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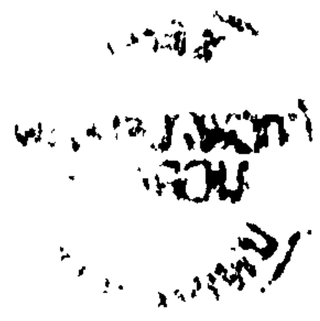

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CHAPTER 4

DIGNITY AND DEATH

While legal debates on the relationship between law and the beginnings of life are extremely well developed, the liaison between law and death is relatively less so. Nevertheless, the continued progress of biomedicine, noted in the previous chapter, with regard to the moment at which life begins, has had an important impact too at the other frontier of life, the moment of death. In response to the evolution of modern medicine – which has made human death a much more uncertain subject than ever before – the development of a discourse amongst lawyers on the nature of the link between law and death may now be observed.[1]

As death is, above all, linked to the values of human life[2] and respect for the person until the moment it ends, its relationship with dignity is quite evident.[3] However, it will be apparent throughout this chapter that dignity may be invoked by all sides and in support of very different, even contradictory, conclusions in death, just as it can at the beginnings of life. This points once more to a difference in the formulation of dignity interests as, on the one hand, subjective concerns which privilege the dignity of the individual (on the point of death) or, on the other, as objective matters which aim at respect for dignity of the human species and tend to prioritise the sanctity of life in order to avoid the dehumanisation of living persons.

Despite the latter objective interpretation, which suggests that there should exist a universal aim in respecting dignity at the point of death in so far as this is the common

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[1] Hennette S., *Les droits de la personne sur son corps autour du moment de la mort: contribution à l'étude théorique de la validité juridique* Thesis in Law: Paris I, 2000; Py. B, *La mort et le droit* (Paris: PUF, coll. Que sais-je?, no. 3339, 1997). The debate specifically on euthanasia is more extensive: see Aumonier N., Beignier B. and Letellier P., *L'euthanasie* (Paris: PUF, coll. Que sais-je?, no. 3595, 2001); Biggs H., *Euthanasia, Death with Dignity and the Law* (Oxford: Hart Publishing, 2001); Cheynet de Beaupré A., 'Vivre et laisser mourir' *D* chron, 2003, 44, 2980-2985; Dworkin R., *Life's Dominion: An Argument about Abortion and Euthanasia* (London: Harper Collins, 1993); Keown J., *Euthanasia Examined* (Cambridge: Cambridge University Press, 1995); La Marne P., *Ethiques de la fin de vie: acharnement thérapeutique, euthanasie, soins palliatifs* (Paris: Ellipses, 1999).

[2] As Bruno Py rightly notes, death is part of life and every one of us is a condemned person ('*la mort fait partie de la vie... chaque être humain vivant est un condamné à mort en sursis*'): *ibid.*, p. 17.

destiny of every human being, it is apparent that the handling of the relationship between law, dignity and death is not at all alike in the two countries which are the object of enquiry here. While French law has demonstrated a keen interest in safeguarding human dignity at the commencement of life, the question has been less extensively dealt with in the context of end of life issues. In the UK, to the contrary, dignity concerns are implicit and marginal in the legal approach to beginnings of life issues, but are rendered more explicit in the context of death. This increased British interest in dignity at the end of life, however, should not be taken to indicate that medical discourse is overshadowed in favour a more legally principled or ethical approach. Once more, it will be observed that the role of doctors and medicine pervades legal debates about death with the judiciary again showing great concern to take account of the views of the medical profession. In this way the notion of respect for dignity at the end of life is very much linked in judicial debate to concern over the individual dignity of the patient as this is viewed by medical opinion.[4] It is evident that this interpretation has little to do with the conception of respect for dignity founded upon safeguarding human life. Quite to the contrary, it facilitates putting an end to life.[5]

It is not simply the *moment of death* which invites the curiosity of lawyers concerned with safeguarding human dignity. This is aroused too with regard to the treatment of the human body *after death* (including both the corpse and isolated elements of it) raising questions about respect for dignity once a person's biological existence has ceased. Moreover, it is not merely physical assaults upon the dead body which may be envisaged. There may equally be attempts to undermine the dignity of the deceased through attacks upon his or her non-physical attributes, a phenomenon which has been responded to in France through the protection of the 'right to one's image' (*'droit à l'image'*). It is, therefore, these two aspects of law's engagement with dignity and death, that is the dying moment and the after life, which form the principle axes of this chapter as we consider the implications for human dignity which emerge in both contexts.

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[3] On the specific relationship between dignity and death, see Biggs H., *supra* n. 1; Cheynet de Beaupré A., *supra* n. 1; and Hennette S., *supra* n. 1, pp. 442-453.
[4] See, for example, the discussion below, pp. 221-230, on the cases of *Airedale NHS Trust v. Bland* [1993] AC 789 and *Re A (Children) (Conjoined Twins)* [2000] 4 All ER 961.
[5] The death of the patient was the result in both *Bland* and *Re A*, *ibid.*

4.1 The dying moments

It might well be imagined that at the point of death we are all finally equal. This is, however, not always the case. Death, or its prospect, may also bring about differences in treatment between people depending upon their individual situation, and it is these differences which may generate intrusions upon personal dignity. However, an important initial distinction needs to be made between two categories of people approaching the end of their lives: those who voluntarily seek their own death, often through medical intervention, and those who are incapable (for reasons of infirmity) of expressing a view upon their situation and destiny, but who may nevertheless be the object of interventions by a third party to hasten their end. In the case of the former, that is fully conscious and competent people, it is suggested below that similar tendencies exist in French and UK law and that, while neither accepts a 'right to die', both seek to respect the wishes of the individual up to the point at which these may be compromised by the intervention of a third party. In the latter case, however, comparative differences may be observed (at least in law if not necessarily in practice) which seem to be grounded in the habitual deference of UK law to medical expertise and the clear preference in French law for an application of foundational legal principles. This observation is, moreover, perfectly in accordance with the legal responses in each country to the beginnings of life issues discussed in the previous chapter.

4.1.1 Voluntarily seeking death

Amongst those people who voluntarily seek their own death, two groups need once more to be distinguished in so far as the exercise of their choice to die is handled differently in law, and this is equally so in France as in the UK. A first category is represented by those who seek death through their own means – that is either through suicide or through a refusal of medical treatment. Secondly, there are those who wish to die but who, for whatever reason, are incapable of bringing this about themselves and require the intervention of another, as in cases of euthanasia. These two sets of

people seeking to 'organise' their own deaths[6] are, it will be suggested, treated uniformly in France and the UK. This common tendency results in the privileging of autonomy (and hence, dignity in a subjective sense) in the former category, but stops short of authorising euthanasia for fear of the risk of pressure being exercised upon vulnerable people wishing to die.

4.1.1.i Death and respect for autonomy

Respect for personal autonomy is one of the fundamental values in UK law, and applies as much to private as to public law.[7] There is nothing surprising, therefore, in the fact that respect is given to the choice of an individual to end his or her life, either through suicide or the refusal of medical treatment which might otherwise save him or her. French law, respectful also of the 'tragic expression of individual and free will'[8] which is demonstrated by suicide or patient consent in the case of medical treatment, is equally respectful of choices to die in certain circumstances. Thus, the decriminalisation of suicide in France and the UK has marked an important turning point in the recognition of personal freedom. This may be viewed, perhaps, as conflicting with respect for dignity in its objective sense, which emphasises the importance of all human life. It, nevertheless, ensures the primacy of the person as an autonomous and free individual, capable of this ultimate act of self-expression.

Suicide In their similar stances on the decriminalisation of suicide, both French and UK law have enhanced that personal aspect of human dignity which is located in individual freedom and autonomy. This common approach, however, has not led to the annihilation of all differences in the area. A distinction emerges notably with regard to the uniquely French obligation to give assistance to others in situations of danger (*'l'obligation de porter secours'*). This, it will be suggested, provides preliminary evidence of the French preference for preserving life rather than facilitating death.

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[6] Robert J. and Duffar J., *Droits de l'homme et libertés fondamentales* 7th ed. (Paris: Montchrestien, 1999) p. 217.
[7] Oliver D., *Common Values and the Public-Private Divide* (London: Butterworths, 1999) pp. 60-65.

First, however, let us consider what is common. It is not only the histories of the relationship between law and suicide which are harmonious in the UK and France, but also their terms of reference. Founded in a religious understanding of the sanctity and unity of human life, the spiritual dimension of suicide has in the past been privileged over its individual dimension. Nevertheless, the UK legislature in 1961 took steps to decriminalise the act (section 1, Suicide Act 1961) during what was a period of profound change in legal attitudes to individual private matters.[9] Suicide, therefore, was decriminalised at a similar point in time to other activities of a private nature, such as abortion and male homosexuality.[10] Viewed from this angle, the legislature accepted in the 1960s that some aspects of private life are quite simply 'not the law's business'[11] and suicide, that final expression of individual liberty, was one such matter to be relocated in the private sphere beyond state intervention.

In France too, the same tendency may be noted towards the acceptance of a private domain which escapes state control over individual activities. Both case law and academic writings were in agreement over the abandonment through disuse of the notion of 'self-murder' (*'homicide sur soi-même'*), an approach which was confirmed in the Penal Code - Article 221-1 of the new Penal Code, stating obliquely that '[t]he fact of voluntarily causing the death of another constitutes murder.'[12] The reference to 'another' in this article renders it apparent that suicide cannot be legally qualified as murder.[13] Without, therefore, using any express reference to respect for personal dignity, these legislative measures reflect a desire to respect individual free will and the capacity to act autonomously in an intimate sphere of private life.

Nevertheless, the two jurisdictions have not thereafter been completely disinterested by issues around suicide. Both remain equally in agreement as to the criminalisation

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[8] *'...expression tragique d'une volonté individuelle et libre'*. Robert J. and Duffar J., *supra* n. 6, p. 217.
[9] Before 1961, suicide, characterised as 'self-murder', was unlawful under the common law.
[10] Section 1 of the Abortion Act 1967 (see Chapter 3 above, pp. 170-171) and section 13 of the Sexual Offences Act 1956, modified by section 1(1) of the Sexual Offences Act 1967. It is notable that female homosexuality has not been the object of repressive measures since Victorian legislators refused to believe in its existence: Weeks J., *Coming Out – Homosexual Politics in Britain from the Nineteenth Century to the Present* revised ed. (London: Quartet, 1990) pp. 87-95.
[11] See further the debate on law and morality which took place in the 1960s between Herbert Hart and Patrick Devlin: Hart H.L.A., *Law, Liberty and Morality* (Oxford: Oxford University Press, 1968); Devlin P., *The Enforcement of Morals* (Oxford: Oxford University Press, 1968).
[12] *'Le fait de donner volontairement la mort à autrui constitue un meurtre.'*
[13] Py B., *supra* n. 1., pp. 56-57.

of any activity which could be said to encourage it. Thus, anyone who incites the suicide of another may be guilty of a criminal offence. For example, both countries recognise the criminal nature of suicide pacts. In France these are characterised as a form of voluntary homicide, while in the UK they are viewed as manslaughter provided that the defendant can prove a common intention to commit suicide.[14] Moreover, the two systems criminalise the incitement to commit suicide or the assistance of the suicide of another. Thus, any activity which could be characterised as a form of publicity in favour of suicide, such as books, products or communications which demonstrate methods for killing oneself, are prohibited.[15] It is necessary, however, to establish an intention to incite the act and judges in the two countries, having been asked to decide whether 'suicide manuals' may engage the criminal liability of the author or publisher in cases where a reader goes on to commit suicide, have decided that they do not.[16] Suicide in such cases remains the simple manifestation of individual liberty without causal connection to the activities of another.

Here, however, the similarity stops and an interesting difference between French and UK legal approaches emerges. In France there is apparently more concern to save the life of a person in danger. Thus, the failure to give assistance (*'porter secours'*) in such instances may bring about criminal liability.[17] This notion is quite foreign to UK

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[14] Articles 223-13 to 223-15 of the new Penal Code which replace Articles 318-1 and 318-2 of the former Code; section 4(1) of the Homicide Act 1957 (modified by the Suicide Act 1961, section 3(2), schedule 2). In the absence of proof of a 'suicide pact', UK law is in alignment with French law, characterising the action as murder.

[15] Articles 223-14 and 223-15 of the new Penal Code. In the UK section 2(1) of the Suicide Act 1961 reads '[a] person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.' It is, thus, that historically the two countries have penalised the practice of duels where the willingness of the participants to consent to their eventual death did not lead to a disapplication of the criminal law: Cass. crim., 22 June 1837, S, 1837, 1, 465; *R v. Young* (1838) 8 C & P 644.

In a similar vein, it may be noted that the more recent French dwarf-throwing cases and the criminalisation in the UK of male homosexual sado-masochistic activities – all of which involved participants consenting, if not to death, to potential physical injury – denote an unwillingness on the part of the judiciary to accept consent as a justification for such unlawful activities: CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence*, Rec. p. 372; *R v. Brown* [1993] 2 All ER 75.

[16] TGI de Paris, 25 January 1984, D jur. 1984, 486, note by D. Mayer; TGI de Paris, 23 January 1985, D jur. 1985, 418, note by B. Calais; *A-G v. Able* [1984] QB 795.

[17] Article 223-6-2 of the new Penal Code renders it an offence to voluntarily abstain from assisting another person who is in danger and who could have been aided by either personal intervention or seeking help from another without risk to oneself or a third party (*'Sera puni [...] quiconque s'abstient*

criminal law which recognises no fault in an omission to act. Nevertheless, in French law the obligation to assist can apply to cases of suicide. Coming back to the example of suicide manuals, the author of the book *Suicide de mode d'emploi* had been informed of the intention to commit suicide of a person who asked for details as to the methods which might be used. Confirming his criminal liability, the *Cour de cassation* held that in abstaining from giving any help and seeking to prevent the risk and instead giving the person the information requested, the author had demonstrated a clear intention not to assist a person he knew was in danger.[18] There is no comparable offence in UK law which does not criminalise behaviour falling short of inciting death. Thus, while both systems are keen to show respect for individual freedom in the choice which suicide implies, French law begins to reveal its preference for the preservation of life over death and respect for the dignity which lies with humanity rather than individual autonomy, where that death may have been reasonably prevented.

Refusal of medical treatment The second situation in which it may be envisaged that a person chooses death over life is in the case of a refusal of medical treatment. As in the case of suicide, French and UK law have both accepted that, in principle, treatment cannot be imposed without the consent of the patient, provided that he or she has the necessary capacity to refuse it. This principle, intimately connected to the right to physical integrity, conforms with respect for dignity to the extent that this requires respect for the human body. Nevertheless, it is apparent that, as with suicide, French law more readily admits exceptions to the principle, showing again a greater degree of respect for the sanctity of life rather than individual bodily integrity.

Beginning again with the common starting position, the principle of non-intervention in the case of a refusal of treatment has been clearly posed in the case of *Re T*[19] concerning the refusal of a Jehovah's Witness to a blood transfusion. The judge, Lord

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volontairement de porter à une personne en péril l'assistance que, sans risque pour lui ni pour les tiers, il pouvait lui prêter, soit par son action personnelle, soit en provoquant un secours.')

[18] *'[En] s'abstenant de provoquer toute aide et de tenter de conjurer le péril mais encore en fournissant au désespéré les renseignements demandés, l'auteur témoigne de sa volonté de ne pas porter assistance à une personne qu'il savait en danger.'* Cass. crim., 26 April 1988, D jur. 1990, 479, note by H. Fenaux.

[19] *Re T* [1992] 4 All ER 649 (CA). This principle applies in England and Wales but not Scotland: *Law Hospital NHS Trust v. Lord Advocate* (1996) SLT 848.

Donaldson MR, found that '[a]n adult patient who, like Miss T, suffers from no mental incapacity, has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments being offered.'[20] Moreover, this right is granted to the patient even if his or her choice appears beyond common sense, and irrespective of whether the reasons which found the decision are rational, irrational, unknown or even non-existent.[21]

In French law, the refusal of treatment is also linked to the principle of consent. Any medical intervention upon the human body requires the prior consent of the patient. The principle has, since 1994, been inserted into the Civil Code, Article 16-1 of which states that '[e]veryone has the right to respect for his or her body. The human body is inviolable.'[22] Article 16-3 further clarifies that '[t]here may be no assault upon the integrity of the human body except in cases where this is of therapeutic necessity to the person. The consent of the person concerned must be obtained beforehand apart from when his or her state makes necessary a therapeutic intervention to which the person is unable to consent.'[23] From this Article, the *Cour de cassation* deduced in 1997 that no one may be forced to undergo a surgical intervention, except in cases provided for by law.[24] Of course, the refusal of treatment may bring about death as a consequence. Thus, both legal systems again demonstrate respect for individual autonomy and dignity in its most subjective interpretation. As with suicide, the interest of the state in safeguarding life has to give way in favour of a final expression of individual freedom.

If the principle is the same, its application has, nevertheless, been somewhat nuanced in France compared with across the Channel. While it may be observed that the English jurisprudential formulation of the right to refuse treatment is in absolute

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[20] *Re T, ibid.*, pp. 652-653.
[21] *Ibid.*, p. 653. Lord Donaldson, in this respect, cited with approval the decision in *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871, pp. 904-5.
[22] *'Chacun a droit au respect de son corps. Le corps humain est inviolable.'*
[23] *'Il ne peut être porté atteinte à l'intégrité du corps humain qu'en cas de nécessité thérapeutique pour la personne. Le consentement de l'intéressé doit être recueilli préalablement hors le cas où son état rend nécessaire une intervention thérapeutique à laquelle il n'est pas à même de consentir.'* These paragraphs were inserted into the Civil Code by Law no. 94-653 of 29 July 1994 on respect for the human body.
[24] *'[I]l résulte de l'article 16-3 du Code civil que nul ne peut être contraint, hors les cas prévus par la loi, de subir une intervention chirurgicale...'.* Cass. 2[e] civ., 19 March 1997, Bull. I no. 86, note by I. Lucas-Gallay.

terms, Article 16 of the Civil Code, even if it begins in its first paragraph by stating the principle of inviolability of the body, later admits in paragraph 3 that there may be exceptions to this when medical intervention is necessary for therapeutic aims.

In practice, this exception to the general rule may permit the state to intervene in paternalistic fashion to save the life of someone who refuses to consent to medical treatment. For example, in the case of *Mme X*,[25] the facts of which are similar to those of *Re T,* a Jehovah's Witness who had refused to consent to a blood transfusion, undertaken eventually despite her protests, sought damages for the non-physical harm caused to her by the intervention. The *Cour administrative d'appel de Paris* stated that the doctors were bound by two obligations which entered into conflict here. On the one hand, they were under a duty to respect the physical integrity of the patient and, on the other, to protect his or her health, and hence life. Finding in favour of life, and justifying this with reference to European norms, the Administrative Court of Appeal held that the treatment was necessary to improve the condition of the patient and had been provided with the aim of preserving her health. Thus, there was no violation of Articles 3, 5 or 9 of the ECHR. More recently, while Law no. 2002-303 of 4 March 2002 on the rights of patients has led to the insertion of Article L. 1111-4 into the Code on Public Health to the effect that physicians may not carry out any medical intervention upon an individual without her free and informed consent, it has been suggested that following more recent case law, doctors may continue to treat patients in the event of their refusal where their life is in immediate danger.[26] In rendering such decisions, the courts and medical profession appear to accept that the preservation of life is a fundamental public policy objective and, therefore, the right of the patient to respect for her physical integrity should give way in favour of this other goal. So it is that, without expressly mentioning human dignity, solutions are adopted which are ultimately based upon a concern to respect the dignity of humanity rather than that of the individual patient who faces an assault upon her bodily integrity.

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[25] CAA de Paris, form. plén., 9 June 1998 (*Mme X*), D jur. 1999, 277, note by G. Pellissier.
[26] CE, ord. référé, 16 August 2002 and Tribunal administratif de Lille, ord. référé, 25 August 2002. These decisions, along with a response from the medical profession, are discussed by Rancé P., 'Le médecin face au refus du patient de subir un acte médical - interview de Jean Penneau' *D* 2002, 38, 2877-2879.

In summary, it can be observed that the balance between respect for individual liberty and that for the sanctity of life is weighed differently in French and UK law. With regard to both a refusal to consent to medical treatment and the decision to take one's own life, the state in France is rather more interventionist than its UK counterpart. This difference might be explained by the foundation of UK law upon the core value of autonomy with all that this implies for the primacy given to the person as individual subject capable of making his or her own rational choices. Conversely, the foundation of French law upon the principle of respect for the human person, interpreted as respect for humanity, leads to a heightened regard for the preservation of human life.

This is an approach which will be found in other examples of the relationship between law and death which are discussed in the remainder of the chapter. Suffice for the moment to note that it is here, in the domain of voluntary actions, that the difference between French and UK law begins. The latter elevates respect for personal dignity in death while the former safeguards human dignity in life. This demonstrates further the extent to which the principle of respect for human dignity may have double meanings and radically opposite consequences.

4.1.1.ii Death and third party interventions

While free will and autonomy are largely respected in France and the UK in cases of suicide and the refusal of medical treatment, the same cannot be said as regards *'la bonne mort'*,[27] that is death by compassion or euthanasia, which has been admitted in Australia,[28] the United States,[29] the Netherlands[30] and Belgium.[31] The difference

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[27] Py B., *supra* n. 1, p. 49.

[28] The Northern Territory legalised physician assisted suicide in the Rights of the Terminally Ill Act 1995 (see Py B., *ibid.*, p. 49). However, in 1997 the Federal Parliament removed the power of the Northern Territory to legislate on the matter, effectively overturning the 1995 legislation.

[29] In Oregon, the Death with Dignity Act 1994, adopted following a referendum and finally coming into force in 1997, authorises physician assisted suicide according to requirements of adult age, competency, residency in Oregon and terminal disease of the patient, together with containing four principal safeguards: informed decision-making; medical confirmation; psychological consultation when needed; and repeated, verified oral and written requests to die. See Marin, I. 'L'euthanasie: question éthique, juridique, médicale ou politique?' *D* 2001, special issue, 20, 128-136, at p. 128. Two decisions of the US Supreme Court, *Compassion in Dying v. State of Washington* 79 F 3D 790 (1996) and *Quill v. Vacco* 138 L Ed 834 (1998) have, nevertheless, refused to find a fundamental

between euthanasia and suicide lies in the intervention of a third party, often a doctor or family member, in the process of dying, with the aim of alleviating suffering. Given this intervention, French and UK law have established that, in principle, individuals may not 'consent' to their own death. Even in less serious situations which do not result in death, it has already been seen that a similar logic may be identified in UK,[32] French,[33] and European,[34] laws which do not permit an individual to consent to degrading treatment of his or her body.

Thus, neither France nor the UK admits the practice of euthanasia. At least, they do not formally accept it; for it is necessary to distinguish between 'active' and 'passive' euthanasia, the latter being less certain to attract legal sanctions.[35] Active euthanasia, on the other hand, may constitute a form of premeditated murder. The wishes (or consent) of the victim do not mitigate the culpability of the assassin. In this sense

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constitutional right to assistance to commit suicide: see Sunstein C., 'The Right to Die' (1997) 106 *Yale LJ* 1123-1163. Equally, in Canada, the Supreme Court has refused to find legislation prohibiting assisted suicide unconstitutional: *Rodriguez v. British Columbia* (1993) 107 DLR (4th) 342: see Martel J., 'Examining the Foreseeable: Assisted Suicide as a Herald of Changing Moralities' (2001) 10 *SLS* 147-107 and further, below, pp. 208-209 and p. 210.

[30] In the Netherlands, the Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001 decriminalises assisted suicide and euthanasia in certain circumstances at the patient's request subject to a number of due care criteria and safeguards, notably a clear and definitive expression of the will of the patient to die established by several requests of more than two weeks apart, the opinion of an authorised psychiatrist and an unfavourable prognosis given by an independent doctor. See Marin, I., *ibid*, p. 128 and, more generally, Griffiths J., *Euthanasia and the Law in the Netherlands* (Amsterdam: Amsterdam University Press, 1998).

[31] In Belgium, the Law of 28 May 2002 on euthanasia permits physician assisted suicide subject to the extensive conditions and procedural requirements set out in Article 2 which include a voluntary and repeated demand by the patient, an incurable prognosis, the presence of constant, unbearable physical and psychological suffering, and consultation with another independent doctor. See Watson, R. 'Belgium Gives Terminally Ill People the Right to Die' (2001) 323 *BMJ* 1024.

[32] *R v. Brown* [1993] 2 All ER 75.

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

[34] *Laskey, Jaggard and Brown v. United Kingdom* (1997) 24 EHRR 39; *Wackenheim v. France* App. no. 29961/96, 16 October 1996. The latter application, an evolution of the French dwarf-throwing cases, was nevertheless declared inadmissible by the European Commission of Human Rights as it was only partially argued (on the basis of Articles 5, 8 and 14 ECHR). It has been suggested that the application might have enjoyed more success had more relevant Articles of the Convention (particularly Article 3) been cited (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., (Paris: Economica, 1999) 53-66, at p. 63).

[35] See Marin I., *supra* n. 29, p. 131, on the practice of doctors in this area. Marin, herself a physician and working in the field of palliative care for 20 years, bears witness to the frequent and clandestine practice of 'murder by compassion' justified by the concerns of doctors to put an end to suffering. In accordance with these sentiments, juries appear willing to acquit doctors prosecuted for deliberately causing the death of a patient in such circumstances (see Py B., *supra* n. 1, p. 51, and Robert J. and Duffar J., *supra* n. 6, p. 221 with regard to the situation in France; and Freeman M.D.A., 'Death, Dying and the Human Rights Act' (1999) 52 *CLP* 218-238, at p. 227, with regard to that in the UK).

there exists in law no 'right to die';[36] quite in accordance with an objective interpretation of dignity which gives priority to respect for life. This solution does, however, need to be viewed in the light of other circumstances, notably in France the account taken of medical discourses on death, and in the UK the growing concern to mainstream human rights. In both countries, it will be suggested, a tendency may be observed towards the adoption of a less rigid approach to the prohibition on euthanasia founded upon the introduction of new discourses: medical in France and fundamental rights in the UK. Thus, new spaces are being created in law for dialogue on how to achieve a 'good death' and are being filled by those arguing in favour of law reform.

The absence of a 'right to die': current solutions Hence, while UK and French law equally admit no right to die, in the sense of seeking active assistance to commit suicide, this solution is not absolute with both systems allowing a form of passive aid on the part of doctors so as not to prolong the life and suffering of a patient with an incurable illness. As regards active euthanasia, in both countries the perpetrator is liable under the criminal law for inciting or assisting the suicide of another. In France, doctors may also be sanctioned for violating their professional Code of Medical Ethics (*'Code de déontologie médicale'*) which clearly states that doctors may not deliberately bring about the death of a patient (Article 38-2).[37] The Code is founded upon the principle of the preservation of health and life and, furthermore, carries the duty to 'respect human life, the person and his or her dignity' (Article 2). This duty, interpreted objectively in the sense of requiring respect for the life of *every* human being, is incompatible with the idea of euthanasia. In the UK, doctors are also bound to respect a standard of conduct in accordance with that accepted by a 'responsible body of medical opinion',[38] a standard which seeks to protect the patient from medical acts which are not well supported by the profession, including of course, provoking a patient's death. It is evident, therefore, that any 'right to die' would conflict with the legal and professional obligations of medical personnel.

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[36] For a general review of the 'right to die', see Zucker M.B. (ed.), *The Right to Die Debate: A Documentary History* (Westport, Connecticut and London: Greenwood Press, 1999).
[37] Decree no. 95-1000 of 6 September 1995, on the Code of Medical Ethics, JO, 8 September 1995.
[38] Failure to do so may render the doctor liable for negligence (*Bolam v. Friern Hospital Medical Committee* [1975] 2 All ER 18).

There is, nevertheless, a distinction made in the UK and France between active and passive euthanasia. Each country admits that where a competent patient with an incurable illness refuses therapeutic care, the effect of which would be to artificially prolong life, this wish can be respected without engaging the doctor's liability. Thus, the struggle to maintain life is not absolute in the face of hopeless circumstances.[39] In this case, the focus switches to a requirement to ease the suffering of the patient through palliative care, a process which was introduced in France in the first Title of the Code on Public Health and which provides that all patients have the right to palliative care in order to ease their pain, reduce psychological suffering, safeguard their dignity, and support their family.[40] In carrying this through, the doctor merely acquits her duty to the patient, treating her with dignity and respect, regardless of status or condition, until the moment of death. This duty, according to Bruno Py, means that the doctor 'must give to the patient of the most modest standing the same treatment that he would give to the "grandest", rendering the doctor the best guarantor of human dignity.'[41] Dignity, therefore, lies in equal treatment for all, a further example of its requirement that no unjustifiable discrimination or selection be made between individuals.

It remains the case, nevertheless, that the acceptance in France and the UK of a patient's wish to refuse therapeutic care amounts to a form of passive euthanasia, which has the capacity to develop into a more active intervention. This is, of course, not automatic. There is an important difference between an omission to provide medical treatment to a patient with an incurable illness and a positive action to assist suicide. Nevertheless, one cannot deny the wave of thinking in favour of the introduction of a legitimate form of active euthanasia being led by both doctors and

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[39] Py B., *supra* n. 1, p. 53; Robert J. and Duffar J., *supra* n. 6, pp. 221-225. In the UK, doctors may provide treatment the effect of which is to shorten life provided that the primary motive in doing so is to end pain and suffering: *R v. Adams* [1957] Crim LR 365. In other words, where the primary reason is, on the contrary, to hasten death, the doctor is guilty of murder: *R v. Cox* (1992) 12 BMLR 38, see Biggs H., 'Euthanasia and Death with Dignity: Still Poised on the Fulcrum of Homicide' [1996] *Crim L Rev* 878-888.

[40] Article L. 1 B of the Code on Public Health, introduced by Article 1 of Law no. 99-477 of 9 June 1999 on the right of access to palliative care. See generally, La Marne P., *supra* n. 1, chapter 3, 'Le sujet conscient et la philosophie des soins palliatifs'.

