, or its poor communication, which generates a claim for wrongful life by the handicapped child, thus has important consequences for the mother. It is paradoxical, in this regard, that the *Cour de cassation* in the *Perruche* case referred to the abortion law of 1975 and a woman's right to choose an abortion in support of its decision, when one of the consequences might well have been increased pressure by doctors upon women pregnant with a handicapped foetus to undergo a termination in order that they should avoid being sued by the child once it was born. Moreover, the fear that the child might sue not only the doctor but also its mother, might add further inducement for the woman to agree to an abortion.

Other dignity concerns arise as a result of the UK approach to wrongful life claims which reveal a lack of consistency in the treatment of handicapped children and the value attached to their lives. This inconsistency shows the operation of a form of

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principle in so far as, thanks to its intervention, the child may now be able to live his life under humanly acceptable conditions.

selection between individuals based upon an appreciation of the quality of their life – which if viewed as insufficiently high can bring about consequences which violate respect for dignity. It is first and foremost, the case of handicapped neonates. UK law, despite the refusal to admit wrongful life claims, nevertheless allows doctors not to treat children born with severe disabilities, with the consequence that they are left to die.[180] This practice seems to show a certain acceptance that some lives are not worth living where a particular level of disability is surpassed.

Moreover, linking back to the use of new reproductive technologies, section 13(5) of the Human Fertilisation and Embryology Act 1990 admits that circumstances exist in which it is better for doctors to refuse access to assisted conception services, this being in the 'best interests' of the child. The question was posed above as to what circumstances might be imagined in which the life of a child would be so terrible that it would be better for it not to be conceived at all. The legislation, nevertheless, seems premised upon the assumption that a child's life is not worth living where its parents lead an untypical life-style. Of course, there is a material difference between assisted conception and wrongful life (in the former no child exists while in the latter it does), however, the *principle* that some lives are better not lived at all remains the same. Thus, while the UK history of stamping firmly upon wrongful life actions may appear generally clearer than its French counterpart, there are still one or two lurking holes in its logic. Given the recent legislative intervention in France, however, a similar lack of consistency as regards lives which are better not lived, now prevails there too.[181]

The idea that circumstances may arise in which a life is not worth living brings us close to the admission of *'une liberté pour la mort'* or 'freedom to die'.[182] It is with this connection in mind, that we turn in the following chapter to a consideration of such a right, it being viewed in the context of respect for the dignity of persons seeking a premature exit from life. Thus, we move from a discussion of the

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[179] CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence*, Rec. p. 372, conclusions by P. Frydman.
[180] *Re B* [1981] 1 WLR 1421; *Re C* [1989] 2 All ER 782.
[181] The French approach to wrongful life claims is now, like that in the UK, inconsistent with provisions on access to assisted conception services which suppose that it would be in the interests of some children not to be brought into existence in view of the status or life-style of their future parents.
[182] Edelman B., *supra* n. 166.

beginnings of life to its opposite, the moment of death, in order to consider the ways in which the many faces of dignity present themselves at this equally controversial point in the human life cycle.