[41] *'[Le médecin] doit accorder au malade de la plus modeste condition le traitement qu'il appliquerait au "plus grand", ce qui fera de lui le meilleur garant de la dignité humaine.'* Py B., *supra* n. 1, p. 54.

associations representing individuals with incurable illnesses.[42] The reformist agenda is, moreover, and paradoxically, also premised upon respect for human dignity. This again shows how dignity may be instrumentalised in order to support two directly opposing arguments. On the one hand, those against active euthanasia call upon dignity – in its objective sense – to protect the life of every human being until its natural end. On the other hand, reformists argue that respect for dignity means paying due regard to the situation of an individual suffering from an incurable condition whereby refusing to let that person die constitutes inhuman and degrading treatment. Again there is an opposition between the universalist tendencies of respect for the dignity of all humanity and its individualist elements which suggest special regard for the patient, his or her family, and the physician involved.

Looking in comparison beyond Europe for a moment, much may be learned about the conflict generated by these opposing interpretations from the minority opinion of McLachlin J in the Canadian case of *Rodriguez*.[43] Sue Rodriguez, who suffered from an incurable illness, sought assistance to die. Asked to decide upon the conformity of this request with the Canadian Charter of Rights and Freedoms, a majority of the Canadian Supreme Court found that Article 241(b) of the Criminal Code which criminalises all incitement or assistance of suicide was not contrary to Article 7 of the Charter which guarantees that '[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.' McLachlin J expressed her disagreement on the grounds that the law made an unjustifiable distinction between suicide (which has been decriminalised in Canada) and assistance to commit suicide, thus effectively denying to some people the choice of death. Replying to the argument that Article

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[42] The point of view of the medical profession in this regard is put forward by Marin I., *supra* n. 29. See also the results of a survey of medical opinion carried out in 2002 in France which found that 44.8% of general practitioners were in favour of legalising euthanasia: Peretti-Watel P., Bendiane M.K., Pegliasco H., Lapiana J.M., Favre R., Galinier A. and Moatti J.P., 'Doctors' Opinions on Euthanasia, End of Life Care, and Doctor-Patient Communication: Telephone Survey in France' (2003) 327 *BMJ* 595-596. Associations calling for the legalisation of assisted suicide are numerous and exist all over the world, such as, for example, EXIT in the UK and ADMD (*Association pour le droit de mourir dans la dignité*) in France. Their campaign has been furthered by the generation of much public sympathy in both France and the UK at the plight of individuals such as Diane Pretty and Vincent Humbert, both of whom sought assistance from family members to end their lives – the former unsuccessfully and the latter successfully. While Diane Pretty pursued her claim through the courts (see below, pp. 211-219), Vincent Humbert told his personal story of unbearable suffering in his autobiography, *Je vous demande le droit de mourir* (Neuilly: Michel Lafon, 2003), before his mother made public her act of compassion which helped to put an end to her son's life.

241(b) protects the sanctity and inherent value of life (and therefore dignity in its universal sense), she questioned what was the value of life when one does not have a choice what to do with it, and insisted on the fact that 'life' also includes death. She concluded that '[d]ifferent people hold different views on life and on what devalues it. For some, the choice to end one's life with dignity is infintely preferable to the inevitable pain and diminshment of a long, slow decline.'[44] Thus, dignity is invoked in favour of easing individual pain and suffering, consequently justifying death rather than life. Such a subjective interpretation in favour of personal liberty is contested by those who seek a more objective formulation of dignity. Bruno Py, for example, claims to the contrary that it is through medically accompanying patients towards the end of their life that the doctor 'restores to the dying that human dignity which is taken from them as a result of their being deprived of death.'[45]

Changing attitudes to reform Having noted the foundation in personal dignity upon which the claim for reform of the law on assisted suicide is based, it is interesting to examine from a comparative perspective the way in which this claim is being pursued. What is striking in this regard is a shift in both France and the UK away from previous approaches to death and dying. This is evidenced in France by a medicalisation of the legal discourse (marginalising the traditional emphasis on fundamental rights and principles) and in the UK by a concretisation of human rights law (moving away from deference to medical authority). Furthermore, in France, the call for change is being made notably by doctors and ethicists while, in the UK, it is supported by lawyers concerned with respect for the fundamental rights of the dying. In both cases, those in favour of euthanasia, in employing the adage 'death with dignity' (*'dignité dans la mort'*), have profited from the opportunity presented by a change in the contours of legal debate to put forward their case for law reform.

In France, the arguments for reform are succinctly summarised in an article appearing in a special issue of the law journal *Dalloz* in 2001 on questions surrounding the relationship between law and the body.[46] The author (and doctor), Isabelle Marin,

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[43] *Rodriguez v. British Columbia* (1993) 107 DLR (4th) 342 (Can SC), at p. 420.
[44] *Ibid.*
[45] *'[Le médecin] redonne au mourant cette dignité humaine que certains lui avaient volé en le privant de sa mort.'* Py B., *supra* n. 1, p. 55.
[46] Marin I., *supra* n. 29.

argues for a 'de-juridification' of the dying process and an alternative approach founded upon the ethics and politics of death. She exposes the gap between law and the reality of death in her clinical experience, showing how formal legal measures are incapable of providing an adequate response to death at the practical level and how juridical principles are insufficiently flexible to allow doctors to behave in an open and clear manner. This leaves physicians operating clandestinely in the shadow of the law in order to deal as best they can with patients suffering from incurable illnesses. The author notes, furthermore, a development in public thinking on this matter as represented in an opinion delivered on 3 March 2000 by the National Consultative Committee on Ethics entitled 'End of Life, Stopping Life, Euthanasia'.[47] In this opinion, the Committee reversed its previous view expressed in a communication of 24 June 1991 in which it disapproved the possibility of a legislative or regulatory legitimation of acts which might cause a patient's death, and moved in favour of a reform permitting euthanasia as an 'exception' to the law in cases of doctor-patient agreement. In this way, euthanasia would in effect remain outlawed, but need no longer be clandestine. It would, instead, be the object of soft law measures, thus confirming the trend noted in the previous chapter towards their expanding use in the area of biomedicine.[48]

Another form of this argument in favour of a more contextualised approach and one which would better reflect public opinion is made by Joane Martel.[49] Through a reflection on Canadian law and the *Rodriguez* case, she notes that Sue Rodriguez eventually committed suicide with medical assistance with no prosecution being brought against the doctors. Martel argues that the very perpetration of this 'crime' is useful to the extent that it shows how the social conditions which made it possible are no longer in harmony with a growing part of public opinion. Thus, the *Rodriguez* example may be viewed as the anticipation of a new morality, a prelude to a change in the dominant moral discourse. It would appear that these new forms of moral and medical thinking are just as present in France as they are in Canada.

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[47] Comité consultatif national d'éthique pour les sciences de la vie et de la santé, *Fin de vie, arrêt de vie, euthanasie*, 3 March 2000. See Marin I., *ibid.*, p. 128.
[48] *Supra* pp. 146-147.
[49] Martel J., *supra* n. 29.

In the UK, however, it is lawyers who have been overtly preoccupied with the question of law reform in so far as there is concern that the present situation may be incompatible with the new legislation on human rights. In an article published in 1999, Michael Freeman raised the (then hypothetical) possibility of a disparity between the Human Rights Act 1998 and section 2(1) of the Suicide Act 1961 which criminalises assisted suicide.[50] Basing his analysis upon Articles 2 and 8 ECHR,[51] Freeman concluded that, while on the one hand, the right to life guaranteed in Article 2 seems perfectly in accordance with section 2(1) of the Suicide Act 1961, on the other hand, Article 8, guaranteeing respect for private life, seems to favour the patient who wishes to end his or her life. The state might then be expected to seek to justify this evident interference in private life under Article 8(2) demonstrating its necessity in a democratic society in order to protect public health and the rights of others (particularly those of the medical profession). Freeman finds that there would probably be no violation of Article 8 because of the margin of appreciation given to the state in such matters and the fact that UK legislation is not out of line with that of most European countries.[52]

The question of compatibility between section 2(1) of the Suicide Act 1961 and the ECHR is now, of course, no longer purely hypothetical. Both the House of Lords and the European Court of Human Rights have been asked to decide upon the matter in the case of Diane Pretty who, suffering incurably from motor neurone disease, sought

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[50] Freeman M.D.A, *supra* n. 35.

[51] Freeman M.D.A., ibid., pp. 226-238.

[52] In the European Union, only the Netherlands and Belgium have decriminalised a form of assisted suicide (see *supra,* n. 30 and n. 31). It is also permissible in Switzerland in so far as Article 115 of the Penal Code provides that assisted suicide is a crime only if the motive is selfish, thus condoning it for altruistic reasons and also (unlike the Netherlands and Belgium) not requiring the involvement of a physician. This has led to well publicised cases of UK citizens, such as Reginald Crew, travelling to Switzerland to end their life (see Hurst S.A. and Mauron A., 'Assisted Suicide and Euthanasia in Switzerland: Allowing a Role for Non-Physicians' (2003) 326 *BMJ* 271-273). The rise to prominence of 'death tourism' is an interesting counterpart to the increase in 'procreative tourism' discussed in the previous chapter. Furthermore, in order to get around national laws prohibiting assisted suicide, it has been suggested by Australian doctor, Philip Nitschke, that a 'euthanasia boat' should be registered in the Netherlands (and so governed by Dutch law) and anchored in international waters, being thus able to provide lawful assistance to die for all those seeking it. This arrangement has a precedent in the 'abortion boat' also registered in the Netherlands which has set sail for Ireland and Poland in order to circumvent restrictive access to abortion in these countries. See Batty D., 'Doctor Plans Euthanasia Boat in UK Waters', *The Guardian,* 19 June 2001; Osborn A., 'World's First Floating Abortion Clinic Heads for Ireland', *The Guardian,* 12 June 2001; 'Abortion Ship Rouses Church Fury', *The Guardian,* 23 June 2003.

the assistance of her husband to commit suicide.[53] Requesting a declaration from the Director of Public Prosecutions that her husband would not be prosecuted under section 2(1) of the Suicide Act 1961, she argued (in a more comprehensive claim than that envisaged by Freeman) that the current state of UK law on assisted suicide amounted to a violation of her rights under Articles 2, 3, 8, 9 and 14 of the Convention which, to the contrary, supported her right to die with dignity at the moment of her choosing. Her plea was rejected unanimously on all counts at both the national and the European levels.

While the claims under Articles 3 and 9 were succinctly rejected on the basis that the state was not directly responsible for Mrs Pretty's ill treatment, had no positive duty to protect her from the suffering which her disease entailed and that not all opinions or convictions were capable of constituting beliefs in the sense protected by Article 9(1), those which fell under Articles 2, 8 and 14 were more fully explored at both national and European levels. With regard to Article 2, first of all, it was argued on behalf of Mrs Pretty that this Article protects not simply the right to life but its corollary the right to die. The Article, it was suggested, should encompass the individual's right to self-determination in relation to issues of life and death, and so should respect a choice to live or to die where this was made in order to avoid inevitable suffering and indignity. The state, it was argued had a positive obligation to protect both rights. In opposition, the UK government maintained that this reliance on Article 2 was inconsistent with existing Convention case law and with the language of the provision. Article 2, it was argued imposed primarily a *negative* obligation and, in the few cases where it had been found to impose positive obligations, these concerned steps to be taken to *safeguard* life and not to end it.[54] The wording of Article 2 required that no one should be deprived of their life intentionally and as such the right to die was not the corollary but rather the antithesis of the right to life.

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[53] *Pretty v. Director of Public Prosecutions* [2002] 1 All ER 1 (HL). *Pretty v. United Kingdom* (2002) 35 EHRR 1. See further Freeman M., 'Denying Death Its Dominion: Thoughts on the Dianne Pretty Case' (2002) 10 *Med LR* 245-270; commentary by Girault C., *JCP*, 2003, II 10 062; 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*; Morris D., 'Assisted Suicide Under the European Convention on Human Rights: A Critique' (2003) 1 *EHRLR* 65-91.

[54] As, for example, in *Keenan v. United Kingdom* [Sect. 3], [2001] 12 HRCD 209, where it was found that an obligation could arise for prison authorities to protect a prisoner who tried to take his own life.

So, one right or two; and a positive or negative obligation? Both the House of Lords and the European Court were persuaded by the force of the government's argument. Lord Bingham in the House of Lords found the Secretary of State's objections to Mrs Pretty's claim 'unanswerable', holding that the right to life guaranteed in Article 2 did not extend to the right to die – quite the reverse in that it was framed to protect the sanctity of life.[55] The European Court agreed, outlining the pre-eminence of Article 2 as one of the most fundamental provisions of the Convention. In reiterating the obligation of the state to positively *protect* life, the Court did not accept that Article 2 could be interpreted to encompass a negative aspect without grossly misrepresenting the content of that Article:

> 'Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.'[56]

In sum, Mrs Pretty's claim to a dignified end to her life via the legal recognition of an individual right to die fell way outside the confines of Article 2 given its fundamental concern to ensure respect for the sanctity of life. Thus, in the context of this Article, the dignity of all humanity expressed in its most universal and objective form so as to protect life is given force over and above the individual and subjective dignity of the person seeking assistance to terminate a state of personal suffering.

While the European Court and the House of Lords were at one in their interpretation of Article 2 of the Convention, there was some disagreement as regards the material scope and applicability of Article 8(1) and the right to respect for private life. Lord Bingham with whom all the other Law Lords except Lord Hope concurred, had argued, as did the UK government, that this right was not engaged at all in Mrs Pretty's case given that it involved respect for the way a person conducted her 'life' rather than death. The European Court on the other hand, like Lord Hope, found that

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[55] *Pretty v. Director of Public Prosecutions* [2002] 1 All ER 1, per Lord Bingham, pp. 6-8.
[56] *Pretty v. United Kingdom* (2002) 35 EHRR 1, para. 39. In the House of Lords, Lord Bingham stated that: '[t]he thrust of this article [2] is to reflect the sanctity which... attaches to life. The article protects the right to life and prevents the deliberate taking of life save in very narrowly defined

the right *was* engaged. In so doing it offered a somewhat broader interpretation of private life than the House of Lords, suggesting that the national judiciary may be over cautious in their new role as custodians of domestic fundamental rights protection.

Thus, the European Court accepted Mrs Pretty's suggestion that Article 8(1) epitomised the right to self-determination encompassing the right to make decisions about one's body and including the right to choose when and how to die so that suffering and indignity could be avoided. In coming to this conclusion the Court emphasised the broad construction already attributed to the concept of 'private life' by the Strasbourg jurisprudence to include aspects of an individual's physical and psychological integrity,[57] social[58] and gender identity,[59] and sexual orientation.[60] It thus stressed that the notion of personal autonomy was an important aspect of the Article 8 guarantee. Taking the imposition of medical treatment against the will of a competent patient as a starting point the Court suggested that this would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8(1) and, although medical treatment was not the issue in this case, the applicant was suffering from the effects of a degenerative disease which would cause her increased physical and mental suffering as her condition deteriorated. Hence, the Court reasoned, the way she chose to pass the final moments of her life were part of the act of living and she had the right to ask that this choice be respected.

It is, in fact, at this moment in the judgment that the Court brings to the fore its discussion of respect for human dignity which, it is reiterated is 'the very essence of the Convention'.[61] More importantly the notion is linked not to the sanctity of human life (as per Article 2) but rather to 'quality of life' which, it is suggested, may fall within the scope of Article 8. In a statement of principle the European Court stressed the link between law and the development of medical technologies arguing that the increasingly sophisticated body of medical knowledge which allows longer life

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circumstances. An article with that effect cannot be interpreted as conferring a right to die or to enlist the aid of another in bringing about one's own death' *(ibid.*, p. 6*)*.

[57] *X and Y v. The Netherlands* (1986) 8 EHRR 235.

[58] *Mikulic v. Croatia* [Sect. 1], [2002] 13 HRCD 55.

[59] *B v. France* (1993) 16 EHRR 1.

[60] *Dudgeon v. United Kingdom* (1982) 4 EHRR 149.

[61] *Pretty v. United Kingdom* (2002) 35 EHRR 1, para. 65.

expectancy should not mean that people are 'forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.'[62] The Court's recognition of the impact of the continual advancement of medical knowledge upon perceptions and experiences of death and the dying process is a significant step towards the acknowledgement that respect for dignity comprises a social component with *quality of life* issues, and not just life *per se*, being a consideration. To the same extent this interpretation gives value to an individual's need for *self*-respect rather than the more general requirement for respect for the human person which surfaces in the interpretation put upon the dignity considerations which underlie Article 2.

For the comparative lawyer, the reference by both the House of Lords and the European Court to the decision of the Canadian Supreme Court in *Rodriguez*[63] marks an interesting display of cosmopolitanism and highlights the importance of comparative legal studies in the particular context of growing pressure across the Western world to reform provisions on euthanasia and assisted suicide. The decision in *Rodriguez* was viewed as providing an important example in determining the degree to which Mrs Pretty's case was capable of falling within Article 8. In fact, herein lies the point of disagreement in interpretation of the scope of Article 8 by the House of Lords and European Court. While Lord Bingham found that Article 7 of the Canadian Charter (the right to life, liberty and security of the person) which had been held applicable to Ms Rodriguez had no direct equivalent in the European Convention (with Article 5's guarantee of liberty and security of the person not being invoked by Mrs Pretty and Article 8 containing no direct reference to personal liberty or security),[64] the European Court on the other hand found that the right of autonomy – described as self-determination and private life in the Convention context - was engaged and therefore any interference required justification in order to avoid a finding of a Convention violation.

Thus, the European Court went on to examine whether the interference in Mrs Pretty's private life could be legitimated under the second paragraph of Article 8 in

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[62] *Ibid.*
[63] *Rodriguez v. British Columbia* (1993) 107 DLR (4th) 342.
[64] *Pretty v. Director of Public Prosecutions* [2002] 1 All ER 1, *per* Lord Bingham, p. 16.

order to protect the rights of others. In assessing the justification the Court was faithful to its previous case law demanding that the interference be 'in accordance with the law', having a legitimate aim under paragraph 2 and being 'necessary in a democratic society' for the pursuit of that aim.[65] The key issue in the *Pretty* decision was the necessity of the interference given that the restriction on assisted suicide was clearly imposed by law in pursuit of the legitimate aim of safeguarding life and so protecting the rights of others. The European Court noted in its usual manner that the idea of necessity demands that the interference correspond to a 'pressing social need' which is proportionate to the legitimate aim pursued and that, in assessing the degree of necessity, the Court would take into account the margin of appreciation left to national authorities. In applying the formula to Mrs Pretty's situation, the Court was ultimately not persuaded by her suggestion that the ban on assisted suicide was disproportionate despite its blanket nature and the lack of consideration given to her individual situation as a mentally competent adult. Finding that Mrs Pretty was not herself a vulnerable person, the Court again cited *Rodriguez* to the effect that states are, nevertheless, entitled to use the criminal law to regulate activities which may in general be detrimental to life and public health and safety.

Holding, therefore, that section 2 of the Suicide Act 1961 was designed to protect the lives of weak and vulnerable persons, the Court maintained that, while the condition of the terminally ill may vary, many such persons are at risk of abuse and that it is the vulnerability of the class which provides the reason for the law. Mrs Pretty's individual claim, as under Article 2, had ultimately to give way to the protection of a wider category of persons. In this way it is once more the dignity of the human person in its most general, life-promoting, sense rather than the dignity of the individual understood in terms of personal quality of life and expression of identity, which commands greatest respect. To the extent that individual circumstances were relevant there was found to be a sufficient degree of flexibility in the enforcement and adjudication process in view of the fact that the DPP had to consent to a prosecution and that a maximum sentence was provided which allowed for lesser penalties where appropriate. Thus, a balance between collective and individual interests was finally

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[65] See *Dudgeon v. United Kingdom* (1982) 4 EHRR 149, para. 43.

drawn under Article 8 which required Mrs Pretty to face a painful and undignified death in order to protect a class of unidentified victims more vulnerable than herself.

Finally, as regards Mrs Pretty's claim under Article 14, it was unanimously found that she suffered no unlawful discrimination *vis-à-vis* people able to take their own lives without assistance. UK law contained no 'right' to commit suicide, the Suicide Act being designed merely to decriminalise the act rather than conferring any positive right.[66] Lord Bingham in the House of Lords argued further that the criminal law could not be viewed as discriminatory because it applied to all. It did not ordinarily distinguish between willing and unwilling victims and any attempt to exonerate those who assisted the suicide of the non-vulnerable as opposed to the vulnerable would be impossible to administer fairly.[67] It is the situation of the vulnerable victim which engaged also the imagination of the European Court in its discussion of the applicability of Article 14. The Court found, that while a difference in treatment might exist, this was based upon an objective and reasonable justification in order to avoid the 'risk of abuse' of vulnerable persons who might otherwise be coerced into requesting an early termination of their life.[68]

To the extent that respect for dignity requires the treatment of individuals in a non-discriminatory and non-selective manner, ensuring that everyone is deserving of equal consideration, it might again be noted that Mrs Pretty's personal dignity looked in danger of assault. Like Article 8, however, Article 14 operates to protect the dignity of a class of persons, in this case the sick and vulnerable, rather than individual interests. Undoubtedly this appeal to the collective good runs the risk of paternalism in its desire to respect the dignity of an unspecified group at the expense of that of the individual obliged to endure a protracted and painful personal dying experience. Yet, as pointed out by the conclusions of the House of Lords Select Committee on Medical

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[66] It is interesting to note that the only discrimination issue pursued was that based upon disability. It might be argued that an additional claim could have been made out on the grounds of sex discrimination given evidence suggesting that women are more likely to seek assistance to die than men as they generally live longer and may wish to avoid death in a communal home or to mitigate the economic and emotional costs to their families that their care over a long period of time would involve. See Biggs H., 'I Don't Want to be a Burden! A Feminist Reflects on Women's Experiences of Death and Dying' in *Feminist Perspectives on Health Care Law* eds. Sheldon S. and Thomson M., (London: Cavendish Publishing, 1998) pp. 279-295.

[67] *Pretty v. Director of Public Prosecutions* [2002] 1 All ER 1, p. 20.

[68] *Pretty v. United Kingdom* (2002) 35 EHRR 1, para. 89.

Ethics in 1994, 'dying is not only a personal or individual affair. The death of a person affects the lives of others, often in ways and to an extent which cannot be foreseen.'[69] While this is of course true, the question still remains as to whether it is justifiable to ask of individuals that they continue their lives in truly unbearable circumstances in the interests of society as a whole.

Furthermore, it is not impossible to see within Mrs Pretty's call for death with dignity the paradoxical instrumentalisation of individual rights in order to end the individual and isolated experience which death of the terminally ill seems presently to entail. Mrs Pretty's desire to die in the manner of her choosing, with her family around her, points to a need for a sustained relationship to others in death as in life. The acknowledgment of this need for inter-personal connection in the dying process comes through clearly in the speech of Lord Bingham in which he emphasised Mrs Pretty's wish to act 'with the support of her family' demonstrating the willingness to assist of Mr Pretty, her husband of 25 years and principal carer, in order to end his wife's suffering.[70] To the extent that dignity interests are respected by the capacity to enjoy and pursue personal relationships, it seems questionable whether these may be secured for some dying persons whose physical disabilities mean they cannot act like able-bodied persons, and suggests a need to rethink the current legal interpretation of the appropriate balance between pursuit of the collective and individual good life and death.

By a tragic coincidence of timing the poignancy of Mrs Pretty's situation, dependent as she was upon receiving assistance in order to die, was drawn starkly to public attention by the case of *Ms B* decided by the Family Division of the English High Court at the same moment as Mrs Pretty battled before the European Court.[71] Like Mrs Pretty, Ms B was 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.

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[69] HL Paper 21-I, 1994, para. 237.

[70] *Pretty v. Director of Public Prosecutions* [2002] 1 All ER 1, p. 5. By way of contrast to the picture drawn of Mrs Pretty's supportive family network is the description of the life of the protagonist in the case of *Re B (Adult: Refusal of Medical Treatment)* (HC, Fam Div) [2002] 2 All ER 449 (see subsequent discussion in text) who had no supportive family and expressed concern that, were she forced to continue to receive medical treatment, she may find herself on her own with carers or in a nursing home (p. 464).

[71] *Re B, ibid.*

Unlike Mrs Pretty, though, she was kept alive by the use of a ventilator and so wished for this life-sustaining treatment to be withdrawn rather than for an active act of assistance to enable her to die. The High Court held that *Ms B* was entitled to have her request respected in order to give full legal expression to her competence and personal autonomy, a decision which resulted shortly afterwards in her death.[72] Mrs Pretty, on the other hand, with no ventilator to switch off, demonstrated in her courageous struggle towards death[73] that the line between act and omission in these matters is finely (and arguably unjustifiably) drawn.[74] With this in mind, the key assertion by the European Court in *Pretty* that respect for human dignity relates not only to respect for life in a general sense, but also to *quality* of life, sets down an important marker for consideration in future cases.

In conclusion, there clearly exists no 'right to die' nor even any 'right to die with dignity'. French law, like its UK counterpart, is strongly protective of vulnerable individuals and seeks to criminalise any assistance or provocation to suicide. Nevertheless, the two systems respect individual liberty and the expression of free will in so far as individuals are capable of bringing about an end to their own life by their own hand. Having considered the law on death and dignity with regard to such individuals as are able to give a clear expression of their wish to live or die, we turn next to a consideration of the dying experience of those people who for reasons of infirmity are incapable of expressing a choice.

4.1.2 Involuntary death

It is around the debate on involuntary death that UK law first became preoccupied with the question of human dignity at the final stages of life. While it was noted in

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[72] In giving weight to personal autonomy in this case, and declining to advance a more collective, paternalistic, vision of best interests Dame Butler-Sloss P stated that: 'a seriously disabled patient has the same rights as the fit person to respect for personal autonomy. There is a serious danger, exemplified in this case, of a benevolent paternalism which does not embrace recognition of the personal autonomy of the severely disabled patient.' (*Re B, ibid.*, p. 472).

[73] Diane Pretty died of natural causes on 11 May 2002, enduring the painful death by choking which she had long feared.

[74] Biggs H., 'A Pretty Fine Line: Life, Death, Autonomy and Letting it B: *R (on the application of Pretty) v. D.P.P.* [2002] 1 All E.R. 1 and *Re B (Adult: Refusal of Medical Treatment)* [2002] 2 All E.R. 449' (2003) 11 *FLS* 291-301.

the previous chapter that UK law makes only oblique reference to dignity in beginnings of life issues (unlike the French which is more explicit), at the other end of the life cycle there is a reversal of interest. The emergence of the discourse on dignity in law, however, is remarkable for its coincidence in the two countries at the same moment in time and with regard to the legal regulation of medical technologies governing life and death. Thus, in 1993 the House of Lords in *Airedale NHS Trust v. Bland*[75] gave its path-breaking decision on the legality of withdrawing medical treatment provided to individuals in a persistent vegetative state. Accepting that there may be circumstances in which it would be in the best interests of the patient to cease treatment, and invoking the *undignified* existence of patients living in this state, the House of Lords rendered a judgment which may be viewed alongside that of the Constitutional Council in its *Bioethics* decision in terms of its magnitude for consideration of the place of human dignity in national law. France has made no similar leaps of faith in this area. In fact, it will be seen that French law seeks above all to protect (prolong) the lives of individuals.

UK law nevertheless, as mentioned in Chapter 2 above,[76] continued to grapple with death in controversial circumstances in a case concerning the proposed separation of conjoined twins where the value of human dignity was invoked in order to justify separation although the death of one twin was the inevitable consequence of this act.[77] No similar dilemma has presented itself to the French courts. However, given French legal mentality and the gap between UK and French law in this area, it is hard to imagine a similar result (death over life) being allowed. It is, thus, to a comparative examination of these two examples of involuntary death that we proceed in investigating the application of human dignity to circumstances in which the very qualification of a human being as a person capable of a valid and worthy existence is put to the test.

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[75] *Airedale NHS Trust v. Bland* [1993] AC 789.
[76] See p. 118.
[77] *Re A (Children) (Conjoined Twins)* [2000] 4 All ER 961.

4.1.2.i Patients in a persistent vegetative state

Medical technologies permit the artificial maintenance of the heart and lungs of a person when other essential parts of the body, such as the brain and the nervous system have ceased to function.[78] The 'persistent vegetative state' (PVS) which ensues signifies that while the brain stem continues to function and thus the patient is not 'dead' according to medical and legal criteria, the brain in its upper part is irreparably damaged so that the person cannot exist without artificial assistance to ensure feeding and hydration. Of course, individuals living in such a state are incapable of expressing a view as to their condition and their wish to continue to live or die. Thus, doctors, relatives and judges have all been required to reflect upon the best interests and final destiny of PVS patients. The result of comparative enquiry suggests that while UK law, reliant as ever upon expert medical opinion, has qualified PVS as an *undignified* state, thus legitimating a withdrawal of treatment, French law has sought instead to safeguard a *dignified* existence until the natural moment of death.

Indignity in life: the UK perspective The *Bland* case which came before the House of Lords in 1993, has become a landmark in the history of medical liability in the UK. Lord Goff invoked the symbolic Rubicon, 'which runs between on the one hand the care of the living patient and on the other hand euthanasia – actively causing his death to avoid or end his suffering', to explain the dilemma in which he found himself when asked to decide upon the liability of doctors in ceasing to provide medical assistance to a patient in PVS.[79] Of the nine judges who considered the issue at first instance, on appeal, and in the House of Lords, all found that the withdrawal of treatment was legitimate, and thus the Rubicon had not yet been crossed.[80]

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[78] Py B., *supra* n. 1, p. 19. In France, the Decree of 2 December 1996, amending Article 671-7-1 of the Code on Public Health, sets out three conditions for establishing brain death: 1) the total absence of conscience and spontaneous motor activity; 2) the absence of all reflexes in the brain stem; 3) the absence of spontaneous breathing: Py B., *ibid.*, p. 21. In the UK the criteria for death are founded upon the Harvard system which similarly defines the moment of death as the point at which the brain stem ceases to function: Morgan D., *Issues in Medical Law and Ethics* (London: Cavendish Publishing, 2001) pp. 217-218.

[79] *Airedale NHS Trust v. Bland* [1993] AC 789, p. 865.

[80] This opinion is not universally shared. For example, J.M. Finnis, has maintained that if, according to the judges, the law remains 'safely north of the Rubicon', from another perspective the judiciary may be said to be 'willy-nilly in mid-stream, wading south' (Finnis J.M., 'Bland: Crossing the Rubicon'

Reflecting upon the circumstances of the tragedy in 1989 which had caused Tony Bland to be crushed by the crowd at a football match, resulting in a loss of oxygen to his brain, his unconsciousness and prolonged artificial life in hospital for three years with no prospect of recovery but equally none of death, the House of Lords confirmed the judgments at first instance and on appeal, giving assent to the wishes of the hospital to put an end to all 'treatments' except those designed to allow the patient to end his life and to die peacefully in the most dignified manner possible. Moreover, according to the Law Lords, the cessation of measures destined to save the life of the patient was not only legitimate but represented the *duty* of any doctor who, provided he or she acted in accordance with a responsible body of medical opinion,[81] considered that treatment was no longer in the best interests of the patient. The law, therefore, permitted the doctor to withdraw treatment even when this was done with the express intention to end the patient's life.

Thus, the question deserves to be asked why the deliberate withdrawal of life-sustaining treatment does not constitute an act of murder? As an early signal of matters to be discussed nearly 10 years later in the case of Diane Pretty, the Law Lords grounded their decision upon the distinction between acts and omissions. The conduct of the doctors in *Bland* was characterised as an omission and, as noted earlier, UK law recognises no obligation to act in order to assist a person in danger. Omissions are, therefore, perfectly legitimate. Thus, Lord Goff described the unplugging of the life support system as an 'omission to struggle'.[82] The duty of the doctor to act in the best interests of the patient is not, therefore, always served by the preservation of life. On the contrary, it may be best satisfied by allowing the patient to die where the quality of life is so poor as to mean that treatment no longer confers any benefit. For the judges, death for Tony Bland was, in the words of J.M. Finnis, 'no harm or loss',[83] as the treatments keeping him alive were no longer of any benefit to him or in his best interests.

(1993) 109 *LQR* 329-337, at p. 329). The decisions of the High Court, Court of Appeal and House of Lords are all available at [1993] AC 789, pp. 795, 806, and 835 respectively.

[81] The judges, thus, applied the test for liability established in *Bolam v. Friern Hospital Medical Committee* [1975] 2 All ER 18.

[82] *Airedale NHS Trust v. Bland* [1993] AC 789, at p. 866.

[83] Finnis J.M., *supra* n. 80, p. 333.

Worthy of a response too is the question of what ethic lies behind this decision. What is the moral basis which justifies the conclusion that treatments, and thus life, no longer confer any benefit. Quite simply the justification lies in an appeal to the dignity of the patient. More precisely, it is not so much 'death with dignity' that is at issue but rather the *indignity* of life in this state. Lord Goff clearly expresses this sentiment when he states that it is reasonable to take account of 'the invasiveness of the treatment and of the indignity to which, as the present case shows, a person has to be subjected if his life is prolonged by artificial means.'[84] This novel interpretation of dignity reverses the more usual understanding of the concept as founding the sanctity of human life and is employed instead to justify death as the best solution. Hence it is the actions of the doctor which are the source of the patient's indignity when they consist in the continued application of medical treatment which no longer confers benefit. Viewed from this perspective, life-sustaining treatment is reinterpreted as an intrusive and unlawful intervention upon the body of the patient whose existence, in the eyes of the medical team, no longer has any meaning.[85] This construction of respect for human dignity in the context of modern medicine is far removed from the French approach which employs dignity to promote the struggle for life. In UK medical law the subject may be *dehumanised*, literally, through being deprived of his or her attachment to humanity.

A further question ensues as to exactly whose 'best interests' are served by the *Bland* decision. It was clear that Tony Bland would die of hunger in the absence of treatment and the failure to provide artificial food and hydration.[86] Yet, he seemed to be in no pain. Lord Goff, nevertheless, mentioned the possibility of providing him

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[84] *Airedale NHS Trust v. Bland* [1993] AC 789, at p. 869.

[85] Stern K., 'Law and the Lack of Sense' in *Law and the Senses: Sensational Jurisprudence* eds. Bently L. and Flynn L., (London: Pluto Press, 1996) 42-61, at p. 57. Stern here cites two members of the Court of Appeal, Butler-Sloss LJ and Hoffman LJ (*Bland, ibid.*, p. 822 and p. 826). Stern also discusses the notion of 'sense' and characterisation of the life of Tony Bland as without sense which she suggests is based upon a subjective appreciation by the doctors of their own existence (which do have sense). Finding nothing similar in the existence of Tony Bland, they presume that for him life has no meaning.

[86] Lord Brown Wilkinson acknowledged that the solution of the Law Lords in permitting death in this way might seem illogical but maintained that it was, nevertheless, legally correct: 'The conclusion I have reached will appear to some to be almost irrational. How can it be lawful to allow a patient to die slowly though painlessly, over a period of weeks, from lack of food but unlawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal...? I find it difficult to find a moral answer to that question. But it is undoubtedly the law.' (*Bland, ibid.*, p. 880).

with palliative care to suppress 'the outward symptoms of dying in such a way'.[87] Wherein lies the need for such care? Perhaps in making the dying process less difficult for the doctors and relatives, but certainly not in satisfying any interest of the patient.[88] It seems that, in this respect, another aspect of human dignity emerges for protection - that of the 'spectators'. There is a certain sad irony in the fact that Tony Bland, himself a football spectator, became in turn the object of medical and familial sustained regard. Useful for comparative purposes is the recollection of the French dwarf-throwing cases in which the *commissaire du gouvernement* had expressed the view that the dignity of the onlookers was compromised by their salacious enjoyment of this degrading spectacle. In a similar way it may be argued that witnessing the painful death of Tony Bland through starvation would likewise impact upon the dignity of his family and doctors. Palliative care would, thus, be in the interest of others to safeguard their dignity in beholding the spectacle of death.

The solution in *Bland* has been followed in later PVS cases.[89] Nevertheless, the decision predates the introduction of the Human Rights Act 1998 and requires reconsideration in the light of this, particularly since the case was constructed as an issue of the duties owed by doctors to patients and not at all as one of the fundamental rights of the latter. Once again it is Article 2 ECHR which appears the most applicable, with the withdrawal of medical treatment to PVS patients seeming to present a clear violation of the right to life which is unjustifiable in terms of the exceptions permitted by this Article.[90] Nevertheless, two decisions of the Family Division of the High Court since the Human Rights Act came into force, have found to the contrary.[91] Thus, in the cases of *M* and *H* brought before the court in October 2000, the interpretation of the fine line between acts and omissions given in *Bland* was found to be compatible with Article 2. The 'omission' of the doctor in ceasing treatment was not a violation of the right to life since the patient would die eventually

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[87] *Bland, ibid.*, p. 870.
[88] See Stern K., *supra* n. 85, p. 58.
[89] *Frenchay Healthcare NHS Trust v. S* [1994] 2 All ER 403; *Re D* [1997] 5 Med LR 225; *Re R* [1996] FLR 99.
[90] The limitations to Article 2 are discussed above, Chapter 2, p. 86.
[91] *NHS Trust A v. M* and *NHS Trust B v. H* [2001] 1 All ER 801.

of natural causes rather than being deprived of life by a deliberate act.[92] There was, therefore, no intention to take life and Article 2 was not violated.

With regard to other ECHR rights, it may be possible to argue that there exist violations of Article 3 (given the degrading process of starvation through which the patient would die following the withdrawal of treatment), Article 8 (as a result of the interference in private life constituted by doctors and family members witnessing the protracted dying process) and Article 14 (given the discriminatory implications *vis-à-vis* other patients who do not suffer such undignified treatment in the final stages of their life). Such questions remain to be answered. Nevertheless, one can only suppose that the resolution of human rights issues, in the same way as that of doctors' liability, will inevitably be conducted in the light of practical and policy considerations (even if these are not expressly brought to the fore). Derek Morgan, in a discussion of the *Bland* decision, frankly notes the high financial costs of maintaining a patient in PVS and suggests that the problem of resources must be a consideration in the minds of judges when determining such cases.[93] Thus, for Morgan, the decision in *Bland* represents but one example of the 'tragic choices' which the courts face in the domain of medical law.[94]

Dignity in life: the French perspective The UK legal perspective on hastening the death of PVS patients is far removed from that of the French courts which remain attached to the primary objective of preserving life. While there is no direct equivalent of *Bland* on the withdrawal of treatment, two French cases (one in civil and one in administrative law) address aspects of the situation of an unconscious individual showing the way in which French law differs from its UK counterpart in the concern to protect human dignity in such circumstances.

The first case concerns an award of damages to the victim of an accident who remained insentient in a state of PVS and with regard to whom it was questioned

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[92] According to Dame Butler-Sloss P, '[a]lthough the intention in withdrawing artificial nutrition and hydration in PVS cases is to hasten death, in my judgment the phrase "deprivation of life" must import a deliberate act, as opposed to an omission, by someone acting on behalf of the state, which results in death' (*ibid.*, p. 809).

[93] Morgan D., *supra* n. 78, p. 220. In Morgan's candid view '[t] here is a sense in which Tony Bland is a hostage to the fortune which the British public health service no longer has.'

[94] Morgan D., *ibid.*, chapter 11, 'Tragic Choices and Modern Death: some *Bland* reflections'.

whether any harm was being experienced. The full assembly of the *Cour de cassation*, in a decision of 10 November 1995, overturned a previous ruling which had found that the victim could feel nothing and therefore was incapable of experiencing harm or loss.[95] In doing so the court recognised that PVS patients have the quality of a 'human person' and refused to introduce a form of hierarchy between individuals on the basis of their state of health. The assessment of the damage suffered by the patient had therefore to be carried out objectively, without taking account of the particular circumstances of the victim. Thus, the court demonstrated concern to safeguard the 'human' attachment of the individual until the very end of life, refusing to reduce the patient to the rank of unfeeling object. This position may be contrasted with that of Law Lords in *Bland* who, having found that Tony Bland possessed no capacity to appreciate his circumstances, accepted that his life fulfilled no further useful purpose and that it may, therefore, be ended. For their part, the French judiciary have put an accent upon the absolute value of respect for the dignity (life) of all human beings, regardless of their impoverished physical or mental state.

The second case which has troubled the French judiciary in this area came before the *Conseil d'Etat* on 2 July 1993.[96] A certain Professor Milhaud, having carried out experiments upon a brain dead patient, was sanctioned by the disciplinary section of the Council of the Order of Doctors and contested this finding before the highest administrative jurisdiction. The *Conseil d'Etat* refused to accept his challenge, insisting upon the importance of respect for individuals and their mortal remains as set out in the Opinion of 7 November 1986 of the National Consultative Committee on Ethics.[97] Once again, this judgment suggests the value attributed to the human person in the final moments of life and beyond. According to French law, this value does not diminish as death approaches, but instead protection is reinforced due to the vulnerability of the patient at this particular moment.

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[95] Cass. ass. plén., 10 November 1995, Bull. ass. plén. no. 6. See also Cass. 2e civ., 22 February 1995, D jur. 1995, 69, note by Y. Chartier.

[96] CE, Ass., 2 July 1993, *Milhaud,* RFDA, 1993, 1001-1017, conclusions by D. Kessler; JCP, 1993, II 22133, note by P. Gonod; D 1994, 74, note by J.-M. Peyrical; LPA 1994, 144, 19-23, note by C. Schaegis; AJDA, 1993, 530-534, commentary by C. Maugue and L. Touvet.

[97] The Opinion of the CCNE of 7 November 1986 provides that doctors may not rely on the presumed consent of the patient in order to carry out scientific research as the law permits in the case of organ transplantation, there being a difference between the latter which is designed immediately to serve another human life and the former with regard to which the results are not foreseeable. On the legality of *post mortem* organ transplants in the UK and France, see below, pp. 236-238.

There is, therefore, a considerable difference in Anglo-French legal perspectives on the (non) treatment of unconscious individuals who are incapable of expressing a view as to their future life or death. The gap seems to have widened in the wake of the more recent decision by the Court of Appeal in the case of the separation of conjoined twins.[98] Like *Bland*, this case demonstrates how human dignity may be employed in the UK legal arena to justify ending life.

4.1.2.ii. Conjoined twins

If UK law did not cross the Rubicon between acts and omissions in *Bland,* the case of *Re A (Children) (Conjoined Twins)* represents a decisive step in this direction. The case of the twins engaged the interest not simply of lawyers and doctors but also that of the media and wider public[99] and, as in *Bland*, involved the judges having to make a 'tragic choice' in a situation where there could be no winners. The twins were born in Manchester in August 2000, joined at the lower part of the spine and sharing a bladder and aorta. The lungs and heart of the weakest twin, Mary, did not function and her blood was pumped by the heart of her sister, Jodie. The legal and ethical dilemma was whether to separate them in the knowledge that, without the operation, Jodie's heart and lungs would eventually cease to be capable of supporting the flow of blood around two bodies and that this would bring about the death of both twins. With separation, the weakest twin, Mary, would certainly die but her sister would have a good chance of life.[100] The children's parents, practising Catholics, were opposed to separation out of respect for the sanctity of life while the hospital authorities favoured it.[101] Thus, the judges, called upon to determine whether

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[98] *Re A (Children) (Conjoined Twins)* [2000] 4 All ER 961.

[99] See the special issue of the *Medical Law Review* devoted to the case: (2001) 9/3 *Med L Rev*; and the discussion of its aftermath by Jason Burke 'Surviving Twin Gracie to go Home to Malta', *The Observer*, 17 June 2001. The first name Gracie used here was the surviving child's real name, the other twin being called Rosie. The names Jodie and Mary were used in the judgments to protect the identity of the twins.

[100] The chance of Jodie dying as a result of the operation to separate the twins was estimated at 6%.

[101] In other cases where there has been no difference of opinion between parents and medical authorities, the courts have not been asked to rule upon the legality of a proposed separation. See Hoyle R.M., 'Surgical Separation of Conjoined Twins' (1990) 170 *Gynaecology and Obstetrics* 549-62; and Sheldon S. and Wilkinson S., 'Conjoined Twins: The Legality and Ethics of Sacrifice' (1997) 5 *Med LR* 149-71.

separation would be lawful, decided finally that it would be so,[102] recourse to the notion of human dignity being made by all sides and once again demonstrating its double façade: respect for dignity in life or death; for that of one twin or the other. It is, therefore, first to a consideration of the interests, including respect for dignity, of the protagonists that we turn, before going on to examine the legitimacy of death which was the inevitable consequence of separation.

An initial question raised in the case, which may seem almost too brutal to be posed, was that of whether Mary and Jodie were 'persons' who benefited from legal protection (and thus respect for their dignity). Being united in one body, this question involved a reflection upon the notion of the human being as a biological and rational entity. Can two persons exist at the same time in one body? Was it not a case of one person rather than two? The Court of Appeal found that, from a legal point of view, Mary and Jodie were both 'persons' who were, therefore, entitled to legal protection. To have the legal status of 'person' it was sufficient that a child be 'capable of an independent existence' (that is, independent of its mother), meaning that both twins qualified.

That established, the judges then had to consider what would be in the 'best interests' of each child. Refusing to agree that the best interests should be determined by the wishes of the parents,[103] the Court of Appeal went on to formulate its own view of the interests of the twins. With regard to Jodie, the strongest twin, it was found, as it had been at first instance, that separation was in her best interests, the conclusion being reached following a consideration of her dignity. Thus, Jodie had the right to reclaim her dignity interpreted as the right to an independent, free and separate body from that of her sister. Without separation, she would exist only as an instrument or machine destined to support the life of another, rendering her a means rather than an end in her own right. With separation she had the chance of a normal and dignified life.

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[102] The four judges in the case (Johnson J at first instance and Ward, Brooke and Walker LJJ on appeal) all deemed the separation to be lawful. They differed on their reasons for this. See below, pp. 228-229.

[103] The Court of Appeal recognised that a certain degree of respect should be accorded to the wishes of the parents but that, ultimately, the view of the court was primary and the opinion of the parents regarding Jodie's future dismissed as too pessimistic.

If Jodie's dignity lay in measures to preserve her life, the Court of Appeal reasoned rather differently with regard to that of Mary. Expressing disagreement with the interpretation of Mary's best interests given at first instance,[104] the Court of Appeal found that each human life has inherent value regardless of the gravity of any handicap. Mary's life was still, therefore, worthy of respect and separation was not, in this respect, in her interests. This finding of the value, and hence need to respect the dignity, of Mary's life is important in that it appears, at first sight, to admit the primacy of life. However, in fact, the consequential preservation of Mary's life was not automatic. Respect for dignity may also, as seen in *Bland*, reside in a permission to die, in order to put an end to suffering in life but without going so far as to give effect to a right to die with dignity.[105] That said, the court faced a dilemma. A balance had to be struck between the two interests and two competing views of dignity at issue. The judges, finding in favour of the life of the strongest twin rather than the death of both, calculated that the benefit of separation for Jody was greater than the detriment it would cause to her sister. The problem, however, was how to justify such a conclusion and permit an act which has all the appearance of murder. Murder in UK law, as in French law, supposes an element of intention and it was more than clear that the medical team knew that separating the twins would result in the death or serious injury of one of them. The intentional element was clearly present. How then to justify the apparent crime?

In deeming the separation to be justifiable, Ward LJ, author of the leading opinion of the Court of Appeal, argued that there were two justifications: the duty of the doctors and self-defence. With regard to the former the doctors were under an obligation to act in the best interests of their patient in which case they faced two contradictory duties: not to kill Mary and to save the life of her sister. In these circumstances, Ward

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[104] Johnson J, at first instance found that Mary's best interests were represented by her death as the fact that her life was supported by her sister was injurious to her too. The last months of her life would serve no purpose; on the contrary, the prolonging of her life would be seriously disadvantageous to her.

[105] Academic opinion has been divided as to the pertinence of these interpretations of dignity. Thérèse Callus, for example, has recorded her agreement with the decision seeing therein a form of respect for the dignity of both sisters: 'Jodie is clearly the means of Mary's survival: she is her life-support machine. As a result, Jodie's dignity is being compromised... Moreover, Mary's dignity cannot be said to be respected in forcing her to remain joined to her sister, a situation which will entail her sister's unavoidable death. ... Intervention on Jodie ... merely recognises the dignity of each individual and the reality that Jodie has the potential to remain alive through medical intervention' ('Conjoined Twins' (2000) 150 *NLJ* 1362). Michael Freeman, on the other hand, even if in agreement with the final

LJ reasoned that a way out of the dilemma had to be found permitting the doctors to choose the least harmful option. With regard to self-defence, it was recalled that the principle of the preservation of life is not absolute and that it applies only to defend life from unjustified attack. Viewed in such terms, the reality of the situation was that Mary was *killing* her sister, acting as a drain on her blood supply. Carrying out the separation, the doctors would simply be defending Jodie from the threat of a fatal assault.[106]

These justifications have been received diversely by academic opinion.[107] Nevertheless, what is important to emphasise here is the appeal made to the dignity of the two girls in order to justify the final conclusion. The case shows how the plasticity of dignity as a concept may be manipulated to justify the death of one twin while used simultaneously in the name of preserving the life of the other. Without any direct point of comparison in French law, one can only speculate that, oriented as it clearly is towards safeguarding life rather than facilitating death, a different ending from that allowed by the Court of Appeal would have been forthcoming.[108]

4.2 The after life

The question of respect for human dignity does not terminate at the moment of death. The treatment of the deceased, of his or her remains, memory and image, continue to provide food for legal thought despite the fact that the person is no longer in existence. Thus, legal recognition that the dead deserve to be treated in a dignified manner is testimony to the consideration given to them and the person they once

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decision, contests the reasoning of the judges, arguing that the best interests of Mary lie precisely in her right to die with dignity ('Whose Life is it Anyway?' (2001) 9/3 *Med L Rev* 259-280).

[106] In this respect it would seem that there is no violation of Article 2 ECHR nor the Human Rights Act 1998, self-defence being one of the justifications for the deprivation of life. See above, Chapter 2, p. 86.

[107] See the conclusions of the various contributors to the special issue of the *Medical Law Review*, *supra* n. 101. Only two authors express agreement with the decision of the Court of Appeal, albeit that they disagree over the reasoning employed: Michael Freeman, *supra* n. 105, agrees that the separation may be justified as an expression of Mary's right to die with dignity, while Barbara Hewson founds her opinion on an interpretation of the presumed consent of Mary to the separation ('Killing off Mary: Was the Court of Appeal Right?' (2001) 9/3 *Med L Rev* 281-298).

[108] This conclusion is supported by recalling the discussion in the previous chapter of the swift French parliamentary response overturning the *Cour de cassation's* decision in *Perruche* that the lives of certain children are not worth living. See above, p. 188.

were. Legal discourse in this area is nuanced by a multiplicity of considerations surrounding the status of the deceased and touches upon public and private sphere concerns as well as both physical and mental aspects of respect for the dead. From a comparative perspective, however, there is a distinct difference in the way in which such issues are handled in French and UK law. Having consistently put an emphasis upon respect for human life, it is not surprising to find that French law is rather more protective of the memory of a person in death too. UK law, on the contrary, seeing respect for dignity in the acceleration of death, is somewhat less respectful once this process is complete. First under consideration, therefore, is the enhanced respect for the dead in French law demonstrated through a progression from protecting burial sites towards a protection of the corpse itself. This is followed by an examination of the protection of the memory and image of the deceased which is again more developed in France than the UK.

4.2.1 Respect for burial sites and bodies

Mirroring the trend of an increased concern to respect dignity during life, the movement towards an enhanced respect for the dead is discernable in French law which, while initially concerned by the need to protect graves and burial sites has sought increasingly to safeguard the integrity of the corpse with the introduction of a series of Articles into the new Penal Code highlighting this aspect of respect for the dignity of the deceased. On the other hand, UK law seems to more readily accept an objectification of the body of the deceased, viewing it even as entering into the domain of property. These two issues, respect for burial sites and corpses, will be considered in turn, with particular regard being given to the different interpretations of dignity in death which they suggest.

4.2.1.i Respect for burial sites

French law appears particularly concerned to respect the dignity of the dead through an extensive range of provisions aimed at protecting tombs, graves and burial sites. Respect in this context, however, is preceded by the specification of conditions for

funerals which are aimed at enhancing the dignity not only of the dead but also that of grieving family and friends. Respect for the deceased begins with legal protection of their last wishes requiring that effect be given to their choice of funeral arrangements.[109] Likewise, a principle of stability of the burial site has been established, such that the *Cour de cassation* has decided that once this has been fixed it cannot be changed except in case of absolute necessity.[110] On the other hand, it would seem that funerary urns, which are more easily displaced, do not form the object of similar legal protection. In this regard, there is a neat distinction between private and public aspects of burial in so far as urns may be placed in a private domicile and even transported from one location to another.[111]

Public order and policy issues may also be a consideration for local authorities in France in the context of the power of mayors to administrate burial arrangements. In this respect it is useful to recall that one result of the dwarf-throwing cases decided by the *Conseil d'Etat* was the inclusion of a new factor in public order matters which can justify the mayor's use of local administrative police powers – this being respect for human dignity.[112] It might be anticipated, therefore, that mayors begin to take into account the necessity to respect the dignity of the deceased and that of his or her loved ones when they exercise their functions under Article L. 2213-9 of the Code for Administrative Regions, according to which the powers of the mayor extend from the mode of transport of deceased persons to the maintenance of order and decency in cemeteries, and the conduct of inhumations and exhumations. Moreover, this Article requires the mayor to exercise police powers in accordance with the principle of non-discrimination, clarifying that he or she may not make any distinctions or impose

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[109] Article 3-1 of the Law of 15 November 1887 on freedom regarding funeral arrangements states that 'any adult or emancipated minor with capacity, may stipulate the conditions for his or her funeral, notably regarding its civil or religious character and the mode of burial' (*'[t]out majeur ou mineur émancipé en état de tester, peut régler les conditions de ses funérailles, notamment en ce qui concerne le caractère civil ou religieux à leur donner et le mode de sa sépulture'*). Respect for this choice is not simply a moral obligation but may result in a criminal prosecution if not followed (see Py B., *supra* n. 1, p. 112). However, a request made by the deceased to have his or her remains preserved or frozen will not be respected as this is not a lawful means of disposing of the body (CE, 29 July 2002, D IR, 2002, 2583; TA de Nantes, 5 September 2002 and CA d'Angers, 9 September 2002, JCP, 2003, II 10 052, note by S. Douay).

[110] Cass. 1re civ., 8 July 1996, Bull. I, no. 205; JCP G 1997, IV 279. See further the discussion of this case by Pédrot P., 'Aux deux seuils de la vie' *D* 2001, special issue, 20, 69-77, p. 76.

[111] TGI de Lille, 25 January 2001, D jur. 2001, 2545, note X. Labbée.

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

particular requirements on the basis of the beliefs or faith of the deceased or the circumstances which accompanied death.

In the UK, the principle of respect for the wishes of the deceased have no equivalent textual foundation to that found in the French Code for Administrative Regions, being rather more implicit.[113] Nevertheless, conflict may arise between relatives of the dead and church authorities, as proprietors of cemeteries, where the latter seek to impose public policy requirements with regard to graves and funeral monuments. In one such case, church authorities refused to allow relatives to inscribe upon the gravestone of the deceased the words 'Dad' and 'Grandad' for the reason that these were too familial and did not sufficiently respect the sacred character of the site.[114] It was suggested instead that more respectful terms such as 'Father' and 'Grandfather' were to be preferred. The issue, demonstrating a conflict between the private wishes of the family and the public policy requirements of the church authorities, was resolved in favour of the latter. Respect for the wishes of the family was required to give way to concerns of a broader public interest.

It is not only the conditions in which funerals are conducted which oblige respect for the deceased. There is also evidence in both French and UK criminal laws of a need to ensure the integrity of cemeteries and burial sites. In the case of France, lack of respect for the dead is sanctioned by Article 225-17 of the new Penal Code which criminalises the violation of tombs, graves and monuments erected to the memory of the dead. Likewise, UK criminal law recognises the offence of causing damage to the property of another, which is applicable to the damage and destruction of tombs and cemeteries.[115] Thus, both legal systems show concern to protect places of rest – a concern which is extended to the safeguard of the body of the deceased.

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[113] The right to bury the body of the deceased in a cemetery may be granted by the Church or by law. See Dowling A., 'Exclusive Rights of Burial and the Law of Real Property' (1998) 18 *LS* 438-452, p. 439.
[114] *Re Holy Trinity Churchyard, Freckleton* [1994] 1 WLR 1588. See Ward D., 'No Dads in Graveyard, Says Church', *The Guardian*, 10 August 1994.
[115] Section 1(1), Criminal Damage Act 1971.

4.2.1.ii Respect for bodies

It is French law in particular which has recently developed its protection not only of burial sites but also of the corpse itself. This evolution may be explained by the more specific aim to safeguard mortal remains which was not covered by existing measures protecting tombs and graves. UK law has also shown willingness to extend legal protection to the corpse.[116] It will be seen, however, that certain exceptions exist permitting interference with the body of the deceased and even the disposal of some elements thereof.

Respect for the integrity of the corpse and its composite elements It might be supposed that respect for the integrity of the corpse requires that it be considered as a whole entity and that its dismemberment should not be authorised. This is not entirely so, however, in the UK where judges have permitted a certain objectification of body parts which has no equivalent in French law. With regard to the latter, the corpse is expressly protected in the new Penal Code through provisions which make direct reference to human dignity. Dating from 1994, the same year in which the principle of constitutional value of safeguarding human dignity was introduced,[117] Article 225-17 of the Code sets out a particular form of protection of the body of the dead by criminalising any assault, in whatever form, upon the integrity of the corpse. In this way, the juridification of the principle of respect for human dignity can be seen to extend to the after life as a form of respect for the person that once was.

Nevertheless, this provision is far from absolute. It did not, for example, prevent the *Cour d'appel de Paris* authorising the exhumation of the body of Yves Montand in 1997 for genetic tests (which he had opposed during his life-time) to be carried out upon it.[118] This controversial act flies in the face of respect for the dead and the wishes they expressed whilst alive and would appear to demonstrate a lack of concern for their dignity in death. Yet, there are as ever two competing interpretations of

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[116] As a property offence, UK law condemns the practice of grave robbing. Historically, however, the theft of the corpse itself was possible under the common law from the moment of its inhumation, as the law did not extend its protection to the *cara data vermibus* (flesh given to worms). See Morgan D., *supra* n. 78, p. 93 and also the discussion below, pp. 235-236, regarding the objectification of the corpse before its burial.

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

[118] CA de Paris, 6 November 1997.

dignity possible in this situation. The decision of the *Cour d'appel* might be defended by invoking the dignity of the applicant who sought to know her biological origins through the possible establishment of the deceased as her father. Respect for personal identity is another facet of dignity and in this case, it could be argued, generated a right to information about family history. The court, balancing between these competing dignity interests, found quite understandably in favour of the living rather than the dead.

In line with French judicial willingness to permit interventions upon the corpse, UK judges have demonstrated a degree of disrespect for the bodies of the dead in admitting that their constituent parts may be considered as property.[119] While historically the common law had refused to define the corpse as property,[120] subsequent developments suggest that elements of the corpse may be transformed into objects capable of being stolen. This proposition results from the case of *R v. Kelly*[121] in which a criminal action was brought against an artist who, with the consent of the Royal College of Surgeons, had created artistic works using body parts of the dead. To do this he had asked a member of the College to provide him with around 40 specimens most of which were subsequently buried in a field, except for one leg which was found in Kelly's home and a number of other body parts found in the flat of friends. Kelly and the College member were prosecuted under section 1(1) of the Theft Act 1968.[122] Their argument before the judge at first instance, that this did not amount to theft as human body parts were not objects capable of being stolen, was rejected and they were convicted. On appeal, the conviction was upheld, it being found that the specimens were indeed objects and that there was an exception to the common law principle that the corpse and its elements are not property in cases where

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[119] *R v. Kelly* [1998] 3 All ER 741. In France, there is resistance to such a legal construction of the corpse. The *Cour de cassation*, for its part, has maintained that the deceased must not be considered a mere 'thing' and that his or her body merits special legal protection: Cass. crim., 21 October 1980, *aff. Gabin,* D jur. 1981, 72, note by R. Lindon; Cass. crim., 20 October 1998, D jur. 1999, 106, note by B. Beignier.

[120] *Haynes' Case* (1614) 77 ER 1389. In Scotland, on the contrary, the corpse may be the object of theft at least before it is buried: *HM Advocate v. Dewar* [1945] SC 5.

[121] *R v. Kelly* [1998] 3 All ER 741.

[122] Section 1(1) of the Theft Act 1968 provides that 'a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it'.

body parts had acquired different attributes through practices such as dissection or preservation carried out upon them for exhibition or educational purposes.[123]

In the *Kelly* case lie the beginnings of an objectification of the human body which demonstrates the transition from person to property after death. The reasoning has a double effect with regard to respect for the dignity of the deceased. On the one hand, it follows Kant's interpretation of dignity requiring that individuals be treated as ends and not means, refusing to accept that elements of the body may be freely utilised for artistic purposes, which would be degrading and dehumanising, especially where the body parts were then disposed of in haphazard fashion without a respectful form of burial. On the other hand, though, the creation of an exception to the general rule that the human body may not be the object of theft, seems to admit that a clear line no longer exists between persons and things once death has occurred.

Use of body parts It is, thus, apparent that while in exceptional circumstances it may be admitted that elements of the human body may be objectified, the rule remains that the human body does not fall within the patrimonial domain either before or after death. Consequently, French and UK law alike state that human organs and body parts may not be the object of commerce but only that of donation.[124] While this principle applies equally to the living and the dead, it does not remove the possibility of either organ donation *post mortem* or medical experimentation on the body of the deceased.

With regard to the taking and use of the organs of the deceased, there is a clear difference in Anglo-French provisions which again demonstrates the higher regard for life in French law. Thus, in France, there is a far more widespread system of organ donation which allows for organs to be taken from the deceased except where a clear refusal has been given during his or her lifetime. The logic behind this is evidently to save the life of another, the act being viewed as one of 'human solidarity' to promote public health objectives.[125] Thus, it is again evident that French law prioritises life,

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[123] See the opinion of Rose LJ: *R v. Kelly* [1998] 3 All ER 741, at p. 749.
[124] Harris J.W., 'Who Owns My Body?' (1996) 16 *OJLS* 55-84. Robert J. and Duffar J., *supra* n. 6, pp. 248-250.
[125] *'[Un] acte de solidarité humaine pour des fins de santé publique'*. Robert J. and Duffar J., *ibid.*, p. 249.

this time over and above the bodily integrity of the dead. To this end, organs may be taken from any deceased person who has not stated their objection in the national register. That said, doctors who do remove organs are obliged to ensure that the body is restored to a decent state once they have completed their work and to inform relatives which organs have been removed.[126]

In the UK, on the contrary, there is no automatic presumption of consent to organ donation *post mortem*. Before removing organs the medical authorities must seek to ascertain what were the views of the deceased on the matter as evidenced by the testimony of relatives or the carrying of a donor card demonstrating consent. The system is, thus, less formal than the French just as one might expect from a country with an unwritten legal tradition. In the absence of consent and in the face of a refusal from relatives, the doctor may not proceed. However, the application of a form of soft law in this area may encourage abuse, as has been demonstrated by complaints brought by parents against hospital authorities in Liverpool and Bristol who discovered the existence of a system of extensive removal and retention of organs from their children without their knowledge and consent.[127]

As far as medical research upon the corpse is concerned, it has been noted above that the *Conseil d'Etat* in *Milhaud*[128] held that experiments carried out by a doctor on a clinically brain dead patient could legitimately lead to disciplinary sanctions. Such a finding is reinforced by amendments to the Civil Code introduced in 1994, notably Articles 16-1 and 16-2 which state that '[e]veryone has the right to respect for his or her body. The human body is inviolable' and that '[t]he judge may take all appropriate measures to prevent or put an end to an unlawful assault upon the human

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[126] Article L. 671-1-11 of the Code on Public Health. The *Tribunal administratif d'Amiens*, in a judgment of 14 December 2000 (D jur. 2001, 3310, note P. Egéa), found the Regional Health Centre of Amiens at fault for its failure to inform the parents of the deceased that the corneas of their son had been removed alongside a number of other organs, the removal of which had been discussed prior to the operation.

[127] *The Royal Liverpool Children's Inquiry Report* (London: HMSO, 2001); *The Report of the Public Inquiry into Children's Heart Surgery at the Bristol Royal Infirmary 1984-1995: Learning from Bristol*, CM5207 (I), July 2001. See Bridgeman J., '"Learning from Bristol": Healthcare in the 21st Century' (2002) 65 *MLR* 241-255. While the parents of the children concerned are presently seeking compensation, the Human Tissue Bill has had its second reading in the House of Commons in January 2004 and is designed to prevent future organ retention without the prior consent of the deceased person or their next of kin. The Bill, therefore, emphatically rules out any notion of presumed consent to organ donation ('Parents Seek Compensation Over Retained Organs', *The Guardian*, 19 January 2004).

[128] CE, Ass., 2 July 1993, *Milhaud.*

body or illicit activities relating to its elements or products.'[129] These provisions apply equally after death through the requirement that the doctor should respect the body of the deceased as set out in Article 2 of the Code of Medical Ethics stating that '[t]he doctor, in the service of the individual and that of public health, carries out his or her mission through respect for human life, the person and his or her dignity. The respect due to the person does not cease to apply after death.'[130]

That said, forms of medical intervention upon the deceased's body are possible in France, as in the UK. In the former, organs may be removed for therapeutic or scientific purposes.[131] However, where the aim is not simply to research the causes of death, the doctor must establish the consent of the deceased expressed either during his or her life-time or through the testimony of relatives. Likewise, in the UK, organs may be removed and research carried out upon the body provided that this is conducted in accordance with lawful procedures.[132] From this ensemble of measures it seems that the dignity of the deceased and his or her family should be respected up to the point at which non-consensual intervention upon the body is authorised for reasons of public interest or public health.

4.2.2 Respect for image and memory

From the preceding analysis of the legal protection of the tangible elements of the body following death, we turn in this final section to less concrete matters, that is the protection of the memory and the image of the deceased. This is a subject much closer to the heart of French lawyers than that of their British counterparts, the difference being explained by the considerable importance placed in French law upon the right to privacy in both the criminal and civil law. UK law, on the other hand,

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[129] Article 16-1: *'Chacun a droit au respect de son corps. Le corps humain est inviolable'.* Article 16-2: *'Le juge peut prendre toutes mesures propres à empêcher ou faire cesser une atteinte illicite au corps humain ou des agissements illicites portant sur des éléments ou des produits de celui-ci.'*

[130] *'Le médecin, au service de l'individu et de la santé publique, exerce sa mission dans le respect de la vie humaine, de la personne et de sa dignité. Le respect dû à la personne ne cesse pas de s'imposer après la mort.'* Decree no. 95-1000 of 6 September 1995, on the Code of Medical Ethics, JO 8 September 1995, Article 2.

[131] Article L. 671-7 of the Code on Public Health.

[132] Section 1, Human Tissue Act 1961. See Kennedy I. and Grubb A., *Medical Law* 3rd ed. (London: Butterworths, 2000) pp. 1832-1849 and pp. 2247-2250.

with its traditional 'negative' approach towards the protection of fundamental rights, has habitually refused to find or create an individual right to this effect.[133] French law, on the contrary, has developed extensively the notion of privacy based upon the guarantee contained in Article 9 of the Civil Code which states that everyone has the right to respect for his or her private life.[134]

The triangular relationship between the law on privacy, the principle of respect for human dignity and death is intimate, but complicated, and calls for careful consideration of the distinction between public and private spheres. On the one hand, the memory of the deceased should be facilitated in the private sphere in so far as this is important to close family and loved ones. To this end, French and UK law permit forms of respect for the memory of the dead by relatives within the framework of regulation governing the treatment of the person's remains. On the other hand, respect for image requires an appreciation of the frontiers between the private life of the deceased and the public interest in his or her life and death, particularly where the individual was a famous celebrity. First, therefore, under consideration is the private sphere of the deceased's family and the mechanisms used to enable respect for the dead by relatives and friends. This perspective is then enlarged to consider the relationship between public and private domains through the singular concept of the 'right to one's image' enjoyed by the deceased in France and which has no UK counterpart.

4.2.2.i Respect for memory: the private sphere

Respect for the memory of the deceased lies at the heart of the debate on the protection of human dignity after death, as it represents a way for loved ones to keep alive and pay tribute to the memory of the person who has died. This, it might be

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[133] *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344.

[134] Article 9: *'Chacun a droit au respect de sa vie privée. Les juges peuvent, sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que séquestre, saisie et autres, propres à empêcher ou faire cesser une atteinte à l'intimité de la vie privée; ces mesures peuvent, s'il y a urgence, être ordonnées en référé.'* See Badinter R., 'Le droit au respect de la vie privée' *JCP*, 1968, I 2136; Dupré C., 'The Protection of Private Life Against Freedom of Expression in French Law' (2000) 6 *EHRLR* 627-649; Picard E., 'The Right to Privacy in French Law' in *Protecting Privacy – The Clifford Chance Lectures, Volume 4* ed. Markesinis B., (Oxford: Oxford University Press, 1999) 49-103; Robert J. and Duffar J., *supra* n. 6, pp. 395-448.

imagined, should be a purely private matter generating no legal interest. In fact, this is not quite the case as the way in which memory should be protected has led to disputes over property rights in ashes and funerary urns which may be particularly problematic where the deceased had an extended family network.

The capacity to pay homage and respect to the deceased through possession of his or her remains has particularly troubled French law, it being found that a person's remains may be the object of family property rights. For example, the *Tribunal de grande instance de Lille* held in 1999 that 'mortal remains are the object of an inviolable and sacred familial co-propriety'.[135] This solution would appear to be contrary to that in UK law which admits no ownership of the deceased's body or elements thereof, except in the exceptional circumstances suggested by the *Kelly* case. In France, though, a similar logic has been applied to circumstances involving ownership of a funerary urn, to the extent that its removal from a place designed to house such urns to the private residence of one of the familial co-proprietors, was not found to be an infringement of the rights of the other proprietors.[136]

The French approach becomes more problematic, however, in cases where the deceased has founded two families both of which wish to pay their respects. Faced with such a scenario, the *Cour d'appel de Paris* decided in 1998 that the ashes of the deceased should be shared between his widow and the children of his first marriage.[137] In adopting this solution the court guaranteed not only equality between all mourners but gave expression to the wishes of the deceased who had requested that he be both returned to his place of origin but also able to remain close to members of his first family.

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[135] *'[L]a dépouille mortelle fait l'objet d'une copropriété familiale, inviolable et sacrée'.* TGI de Lille, 5 December 1996, D jur. 1997, 376, note by X. Labbée.

[136] TGI de Lille, ord. référé, 23 September 1999. The judgment is further discussed by Philippe Pédrot, *supra* n. 110, p. 76.

[137] CA de Paris, 27 March 1998, D jur. 1998, 28, 383, note by P. Malaurie; JCP G, 1998, II 10113, note by T. Garé. Philippe Pédrot, *ibid.*, p. 76, notes that the basis of this decision may be found in the Law of 15 November 1887 which permits any adult to specify the conditions for his or her funeral and burial. See above, p. 232, n. 109.

4.2.2.ii Respect for image: between public and private spheres

It is not only the capacity of relatives to pay homage to the memory of a loved one which engenders a relationship between law and respect for dignity after death. There may be public interest in a more widespread (usually media) dissemination of images of the deceased which may, in turn, cause pain and suffering to the grieving family who seek legal means to end this intrusion viewing it as degrading to the memory of their dear departed. It is this protection of the family from public interest in the death of one of its members which marks an important distinction between French and UK law. While in France the right to one's image is a component of the right to respect for private life, it is clear that no such right is recognised in the common law.[138] A consideration of the protection of image in French civil and criminal law will, therefore, be followed by a contrasting examination of privacy law in the UK and the possibility raised that the systems may be drawn closer as a result of the implications of the Human Rights Act 1998.

The right to one's image and respect for private life: a French perspective In France an attempt to degrade the image of a dead person may be viewed as unlawful as a result of the double guarantees offered by the civil and criminal law. With regard to the former, respect for the deceased's image falls within the scope of the right to respect for private life guaranteed by Article 9 of the Civil Code.[139] Thus, any person may oppose attempts to distribute his or her image without express authorisation; image being viewed as an extension of one's personality.[140] More importantly for present purposes, French judges have accepted that the right to respect for private life may extend 'beyond death to the mortal remains'.[141]

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[138] Indeed in UK law, providing an exception to the general rule that causes of action in tort law survive against or for the benefit of the deceased's estate, any cause of action for defamation (discussed in Chapter 6 below, pp. 298-300) does not survive the death of the person defamed (section 1(1), Law Reform (Miscellaneous Provisions) Act 1934). See further Rogers W.V.H., *Winfield and Jolowicz on Tort* 16th ed. (London: Sweet & Maxwell, 2002) p. 804.

[139] Acquarone D., 'L'ambiguïté du droit à l'image' *D* chron, 1985, 22, 129-136; Edelman B, 'Esquisse d'une théorie du sujet: l'homme et son image' *D* chron, 1970, 26, 119-122; Gaillard E, 'La double nature du droit à l'image et ses conséquences en droit positif français' *D* chron, 1984, 26, 161-164. It has been suggested by some academic commentators, however, that the right to one's image is autonomous from the right to private life: see Badinter R., *supra* n. 134.

[140] CA de Paris, 25 October 1982, D jur, 1983, 363, note by R. Lindon.

Nevertheless, a problem arises as the right to one's image belongs squarely in the domain of personality rights. As such it would seem to depend upon the *existence* of the person to whom it belongs and who is capable of exercising it. Given that the deceased is no longer recognised as a subject of law, it, therefore, falls to his or her relatives to bring an action based upon a violation of *their* right to private life. For example, it has been found that the publication *post mortem* of information concerning a deceased's private life may fall within the scope of Article 9 where this causes harm to the person's surviving partner.[142]

Because of the limited operation of Article 9 in this regard, French law has provided reinforced protection for the memory of the deceased through the criminal law with a series of offences designed particularly for use in the context of the dissemination of images of dead celebrities by the media and causing much polemical discussion of the dividing line between the private and public aspects of the life of the deceased. A particularly good example of this surrounds the publication of pictures of former President of the Republic, François Mitterrand, on his deathbed. Despite the fact that previous cases had ruled that interference in private life might be justified when the facts relating to that life were well known to the public because the person in question was an important historic figure,[143] the *Tribunal de grande instance de Paris* in 1997 found that the publication of these particular photographs could not be justified by historic interest.[144] In this case the interference in private life was described as that affecting the family members who based their complaint upon a violation of Article 226-6 of the new Penal Code.[145] The judges, however, recognised that the taking of

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[141] TGI de Paris, 11 January 1997, D jur. 1997, 83, note by R. Lindon; JCP, 1997, II 18711, note by D. Ferrier.

[142] Cass. 2e civ., 22 May 1996, JCP 1996, IV 1571. In this case the *Cour de cassation* confirmed the decision of the appeal court that there was no violation of Article 9 of the Civil Code, the facts reported by the magazine in question having already been made known to the public through personal revelations made by the deceased prior to death.

[143] Tribunal de la Seine, 3 May 1854; CA de Paris, 29 June 1961, D jur. 1962, 208.

[144] TGI de Paris, 13 January 1997, D jur. 1997, 255, note by B. Beignier.

[145] This reasoning followed that of the *Cour de cassation* in the *Gabin* case concerning publication by *Paris Match* of the photograph of the actor Jean Gabin on his death bed. While the Court of Appeal in the case had founded its decision on a violation of Article 9 of the Civil Code, the higher court preferred to base its decision on Article 368 of the former Penal Code to the effect that publication of the image of the deceased without prior authorisation from persons capable of granting this was a criminal offence: Cass. crim., 21 October 1980, D jur. 1981, 72, note by R. Lindon: *'attendu en effet que la fixation de l'image d'une personne vivante ou mort, est prohibée sans autorisation préalable des personnes ayant pouvoir de l'accorder et que la diffusion et la publication de ladite image sans autorisation entre nécessairement dans le champ d'application des articles précité [art. 368, 369, 370].'* See further the discussion of this case by Catherine Dupré, *supra* n. 134, p. 641. It is notable

photographs in such circumstances could amount to a lack of respect for the deceased and, one might conclude, an undignified assault upon his memory. Furthermore, the *Cour de cassation* went on to confirm the decision of the *Cour d'appel de Paris* which had found that 'the taking of photographs of mortal remains is incontestably an assault upon the private life of others and upon respect due to the person, whether he or she is alive or dead and regardless of status.[146] French law, therefore, demonstrates the importance of respect for the human person even after death through the protection of the rights of close family members. This approach has been confirmed in a further decision of the *Cour d'appel de Paris* concerning the publication of a photograph of the Corsican *préfet*, Claude Erignac, who had been assassinated in the street. The court considered that public dissemination of the image conferred harm upon his relatives in the form of a 'profound assault upon their feelings of affliction, belonging to the intimate sphere of their private life.'[147]

More recently, similar media interest has focused upon the deaths in Paris on 31 August 1997 of Lady Diana and her partner Dodi Al Fayed causing the father of the latter to intervene as a civil party in the prosecution for involuntary homicide of photographers present at the scene of the accident – a case which was subsequently closed as unfounded in September 1999. An extension of the charges, however, to include the crime of assault upon the intimacy of private life, which sanctions the taking of photographs without consent in a private location, resulted in the acquittal of the photographers in November 2003, it being found that the six shots taken of the interior of the Mercedes carrying the couple did not constitute an invasion of private space since the car was on a public road with its doors open.[148] The example remains interesting, however, for its clarification of the relationship between public and private domains in the capturing and dissemination of the images of celebrities whose

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that the courts in France have systematically refused to admit that the publication of photographs in such circumstances is justified by the freedom of information and expression of the publishers: Dupré C., *ibid.*, pp. 647-648.

[146] *'[L]e fait de prendre des photographies d'une dépouille mortelle porte incontestablement atteinte à la vie privée d'autrui, le respect étant dû à la personne humaine, qu'elle soit morte ou vivante, et quel que soit sont statut.'* CA de Paris, 2 July 1997, D jur. 1997, 596, note by B. Beignier; Cass. crim., 20 October 1998, D jur. 1999, 106, note by B. Beignier; JCP, 1998, II 10 044, note by G. Loiseau.

[147] *'[U]ne profonde atteinte à leurs sentiments d'affliction, partant à l'intimité de leur vie privée.'* CA de Paris, 24 February 1998, D jur. 1998, 225, note by B. Beignier.

[148] Guerrin M. and Prieur C., 'La justice reprend ses investigations sur l'attitude des photographes lors de la mort de Lady Diana', *Le Monde*, 9 June 2001; Henley J., 'Paparazzi to be investigated again over Diana', *The Guardian*, 26 July 2001; *The Financial Times*, 29-30 November 2003.

deaths are as spectacular, and thus interesting to the public, as their lives.[149] It also clearly reveals the difficulties of striking an appropriate balance between respect for the dead and freedom of expression in the media.

The right to one's image and respect for private life: a UK perspective While French law offers extensive protection for intrusions in private life even in death, the situation in UK law is rather different. Confirmed explicitly in the *Malone* case, the UK judiciary has consistently refused to find the existence of a right to respect for private life in domestic law.[150] There is consequently no right to the protection of one's image either for the living or the dead. This gap has been made perfectly apparent in the well-known case of the actor Gordon Kaye, photographs of whom had been taken whilst he was ill in hospital.[151] Denied any right to stop the publication of the photographs, his claim for damages was deemed unfounded. In this respect, French law would have been of notably more assistance, as the right to respect for private life has been found in France to apply in the case of media attention focusing upon an actress leaving hospital.[152]

Yet, despite the traditional absence of privacy rights in the UK, it is possible to discern traces of development in this area. While there remains no case law on the protection of the image of deceased persons, speculation has surrounded the possible importation of a right to privacy in domestic law from Article 8 ECHR through an application of the Human Rights Act 1998. For example, in another case arousing much media interest (but in the case of the living rather than the dead), Michael Douglas and his wife Catherine Zeta-Jones brought an action against Hello! magazine for the unauthorised publication of photographs taken of their New York wedding in November 2000, arguing that this amounted to a violation of their privacy. Following a Court of Appeal hearing in November 2000 in which an injunction (obtained before

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[149] See the discussion by David Feldman of the assaults upon the physical integrity and security of Lady Diana during her life, notably when she was the object of persistent harassment by two men in June and August 1996: 'Human Dignity as a Legal Value – Part II' [2000] *PL* 61-76, at p. 64. More generally, for discussion of some of the legal consequences of the death of Lady Diana, see Story A., 'Owning Diana: From People's Princess to Private Property' (1988) 5 *Web JCLI*; and Whitty N., 'Royalty and Identity in Public Law: Diana as Queen of Hearts, England's Rose and People's Princess' in *Feminist Perspectives on Public Law* eds. Millns S. and Whitty N., (London: Cavendish, 1999) 41-61.
[150] *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344.
[151] *Kaye v. Robertson* [1991] FSR 62 (CA).
[152] Cass. 1re civ., 6 June 1987, Bull. I, no. 191.

publication) was set aside and it was found that the couple would have to be satisfied with damages if they were to pursue their complaint,[153] Mr Justice Lindsay in the High Court ruled on 11 April 2003 that publication breached the couple's rights under the existing law on confidence.[154] He, thus, refused to decide whether their privacy had also been invaded as this was not necessary to resolve the case. Wary of seeing law reform as a matter for the judiciary, the judge stated that '[s]o broad is the subject of privacy and such are the ramifications of any free-standing law in the area that the subject is better left to parliament.'[155] The government responded, however, by saying it had no intention of introducing a privacy law being satisfied, instead, with the current system of press self-regulation.[156] Thus, any development on the law of privacy in the UK appears unlikely for the moment, leaving the image of the stars to be protected during their life-time by the law on confidence. The image of the dead and, thus, respect for their and their family's dignity in the wake of intrusive press attention, looks set to remain far removed from the protective cover of UK law.

In conclusion of this chapter on the legal relationship between human dignity and death, it falls simply to be reiterated that this relationship is indeed alive and kicking in many respects despite the fact that the protagonists are no more. This is particularly so in France with a reinforced protection of the physical and spiritual remains of the person. The question is infinitely more delicate in cases where individuals are on the point of death and the law is required to reflect upon the (in)dignity of their situation. Here, UK law demonstrates itself particularly concerned to put an end to undignified suffering but only in so far as this requires an omission rather than an act on the part of those called upon to ease the plight of the individual. French law, conversely, has shown itself to be more concerned with an application of the principle of respect for human dignity in order to preserve life, thus is reluctant to sanction its premature termination, reading dignity into the obligations of the doctor to care for the patient until the final moment. From this reflection upon applications of human dignity to law at the frontiers of life, we move in the remaining two chapters to a comparative examination of human dignity as it is instrumentalised

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[153] *Douglas and Zeta-Jones v. Hello! Ltd* [2001] 2 WLR 992 (CA). See the further discussion of this case below, Chapter 6, p. 301, in the context of assaults upon mental integrity.
[154] *Douglas v. Hello! Ltd* [2003] 3 All ER 996 (Ch).
[155] *Ibid.*, pp. 1061-1062.
[156] Byrne C., 'Government Rejects Call for Privacy Law', *The Guardian*, 17 June 2003.

through law in that middle portion of the human life cycle which falls between its very beginnings and very end but which may, nevertheless, be replete with intrusions upon dignity envisaged as an important component of respect for both human mind and body.

CHAPTER 5

DIGNITY AND THE BODY

While the two preceding chapters sought to demonstrate the importance of the principle of respect for human dignity at the opposing ends of human life, this does not mean that the principle has no interest during the intervening period. Although it is clearly at the extremities of life and death that the requirement to respect dignity is particularly acute, the principle has important implications during the whole of the human life cycle. Moreover, its impact can be felt with regard to innumerable violations of personal integrity spanning all aspects, physical and mental, of the human condition. For this reason the two concluding chapters of the thesis aim to complete the picture of legal clusters of human dignity claims by examining these as they emerge in the twin contexts of assaults upon the body and the mind. While this Cartesian dualism can at times be difficult to sustain,[1] the subject matter has been classified according to the centre of gravity of each example used; in other words its leaning towards an infringement of either physical or mental integrity.

The focus of the present chapter is upon the former, that is those applications of the principle of respect for dignity which touch upon the physical aspects of the human being; the chapter's wider context being the increasingly complex relationship between law and the human body. This relationship has been the object of growing attention from lawyers in recent years. In France, particularly, much has been written on the subject,[2] sparked by the introduction of a new Article 16 into the Civil Code, following the adoption of Law no. 94-653 of 29 July 1994 on respect for the human body. The newly enacted Article 16, stating 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',[3] marks the

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[1] See Kingdom E., 'Body Politics and Rights' in *Law and Body Politics: Regulating the Female Body* eds. Bridgeman J. and Millns S. (Aldershot: Dartmouth, 1995) 1-21, at pp. 4-5.

[2] See the special issue of *Dalloz* devoted to various aspects of the matter: *D* sommaire - justices, 2001, 20, 1-136; and Cabrillac R., 'Le corps humain' in *Libertés et droits fondamentaux* eds. Cabrillac R., Frison-Roche M.-A. and Revet T., 6th ed. (Paris: Dalloz, 2000) 141-155.

[3] *'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.'*

crystallisation of the legal relationship between respect for dignity and respect for the body – in French law at least. From a UK perspective, there is as ever an absence of written and express provision on respect for bodily integrity seen through the prism of dignity. Nevertheless, it will be argued that the legal protection of the body in the UK is not less extensive than that in France. In fact, in certain cases it is more so.[4] There is, in addition, an increasing doctrinal interest in the liaison between UK law and the human body, particularly as regards questions of ownership[5] and in the specific area of the regulation of women's bodies.[6]

Despite their different approaches, there are two common threads which link French and UK law concerning the failure to respect human dignity through physical assaults upon the body. The first is the influence of European law. This is demonstrated in the UK through the measures adopted under the Human Rights Act 1998 which require that attention be paid to the link drawn by the ECHR between dignity and physical assault as framed by Article 3's prohibition on inhuman and degrading treatment. The relationship between (in)dignity and degradation has been further evidenced in France by the Constitutional Council in its *Bioethics* decision in which, it will be recalled, the reference to 'degradation' in the preamble to the Constitution of 1946 provided the legal source for the discovery of dignity in national constitutional law.[7] It is, therefore, the notion of inhuman and degrading treatment which forms a leitmotiv running through this chapter, albeit that references to this concept in UK law are often more implicit than those in French law.

A second point of commonality between French and UK law is a presumption that physical assaults are non-consensual activities. Nevertheless, situations can arise in

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[4] See, for example, the discussion below, pp. 276-282, of non-consensual medical interventions upon the body.
[5] Gray K., 'Property in Thin Air' (1991) *CLJ* 252-307; Grub A., '"I, Me and Mine": Bodies, Parts and Property' (1998) 3 *Med Law Int* 299-317; Harris J.W., 'Who Owns My Body?' (1996) 16 *OJLS* 55-84; Matthews P., 'Whose Body? People as Property' (1983) 36 *CLP* 193-239. This debate resembles that taking place amongst French lawyers on the distinction between persons and things, even if UK law does not adopt such a rigid classification. For a *résumé* of the French approach, see Andorno R., *La distinction juridique entre les personnes et les choses – à l'épreuve des procréations artificielles* (Paris: LGDJ, 1996).
[6] Bridgeman J. and Millns S. (eds.), *supra* n. 1; Murphy T., 'Feminism on Flesh' (1997) 8 *Law and Critique* 53-59. See more generally, Butler J. *Bodies that Matter: On the Discursive Limits of Sex* (New York, Routledge, 1993); Naffine N. and Owen R. (eds.), *Sexing the Subject of Law* (Sydney: Law Book Company, 1997).
[7] Decision no. 94-343-344 DC of 27 July 1994, *Bioethics*.

which the 'victim' is happy to consent to treatment which may cause injury. Legal responses then vary depending on the circumstances (and acceptability) of the activity. A second theme which runs through this chapter is, therefore, that of consent, a notion intimately linked to personal autonomy, and suggesting, in principle, the freedom to agree or not to the treatment of one's body in a particular way.

While the twin themes of degradation and consent provide the meat of the present chapter, the discussion is organised in the light of a third conceptualisation of bodily violation. This involves a distinction being made between assaults having either an *internal* or *external* bodily dimension to them and with regard to which the 'harm' that ensues, and its characterisation as respectful of personal dignity or not, differs. Hence, the first part of the chapter considers violations of physical integrity which impact upon the external surface of the body, for example physical detention, blows and slaps, and the violence generated by contact sports and other potentially harmful leisure activities. This is followed by a consideration of internal bodily violations, characterised by an intrusion into, or penetration of, the body, as evidenced by the examples of medical or surgical intervention and acts of sexual violence.

5.1 External assaults upon bodily integrity: inhuman and degrading treatment

Article 3 ECHR which states that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment' encapsulates one of the 'fundamental values of the democratic societies making up the Council of Europe'.[8] It establishes a link between the requirements of democracy and the necessity of ensuring that individuals do not suffer treatment which is contrary to their dignity; degradation being the flip side of respect for dignity. Article 3 represents, therefore, the expression of a common value according to which the mistreatment of individuals in certain circumstances can be considered as degrading as much for the person in question as for the rest of humanity.[9] In order to ensure respect for this value, state parties to the ECHR are not only obliged to ensure that inhuman and degrading treatment is not

[8] *Soering v. United Kingdom* (1989) 11 EHRR 439, para. 88.

carried out by public authorities,[10] but may also be required to protect individuals from such treatment when this is perpetrated by other individuals[11] or outside of the state's territorial boundaries.[12]

Inevitably, in most cases, degrading treatment is inflicted against the wishes of the victim, for example in the case of detainees who may be degraded through conditions related to a depravation of their liberty, these being justified for reasons of public interest or the protection of the rights of others. Nevertheless, other situations arise in which consent to a particular treatment is given by an individual in the pursuit of a particular life-style or identity, despite the fact that this may appear degrading in the eyes of others. In this regard, the state may decide to introduce regulatory measures in order to restrict personal freedom in accordance with a particular view of what constitutes a dignified life. The state, in such cases, seeks to restrict individual choice when the outcome would otherwise be the pursuit of activities which are contrary to its vision of the best interests of the individual and society.[13] It is important, therefore, to try to clarify the fuzzy outer limits of inhuman and degrading treatment, in order to assess how respect for personal (individual) and human (collective) dignity can be maximised. To this end, it is necessary to consider first of all those assaults upon the body which amount to *non-consensual* degrading treatment, before going on to look at *consensual* activities which may, nonetheless, cause harm to individuals. In both instances it will be noted how the dynamic of European law on corporal degradation has influenced both French and UK law to the extent that a distinct *rapprochement* of the two systems is now evident.

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[9] Feldman D., 'Human Dignity as a Legal Value – Part I' [1999] *PL* 682-702, at p. 685.
[10] See, for example, the practices censured as forms of inhuman and degrading treatment in the cases of *Tyrer v. United Kingdom* (1978) 2 EHRR 1 (corporal punishments) and *Ireland v. United Kingdom* (1979) 2 EHRR 25 (interrogation methods of detainees).
[11] See *X and Y v. The Netherlands* (1986) 8 EHRR 235 on the effects of the ECHR on private individuals, and *A v. United Kingdom* (1999) 27 EHRR 611 with regard to an application of Article 3 in particular. For a more extensive study of the horizontal effects of the ECHR, see Clapham A., *Human Rights in the Private Sphere* (Oxford: Oxford University Press, 1993).
[12] *Soering v. United Kingdom* (1989) 11 EHRR 439.
[13] Other examples of state intervention with this aim might include the obligation to wear a motor cycle helmet or seat belt and the prohibition on taking recreational drugs.

5.1.1 Non-consensual degrading treatment

In the domain of degrading treatment which is carried out without consent and impacts upon the external surface of the body, national laws are subject to a number of written and jurisprudential requirements emanating from both the Council of Europe and the European Union. These have the effect of prohibiting many forms of physical punishment, blows and unwanted bodily contact, and seek to protect both individuals who are deprived of their liberty as well as those who are not, but who are nevertheless vulnerable to physical abuse. Respect for the dignity of each of these groups of individuals will, thus, be considered in turn.

5.1.1.i Physical detention

The law governing physical detention and consequent deprivation of individual liberty has been much influenced by decisions of the European Commission and Court of Human Rights in their development of Article 3 ECHR. While French law, with its monist approach towards the direct insertion of international law into the national system, has long admitted that individuals may base claims made in the domestic courts upon a violation of the Convention, this has not been so in the UK until very recently. It is only with the introduction of the Human Rights Act 1998 that UK law has begun to permit similar initiatives and there is no doubt that this will require increased attention to the compatibility between national measures and the guarantees which Article 3 encompasses. While this suggests an amelioration in national laws with regard to the treatment of detainees, there remain a number of problematic issues linked to conditions of detention which continue to pose concerns about the extent to which the dignity of detainees is respected.

Progressive developments Due to the imprecise definition of acts which constitute a violation of Article 3, it is hardly surprising that in the past both France and the UK have been found wanting in their treatment of detainees and thus in violation of the provision. The Strasbourg institutions have tended to avoid any strict distinction between the Article's composite elements of torture, and inhuman and degrading treatments, except to indicate that the difference is one of degree. The European

Commission, therefore, has found that torture, the most extreme form of violation, automatically amounts to inhuman treatment, and that all inhuman treatment is also degrading.[14] Consequently, with regard to the treatment of detainees, Article 3 may be violated by all three types of acts. Moreover, (and highlighting the difficulty raised above with regard to the impossibility of delineating strictly between assaults upon the body and the mind), treatment falling within Article 3 may be of both a physical and psychological nature. Thus, the European Court of Human Rights recognised in the *Tyrer* case (concerning corporal punishment inflicted upon the victim after his clothes had been removed) that inhuman and degrading treatment comprises any punishment which causes mental or physical suffering, provided that it attains a certain level of intensity.[15] It also found that degrading treatment is conduct designed to grossly humiliate the individual before others or in his own eyes.[16] From this it may be surmised that for the Court, the violation of dignity in such cases can have two sources, the degradation of the individual before others and the denial of self-respect.

Similarly shamed before the Strasbourg institutions, both the UK and France have been found in violation of Article 3 ECHR for their inhuman and degrading practices associated with detention. In the case of the former, interrogation methods were declared contrary to Article 3 where they were designed to destroy the victim mentally and physically through sensory disorientation.[17] With regard to the latter, brutalities carried out during police detention were likewise found to infringe the Article 3 prohibition.[18] Undoubtedly, the condemnation of these practices has resulted in an improvement of state policies on detention. In the UK, notably, measures taken in the past to respond to terrorist activities in Northern Ireland have been abandoned. Nevertheless, the risk of inhuman and degrading treatment being carried out upon detainees remains a subject of present interest as, despite the ending of the physically degrading practices which had been condemned in Strasbourg, conditions of detention which provoke mental suffering still give cause for concern.

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[14] *Yagiz v. Turkey* App. no. 19092/91, 16 May 1995.
[15] *Tyrer v. United Kingdom* (1978) 2 EHRR 1, paras. 29, 30 and 33.
[16] *Ibid.*, para. 32.
[17] *Ireland v. United Kingdom* (1979) 2 EHRR 25, para. 168.
[18] *Tomasi v. France* (1993) 15 EHRR 1.

Persisting concerns Of course, the link between physical and moral aspects of degradation in the case of persons deprived of their liberty is intimate. Conditions of detention may lead to a multiplicity of interferences in personal dignity which generate a combination of mental and physical anguish for the detainee and can result in acts of self-mutilation or attempts to commit suicide. In an effort to respond to this situation, there is evidence on both sides of the Channel of measures being adopted which, in accordance with the increasing consolidation of fundamental rights protection in Europe, point towards a concretisation of the 'rights' of prisoners.

Beginning first of all with the UK, a number of difficulties persist with regard to conditions of detention which are not helped by an absence of clarity (and consequent capacity for abuse) in the regulatory framework. Thus, neither the Prisons Act 1952 nor the Prison Rules 1964, nor indeed the common law, impose obligations upon prison authorities with regard to conditions and regimes of detention.[19] While the House of Lords in *R. v. Deputy Governor of Parkhurst Prison, ex parte Hague,*[20] suggested that prison authorities had a duty of care towards detainees, this requirement has the unique aim of avoiding any foreseeable physical or mental harm. It does not explicitly impose an obligation to respect the dignity of the detainee in the sense of prohibiting poor conditions of detention. The link between UK law and disrespect for dignity is, once again, implicit. At a more informal level, conditions in prisons are controlled by the Home Office and by the Prisons Agency. The intervention of these bodies through the application of a form of 'soft' regulation is hardly ideal given the danger of abusive practices. Nevertheless, it has been observed by David Feldman that, in future, the influence of the Human Rights Act 1998 should be felt as prisoners begin to make claims of violations of Article 3 ECHR.[21] Moreover, these could be made against the government, the Prisons Agency and even the heads of penal establishments for violation of the duties imposed upon all 'public authorities' to respect Convention rights.[22]

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[19] See the discussion in Feldman D., 'Human Dignity as a Legal Value – Part II' [2000] *PL* 61-76, at pp. 65-67.
[20] *R. v. Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 AC 58.
[21] Feldman D., 2000, *supra* n. 19, p. 65.
[22] Sections 6(1) and 7(1), Human Rights Act 1998. Feldman D., 2000, *ibid.*, p. 66. It should be noted however, that the House of Lords in *Wainwright v. Home Office* [2003] 1 WLR 1137, found that relatives of a prisoner suspected of dealing drugs in prison who were subjected to a humiliating and distressing strip search when visiting the jail had no cause of action under the common law. The claimants were not entitled to rely on the Human Rights Act as the relevant event occurred before the

In addition to the imprecision of the rules governing conditions in prisons, a second aspect of detention which may constitute a violation of the Human Rights Act is the indeterminacy of certain sentences. In the case of life-sentence prisoners, for example, it might be sustained that the discretionary element of their sentence which relates to the practical possibility of release, amounts to inhuman treatment. In the case of *Hindley* concerning the discretionary nature of the prisoner's life-sentence for murder, certain members of the Court of Appeal expressed a preference for a fixed penalty articulated in terms of a precise number of years, rather than by reference to the life of the defendant.[23] Given that the European Court of Human Rights in its *Soering* decision decided that the wait upon death row amounted to inhuman and degrading treatment,[24] it may be that condemning a defendant to an expectation of an indeterminate life behind bars until death also violates Article 3 ECHR.[25] The UK has, moreover, been found in violation of Article 6 ECHR (the right to a fair hearing) in the case of two children tried before adult courts under conditions which would have caused them difficulties in following the procedures,[26] confirming that there remain in the UK a number of aspects of the treatment of prisoners which warrant attention for their general human rights compliance and specific lack of concern for personal dignity.

In France problems persist too, despite the introduction of Article D. 189 of Decree no. 98-1099 of 8 December 1998 on the prison service, which states that 'the public penitentiary service ensures respect for the inherent dignity of the person and takes all necessary measures designed to facilitate [...] social reintegration.'[27] Xavier Lameyre, in a discussion of the poor treatment of prisoners in France, suggests that an unjustifiable discrepancy exists between the lack of protection for detainees and the reinforced protection of victims which, for the author, amounts to an infringement of

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Act came into force. Lord Hoffman considered, however, that there was nothing in the European Convention case law that required the development of a high level principle of privacy in order to comply with Article 8 ECHR (p. 1146) and that the searches had not produced the necessary degree of humiliation required by the European Court of Human Rights to violate Article 3 (p. 1149).

[23] *R v. Secretary of State for the Home Department, ex parte Hindley* [1999] 2 WLR 1253.

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

[25] Feldman, 2000, *supra* n. 19, p. 66.

[26] *V and T v. United Kingdom* (1999) 30 EHRR 121.

[27] *'[L]e service public pénitentiaire assure le respect de la dignité inhérente à la personne humaine et prend toutes les mesures destinées à faciliter [...] la réinsertion sociale.'*

the dignity of prisoners.[28] Lameyre maintains that, under the rule of law, the disrespectful treatment of criminals deserves closer attention as, once they have been found guilty and incarcerated (which constitutes the penalty), there is no reason to further subject them and their bodies to degrading forms of treatment.[29] Thus, the fact that the individual is deprived of his or her liberty should not mean a deprivation of dignity too. Despite the appeal made to dignity in the regulatory provisions governing the prison service in France, Lameyre notes the extent to which the treatment of detainees continues to be a source of physical and psychological suffering. In particular, he cites the worrying protest mechanism of hunger strikes (viewed as a way for the prisoner to regain possession of the incarcerated body), and the high number of incidences of self harm (20 times greater in prison than outside) and suicide (six and a half times greater).[30]

Criticism of detention conditions in France has not only come from the academy. The state of French prisons has been denounced in an enquiry carried out by the Senate and National Assembly in 2001 which suggested that the situation was 'humiliating for the Republic' and 'unworthy of the fatherland of human rights'[31] It is interesting to note here the application of notions of humiliation and unworthiness (themselves components of the failure to respect dignity) to the *state* which it might be thought to be incapable of undergoing an assault upon its dignity, having no personal, corporal or moral integrity to violate.[32] That said, dignity provides the link between national shame and the political debate on prison reform which has been couched in the language of promoting the dignity of detainees. In 2001, for example, Marylise Lebranchu, then Minister for Justice, introduced reform proposals comprising three principal suggestions: (i) a reduction in the number of prison sentences with prison viewed as a 'last resort'; (ii) the need to accord prisoners their due dignity as 'citizens'; (iii) the provision of greater assistance to prisoners aimed at their social

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[28] Lameyre X., 'Les deux corps de la justice pénale: du corps violé au corps enfermé' *D* 2001, special issue, 20, 21-33.
[29] Lameyre X , *ibid.*, p. 32.
[30] Lameyre X , *ibid.*, pp. 30-31. See also Bourgin N. and Girard C., 'Les automutilations et les grèves de la faim en prison' *R Sc Crim*, 2000, 656-666; and Guillonneau, *Rapport sur les suicides de détenus (1998-1999)* (Paris: Ministère de la justice - Direction de l'administration pénitentiaire, May 2000).
[31] *'[H]umiliante pour la République' et 'indigne de la patrie des droits de l'homme'.* Cited by Cécile Prieur, 'Les droits des citoyens-détenus au cœur du projet de réforme pénitentiaire', *Le Monde*, 19 July 2001.

reintegration.[33] It is the second of these themes which is particularly interesting from the point of view of this thesis given its innovative suggestion that the dignity of prisoners be envisaged in the light of their citizenship. This has a number of seemingly positive consequences. It means that the prisoner-citizen benefits from the full spectrum of fundamental rights as citizen – except, of course, for those related to free movement. For example, it would suggest respect must be ensured for prisoners' physical integrity, private and family life, and security of their person, together with offering protection against discriminatory practices. In addition, it might entail guaranteeing economic and social rights to detainees, such as to the right to work and to health care. The formulation of the objectives of detention away from punishment and towards social reinsertion, thus, appears to consolidate prisoners' rights through the democratic recognition of their equal human worth to society. In short, while both in a state of flux, French and UK examples in this area demonstrate a similar concern to improveme conditions of detention with the aim, explicit or implied, of further promoting respect for the personal dignity of those in detention.

5.1.1.ii Corporal punishment and physical violence

Moving from the examination of non-consensual harms inflicted upon those in detention, it remains to be considered how the indignity of non-consensual physical violence is sanctioned by law with regard to other individuals who, while not deprived of their liberty, are nevertheless vulnerable to abuse. Hence, while in law *all* individuals are entitled to protection from physical abuse which may contribute to a lack of respect for dignity,[34] there has been a marked trend recently towards special forms of protection for certain social groups who are particularly at risk of assault upon their person. In this section we consider two such examples - children and women - both of which illustrate how those who lack power in society face enhanced

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[32] See the discussion by David Feldman regarding possible assaults upon the dignity of states (1999, *supra* n. 9, p. 683).

[33] Proposed Bill on sentencing and the prison service (*Avant-projet de loi sur la peine et le service public pénitentiaire*) présented by Marylise Lebranchu, Minister for Justice, 18 July 2001. See Prieur C., *supra* n. 31.

[34] See, for example, the discussion above, Chapter 2, pp. 113-115, on the scope of dignity torts in UK law.

threats of violation and thus may warrant special consideration of their physical integrity.

Children With regard to legal responses to the abuse of children, the European Court of Human Rights has led the way in seeking to protect them from violations of their bodily integrity and, consequently, their dignity. The Court's interventions, which at first were only partial, in the sense of creating a distinction between the legality of physical assaults upon children in the public and private spheres, have now moved towards the consolidation of a harmonised approach over both domains, thus offering protection to all victims irrespective of the status of the perpetrator of the abuse.

In the public sphere, first of all, children have benefited from the Court's protection against physical assault under its case law on corporal punishment. It was noted above that the Court in *Tyrer*[35] incorporated the notion of punishment into the sphere of inhuman and degrading treatment. Subsequently, the Court was asked to decide upon the legitimacy of corporal punishment in UK schools.[36] Finding that it constituted degrading treatment for the child, and therefore a violation of Article 3, it began its protection of children against assaults upon their dignity characterised by this form of public humiliation.[37] Parliament went on to improve respect for the dignity of children faced with corporal punishment by adopting specific measures to put an end to such practices not only in state schools but also in children's homes.[38]

While the above solution concerned violence inflicted upon children by public authorities, it did not apply in the private sector. Subsequent national legislative developments, however, curtailed the exceptional status enjoyed by private schools in inflicting corporal punishment upon pupils.[39] A further decisive step was taken by the

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[35] *Tyrer v. United Kingdom* (1978) 2 EHRR 1. See above, p. 88.
[36] *Campbell and Cosans v. United Kingdom* (1982) 4 EHRR 293; *Costello-Roberts v. United Kingdom* (1982) 19 EHRR 112.
[37] It will be recalled that in the *Tyrer* case, *supra* n. 35, the European Court explicitly included in the notion of degrading treatment the humiliation of an individual before others.
[38] Education (No. 2) Act 1986; Children's Homes Regulations 1991. This development is in accordance with Article 28-2 of the UN Convention on the Rights of the Child (1989) which requires that in matters of disciplinary action in schools, all measures should be administered in accordance with the child's dignity.
[39] Section 131, School Standards and Framework Act 1998.

European Court in the case of *A v. United Kingdom*[40] in which it was found that corporal punishment inflicted by a step-father fell within the scope of Article 3, thus establishing the relevance of this provision to violations of physical integrity carried out by private individuals.[41] The significance of this case extends, in fact, far beyond the relationship between children and those exercising parental authority over them. In finding that Article 3 of the Convention has an indirect 'horizontal' effect, the Court effectively imposed upon states an obligation to take all necessary measures to protect individuals under their jurisdiction from degrading treatment, even if the state is not its source.[42] This important extension will, it is hoped, have an impact upon a second category of individuals who face increased risks of abuse given their position in society, that is women.

Women While the anomaly of different rules relating to the chastisement of children in the public and private spheres has now been cleared up, the situation with regard to harms perpetrated on women's bodies is not quite so straightforward with a distinct difference still apparent between the two sectors. It is, not surprisingly, in the public sphere, that protection is substantially better. For example, it was noted above in Chapter 2 that assaults (both of a physical and non-physical nature) upon women at work have been characterised by the European Union as (sexual) harassment and, furthermore, as an explicit violation of personal dignity.[43]

Developments at the European level are mirrored by national measures aimed at dealing with (sexual) harassment in the public sphere, particularly in employment. In France, the new Penal Code, which introduces a number of offences involving working and living conditions that are 'contrary to human dignity', provides in Article 225-14 that to profit from the situation of a vulnerable person in order to subject him or her to working conditions that are an infringement of dignity is a crime. This

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

[41] At the national level, the step-father, who had repeatedly beaten the child with a cane, was found not guilty of assault occasioning actual bodily harm on the ground that his conduct constituted 'reasonable chastisement' of the child.

[42] *A v. United Kingdom* (1999) 27 EHRR 611, para. 24.

[43] 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; 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.

might, given the European Union's formulation of the link between dignity and harassment, criminalise behaviour which creates a hostile work environment for any vulnerable employee. It is not, however, as an adjunct to respect for dignity at work that French law has chiefly addressed the problem of *sexual* harassment. It is viewed, instead, as a distinct offence under Article 222-33 of the new Penal Code which provides that 'to harass another with the aim of obtaining favours of a sexual nature is punishable by one year's imprisonment and a fine of 15,000 euros.'[44] Thus the offence is not limited to activities in employment, making it apparently more extensive than UK measures which have instead located sexual harassment within the context of discrimination in the work place bringing it within the remit of the Sex Discrimination Act 1975. Viewed through the lens of sex discrimination law, it has been noted by the Scottish judiciary in *Porcelli* that assaults upon the body of a woman can have a different significance from those upon a man.[45] Important too (and explaining the contextualisation of sexual harassment in this chapter on dignity and the body rather than in the following chapter) it appears that the courts are more willing to admit complaints of sexual harassment when these involve physical contact with the woman rather than when they involve verbal assaults or the adornment of the work place with pornographic images, these being viewed as objectively more trivial.[46] This has led to the suggestion that a more subjective interpretation of sexual harassment should be adopted by the courts which would take better account of the female perspective in determining what amounts to harassment and, hence, a lack of respect for dignity.[47]

From a comparative viewpoint, it is interesting to investigate further the different ways in which the debate on harassment has been constructed on either side of the

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[44] *'Le fait d'harceler autrui dans le but d'obtenir des faveurs de nature sexuelle est puni d'un an d'emprisonnement et de 15000 euros d'amende.'*

[45] *Porcelli v. Strathclyde Regional Council* [1986] IRLR 134.

[46] *Stewart v. Cleveland Guest (Engineering) Ltd* [1994] IRLR 440: see Flynn L., 'Interpretation and Disrupted Accounts in Sexual Harassment Cases: *Stewart v. Cleveland Guest (Engineering) Ltd* (1996) 4 *FLS* 109-122 and Flynn L., 'See What I Mean: The Authority of Law and Visions of Women' in *Law and the Senses: Sensational Jurisprudence* eds. Bently L. and Flynn L., (London: Pluto Press, 1996) 139-159, at p. 154.

[47] See Forell C.A. and Matthews D.M., *A Law of her Own: The Reasonable Woman as a Measure of Man* (New York and London: New York University Press, 2000) pp. 28-33; Monti G., 'A Reasonable Woman Standard in Sexual Harassment Litigation' (1999) 19 *LS* 552-579; Monti G., 'Understanding Sexual Harassment a Little Better: *Reed and Bull Information Systems Ltd v. Stedman* [1999] IRLR 299' (2000) 8 *FLS* 367-377.

Channel, principally its formulation as an issue of either discrimination or freedom.[48] Taking account of the more explicit protection of fundamental rights in French law, it is possible to see the inclusion of the offence of sexual harassment in the Penal Code as an indication that it is viewed there as a 'liberty' issue, that is as part of an individual's right to be free from harassing conduct. The UK perspective, to the contrary, squarely views the matter in terms of discrimination which may be problematic for the female victim who has to prove, therefore, that a man would not have suffered identical treatment to herself and, thus, that the discrimination was indeed founded upon sex. This is not easy as the *Stewart* decision demonstrates, it being found by the industrial tribunal in that case that images of naked women placed around the work place could be just as degrading to men as to women. Hence, a man who had complained about them would, it was decided, have been treated in the same way as the complainant who had, consequently, suffered no discrimination. The logic of the approach founded upon discrimination seems, therefore, to permit a continuation of certain forms of female degradation through the treatment of women as sexual objects. To the extent that respect for dignity implies a rejection of any attempt to objectify a person (as clearly suggested by the *commissaire du gouvernement* in the French dwarf-throwing cases),[49] the UK approach to harassment law would seem to have some way to go if it is to secure proper respect for the dignity of women at work.

Nevertheless, there are indications of a move in the UK towards a broader perspective upon harassment and, in particular, an enhanced consideration of it as a fundamental rights issue. This is in two respects. First, the introduction of the Protection from Harassment Act 1997 has reinforced the protection of victims from harassment under both the civil and criminal law (with the latter suggesting a move in the French direction). Whilst this legislation has been criticised from a feminist perspective for its attempt to remedy the specific problem of sexual harassment through a diverse mixture of criminal and civil measures and for its maintenance of an objective

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[48] Dekeuwer-Defossez F., 'Le harcèlement sexuel en droit français: discrimination ou atteinte à la liberté?' *JCP*, 1993, 13, I 3662; Dine J. and Watt B., 'Sexual Harassment: Moving Away From Discrimination' (1995) 58 *MLR* 343-363.

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

perspective on harassment,[50] the law does, nevertheless, demonstrate the concern of parliament to deal with a problem which had not previously been taken seriously. The second push towards viewing harassment in a broader human rights context results not surprisingly from the adoption of the Human Rights Act. It may be anticipated that arguments founded upon Article 3 ECHR will now be made out in cases of sexual harassment, founded upon the ruling of the European Court of Human Rights in *A v. United Kingdom*, discussed above. This decision would suggest that victims of harassment at work may invoke the indirect horizontal effect of the Article to argue that they have suffered degrading treatment and that the state should have acted positively to prevent this, despite it not being the perpetrator of the violation.

If the legal protection of women's bodily integrity in the public sphere may sometimes be found wanting, the situation is poorer in the private sphere where there has historically been little concern to protect the female body from 'domestic' violence inflicted within the family and often hidden from the attention of public authorities.[51] In UK law, for example, women who had been subjected to years of physical and mental abuse and who subsequently killed their violent partner, were for many years unable to benefit from the defence of provocation which would have reduced a conviction of murder to one of manslaughter.[52] This position may be contrasted with that of men who have been 'provoked' to kill their partner following her nagging[53] or taunts about sexual prowess.[54] Men who appear more apt to fulfil the 'objective' conditions attached to the legal definition of provocation through their immediate and physical reaction to the provocative word or deed have benefited to the detriment of women who, following sustained abuse over what is often many years and usually of a slighter physical stature than their tormenter, tend to wait for the

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[50] Conaghan J., 'Enhancing Civil Remedies for (Sexual) Harassment: S. 3 of the Protection from Harassment Act 1997' (1999) 7 *FLS* 203-214.
[51] Howe A., 'The Problem of Privatized Injuries: Feminist Strategies for Litigation' in *At the Boundaries of Law: Feminism and Legal Theory* eds. Fineman M.A. and Thomadsen N.S., (New York: Routledge, 1991) 148-167.
[52] *R v. Ahluwalia* [1992] 4 All ER 889; *R v. Thornton* [1992] 1 All ER 306. See Fox M., 'Legal Responses to Battered Women who Kill' in *Law and Body Politics: Regulating the Female Body* eds. Bridgeman J. and Millns S., *supra* n. 1, 79-104; McColgan A., 'In Defence of Battered Women who Kill' (1993) 13 *OJLS* 508-529; O'Donovan K., 'Defences for Battered Women who Kill' (1991) 18 *JLS* 219-240; O'Donovan K., 'Law's Knowledge, the Judge, the Expert, the Battered Woman, and her Syndrome' (1993) 20 *JLS* 427-437.
[53] *R v. Singh, The Times*, 30 January 1992.
[54] *R v. Toi, The Times*, 10 May 1995; *R v. Greech, The Times*, 22 February 1994.

'right moment' before killing him, thus giving their action the appearance of premeditation.

It is only more recently that the House of Lords has accepted the need to modify the definition of provocation to include a more subjective perspective which allows for the 'slow burn' effect of domestic abuse to be fully considered.[55] Concern still remains, however, that despite this new approach, women who kill a violent partner continue to be treated more harshly than their male counterparts by the courts, this being now evidenced in gender biased sentencing practices.[56] Once again, assistance may be at hand in Article 3 ECHR with its capacity to impact indirectly upon private relations through a requirement that the state intervene to prevent and sanction their occurrence. Its use in this way would go some way to meet the suggestions made by feminist commentators that physical harms caused to women in the domestic sphere should be capable of inclusion under the heading of degrading treatment or even torture so as to permit the application of international human rights instruments in this context.[57] To this end, the UN Convention on the Elimination of All Forms of Discrimination Against Women,[58] which forms part of the measures taken by the international community to protect women from violence and torture, is not without influence at the supra-national level, facilitating a more expansive reading of degrading, and thus undignified, treatment of women whether this occurs in the visible, public or invisible, private sphere.

5.1.2 'Consensual' degrading treatment

Having considered the more usual situations in which assaults upon bodily integrity are carried out against the wishes of the victim, it is appropriate now to investigate the

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[55] *R v. Smith* [2000] 4 All ER 289: see Burton M., 'Intimate Homicide and the Provocation Defence: Endangering Women? *R v. Smith*' (2001) 9 *FLS* 247-258.

[56] Burton M., 'Sentencing Domestic Homicide Upon Provocation: Still "Getting Away With Murder" *R v. Suratan, R v. Humes and R v. Wilkinson (Attorney General's Reference No. 74, No. 95 and No. 118 of 2002)* [2002] E.W.C.A. 2982' (2003) 11 *FLS* 279-289.

[57] Beveridge F. and Mullally S., 'International Human Rights and Body Politics' in *Law and Body Politics: Regulating the Female Body* eds. Bridgeman J. and Millns S., *supra* n. 1., 240-272; Charlesworth H. and Chinkin C., *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) chapter 7, 'Human Rights'.

less habitual instances of physical assault to which a 'victim' may consent. In such circumstances, both UK and French law distinguish their legal approaches depending upon the type of activity and the sphere in which it is practised. There are, however, dissimilarities between the two systems which, in fact, mirror the perspectives of each system on the application of human dignity at the frontiers of life (discussed in Chapters 3 and 4 above). Hence, it will be argued that the UK approach to matters of sporting conduct, entertainments and leisure activities concentrates upon the negative aspects of degrading treatment, that is to say their *undignified* qualities, while the French approach is oriented towards the positive aspects, in other words respect for the person requiring *dignified* treatment. This difference may be explained by the traditional 'negative' protection of rights in UK law, while the French system has been based upon the positive articulation of individual subjective rights (*droits subjectifs*). As in the previous section, the importance of the public-private divide springs to the fore in the debate on 'consensual' harms. Thus, we will consider first Anglo-French approaches to human dignity as this is constructed by injuries received in the context of public sector sporting activities and entertainments (often characterised as merely 'part of the game'). This will be followed by an examination of harms generated through the pursuit of leisure activities in the private domain (conversely, normally viewed as unlawful despite the victim's consent to 'degradation' of the body).

5.1.2.i Sports, entertainments and the public sphere

In the public sphere, French and UK law both accept that with regard to certain physical activities, notably of a sporting variety, the consent of the participants to a degree of bodily injury is valid, meaning that the author of the harm is not liable under the criminal or civil law and the treatment is not viewed as degrading. Beyond the domain of contact sports, however, it will be observed that other kinds of entertainment may be prohibited where public authorities are concerned that the 'consensual' acts they entail contravene public order and morality.

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[58] UN Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18

Sports It was noted in the previous chapter that both French and UK law have historically refused to accept that individuals may consent to their own death through the practice of duels.[59] Nevertheless, in the case of present day sporting activities, even where the risk of physical contact and, therefore, injury, is high (for example, in boxing, wrestling, rugby and football), the common Anglo-French approach is to accept the validity of the consent of participants as a legitimate defence in cases of physical harm suffered by the players. There are exceptions to the rule, but these are limited to instances where the degree of violence goes beyond what is 'acceptable' sporting conduct.[60] For example, in the UK, it was held in *R v. Coney* that prize-fighting is not a legitimate activity.[61] Likewise, in France, local mayors may employ their police powers to ban boxing matches where these are considered morally insalubrious (that is contrary to *'l'hygiène morale'*).[62]

The question must be posed, however, as to whether these instances of bodily assault are not equally as degrading for the victim as other forms perpetrated outside the sporting arena. With regard to boxing in particular, it may well be imagined that participants who submit themselves to blows upon the body before a paying audience for entertainment purposes contribute to a degradation of their person. Moreover, it is not only the risk of injury which may ensue, but also that of death. It is not so evident, therefore, why the issue of consent to injury caused by participation in dangerous modern day sports should be viewed differently from that in the context of prize-fights and duelling when the degree of risk, harm and degradation is equivalent.

Entertainments Given the way in which consent is accepted as a legitimation of sporting injury, it is equally unclear why it is not viewed as similarly valid in cases of (potential) harm generated through the pursuit of other forms of public entertainment. That consent is invalid in such circumstances, however, was made abundantly clear in the French dwarf-throwing cases in which the *Conseil d'Etat*, overruling judgments

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December 1979, entered into force 3 September 1981.

[59] Cass. crim., 22 June 1837, S, 1837, 1, 465; *R v. Young* (1838) 8 C & P 644. See above, p. 200.

[60] See the discussion by Alain Lacabarats on the role of judges as 'referees' to the extent that they implement sanctions for failure to respect the rules of sporting activities: 'Le juge, arbitre du conflit sportif' *D* 2001, special issue, 20, 61-68.

[61] *R v. Coney* (1882) 8 QBD 534.

[62] CE, 7 November 1924, *Club indépendant sportif châlonnais.*

from the lower administrative courts of Versailles and Marseille,[63] held that such spectacles might be prohibited by the mayor because of the risk they generated of a violation of respect for human dignity.[64] Viewed as an issue of degradation, it is noteworthy that the *Conseil d'Etat* did not seek to rely on Article 3 ECHR (in spite of a circular from the French Home Office in 1991 which suggested that these events should be prohibited precisely because they violated this provision). In fact, according to the conclusions of the *commissaire du gouvernement*, this was not legally the case because Article 3 conferred no competence upon administrative authorities (ie the mayor) to ban public entertainments. Instead the *Conseil d'Etat* preferred to found its judgment upon national law, more specifically local administrative police powers. To the extent that the protection of dignity was not hitherto a reason for invoking police powers, however, it had to be juridified in this context and, as was noted above in Chapter 2,[65] this was achieved through the introduction of a new justification for the use of police powers based upon the protection of public morality (and specifically including respect for dignity). While this solution suggests that from a legal and moral point of view, individuals may not consent to their personal degradation in a spectacle as debasing as dwarf-throwing, there are nonetheless clear similarities between his type of entertainment and contact sports. The risk of injury, it is suggested, is similar if not less in the case of the former (given the protective clothing worn by the dwarf) and consent is equally present in both cases.

For the *Conseil d'Etat*, however, the difference lay principally in the status of the participants; more precisely it was the fact of the dwarf's disability that justified the ban. Chosen precisely because of his height and thrown like a projectile, the dwarf endured an objectification of his body. His dignity was violated because he was treated as a thing rather than a person. In this respect, the *commissaire du gouvernement* made reference to what were in his view similarly degrading spectacles such as the exhibition in fairs and circuses of 'freaks of nature', Siamese twins and the

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[63] Flaus J-F., 'L'interdiction de spectacles dégradants et la Convention européenne des droits de l'homme' *RFDA*, 1992, 8/6, 1026-1031; Vimbert C., 'Police administrative' *AJDA*, 1991, 525-527.
[64] CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence;* Rec. p. 372, conclusions by P. Frydman; AJDA 1995, 942; 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.
[65] See p. 59.

elephant man.[66] To this observation, it might be added incidentally that, contrary to the concern of French authorities, the willingness of the UK judiciary to condone the separation of Siamese or conjoined twins in the knowledge that one is sure to die might not constitute a huge advancement on past practices.[67]

As far as the appeal to dignity is concerned in the dwarf-throwing cases, it is clear that it is constructed in an objective fashion. In other words, the assault is upon *human* dignity in a general sense, rather than solely upon the *personal* dignity of the dwarf.[68] In fact, the dwarf, seeing nothing degrading in being thrown (an activity to which he freely consented) considered on the contrary that his personal dignity was threatened as a result of being prevented from exercising his right to work. This subjective view of dignity, however, cut no ice with the highest administrative jurisdiction. Preferring instead a construction of dignity founded upon the requirements of public morality, the *Conseil d'Etat* plumped for the legitimation of a form of state paternalism which has no equivalent in the domain of other sporting competitions.

5.1.2.ii Leisure activities and the private sphere

Yet, it is not only in the sphere of public entertainments that law may at times refuse to legitimate consensual injury. In the private sector too certain forms of behaviour, viewed as violent or dangerous for the participants, may be outlawed. Having considered above the French example of the relationship between dignity and public spectacles, we now turn to a matter which has troubled UK (and subsequently European) judges, this being the degradation entailed by homosexual sado-

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[66] On a wider note, it is interesting to consider in this regard the 1932 film 'Freaks' directed by Tod Browning about a circus community. The film was banned until 1963 as a result of its featuring a number of actors with disabilities and being viewed as immoral and in bad taste.

[67] See the discussion above, Chapter 4, pp. 227-230, of *Re A (Children) (Conjoined Twins)* [2000] 4 All ER 961.

[68] See the discussion in Chapter 1 above, pp. 41-42, of the conclusions of the *commissaire du gouvernement* on the question of whose dignity was at stake. It is interesting in this respect to compare the dwarf-throwing events with bungee jumping activities in which participants are not normally handicapped or paid to take part. The latter go unregulated and yet in both Britain and France they have led to serious injury and even the death of participants, with no debate being forthcoming as to their capacity to compromise human dignity (see *Le Monde*, 6 June 2001; *Harris v. Evans and another* [1998] 3 All ER 522).

masochistic activities in the private sphere.[69] The case of *R v. Brown*,[70] concerning acts carried out by a group of gay men in private, highlighted the difficulty of legal prohibitions upon conduct which appears harmful to outsiders but to which all participants have consented. Despite no member of the group suffering permanent injury, the defendants were prosecuted under sections 20 and 47 of the Offences Against the Person Act 1861 for causing 'unlawful wounding' and for 'assault occasioning actual bodily harm'. Found guilty at first instance, the Court of Appeal similarly rejected the defendants' claim that consent negated the criminality of their activities, a solution which was confirmed by the House of Lords in a controversial decision in which the Lords were divided three to two.

In an explanation of their decision which echoes the public morality discourse employed by the *Conseil d'Etat* in the dwarf-throwing cases, the majority in the House of Lords sustained that consent was not a valid defence in the circumstances for reasons of public interest. Although making no direct reference to the link between harm and human dignity, a not dissimilar thematic progression is made between violence and incivility, as Lord Templeman explains that '[s]ociety is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.'[71] Hence it was found to be contrary to the public interest that harm should be inflicted for 'no good reason'.[72] Since the activities of sado-masochists presented no such reason, being regarded as unconducive to the 'enhancement or enjoyment of family life' and the 'welfare of society', any consent to such activities was invalid.[73]

Despite this invocation of the public good at the national level, a justification based upon public morality was not employed by the European Court of Human Rights

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[69] No similar issue has been brought before the French judiciary. This might be explained, according to Bruno Py, by the extremely private and limited nature of the acts and the absence of any will on the part of public authorities in France to prosecute (*Le sexe et le droit* (Paris: PUF, coll. Que sais-je?, no. 3466, 1999) p. 67). This would seem to suggest a further instance of the extensive protection of private life in France (discussed in Chapter 4 above) when compared with that in the UK.
[70] *R v. Brown* [1993] 2 All ER 75.
[71] *R v. Brown, ibid.*, p. 84. On the presence of the theme of violence in the judgment of the House of Lords, see Moran L., 'Violence and the Law: The Case of Sado-Masochism' (1995) 4 *SLS* 225-251.
[72] *R v. Brown, ibid*, p. 99, *per* Lord Lowry.
[73] Lord Lowry, *ibid.*, p. 100.

when it was later asked to consider the case.[74] The European judges, while ultimately finding no violation of Article 8 ECHR, admitted that the repressive measures adopted by the UK government entered into the sphere of private life of the claimants, interpreted to include their sexual life.[75] The measures were, nevertheless, justified as necessary in a democratic society to protect public health, it being suggested that the injuries caused, or susceptible to being caused, were not harmless either in nature or severity and that the claimants' behaviour was of an extreme nature.[76] While the discourse of public health does not have the same overt moral ring to it as one based upon public order requirements, there is nevertheless a judgmental undertone to the decision of the European Court. As Judge Pettiti explains in his concurring opinion (highlighting the degrading and undignified quality of the men's activities), the protection of private life means the protection of intimacy and dignity and not the promotion of criminal immorality.[77]

The capacity attributed to the homosexual sado-masochists in *Brown* to disrupt social *moeurs* through their private conduct is quite remarkable. In this respect their bodies have symbolic power, capable of reaching out from the private domain to produce palpable effects in the public sphere. This 'spill over' effect with its wider implications justifies the repression of the activities for similar reasons to those put forward in *R v. Coney* in which prize-fighting had been outlawed on the basis that:

> 'the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds.'[78]

The 'spill over' effect in both cases is linked to the health of the participants, but in *Brown* it spreads beyond this to infect the wider public too. This is evident in the

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[74] *Laskey, Jaggard and Brown v. United Kingdom* (1997) 24 EHRR 39.
[75] Thus the Court followed cases such as *Dudgeon v. United Kingdom* (1982) 4 EHRR 149 and *Norris v. Ireland* (1991) 13 EHRR 186.
[76] *Laskey, Jaggard and Brown v. United Kingdom* (1997) 24 EHRR 39, at para. 46.
[77] Judge Pettiti explains his decision to offer a concurring opinion on the case in an essay published subsequent to the judgment in which he suggests that he found the reasoning of the Court in the case too vague: 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., (Paris: Economica, 1999) 53-66, at p. 59.
[78] *R v. Coney* (1882) 8 QBD 534, at p. 549, *per* Stephen J.

suggestion that the activities of the sado-masochists present a risk of infection which is linked by the House of Lords to the particular and unavoidable threat of AIDS. Thus, Lord Lowry states that:

> '[w]hen considering the danger of infection, with its inevitable threat of AIDS, I am not impressed by the argument that this threat can be discounted on the ground that, as long ago as 1967, Parliament, subject to conditions, legalised buggery, now a well-known vehicle for the transmission of AIDS.'[79]

The homosexual bodies are also viewed as agents of corruption and proselytisation of others, particularly the young and vulnerable. Lord Templeman, for example, cites the judgment of the Chief Justice, Lord Lane, on appeal, according to which two members of the group were responsible for the corruption of a young man 'K', who subsequently, happily, had abandoned these activities and 'settled into a normal heterosexual relationship'.[80] The implicit discrimination against homosexuals displayed by judicial attitudes in *Brown* is rendered further apparent in later case law according to which similar activities carried out by *heterosexuals* have not been criminalised, precisely because they occurred in the private sphere and beyond the gaze of the state. For example in *R v. Wilson* the Court of Appeal overturned a decision of the Crown Court at Doncaster which had found Mr Wilson guilty of assault occasioning actual bodily harm for branding his initials on his wife's bottom.[81] Accepting that Mrs Wilson had consented to this act, it was held that:

> '[c]onsensual activity between husband and wife, in the privacy of the matrimonial home is not, in our judgment, a proper matter for criminal investigation, let alone criminal prosecution.'[82]

At the level of their facts, however the *Wilson* and *Brown* cases display a good deal in common – both concern consensual injury sustained in the private sphere. It is

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[79] *R v. Brown* [1993] 2 All ER 75, p. 100. The implicit and explicit homophobia expressed in the judgments of the majority of the Law Lords is discussed in Bibbings L. and Aldridge P., 'Sexual Expression, Body Alteration, and the Defence of Consent' (1993) 20 *JLS* 356-370.
[80] 94 Cr App R 302, at p. 310, *per* Lord Lane. Cited by Lord Templeman, *R v. Brown*, [1993] 2 All ER 75 (HL), at p. 83.
[81] *R v. Wilson* [1996] 3 WLR 125.
[82] *R v. Wilson, ibid.*, p. 128, *per* Russell LJ.

perhaps the *group* component of the sado-masochistic activities which justifies a distinction although this is not made explicit by the judges. In this respect a similar consideration to that noted in the French dwarf-throwing cases may be present in so far as the participation of others, notably the spectators, in the degrading spectacle is viewed as an aggravating factor in the violation of dignity. Yet, like the dwarf participant, the defendants in *Brown* might also have had claims to make related to a lack of respect for their personal dignity, resulting from the interference in their private life and the discriminatory treatment they received at the hands of the public authorities. As with dwarf-throwing, though, it would appear that the more subjective formulation of respect for human dignity is overshadowed by its objective component which recognises the menace to social order posed by such examples of disruptive conduct and thus seeks to protect the collective dignity of all rather than the individual dignity of the few.

The conclusion which may be drawn from the French and UK cases discussed in this section is that there is a lack of coherence and a trace of discrimination in the acceptance or not of consent as a means of legitimising conduct. Above all, however, the cases show how diverse conceptions of dignity and its foil, degradation, have contributed to the (often illogical) dissemination of the concept of human dignity through law. That said, the cases maintain their consistency in demonstrating the need to protect people, even against their better judgment, from degrading treatment resulting from the use of their own bodies for particular (immoral or entertainment) purposes.

It is not only in the area of assaults upon the external surface of the body, however, that consent plays a key role in the relationship between law and respect for human dignity. It is also the case for internal corporal injuries. Once more, the view that individuals are not free to do as they please with their own bodies is clearly in evidence. However, as in the case of sporting activities, it will be observed that there remain, nevertheless, controversial circumstances in which internal violations of the body may be legitimated by invoking the consent of the victim.

5.2 Internal assaults upon bodily integrity: medical interventions and sexual violations

We move, therefore, in this second section to examine the relationship between dignity and the legal protection of the human body in the sphere of assaults involving corporal penetration. Such violations often threaten intimate spheres of human life and it is, therefore, particularly important in this context that respect for the person is ensured. The subject is examined through the use of two principal examples which characterise the insertion of dignity into law in this domain: medical interventions and sexual violations. Both show the extent to which consent continues to play a primary role in the legitimisation of intrusions upon the body and also pick up on the theme of discrimination discussed above in demonstrating important distinctions with regard to the treatment of different bodies, for example, those of men/women, the young/old and the disabled/able-bodied.

5.2.1 Medical interventions

Our first example, medical interventions upon the human body, brings to the fore the ensemble of problems related to consensual and non-consensual assaults upon the person. While it is only doctors who may carry out a violation of physical integrity, provided that this is done in the best interests of the patient and with his or her consent, in both France and the UK certain types of medical intervention have given rise to polemical debates about when it might be possible for doctors to act upon the body *without* patient consent. In this regard it seems quite clear that non-consensual intervention can constitute a threat to human dignity in so far as it implies both physical assault and a denial of personal autonomy. For this reason French and UK laws have sought to place conditions upon bodily intrusions requiring that these be in order to ensure the health and well-being of the patient. Differences between the two legal systems are, however, apparent. In France, the medical profession is permitted a more interventionist role, notably in order to save the life of a patient who resists treatment. That said, in both countries it will be observed that, while quite strict legal conditions are imposed upon medical intrusions for the purposes of organ and tissue

removal, they are less so with regard to therapeutic interventions carried out upon 'atypical' bodies, such as those of women, children and the disabled.

5.2.1.i Organ and tissue removal

In the preceding chapter the implications of organ donation after death were discussed in terms of the requirements that human dignity be upheld so as both to respect the wishes of the deceased and to save other human lives.[83] In the case of the living, the conditions for medical intervention to remove organs and tissue are equally tight. In the UK, as in France, individuals do not enjoy property rights over their body. Nevertheless, the two countries do display clear differences in approach.[84] In France, interventions are permissible in so far as they respect the special 'status' which the body enjoys in law. In the UK, however, there is no correspondingly straightforward legislative formula, the situation being regulated by a mixture of statute and case law.

The legal status of the body and juridification of dignity: the French example It has been remarked in the preceding discussion that the juridification of human dignity often materialises at points in time and in situations when it appears most at risk. Such an interpretation may be placed upon developments in French law which have seen the rather contradictory introduction into the Civil Code of a specific 'status' guaranteeing respect for the human body while at the same time legislation has been passed to define the conditions of access to the body in order to carry out organ removal.

Thus, Article 16 of the Civil Code, revised by parliament in 1994, explicitly seeks to articulate the relationship between law and the human body. Its first paragraph provides that '[e]veryone has the right to respect for his or her body. The human body is inviolable. The human body, its elements and its products may not form the

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[83] See pp. 236-238.

[84] These different approaches are unlikely to be harmonised given their embeddedness in each legal system, despite the likely introduction of an EU directive setting out new and common standards on safety and quality for the clinical use of tissues and cells in the EU. See Burgermeister J., 'Doctors Hail New EU Directive on Tissues and Cells' (2004) *BMJ* 328.

object of a patrimonial right.'[85] Traditionally, doctors have run no risk of criminal prosecution for carrying out medical interventions provided that these were done with a therapeutic aim and in the strictly personal interest of the patient. Yet, because in the case of the removal of organs from the living, the intervention is rarely in the interest of the patient, but in that of someone else, legislation was necessary to explicitly authorise an intervention upon the body for reasons other than personal patient interest.[86] Beyond this, in principle the doctor would be *a priori* criminally liable for acts and assaults upon the body of the patient.

Since the introduction of Law no. 94-654 of 29 July 1994 on the donation and use of elements and products of the human body, however, the perspective has shifted. Giving a 'status' (*'statut'*) to the human body in law has the effect of generating individual rights attached to the body, notably appearing to grant to the individual the freedom to accept or to refuse any proposed intervention.[87] Dominique Thouvenin, nevertheless, notes that this shift of perspective, in asserting the apparent power of the individual to do as she likes with her own body, masks the reality of the assault to which the doctor subjects the patient.[88] In this way, the change in discourse creates a screen hiding the fact that the new regime, while emphasising the subjectivity of the individual, allows the conditions attached to his or her 'freely' taken decision to be fixed by law.[89]

The danger of not attaching conditions to an individual's power to act freely in this context is, of course, evident in so far as it would permit the individual to treat her body as an object, amounting to an assault upon human dignity. An attempt to reconcile individual liberty and legal regulation suggests the need for some sort of distinction to be made between *elements* of the body (which may be freely disposed

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[85] *'Chacun a droit au respect de son corps. Le corps humain est inviolable. Le corps humain, ses éléments et ses produits ne peuvent faire l'objet d'un droit patrimonial.'* It is not only the Civil Code which has been responsible for the definition of the status of the human body in French law. See the discussion of its constitutional and jurisprudential sources in Duprat J.-P., 'La définition du statut juridique du corps humain, entre l'énoncé de principes fondamentaux et l'affirmation de libertés publiques' in *Droits et libertés en Grande-Bretagne et en France* eds. Dubourg-Lavroff S. and Duprat J.-P., (Paris: L'Harmattan, 1999) 243-256, at pp. 244-250.

[86] In the case of organ removal, this came in the form of Law no. 76-1181 of 22 December 1976. See Thouvenin D., 'La construction juridique d'une atteinte légitime au corps humain' *D* 2001, special edition, 20, 113-127, at p. 114.

[87] Thouvenin D., *ibid.*, p. 115.

[88] Thouvenin D., *ibid.*

of) and the *human person* (whose body and dignity is inviolable). The dividing line here, though, is not at all precise and the confusion seems to run through the French legislative perspective in so far as the new status of the human body and the rights and liberties which flow from it are difficult to reconcile with those measures introduced in Law no. 94-653 of 29 July 1994 on respect for the human body precisely importing into Article 16 of the Civil Code the prohibition on '*any assault* upon human dignity'.[90]

The key to this contradictory package of measures would seem to lie once more in the notion of patient consent, as the removal of organs, tissues, cells or body products cannot be carried out without this vital ingredient[91] which in France, moreover, has to be affirmed before the courts.[92] Thus, contrary to the position observed above with regard to the regulation of entertainments and leisure activities, consent to organ donation is valid and constitutes a legitimate defence for the doctor in case of criminal prosecution. The result is that the law permits a *voluntary* assault upon bodily integrity which is carried out deliberately in the interests of another.[93] If, on the one hand, this may be viewed as respectful of the personal dignity of the individual who is allowed to do as she likes with her body, it would seem, on the other, to run counter to the more general and objective approach of French law towards dignity (as evidenced in Article 16 of the Civil Code) which suggests the inviolability of the body and the illegality of its instrumentalisation by another.

The absence of legal status and property in the body: the UK example As one might expect from a country with an unwritten legal tradition, there is no equivalent 'status' attached to the human body in UK law to that in French law. Likewise, there are no provisions requiring that human dignity be safeguarded such as are included in Article

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[89] Thouvenin D., *ibid.*

[90] '... toute atteinte *à la dignité'* (emphasis added). See Thouvenin D., *ibid.*, p. 120.

[91] Article L. 671-3 of the Code on Public Health provides that: '[t]he removal of organs from a living person, for donation purposes, may be carried out only in the direct therapeutic interests of a receiver. ... The donor, being informed beforehand of the risk which he or she runs and of the eventual consequences of the removal, must express his or her consent before the president of the *tribunal de grande instance* or the judge designated by him or her. ...' (*'Le prélèvement d'organes sur une personne vivante, qui en fait don, ne peut être effectué que dans l'intérêt thérapeutique direct d'un receveur. ... Le donneur, préalablement informé des risques qu'il encourt et des conséquences éventuelles du prélèvement, doit exprimer son consentement devant le président du tribunal de grande instance ou le magistrat désigné par lui. ...'*)

[92] *Ibid.*

16 of the French Civil Code. Instead, the area is regulated by legislation in the form of the Human Tissue Act 1961, the Human Organ Transplants Act 1989 and the Anatomy Act 1984.[94] Given too that UK law has traditionally been more orientated around legal actions rather than fundamental rights, it is not surprising that debate has focused upon the possible claims which may be made by individuals whose organs have been removed.[95] In actual fact, it appears that parliament has left open no possibilities of legal action. The legislation presumes, in implicit fashion, that organs and tissue are freely given, the gift being unconditional, so that the donor cannot be considered the owner of the body parts conceded. Moreover, the question has never formed the object of a claim based upon the common law. Here there is a presumption that the person making the donation has no interest in pursuing legal action once the organ has been separated from his or her body.[96]

Given the hazy picture of the legal status of the body in UK law and the additional absence of any safeguards in terms of positive requirements to respect fundamental rights and/or human dignity in the area of organ removal, a question deserves to be posed as to how long the situation can remain as it is at present. Academic discussion points towards the possible creation of a property right over detachable components of the human body (thus suggesting a similar distinction to that sought in French law between bodily elements and the full human person) although it may be that this would constitute a violation of human dignity. John Harris, for example, contends that '[i]t is arguable that any sale by a human being of parts of his or her body is such an affront to our fundamental notions of human dignity that it ought not to be permitted.'[97] Harris goes on, nevertheless, to suggest a distinction between certain 'exceptional' elements of the body, such as organs and gametes which lie at the heart of human reproduction and survival and should thus be free from any proprietorial claims, and other less emotive elements, which might be considered as belonging to

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[93] Thouvenin D., *supra* n. 86, p. 123.
[94] A new Human Tissue Bill is currently under discussion in parliament (see above p. 237, n. 127) and will set out the penalties which individuals or institutions could face if they remove organs without prior consent either from the living or after death.
[95] Grub A., *supra* n. 5; Harris J.W., *supra* n. 5; Matthews P., *supra* n. 5; Morgan D., *Issues in Medical Law and Ethics* (London: Cavendish Publishing, 2001) pp. 83-104.
[96] See the discussion on this point by Derek Morgan, *ibid.*, p. 92.
[97] Harris J., *supra* n. 5, p. 76.

the individual and with regard to which he or she could be compensated upon their removal.[98]

This argument, which permits an objectification of the human body (at least in some of its elements) would, as Harris identifies, seem incompatible with the principle of respect for human dignity which requires that individuals be treated always as ends and not means and that their bodies should not be exploited for financial gain. Implicitly, in rejecting the idea of property rights in the human body, and therefore remuneration for the taking of body parts, it may be observed that the personal integrity of the donor is respected. Similarly, in requiring consent even for the gratuitous donation of elements of the body, the law implicitly demonstrates its concern that the dignity of the donor be protected.

5.2.1.ii 'Therapeutic' interventions

If patient consent is the password to lawful organ and tissue removal in France and the UK, it is likewise of prime importance with regard to other kinds of medical interventions upon the body. However, in such cases a tendency may be observed towards intervention when this is deemed necessary in the best interests of the patient even in the absence of consent. This observation needs to be clarified by two points. The first is that both UK and French law appear more disposed to accept interventions upon certain bodies than others. This occurs notably where individuals are viewed as vulnerable because of their social status, as in the case of women, minors and the disabled. The second point of note is that UK law is more prepared than its French counterpart to accept that in principle no medical intervention should be carried out upon a patient without his or her consent[99] except when this is a clear matter of life and death. In France, to the contrary, interventions in cases of therapeutic necessity are more frequently discernable.[100] Once again, from the perspective of respect for human dignity, a confrontation ensues between the dignity of the individual, free to

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[98] Harris J., *ibid.*

[99] *Re T (an adult) (consent to medical treatment)* [1992] 3 WLR 782. Otherwise, the treatment constitutes a battery and may give rise to civil or criminal liability.

do as she likes with her body (and ultimately life), and the dignity of humanity expressed through the principle of the sanctity of life. This conflict, and the diverse Anglo-French responses to it, will be examined through the use of two telling examples: therapeutic interventions upon the reproductive body and the anorexic body.

The reproductive body With regard to human reproduction, there are two questions which have particularly troubled French and UK judges alike, and which represent two sides of the same coin: on the one hand, the legitimacy of medical acts which aim to prevent procreation through (forced) sterilisation and, on the other, the legality of interventions aimed at promoting procreation through the practice of caesareans upon women in the absence of their consent. In both cases, it is suggested, an assault upon human dignity may be perpetrated via the infringement of bodily integrity which these actions require.

First, in the case of sterilisation, it deserves to be stressed that the violation of dignity extends from the assault upon physical integrity through to the deprivation of an individual's reproductive capacity and, thus, an important part of life and human experience. French and UK law alike are not surprisingly, therefore, rather wary of permitting such interventions, French law being in fact slightly more conservative than its UK counterpart. As far as sterilisation for the purposes of contraceptive choice is concerned, there has in the past been a difference in Anglo-French approaches. Permitted in the UK, the practice was until recently unlawful in France, even if the patient wished to give consent to the operation.[101] In 2001, however, the adoption of Law no. 2001-588 of 4 July 2001 on abortion and contraception legitimised 'sterilisation for contraceptive purposes' by adding Article L 2123-1 into the Code on Public Health to this effect. This Article allows sterilisation in cases where 'the adult concerned has expressed free will and made a reasoned decision

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[100] Article 16-3-1 of the Civil Code provides that interventions upon the human body may be carried out in cases of therapeutic necessity for the person concerned (*'[i]l ne peut être porté atteinte à l'intégrité du corps humain qu'en cas de nécessité thérapeutique pour la personne.'*).

[101] Cass. crim., 1 July 1937, S, 1938, 1, 193; JCP, 1937, II 440, note by Tortat. This policy represents one facet of the more pro-natalist orientation of family planning measures in France. For an account of the historical evolution of French pro-natalist legislation, see Latham M., *Regulating Reproduction: A Century of Conflict in Britain and France* (Manchester: Manchester University Press, 2002) especially pp. 84-86.

following deliberation and in the light of clear and complete information about the consequences'.[102] This reform may be viewed as an attempt to further reproductive and contraceptive choices for adults and thus as part of the respect for their autonomy and private life with all that this implies for a heightened consideration of personal dignity.

Conversely, as far as therapeutic sterilisation is concerned, France has always been closer to the UK position, with this being possible in both countries. The question has been raised most notably with regard to the handicapped. UK law admits the practice when it is deemed to be in the best interests of the individual concerned according to a responsible body of medical opinion.[103] Often carried out upon young women, however, therapeutic sterilisation has been rightly criticised for being discriminatory (in so far as men are treated differently from women), eugenicist and for violating personal autonomy.[104] In more recent years, the Court of Appeal has come to accept the validity of such criticism and in two separate cases has refused to allow the sterilisation of a man and a woman both aged 28 on the grounds that the intervention was in neither of their best interests and that there were other means of contraception which might be used before opting for this drastic solution.[105] A similar thrust is evident in the new French legislation on contraception. The Law of 4 July 2001 introduced into the Code on Public Health Article L. 2123-2 which prohibits the sterilisation of handicapped minors and only allows that of adults when there is an absolute medical contra-indication to the use of other methods of contraception or an impossibility of putting them effectively into practice.[106] Moreover, this intervention must be authorised by the court (in this case the *'juge des tutelles'*).[107] The new legislation has been greeted positively for bringing out of the shadows a practice

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[102] *'[L'intervention est légitime lorsque] la personne majeure intéressée a exprimé une volonté libre, motivée et délibérée en considération d'une information claire et complète sur ses conséquences.'*

[103] *Re B (a minor) (wardship: sterilisation)* [1987] AC 199; *Re F (mental patient: sterilisation)* [1990] 2 AC 1; *Re W (mental patient) (sterilisation)* [1993] 1 FLR 381.

[104] Keywood K., 'Sterilising the Woman with Learning Difficulties – In her Best Interests?' in *Law and Body Politics: Regulating the Female Body* eds. Bridgeman J. and Millns S., *supra* n. 1, 125-150.

[105] *Re A (medical treatment: male sterilisation)* [2000] 1 FCR 193; *Re SL (adult patient) (medical treatment)* [2000] 2 FCR 452: see Keywood K., '"I'd Rather Keep Him Chaste": Retelling the Story of Sterilisation, Learning Disability and (Non)sexed Embodiment – *Re SL (adult patient) (medical treatment) [2000] 2 FCR 452; Re A (medical treatment: male sterilisation) [2000] 1 FCR 193*' (2001) 9 *FLS* 185-194.

[106] See Fossier T. and Verheyde T., 'La stérilisation à fins contraceptives des incapables majeurs: L. no. 2001-588, 4 juillet 2001' *JCP, Actualité*, 2001, 30, 1477-1479.

[107] Article L. 2123-2-2 of the Code on Public Health.

previously considered as taboo.[108] Undoubtedly, the transparency of the new system offers better protection to vulnerable individuals and ensures greater respect for their bodily integrity and dignity, permitting them to enjoy a sexual and procreative life in spite of their disability.

A second instance of interventions upon the reproductive body which has interested the UK courts particularly is that of forced caesareans. The question of whether, in the absence of consent, a doctor may be authorised to intervene upon the body of a pregnant woman in order to effect such an operation would seem to require a negative response in the light of the judgment in *Re T*[109] in which, it will be recalled, the requirement for patient consent prior to any intervention upon the body was made clear in order to respect individual autonomy. Nevertheless, in the case of caesareans, the situation is complicated by the existence of a foetus, which is moreover viable. The refusal of the woman to consent to the operation, therefore, puts at risk the life of the unborn. The dilemma was resolved initially by the courts in favour of the foetus on the grounds that it would be in the best interests of both foetus and mother that the operation be performed.[110] Arriving at this conclusion, Sir Stephen Brown P held that there existed an exception to the principle of respect for consent in cases where the refusal of medical treatment would cause the death of a viable foetus.[111] This solution, criticised for its denial of the woman's fundamental right not to be subjected to degrading treatment, was dubious in its legal foundation upon the interests of the unborn child given that UK law accords no legal status to the foetus before its birth.[112] To this end, as in the case of forced sterilisation, the judiciary has subsequently softened its approach. Thus, more recently it has been accepted that the refusal of a competent woman to consent should not be overridden by the interest of the foetus.[113]

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[108] Grosjean B., 'La stérilisation des handicapées mentales sort de l'ombre', *Libération*, 30 May 2001. It has been estimated that every year 25,000 to 30,000 acts of sterilisation are performed in France, mainly upon women: Fossier T. and Verheyde T., *supra* n. 106, p. 1478.

[109] *Re T (an adult) (consent to medical treatment)* [1992] 4 All ER 649.

[110] *Re S (an adult: refusal of medical treatment)* [1992] 3 WLR 806.

[111] This exception was introduced by Lord Donaldson in *Re T (an adult) (consent to medical treatment)* [1992] 4 All ER 649. Sir Stephen Brown supported his conclusion with reference to the US case of *Re AC (1990)* 573 A.2d 1235 (DC App. 1990) in which a similar surgical intervention had been authorised under exceptional circumstances.

[112] *Re F (in utero)* [1988] 2 All ER 193. See the discussion of this point in Chapter 3 above, p. 137.

[113] *St George's Healthcare NHS Trust v. S* [1998] 3 WLR 936. See Morris A., 'Once Upon a Time in a Hospital... The Cautionary Tale of *St George's Healthcare NHS Trust v. S, R v. Collins and others, ex p S* [1998] 3 All ER 673' (1999) 7 *FLS* 75-84; Lim H., 'Caesareans and Cyborgs' (1999) 7 *FLS* 133-173.

The willingness with which the judiciary has in the past accepted interventions upon the female body shows the extent to which the principle of respect for personal autonomy is vulnerable when weighed against other aims, such as that of saving life. In our second example of therapeutic interventions upon the body, that is in cases involving eating disorders, it will be observed that UK judges have shown themselves to be even more prepared to permit doctors to act in order to save the life of the patient, even when consent has not been given. This observation applies particularly to interventions upon the female anorexic body, demonstrating once more a discriminatory approach when compared with a lack of willingness to intrude upon the integrity of the male body.

The anorexic body In the case of *Robb,*[114] Thorpe J held that it was perfectly lawful to respect the wish not to be force-fed of a prisoner on hunger strike in order to give effect to the fundamental principles of respect for physical integrity and self-determination. In other circumstances where individuals are refusing to eat, however, the UK courts have been far more assertive with legal intervention being particularly strong in cases involving minors and incompetent adults deemed incapable of understanding that forced feeding would be in their best interests. In France, by comparison, this area of law is less developed and, while the issue of prisoners on hunger strike has been of interest to French criminologists, that of the refusal to eat of other persons has not attracted attention in the same manner.[115] Nevertheless, it appears that in this particular area the UK approach supporting therapeutic intervention comes close to the principle applied in French law that such non-medical intervention can be lawful when performed to save life.

This is evident, first of all, in the case of minors where the life destructive problem of eating disorders is tremendously acute as young girls seek to alter their body shape in order to conform to stereotypical images of women in contemporary society.[116]

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[114] *Secretary of State for the Home Office v. Robb* [1995] 1 All ER 677.
[115] See Bourgin N. and Girard C., *supra* n. 30.
[116] On the causes of eating disorders see Dresser R., 'Article and Commentary on Anorexia Nervosa: Feeding The Hunger Artists: Legal Issues in Treating Anorexia Nervosa' (1984) *Wis L Rev* 297-374. More generally, see Bordo S., *Unbearable Weight, Feminism, Western Culture and the Body* (Berkeley: University of California Press, 1993); Orbach S., *Hunger Strike: The Anorectic's Struggle as a Metaphor for our Age* (Harmondsworth: Penguin, 1993). Conversely, death may also be caused through overeating. In this regard, see the discussion by Jo Bridgeman of the criminal liability of a parent in

Inevitably though, the refusal to eat in order to match popular, skeletal ideals of female beauty, may ultimately lead to death. In response to the wishes of doctors and family to avoid this consequence, UK judges have been asked to consider the question of the legality of forced medical intervention in order to treat young women at risk of starvation.[117] Thus, in the case of *Re W*,[118] the Court of Appeal held that it would be in the best interests of a young woman aged 16, who was refusing to eat, to allow her to be force-fed. This intervention, carried out with the intention of saving the woman's life, may be interpreted in two familiar ways with regard to respect for human dignity. On the one hand, it may be viewed as respecting the dignity of the human species in the sense of protecting the sanctity of life. On the other hand, it may be argued that the decision in *Re W* demonstrates a clear lack of respect for the personal dignity of *W*, forced to undergo an intervention upon her body in violation of her autonomy and physical integrity. In deciding in favour of life, however, the judges have shown themselves to be quite ready to restrict the autonomous choices of minors, a key aspect of whose development, it might otherwise be argued, is the possibility to take decisions and exercise choices for themselves.[119]

It might be supposed that the example of female minors is special precisely because of their age and the wishes of doctors and parents to help them through the difficult phase of adolescence. In fact, however, the UK judiciary has been equally happy to intervene in cases of adult women in the face of their refusal to eat. Given the age difference, however, the legal issue has to be formulated alternatively in order to circumvent the right of adults to refuse medical treatment (while children may be treated if, in the view of the court, this is in their best interests). In order to overcome this point of principle, and to restrict the sphere of autonomy of adult women, the courts have found it convenient to make a liaison between the physical and psychological aspects of eating disorders. Thus, being asked to consider the question

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the American case of *Corrigan* (unpublished decision): 'Criminalising the One who really Cared: *Corrigan*' (1998) 6 *FLS* 245-256.

[117] The history of the relationship between UK law and anorexia is told in Keywood K., 'My Body and Other Stories: Anorexia Nervosa and the Legal Politics of Embodiment' (2000) 4 *SLS* 495-513.

[118] *Re W (a minor) (medical treatment: court's jurisdiction)* [1992] 4 All ER 27.

[119] For further discussion of *Re W* and, more generally the participation of minors in decisions concerning their medical treatment, see Brazier M. and Bridge C., 'Coercion or Caring: Analysing Adolescent Autonomy (1996) 16 *LS* 84-109; Bridgeman J., 'Old Enough to Know Best?' (1993) 13 *LS* 69-80; Eekelaar J., 'White Coats or Flak Jackets? Doctors, Children and the Courts – Again?'(1993) *LQR* 182-187; Thornton R., 'Minors and Medical Treatment – Who Decides?' (1993) *CLJ* 34-37.

of a refusal to eat made by a 37 year-old woman, the Family Division of the High Court found that the doctors could lawfully act to treat the woman without her consent as forced feeding could be considered a form of 'medical treatment' for 'mental disorder'.[120] The link made between the physical and mental aspects of eating disorders is worrying to the extent that it permits a legal justification for what otherwise amounts to a serious assault upon bodily integrity. Seen in this light, and viewed comparatively alongside the refusal to legitimise forced feeding of prisoners on hunger strike, it is difficult not to contemplate the matter as one of discriminatory attitudes and a violation of women's bodily autonomy.

5.2.2 Sexual violations

Alongside non-consensual medical interventions, a second category of assaults upon the internal body lies in the domain of sexuality and sexual violence. In this area too the frontier between criminal and legitimate acts can be difficult to ascertain. As in the case of medical intervention, a line is often drawn depending upon the presence or absence of consent on the part of victims. Nevertheless, in the domain of sexual violence, both UK and French laws show themselves to be more ready in some instances than others to accept the existence of consent (notably in cases of rape). This may inevitably constitute an assault upon the dignity of victims who have undergone a violation of their body in one of its most intimate respects.

The two examples of sexual violence that will be discussed below have been chosen for the explicit link which has been made between them and respect for human dignity by both European and national judges. Thus, in the first example, that of rape, it is the European Court of Human Rights which has noted the relationship between respect for the dignity of women and the criminalisation of marital rape.[121] In the second example, that of genital mutilation, it is the French judiciary which spotted the liaison between this practice and the prohibition upon inhuman and degrading

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[120] *Riverside Mental Health Trust v. Fox* [1994] 1 FLR 614. The Court of Appeal reversed the decision of the High Court but only on the grounds of procedural irregularity, accepting the reasoning on the substance of the case. The treatment of the patient was justified under section 3 of the Mental Health Act 1983 which allows medical interventions to be carried out on detainees in the absence of their consent where necessary to treat a mental disorder.

treatment in Article 3 ECHR.[122] Viewed from a comparative perspective, therefore, we move in the final part of this chapter to consider the various ways in which French and UK law have sought to respond to assaults upon human dignity as evidenced through the practices of rape and genital mutilation

5.2.2.i Rape

The recognition by the European Court of Human Rights that sexual violations constitute an assault upon human dignity shows the extent to which the concept of dignity is closely related to corporal integrity and to the treatment of the victim as a sexual object.[123] Moreover, proper recognition of the intimate character of the violation which sexual assault entails would suggest that the principle of respect for human dignity should apply to all relationships between all individuals. That said, it will be seen below that, even if French and UK laws seek to protect individuals from sexual assault, protection is only partial. This is because, notably in the UK, the legal construction of rape privileges a certain image of rape victims with the effect that some sexual assaults, especially those carried out by a stranger are more readily criminalised that those committed by someone known to the victim. Furthermore, even if legal measures offer some protection of the dignity of victims against physical assault, they remain inadequate with regard to the procedure and process of rape trials, the 'spectacle' of which often inflicts a form of degradation upon the victim of equal gravity to the rape itself.

The image of the ideal victim It was noted above in Chapter 3, in the course of discussion about medically assisted conception, that legal preferences may be expressed suggesting that certain individuals rather than others will be favoured where they demonstrate particular desirable traits or characteristics.[124] For example,

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[121] *SW v. United Kingdom* and *CR v. United Kingdom* (1995) 21 EHRR 363.
[122] Tribunal administratif de Lyon, 12 June 1996, *Mme C*, RTDH, 1996, 695, observations by M. Levinet.
[123] The Court has not only intervened in the area of marital rape, but also in the case of sexual violence perpetrated upon a young woman who was resident in a private institution where she was abused by the son of the director. The Court found a violation of Article 8 ECHR with regard to the state's failure to adopt legal measures to sanction such conduct: *X and Y v. The Netherlands* (1986) 8 EHRR 235.
[124] See pp. 143-157.

Diane Blood, constructed by the courts as an 'ideal mother' won her claim to export her dead husband's sperm to Belgium in order to be inseminated there when treatment would have been unlawful in the UK. A similar preference system operates in the case of sexual assault in so far as some victims find it easier to establish the fact of rape where their behaviour and the circumstances of the assault correspond to those expected of the perfect victim and typical assault.

Of course, this is not to deny that both French and UK law recognise sexual assault as a serious offence. In the UK, the crime of rape is established by the Sexual Offences Act 1956, modified by the Criminal Justice and Public Order Act 1994, of which the first section states that '[i]t is an offence for a man to rape a woman or another man.' The definition of rape, comprising an act of penetration without the consent of the victim and the appreciation by the defendant of this absence, is found in section 1(2) of the 1956 Act, again modified in 1994. The definition in France is different in one interesting respect: the sex of the accused. In effect, in France parliament has defined rape in Law no. 80-1041 of 23 December 1980 (now Article 222-23 of the new Penal Code) as '[a]ny act of sexual penetration, of whatever nature, committed on another, through violence, force, threat or surprise...'.[125] Consequently, in France, women may technically be charged with rape, even if academic opinion is rather sceptical about the possibility of securing a conviction.[126]

This difference aside, there is common Anglo-French agreement that rape comprises two key elements: physical and mental. While the act may be more easily established by medical proof, this is not so with regard to the mental element and it is here that the heart of the problem of (absence of) consent lies. Because of the difficulty for victims in proving that they did not consent to the assault, it is apparent that judges and juries may simply presume that consent did or did not exist based upon their appreciation of the status and identity of the victim. Thus, following a study of prosecutions and sentencing decisions in cases of sexual assault in Scotland during 1992, Sue Moody has sought to construct an 'ideal profile' of the victim of rape.[127]

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[125] *'Tout acte de pénétration sexuelle, de quelque nature qu'il soit, commis sur la personne d'autrui, par violence, contrainte, menace ou surprise est un viol. [...]'.*

[126] Py B., *supra* n. 69, p. 57.

[127] Moody S., 'Images of Women: Sentencing in Sexual Assault Cases in Scotland' in *Law and Body Politics: Regulating the Female Body* eds. Bridgeman J. and Millns S., *supra* n. 1, 213-239.

According to this construction, the more the woman complied with a form of correct, innocent and feminine behaviour, the easier it was to establish the guilt of the defendant and the greater his sentence. The findings of Moody's study are confirmed by other research which has identified the prevalence of 'rape myths' in legal discourse, which have resulted in the proliferation in law of stereotypes of male and female sexual behaviour.[128] Amongst such myths is the presumption that women are less likely to have sexual relationships with people they have known for only a short while. In the light of this, it is not surprising that judges and juries are willing to accept that a victim has not consented when the attacker was unknown to her. A telling example to this effect is the move by the International Criminal Tribunal for the Former Yugoslavia to include rape within the definition of crimes against humanity, it being readily accepted that female Bosnian Muslims would not consent to sexual relations with their Serb aggressors.[129]

The flip side of the coin of quasi-presumption of a lack of consent in cases of rape by a stranger is the difficulty for victims to establish a similar absence of consent in cases where their aggressor was already known to them. Despite the decision of the House of Lords in *R v. R*,[130] which put an end to the marital rape exemption, judges and juries are notoriously less likely to believe that there was no consent in cases involving sexual relationships between parties who already knew one another. For example, in the case of *Donnellan* in 1993, the fact that the assault in question had occurred after a student party at which both parties had had a substantial amount to drink, together with the fact that there had already existed a certain degree of intimacy between them, led to the conclusion that the defendant was not guilty of rape.[131] Likewise, in *Diggle*, the Court of Appeal reduced a sentence of three years imprisonment to two years in the case of a rape which had been carried out by a solicitor upon a woman after they had gone out together.[132] The Court of Appeal, while finding that there had at no moment in the evening been any indication that the

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[128] Stewart M.W., Dobbin S.A. and Gatowski S.I., 'Definitions of Rape: Victims, Police and Prosecutors' (1996) 4 *FLS* 159-177.
[129] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* judgment IT-96-23-T & IT-96-23/1-T (22 February 2001): Buss D., 'Prosecuting Mass Rape: *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* judgment IT-96-23-T & IT-96-23/1-T (22 February 2001)' (2002) 10 *FLS* 91-99.
[130] *R v. R* [1991] 4 All ER 481.
[131] *The Times*, 20 October 1993.
[132] *R v. Diggle* (1995) 16 Cr App R (S) 163.

woman wanted to have sexual relations with the defendant, held that the rape was to be located between two extremes – on the one hand, violent or stranger rape and, on the other, non-consensual sexual relations where the victim had intimated previously the possibility of a future relationship.[133]

Of course, the question deserves to be posed as to the difference between these two extremes from the point of view of the victim and the violation of her dignity. While it is true that stranger rape may have profoundly troubling effects for the victim and evoke fears, such as of death, which are not so likely to be present in the case of rape by someone known to the victim,[134] the latter scenario may, nevertheless, generate considerable anguish on the part of the victim who has been betrayed by someone she thought she could trust. The element of degradation is not so substantially different in this respect.[135]

The (far from ideal) image of the rape trial The degradation of rape victims through the construction and interpretation of legal provisions on sexual assault is further enhanced by the processes they have to endure in order to secure the defendant's conviction. This is particularly so in the UK compared to France given its adversarial rather than inquisitorial system of investigation and trial. In this regard, many reports have shown the extent to which the adversarial system may result in victims of rape having to undergo an extremely traumatic experience as the case goes to trial.[136] Not only obliged to relive the horror of the rape, in the presence of the accused, the victim also risks being treated as a liar and having her character and reputation called into question by defence lawyers. Thus, the trial may become for the victim a 'second violation'.[137] This is precisely the location of a further assault upon the dignity of the

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[133] *Ibid.*, p. 166, *per* Evans LJ.
[134] The different effects of stranger rape and rape by someone known to the victim are discussed in Bownes I.T., O'Gorman E.C, and Sayers A., 'Rape - A Comparison of Stranger and Acquaintance Assaults' (1991) 31 *Med Sci Law* 102-109.
[135] Catharine MacKinnon, for example, has argued that 'women feel as much, if not more, traumatized by being raped by someone we have known or trusted, someone we have shared at least an illusion of mutuality with, than by some stranger': 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635-658, at p. 649.
[136] Lees S., *Ruling Passions: Sexual Violence, Reputation and the Law* (Buckingham: Open University Press, 1997); Smart C., *Feminism and the Power of Law* (London: Routledge, 1989) chapter 2; Temkin J., 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 *JLS* 219-248.
[137] Smart C., 'Law's Power, the Sexed Body, and Feminist Discourse' (1990) 17 *JLS* 194-210.

victim who is required to play her role in a spectacle which, according to some, is of a more pornographic than legal nature.[138]

It is in the spectacle of the trial, and in the context of rules on criminal procedure, that an important difference lies between the UK and France, pointing to a less humiliating experience for the victim in the case of the latter.[139] This is because the investigating magistrate (*'juge d'instruction'*) who assembles the *'dossier'* on the case obviates the need for a public battle between advocates for the defence and prosecution, thus avoiding the crossfire in which UK victims are notoriously caught. The inquisitorial system seems more humane to the extent that it is better able to protect the victim from the degradation and humiliation which results from the trial-spectacle of the accusatory system. It might be recalled too that the decision of the *Conseil d'Etat* in the French dwarf-throwing cases found that the dignity of participants and spectators in public spectacles needs to be safeguarded. What goes for ensuring respect for dignity in this area of public entertainment, it is suggested, might easily be transferable to the context of the equally public and even more titillating rape trial-spectacle.

That said, dignity in the context of rape cases has, as ever, two sides. The rules governing the adversarial system in the UK are there to ensure that the defendant's right to a fair trial is guaranteed. This right might also be viewed through the lens of human dignity, this time not the victim's but the defendant's. In this regard, it has been suggested by David Feldman that one of the purposes of the right to a fair trial is to ensure that the defendant is included in the process which, after all, will seal his fate, and that this may be viewed as a measure to safeguard dignity.[140] An alternative conception, however, might suggest that the foundation of the right to a fair hearing does not allow any space for a consideration of dignity as its *raison d'être* is purely 'instrumental', that is to say it exists in order to improve the quality of the decision and to ensure that it is correct.[141]

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[138] Lees S., *supra* n. 136, pp. 78-79; Smart C., *ibid.*, p. 205.
[139] For discussion highlighting the differences between English and French criminal procedure, see Spencer J., *La procédure pénale anglaise* (Paris: PUF, coll. Que sais-je?, no. 3274, 1998).
[140] Feldman D., 1999, *supra* n. 9, at p. 696.
[141] Craig P.P., *Administrative Law* 4th ed. (London: Sweet and Maxwell, 1999) p. 402.

Whatever its foundational premise, it has become abundantly clear that the defendant's right to a fair trial may conflict with the due respect for the dignity of the victim. In the UK, following the introduction into domestic law of the ECHR, Article 6 of which guarantees the right to a fair trial, the House of Lords in the case of *R v. A* has found that legislation which sought to protect victims of sexual assault from abusive, traumatic and humiliating questioning by defence lawyers as to their previous sexual history could amount to a contravention of Article 6.[142] Thus, while on the one hand it is recognised that the rights of the defendant deserve to be properly respected, it seems, on the other, rather paradoxical that this right has been invoked to justify a solution which is so evidently counter-intuitive to the findings of the European Court of Human Rights that respect for the dignity of the victim in cases of sexual assault is a foundational objective of the Convention.[143]

5.2.2.ii Genital mutilation

As in the case of sexual assault, forms of genital mutilation raise serious dangers of a violation of the dignity of victims through an assault on their bodily integrity. It is hardly surprising, therefore, that judges in France have found that the practice constitutes degrading treatment within the sphere of Article 3 ECHR and that it would be illegal to deport a woman and her two daughters to a country where the latter were at risk of being mutilated.[144] While in France it is the judiciary which has reacted against this practice, in the UK parliament has intervened. Despite the difference in legal source, it will be observed that the jurisdictions are similar in drawing a distinction between (male) circumcision and (female) excision, the latter being more readily sanctioned than the former, suggesting differential treatment according to the sex of the victim and severity of the practice. An examination of the operation of this distinction in each legal system will be followed by the observation of a similarly

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[142] *R v. A* [2001] 3 All ER 1. See further Murphy T. and Whitty N., 'What is a Fair Trial? Rape Prosecutions, Disclosure and the Human Rights Act' (2000) 8 *FLS* 143-167.
[143] *SW v. United Kingdom* and *CR v. United Kingdom* (1995) 21 EHRR 363. See the very sceptical (and prophetic) views expressed by Aileen McColgan at the moment of the introduction of the Human Rights Act 1998 with regard to its capacity to ameliorate the protection of women's rights in *Women Under the Law: The False Promise of Human Rights* (Harlow: Pearson, 2000).
[144] Tribunal administratif de Lyon, 12 June 1996, *Mme C, supra* n. 122.

common rejection of arguments put forward in both countries to justify genital mutilation based upon consent and respect for cultural traditions.

Sexual difference While accepting that genital mutilation can amount to a severe violation of physical integrity, both French and UK law acknowledge that there exists a difference in its being carried out upon boys or girls. This distinction may be viewed in the light of the principle of respect for human dignity in so far as it involves an appreciation of the degradation (or not) which results from the practice.

With regard to male circumcision, often practised by Muslims and Jews as a religious ritual, neither French nor UK law in fact expressly deals with the matter of its (il)legality. More precisely, the criminal law in both countries does not render it an offence, even if it might be thought to constitute an assault upon bodily integrity. This tolerance cannot be explained either by reliance on the consent of the victim who is often only several days old at the time the act is carried out. It would appear, however, that the impunity is founded upon a degree of social tolerance of cultural, customary and religious tradition together with the relative benign nature of the operation itself.

Nevertheless, male circumcision is not a matter totally devoid of legal interest, if not from a criminal then from a civil law perspective. For example, the *Cour d'appel de Paris*, in a decision of 29 September 2000, confirmed the civil liability of a father who had profited from the exercise of his right to contact with his son in order to take the 'serious decision' to go ahead with the operation for ritualistic rather than surgical reasons, without having secured the agreement of the child's mother.[145] The responsibility of the doctor who had carried out the intervention was also upheld because of the reprehensible cavalier attitude displayed in accepting as sufficient the sole consent of the father. Founding its decision upon Article 372-2 of the Civil Code which states that '[w]ith regard to third parties operating in good faith, parents are presumed to act in agreement with one another in matters of usual acts of parental authority relating to the child's person',[146] the court refused to regard the circumcision

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[145] CA de Paris, 29 September 2000, D jur. 2001, 1585-1587, note by C. Duvert.

[146] *'A l'égard des tiers de bonne foi, chacun des parents est réputé agir avec l'accord de l'autre, quand il fait un acte usuel de l'autorité parentale relativement à la personne de l'enfant.'*

as a 'usual act' (which would normally include a wide range of medical interventions). In this respect, the decision takes seriously the corporal assault upon the boy and, without invoking dignity expressly, would seem to demonstrate concern for protecting children from physically abusive treatment. The solution in the case is important in that it counters a previous decision of the *Tribunal de grande instance de Paris* in a case involving a mother who reproached her husband for having had their three children circumcised without her consent.[147] In this case, the court described the operation as a 'relatively benign surgical intervention' and rejected the mother's claim.

If the result in the more recent case should be applauded for the protection it apparently offers children, it does need to be viewed with a degree of caution regarding the method of compensation it offers, that is damages to the mother and child. Of course, in the case of the mother, civil damages may be entirely adequate to make up for the violation of her parental rights. However, parents are not generally viewed as the holders of such debts towards their children and, in so far as circumcision may be characterised as an assault upon bodily integrity, the imposition of civil responsibility would seem a rather inappropriate solution. The matter might, nevertheless, be viewed as evidence of a similar dynamic to that displayed in the *Perruche* case,[148] both being aimed at boosting the responsibility of parents in civil law for damage caused to their children.

While French law, unlike its UK counterpart, has recently become sensitive to the damage that may result from male circumcision, both systems have, for quite some while, recognised the harm generated by the practice of excision upon girls.[149] They have, nevertheless adopted somewhat different approaches which appear to contradict their respective legal traditions. French law has adopted a solution which often calls

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[147] TGI de Paris, 6 November 1973, Gaz Pal, 1974, I, jur, 299, note by P. Barbier.
[148] Cass. ass. plén., 17 November 2000; *Epx X c/ Mutuelle d'assurance du corps sanitaire français et a. (affaire Perruche)*. See the discussion of this case in Chapter 3 above, pp. 188-190.
[149] Female excision comprises a number of practices which vary in their severity but which may lead to numerous medical problems (including infection, haemorrhaging, gynaecological, genital and urinary problems) and even the risk of death. See Bibbings L., 'Female Circumcision: Mutilation or Modification?' in *Law and Body Politics: Regulating the Female Body* eds. Bridgeman J. and Millns S., *supra* n. 1, 151-170; Slack A., 'Female Circumcision: A Critical Appraisal' (1988) 10 *HRQ* 437-486.

for the intervention of the judiciary while the UK approach is founded upon legislation that criminalises the act of female genital mutilation.

With regard to French law, first of all, there is clear recognition in principle that excision constitutes an assault upon physical integrity. Thus, the new Penal Code sets out two offences, the first of which – the mutilation of the clitoris of a woman above the age of 15 – is viewed as slightly less serious (characterised as a *'délit'*) than the second – the same act carried out upon a girl under 15 (characterised as a *'crime'*).[150] UK law, for its part, has criminalised the act of 'female circumcision' as set out in the Prohibition of Female Circumcision Act 1985. Section 1(1)(a) of the Act outlaws any act of excision, infibulation and mutilation of part or the whole of the labia majora, labia minora or clitoris, while the following subsection 1(1)(b) provides that anyone who aids, abets, counsels or procures this act upon the body of another is equally criminally liable. The latter subsection, therefore, encompasses the acts of doctors and parents who may assist or encourage the practice. Under French law, however, the role of parents in bringing about excision is viewed rather differently, falling under the more general criminal law provision, unknown to UK law, of failure to assist a person in danger. Hence, anyone who has knowledge of an excision which has been carried out or is in process and fails to intervene is guilty of the offence, including the girl's parents.[151]

An interesting distinction emerges between the two systems with regard to the age of the victim. While the UK legislation makes no differentiation between female genital mutilation carried out upon minors and adults, the French new Penal Code does do so, in recognition of the more serious intervention upon minors. This difference demonstrates an acceptance that the age of the person whose body is mutilated is a factor when it comes to consent to the act, the presumption being that adult women have undergone excision voluntarily. Not surprisingly, therefore, consent operates as one of the justifications for the practice of excision upon adults put forward by those who see its criminalisation as an example of Western ethnocentric repression of a cultural and customary practice.

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[150] Articles 222-9 and 222-10-1 of the new Penal Code. See Cour d'assises de Paris, 8 March 1991, R Sci Crim, 1991, 565, observations by G. Levasseur.

Justifying genital mutilation The two principal justifications for excision are, thus, the consent of the person excised and the cultural relevance of the act. Nevertheless, to the extent that genital mutilation remains an assault upon the physical integrity of the person upon whom it is practised and, consequently upon her dignity, this suggests that neither justification is sufficient to warrant decriminalisation of the act. This does not mean, however, that the arguments in favour of excision should not be taken seriously and investigated a little more closely.

With regard to consent first of all, it has already been noted that, in the case of French law at least, a different view is taken on genital mutilation depending upon the age of the victim with a presumed absence or invalidity of consent on the part of minors explaining the qualification of the offence as a *'crime'*. In the UK, however, no such distinction is made and all acts of excision are criminalised, regardless of whether the woman consented or not. This approach has led to some authors questioning the validity of such a solution when other practices involving body modification, such as tattooing and cosmetic surgery, are legitimate provided that the person undergoing them has given consent.[152] Their argument, however, appears not to delineate between the varying degrees of harm and long-term consequences which the different practices entail and, thus, does not recognise the severity of the intimate bodily assault which genital mutilation confers. It does, though, point to another line of defence for the practice which is the discrimination that results from the suppression of an act which is culturally significant to non-Westerners when other (more Western) forms of bodily alternation are not criminalised in like manner.

For the above reason it has been argued that the prohibition on female genital mutilation is ethnocentric and arrogant.[153] Western law is reproached for its lack of respect for the customs of other cultures and for its intolerance towards other religious and ethnic communities which are regarded as foreign and even barbarian.[154] In this respect, an assault upon the dignity of the 'foreign' community, practising excision as

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[151] Cass. crim., 22 April 1986, Bull. crim. no. 136; Cass. crim., 3 May 1988, Bull. crim. no. 188. These cases are discussed by Bruno Py, *supra* n. 69, p. 37.
[152] Bibbings L., *supra* n. 149; Sheldon S. and Wilkinson S., 'Regulating Consensual Harm: Female Genital Modification and Cosmetic Surgery' (1998) 12 *Bioethics* 263-285.
[153] Gunning I., 'Arrogant Perception, World-Travelling, and Multicultural Feminism: The Case of Female Genital Surgeries' (1991-92) 23 *Col HRL Rev* 189-248.
[154] Py B., *supra* n. 6, p. 39.

part of its customary life, might be identified. The prohibition might also be constructed as an assault upon the dignity of individual women to the extent that it fails to respect their cultural identity and may result in their being unable to marry within, or even excluded from, their community.[155] This appeal to dignity in favour of excision can, conversely and probably more successfully, be refuted by an insistence upon the dignity which results from respect for bodily integrity. This is the approach taken by the *Tribunal administratif de Lyon* in its decision of 12 June 1996.[156] The court effectively brings to light the relationship between dignity and the potential physical assault upon the bodies of the claimant's two daughters in the wake of the attempt by French authorities to deport them to Guinea where the girls were liable to undergo excision. More precisely, the claimant, founding her case upon Article 3 ECHR and the notion of inhuman and degrading treatment, successfully highlighted the assault upon bodily integrity involved in the practice and its capacity to dehumanise and degrade her daughters.

Above all, it is evident in the case of genital mutilation as in many other areas that a confrontation results between two distinct and opposing interpretations of the notion of respect for human dignity. The solution adopted by French and UK law would seem justified by our (Western) conceptions of humanity and justice and our desire to protect all persons, regardless of their cultural, ethic and religious background, from degrading bodily assaults. Of course the legal measures in place may be criticised for their inconsistencies. However, it does not automatically follow that the solution lies in an unconditional acceptance of the practice of excision. Rather, an approach which seeks to systematise the legal response to genital mutilation alongside responses to other Western body modification techniques, together with a process of education to reduce the incidence of excision, would seem to be preferable.[157] Through efforts to achieve a *rapprochement* of different points of view (legal, political, social and cultural) aimed at consolidating agreement that genital mutilation is a form of inhuman and degrading treatment for the *victim,* whatever her background, the debate

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[155] The relationship between identity and human dignity is explored further in Chapter 6 below in the context of assaults upon mental integrity. See particularly, pp. 318-344.
[156] Tribunal administratif de Lyon of 12 June 1996, *Mme C, supra* n. 122.
[157] These are the solutions suggested at the international level by the World Health Organisation (Declaration of Geneva, 12 May 1993) and by certain French and UK authors (see Atoki M., 'Should Female Circumcision Continue to be Banned?' (1995) 3 *FLS* 223-235; Py, B, *supra* n. 69, p. 39, Sheldon S. and Wilkinson S., *supra* n. 152).

over its (il)legality might be resolved in a way which ensures the most important thing of all, that is a better recognition of, and respect for, her personal dignity.

Having considered in this chapter the violations of human dignity which operate in the context of physical assaults upon the body, their justifications and the uneven responses in both French and UK law to the giving or refusing of consent to such practices, the final chapter turns to an examination of the second cluster of dignity violations which may occur throughout the course of human life. Thus, we move on to consider the more intangible, more spiritual and less visible dimensions of the human person through a discussion of non-physical assaults which, despite their lack of impression upon the flesh, may nevertheless impact upon an individual's mind, personality, reputation and identity.

CHAPTER 6

DIGNITY AND THE MIND

Despite the non-physical aspects of the failure to respect human dignity being less visible than its corporal dimension, respect for mental integrity is no less desirable than respect for the human body. Its importance may be traced to the spiritual origins of respect for the person which is linked to the relationship between man and God.[1] While man is made in God's image, it is not through his body that this image is reproduced, but rather through his spirit. Thus, 'to maintain that man is an image of God means that divinity may be found in the human soul'.[2] The idea of human dignity, therefore, when viewed from a spiritual perspective, is associated as much with the mind as the body.

From a philosophical perspective, Kant too links dignity to the mental integrity of humankind through the identification of individuals as free moral thinkers.[3] That is, individuals are constructed as self-legislators, in possession of the faculty to develop their own form of moral autonomy.[4] In this regard, they are capable of thinking for themselves and expressing their personal legislative will, allowing development of their personality and identity through the exercise of moral freedom and without the need to refer to any external being such as God. Respect for individuals and for their human dignity, therefore, demands respect for autonomy, self-determination and freedom of moral thought.[5]

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[1] Andorno R, La distinction juridique entre les personnes et les choses – à l'épreuve des procréations artificielles (Paris: LGDJ, 1996) p. 76.
[2] *'[S]outenir que l'homme est une image de Dieu veut dire que le divin se trouve dans l'âme humaine'.* Andorno R., *ibid.*
[3] Kant I., *Kritik der praktischen Vernunft - Grundlegung zur Metaphysik der Sitten* Werkausgabe Band VII, Herausgegeben von W. Weischedel, (Frankfurt a M: Surkamp, 1977, first published 1797), chapter 2, pp. 33-80; Kant I., *Groundwork of the Metaphysic of Morals* trans. and analysed by Paton H.J. (London: Harper and Row, 1964, first published 1785) pp. 34-35; Kant E., *Fondements de la métaphysique des moeurs* (Paris: Vrin, 1997) pp. 108-120. See the discussion in Chapter 1 above, pp. 37-38, regarding Kant's interpretation of respect for human dignity.
[4] Kant I., trans. Paton H.J., 1964, *ibid.*, p. 34; Kant E., *ibid.*, p. 114.
[5] *Ibid.*

Similarly, in law the importance of respect for mental integrity is recognised and an effort made to to safeguard dignity in its non-physical manifestations. In fact, as in the case of bodily assaults, the possibilities of a violation, and thus the number of legal responses, are multiple, including attempts to undermine the honour, reputation, private life, image or status of a person. The same goes for assaults upon the ability of individuals to develop their personality freely, which is closely linked to respect for personal identity. Such assaults, often resulting from discrimination against certain groups in society, require that particular attention be paid to the material and personal scope of the violation, since there is in operation here a third category of dignity (alongside that of the individual and that of humanity) which is that of the social group(s) or community(ies) to which the individual belongs. This additional layer of dignity complicates the legal picture as the law is required to find a balance between respect for all three types of dignity claim (which often conflict with one another). As already observed in previous chapters, it will become clear with regard to the mental component of human dignity, that the concept has many different forms and may vary wildly in its content depending on the point of view of the person interpreting it. The task of the law is once more to arbitrate between its individual, communitarian and universalist tendencies.

In spite of the complexity of the relationship between dignity and non-physical assaults upon the person, it is possible to identify two key components of the issue. First, French and UK laws both safeguard certain personality rights (albeit in slightly different ways). Thus, they condemn assaults upon honour, reputation and status which have the effect of lowering an individual's personal and social standing. Secondly, the two systems seek to protect certain people from discriminatory practices which operate unjustifiable forms of selection between individuals. Thus, the principle of non-discrimination is employed by both legal systems to ensure equality, meaning in this context equal respect for the dignity of all. It is, therefore, these two ingredients of the mental aspect of human dignity – honour and equality - which will be analysed in the chapter from a comparative perspective in order to assess how the law might best respond to assaults upon mental integrity.

6.1 Dignity, honour and personal standing

The protection of an individual's honour and personal standing, while an important aspect of both French and UK legal protection of personality rights, is rather more developed in the case of the former. This greater sensibility in France would seem to be linked to the more general constitutional protection of human rights. The UK, with no similar constitutional framework (at least until the adoption of the Human Rights Act 1998), has traditionally had to content itself with a strategy of piecemeal protection of individuals from assaults upon their personality.

The diversity in national approaches, together with the possibility of an eventual *rapprochement*, will be examined here through the use of two examples, both of which ignite fierce confrontations between the different rights and perspectives at issue. The first example, that of violations of human dignity by the media, will be investigated for the stand-off it generates between the harms associated with dissemination of the oral and written word together with the image of a person *vis-à-vis* the media's right to freedom of expression. The second example, that of assaults upon the economic standing of a person, is analysed for its implication that certain minimum economic conditions are necessary in order to ensure that everyone should enjoy a dignified existence which inevitably calls into play the dignity component of controversial social and economic rights.

6.1.1 Dignity and the media

While respect for human dignity in the domain of media assaults upon personal standing covers a myriad of issues, it is useful from an Anglo-French comparative perspective to distinguish two clusters of concerns which demonstrate the adoption in each system of a rather different approach. Thus, while both systems offer some protection to individuals against verbal and written attacks upon their honour and reputation, it is the French system which offers a form of protection *par excellence* against assaults upon privacy and image.

6.1.1.i Assaults upon honour through the written and spoken word

It is primarily through the notion of honour and reputation that UK law protects individuals from non-physical assaults. This is effected notably through the law on defamation which has its roots in the delict of *iniuria* found in Roman law.[6] That said, it may be observed that this guarantee is inadequate in so far as it results in a banalisation of the notion of honour and, thus, protects certain individuals whose claims seem rather hollow while leaving others who have suffered more serious damage without reparation. In this respect, it is suggested, UK law has something to learn from its cross-Channel neighbour.

The banalisation of assaults upon honour Defamation in UK law is an area noted for its lack of clarity and simplicity.[7] The distinction made between assaults in written and permanent form (libel) and those which are oral and instantaneous (slander) is long-standing; the first dating back to the 16th century and the second to the discovery of printing and the introduction of the written press.[8] Nevertheless, the common thread between the two actions is that it must be shown that the defamatory act has the effect of lowering the claimant in the eyes of society[9] or exposing him or her to hate, shame or ridicule.[10] The extent to which this package permits respect for dignity is, however, debatable. Reinhard Zimmerman, for example, argues that there is a distinction between protection of personal honour (that is an individual's reputation in the eyes of others) which is safeguarded and the protection of dignity (the individual's opinion of him or herself) which is not.[11] However, it may be countered that respect for dignity encompasses not simply due regard being paid to one's opinion of oneself but, drawing upon European and French case law, it also demands (in the form of the prohibition on inhuman and degrading treatment) that a person's standing in the eyes of others should not be lowered.[12] This would suggest that even assaults upon the honour of a person constitute a threat to dignity and that an

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[6] Zimmerman, R., *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996) p. 1074. See Chapter 2 above, pp. 78-79.
[7] Zimmerman, R., *ibid.*
[8] Zimmerman, R., *ibid,* p. 1075.
[9] *Sim v. Stretch* (1936) 52 TLR 669.
[10] *Parmiter v. Coupland* (1840) 6 M & W 105.
[11] Zimmerman R., *supra* n. 6, p. 1076.
[12] *Tyrer v. United Kingdom* (1978) 2 EHRR 1; CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence,* Rec. p. 372.

award of damages may go some way towards compensating for acts of non-physical degradation.

David Feldman offers a key to resolve this conceptual problem by reference to the binary quality of dignity. Thus, as outlined in Chapter 1 above, it is suggested that dignity be viewed in both its subjective and objective guises (the former being based upon a sense of one's own value (ie self-worth) and the latter comprising one's attitude towards others[13]) and that the protection of personal reputation falls within the domain of self-worth.[14] Nevertheless, the formulation of dignity in this way may produce unwelcome legal consequences in the case of overly sensitive individuals, contributing to an exaggerated form of protection and a banalisation of mental assaults upon dignity.[15] For example, the decision in *Berkoff v. Burchill,*[16] mentioned already in Chapter 2, upheld the claim of a actor described as 'hideously ugly' by the journalist Julie Burchill that his reputation had been undermined. The Court of Appeal was not, however, unanimous in its view. Millet LJ, in a dissenting opinion, found the claim lacking in seriousness and thought the Court should not have had to deal with what was only a remark made in jest.[17]

Balancing defamation and freedom of information French law offers a similar response to the question of protecting honour and reputation. Again seeking to balance freedom of expression with the protection of the individual, it penalises defamation and insults (*'diffamation'* and *'injure'*).[18] As in the UK, the judges are called upon to weigh the respective merits of infringements of mental integrity alongside the free circulation of ideas and opinions which lies at the heart of any democratic society. An interesting example of how these principles may be reconciled (and in this instance balanced in favour of press freedom) is discussed by Patrick Wachsmann who cites the case of the suicide of former prime minister Pierre

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[13] Feldman D., 'Human Dignity as a Legal Value – Part I' [1999] *PL* 682-702, at pp. 685-686. See above, pp. 40-42.
[14] Feldman D., *ibid.*, p. 687.
[15] Feldman D., *ibid.*
[16] *Berkoff v. Burchill* [1996] 4 All ER 1008. See Chapter 2, above, p. 115.
[17] *Ibid*, p. 1020. See further Feldman, 1999, *supra* n. 13, p. 687; and Feldman D., 'Human Dignity as a Legal Value – Part II' [2000] *PL* 61-76, at pp. 74-75.
[18] Wachsmann P., 'La liberté d'expression' in *Libertés et droits fondamentaux* eds. Cabrillac R., Frison-Roche M.-A. and Revet T., 6th ed. (Paris: Dalloz, 2000) 323-350, particularly pp. 340-344. Defamation and insults are sanctioned by Article 29 of the Law of 29 July 1881 on the press.

Bérégovoy, imputed to press revelations about the dubious legitimacy of the conditions under which he had acquired his home. While the role of the press in the matter was heavily criticised, including by François Mitterrand, then President of the Republic (who denounced the fact that 'all the explanations in the world do not justify giving to the dogs the honour, and finally the life, of a man, for the price of a double lack of respect by his accusers for the fundamental laws of our Republic which protect both the dignity and the freedom of everyone'[19]), Wachsmann maintains that, despite the risks carried by freedom of expression, it plays a crucial role in allowing the press to reveal instances of dishonest behaviour.[20] The value of liberty, thus, suggests that assaults upon honour and dignity, linked to the individual's appreciation of his or her self-worth, have to be reconciled with (well-founded) criticism, even if this is disagreeable to the person concerned. While both French and UK law are largely respectful of media freedom to call into question an individual's reputation through the written or spoken word (suggesting that liberty may be prized more highly than personal standing, even in the case of the prime minister), the difference between the two systems appears greater with regard to assaults upon mental integrity which result from a lack of respect for a person' privacy and image. In this domain French law reveals itself to be infinitely more concerned than its UK counterpart to ensure respect for the individual's personal and private space.

6.1.1.ii Assaults upon privacy and image

As a result of media expansion and new ways of disseminating information, the possibilities for infringement of an individual's mental integrity via this form of communication are becoming ever more frequent and more varied. Although the phenomenon of mass communication has been similarly experienced in France and the UK, there is nevertheless a difference in their legal responses to the question of how to protect individuals from injury in this sphere. While, on the one hand, France has developed an extensive system of protection, notably through the invocation of

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[19] *'Toutes les explications du monde ne justifieront pas qu'on ait pu livrer aux chiens l'honneur d'un homme, et finalement, sa vie, au prix d'un double manquement de ses accusateurs aux lois fondamentales de notre République, celles qui protègent la dignité et la liberté de chacun d'entre nous'* (funeral speech made by President Mitterrand in honour of Pierre Bérégovoy). Cited by Wachsmann P., *ibid.*, p. 340.

the right of individuals to their image, the UK, on the other, has yet to acknowledge even any right to privacy in domestic law.

Respect for private life It almost goes without saying that many aspects of private life intersect with the requirement to respect human dignity.[21] Thus, it is worrying to note from a UK perspective that there exists no right to this effect in domestic law with it being made quite clear in the case of *Malone,*[22] concerning unauthorised telephone tapping, that there was a good deal of judicial hostility to the creation of a right to privacy by the courts. The result, however, has been that serious assaults upon personal integrity have gone unredressed. It was noted above, for example, that the famous actor, Gordon Kaye, found it impossible to establish that he had suffered harm as a result of the dissemination of photographs taken of him while in hospital following a serious accident.[23] Whilst it might have been hoped that the situation would change with the introduction of the Human Rights Act 1998 leading to the construction of a right to privacy in domestic law based upon Article 8 ECHR, this has not yet materialised, for reasons of continued judicial reluctance to intervene in what is considered an extremely tricky matter best left to the legislature.[24]

This impoverished view of privacy in UK law stands starkly in contrast with the highly developed right to respect for private life in France which has been constructed around Article 9 of the Civil Code.[25] As in the case of defamation, though, this right has to be reconciled with press freedom. Hence, for example, the French courts banned publication of the book *Le Grand Secret* written by the doctor of François Mitterrand about the former President of the Republic's illness before his death. This was justified on the basis that the book revealed facts which violated the

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[20] Wachsmann P., *ibid.*

[21] It has been observed above in Chapters 3 and 4 that disrespect for dignity may relate closely to a lack of respect for private life, for example regarding the restricted availability of abortion services (p. 180) and the dissemination of images of deceased celebrities (pp. 241-264).

[22] *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344.

[23] *Kaye v. Robertson* [1991] FSR 62. See Chapter 4 above, p. 244.

[24] *Douglas and Zeta-Jones v. Hello! Ltd* [2001] 2 WLR 992 (CA); [2003] 3 All ER 996 (Ch). See Chapter 4 above, pp. 244-245.

[25] *'Chacun a droit au respect de sa vie privée...'*. See further Beignier B., 'La protection de la vie privée' in *Libertés et droits fondamentaux* eds. Cabrillac R., Frison-Roche M.-A. and Revet T., *supra* n. 18, 157-189; Dupré C., 'The Protection of Private Life Against Freedom of Expression in French Law' (2000) 6 *EHRLR* 627-649; Picard E., 'The Right to Privacy in French Law' in *Protecting Privacy – The Clifford Chance Lectures, Volume 4* ed. Markesinis B., (Oxford: Oxford University Press, 1999) 49-103.

confidentiality that should exist between doctor and patient. It was found, therefore, that freedom of expression and the public interest in Mitterrand's state of health did not justify the doctor's breach of his obligations towards the deceased and his family.[26] Even if this example 'certainly constitutes a borderline case, in which the secrecy of private life forms an obstacle to the contribution by the doctor to a debate belonging to the public sphere of open discussion',[27] from a UK perspective it may be observed that at least a borderline exists in France. It is doubtful, in the light of the *Kaye* case, that a similar result would be arrived at in the UK were this type of factual scenario to present itself before the courts.

Hence, French law is evidently more protective in its personal scope of the intimate sphere of private life extending its protection to all persons, regardless of their notoriety. Equally, with regard to the material scope of private life in France, this is quite substantial, having been interpreted to include not only health but also sentimental and sexual matters, family relations, and any behaviour related to the intimate life of the person.[28] French law in this way can be seen to be much more protective of human dignity than its UK counterpart in so far as this demands respect for private life.[29]

The right to one's image Moreover, the protection in France of the individual from non-physical injury does not stop with respect for private life. The legal system benefits from a further instrument which is closely interconnected with privacy, this being the right to one's image (discussed already in the context of the dissemination

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[26] TGI de Paris, 23 October 1996, Légipresse no. 138, 1997, III, 3; CA de Paris, 23 May 1997, Légipresse no. 143, 1997, III, 100, note by E. Derieux; Cass. 1re civ., 14 December 1999, JCP, 2000, II 10241, conclusions by C. Petit.

[27] *'[Cet exemple] constitue certainement un cas limite, où le secret de la vie privée fait obstacle à la contribution du médecin à un débat qui relève de l'espace public de libre discussion'*. Wachsmann P., *supra* n. 18, p. 345.

[28] See Wachsmann P., *ibid.*, pp. 344-347 and Robert J. and Duffar J., *Droits de l'homme et libertés fondamentales* 7th ed. (Paris: Montchrestien, 1999) chapter 5.

[29] It is notable that, even if no specific link is made in Article 9 of the Civil Code between respect for private life and respect for dignity, it was recommended in 1993 by the Consultative Committee on Constitutional Reform, presided by the *Doyen* Vedel, that an addition should be made to Article 66 of the Constitution of 1958 to the effect that '[e]veryone has the right to respect for his or her private life and human dignity' (*'[c]hacun a droit au respect de sa vie privée et de la dignité de sa personne'*). Had this been accepted, respect for private life and dignity would have benefited from explicit protection at the constitutional level without the need for jurisprudential creativity in this regard by the Constitutional Council.

of photographs of the dead in Chapter 4 above).[30] This right, it will be recalled, implies a prohibition upon the publication of images obtained without authorisation and in a private place and constitutes an acceptance of the fact that one's image is but a continuation of one's personality.

That said, an interesting question which has begun to trouble the French courts is whether or not a person's image is also a continuation of his or her *dignity*. The response would appear to be that it is not, or at least that the one is not synonymous with the other. This is the interpretation given by the *Tribunal de grande instance de Lille* on 4 January 2000 in a case concerning the televised broadcast of footage of the claimant shown naked and perfectly identifiable at her wedding ceremony which had taken place in a nudist camp.[31] The court found that the broadcasting company had violated the claimant's right to her image through its dissemination of the footage despite the fact that her ex-husband had given his authorisation for it to be shown. The claimant, it was held, clearly had not given her consent and it made no difference that the event had received media publicity at the time.

It was, however, not simply a question of the unlawful dissemination of the woman's image. Her former husband had also provided a commentary upon the film revealing that his ex-wife was an avid naturalist and suggesting that she was perverse in this regard. His former wife, therefore, in addition suggested that her dignity, protected by Articles 16 and 16-2 of the Civil Code,[32] had been infringed. The court was thus required to determine the relationship (and boundary) between the twin claims. This it did by clearly demarcating a difference between respect for image and dignity with the result that the ex-wife's claim of a violation of respect for the latter was rejected. The court found that Articles 16 and 16-2 only protected the victim from a violation of *physical* integrity and in this case it was the woman's honour rather than her body which was threatened. In other words, the assault she had suffered was of a mental

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[30] At pp. 241-244.
[31] TGI de Lille, ord. référé, 4 January 2000, D jur. 2001, 1503, note by P. Labbée.
[32] Article 16 prohibits any assault upon human dignity (*'[l]a 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.*) and Article 16-2 states that the court may take all appropriate measures to prevent or put an end to an unlawful assault upon the body (*'[l]e juge peut prendre toutes mesures propres à empêcher ou faire cesser une atteinte illicite au corps humain ou des agissements illicites portant sur des éléments ou des produits de celui-ci.'*).

rather than corporal nature and dignity, at least in so far as it is protected by the Civil Code, lies in respect for the physical body rather than the exploitation of its image. Commenting upon the decision, Pascal Labbée notes that the dissemination of the image of the nude body could not be said to violate dignity in so far as the victim had consented to its being captured on film.[33] Likewise, he asserts that those who practise nudism cannot by definition be humiliated by it otherwise they would not do so.[34] It might, nevertheless, be countered that nudists practise this activity in protected and secure locations which have been specially designed for this purpose and they have every right to expect that the image of their activities should not be made available to a wide public audience. That said, the author does raise the possibility of another interesting assault upon dignity resulting from the case, this being the attempt to undermine the dignity of the institution of marriage through the spectacle of a public official presiding over the ceremony on the beach robed only in a tricolour scarf![35]

Humour aside, the argument that the dissemination of images of the naked body fails to constitute a dignity violation in the civil law needs to be taken seriously. In a climate where the media often employ body imagery for publicity and advertising purposes there may well result harm to the individuals represented by such depictions. In this respect the above case seems to adopt a somewhat different approach to that taken by the *Cour d'appel de Paris* in the *Benetton* case referred to above in Chapter 2, in which it was found degrading to AIDS victims that images of nude bodies tattooed with the letters HIV should be used in an advertising campaign.[36] The latter case suggests a far stronger limitation upon freedom of expression in the name of human dignity than the former and might perhaps be explained by the wider implications of the Benetton advertisements upon the whole community of people suffering from AIDS as compared with the much more individual effect of the broadcasting of the nude wedding footage.[37]

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[33] Labbée P., *supra* n. 31, p. 1505.
[34] Labbée P., *ibid.*
[35] Labbée P., *ibid.* The question of the dignity of institutions, like that of states (referred to in the previous chapter, p. 255) falls outside the remit of this thesis, the focus of which is *human* dignity.
[36] TGI de Paris, 1 February 1995, D jur. 1995, 572, note by B. Edelman; CA de Paris, 28 May 1996, D jur. 1996, 617, note by B. Edelman. See Chapter 2 above, pp. 107-108.
[37] The *Cour de cassation* has since confirmed that freedom of expression may justify the publication of an individual's image only if it is respectful of human dignity (Cass. 1re civ., 20 February 2001, D jur. 2001, 1199, note by J.-P. Gridel; Cass. 1re civ., 12 July 2001, D somm. 2002, 2298, note by L. Marino; D jur. 2002, 1380, note by C. Bigot).

In sum, it is suggested that the reinforced protection of image and privacy in French law echoes French legal tradition with its strong grounding in positive fundamental rights guarantees which has no equivalent in the UK legal system. Nevertheless, it might well be asked how long the position in the UK can remain unchanged given the impetus of the Human Rights Act to mainstream fundamental rights and to increase their profile throughout the system. Should either the judiciary or the legislature decide to act upon the matter, they could, it is suggested, do far worse than look across the Channel for inspiration as to the best way to guarantee respect for private life.

6.1.2 Dignity and the economy

Alongside the media, a second sector in which human dignity in its non-physical guise may be compromised is the economic. In this context, it is not so much the reputation of an individual which is the object of assault, but rather his or her status. That is to say, a person's economic circumstances may provoke injury in so far as they contribute towards a loss of esteem and social regard and prevent him or her from leading a dignified life. This has implications not so much for the enjoyment of first generation rights, such as freedom of expression, discussed above in relation to the media, but rather touches upon second generation social and economic rights. While it has been observed earlier that respect for human dignity is not a right *per se*, it does nevertheless act as a springboard to the enjoyment of certain other rights. The purpose of the present section is, therefore, to investigate further the extent to which

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Beyond the civil law, the increased risk of a violation of human dignity presented by the dissemination of nude and often pornographic images of the body through the use of information technologies and new channels of communication has led the French legislature to intervene further. Thus, Article 227-24 of the new Penal Code creates the offence of disseminating a pornographic message to minors which has the effect of seriously compromising human dignity. ('*Le fait soit de fabriquer, de transporter, de diffuser par quelque moyen que ce soit et quel qu'en soit le support un message à caractère violent ou pornographique ou de nature à porter gravement atteinte à la dignité humaine, soit de faire commerce d'un tel message est puni de trois ans d'emprisonnement et de 75 000 euros d'amende lorsque ce message est susceptible d'être vu ou perçu par un mineur...* '.). Article 227-24 has been interpreted to impose an obligation upon those who disseminate pornography via the internet to take adequate measures to ensure that access by minors is impossible (CA de Paris, 2 April 2002, D jur. 2002, 1900). The provision has no equivalent in UK law where the dissemination of pornographic images is regulated by the Obscene Publications Acts of 1959 and 1964 with no reference

human dignity may be safeguarded through an exercise of social and economic rights through the consideration of two (related) matters: dignity at work and the capacity to lead a decent life.

6.1.2.i Dignity at work

The link between dignity and work is as old as it is paradoxical.[38] On the one hand, the right to work may be regarded as an essential condition of a fulfilling life ensuring that individuals are able to satisfy their basic needs and, thus, may enjoy a dignified existence. On the other hand, there exists in the very notion of work an element of subordination of the worker, even an objectification of his or her human capabilities, which may be the source of indignity. We will examine each of these aspects in turn; first, the positive dignity in work and then the negative indignities which it may, nevertheless, generate.

Dignity in work It is hardly surprising that the right to work is recognised expressly in French but not in UK law: the 'right to obtain employment' (*'le droit d'obtenir un emploi'*) being prescribed in paragraph 5 of the preamble to the Constitution of 27 October 1946. Thus, at least in the case of France, the very fact of not working may be considered an indignity. Of course, this fundamental right is of an economic and social persuasion, in other words it is a *'droit-créance'*, which can only be guaranteed through the intervention of the state. This does not, however, deprive it of value. To the contrary it benefits from a degree of constitutional protection since a ruling of the Constitutional Council on 28 May 1983 that public authorities are invited to create the conditions necessary to allow the greatest number of those who are without

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to the dignity of those affected by publication. See Bridgeman J. and Millns S., *Feminist Perspectives on Law – Law's Engagement with the Female Body* (London: Sweet and Maxwell, 1998) pp. 501-533.

[38] 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., (Paris: Economica, 1999) 137-157, at p. 137. Thiery Revet dates this relationship back to biblical references in Genesis: '[w]ork is presented here as the effort required of man if he wishes to survive after the fall, through which he has lost the divine aspect of his condition, becoming merely human: work ... tarred with indignity, renders man worthy.' (*'Le travail y est présenté comme l'effort s'imposant à l'homme s'il veut survivre après la chute, par où il a perdu sa condition empreinte d'une certaine divinité, pour n'être plus qu'humain: le travail est digne de l'homme... frappé d'indignité.'*)

employment to find it.[39] It is, however, difficult to give full effect to such a right, especially if viewed as encompassing a right to access, maintain and return to work, which perhaps explains why the UK legislature and judiciary have refused to create anything similar. That said, it is useful to note that both French and UK law seek, in so far as employment exists, to ensure *equality* in terms of access to, and enjoyment of, it. To this end it is unlawful for employers to discriminate against actual or potential workers with regard to their sex or sexual orientation, race, religion or belief, or disability, for example.[40] Yet the right to work and the prohibition on discrimination only extend so far even in France where it may be required that the *individual* dignity of the worker give way to a more collective approach.[41] This is evident, for example in the decision of the *Conseil d'Etat* in the dwarf-throwing cases.[42] The dwarf in question had no right to renounce the protection offered to dignity in its collective guise despite his complaint of a violation of his personal dignity through his inability to pursue his freedom to engage in commercial and industrial activities.[43]

Indignity at work While the right to work may constitute the positive aspect of respect for dignity in the sphere of employment, there is a more negative interpretation of the relationship between dignity and work which suggests that employment leads to indignities as it is, above all, founded upon constraint and subordination, implying that workers are treated as things or means rather than ends in themselves. Thus, the very existence of a contract of employment implies the subordination of the worker whose labour power is exploited by his or her employer. Viewed in this light, the phenomenon of work equates humans with animals or machines and, thereby, debases humankind.[44] More precisely, the element of force or

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[39] Decision no. 83-156 DC of 28 May 1983, *Benefits for the aged*; Dt Soc, 1984, 159, note by L. Hamon; see also Decision no. 84-200 DC of 16 January 1986, *Limitation on the possibilities of combining retirement pensions with revenue-generating activities*; Dt Soc, 1986, 372, note Y. Gaudemet.

[40] See further below, pp. 318-320.

[41] Revet T., *supra* n. 38, pp. 155-156.

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

[43] See below, p. 311.

[44] Revet T., *supra* n. 38, p. 137. The utilisation of labour may also be regarded as an exploitation of the body of the employee given the expropriation of the fruits of his or her physical endeavours. See the application of Marxist and liberal thinking in this regard by Harris J.W., 'Who Owns My Body?' (1996) 16 *OJLS*, 55-84, at pp. 65-75. A similar analogy has been made by the *Cour de cassation* which has condemned the practices of a clothing manufacturer whose employees were treated as 'an extension of their machine tools' ('*le prolongement de la machine outil*'): Cass. crim., 4 March 2003, JCP G, 2003, IV 1804 (see further *JCP*, 2003, 26, I 146 and D somm. 2004, 181, note by T. Aubert-Monpeyssen).

constraint which is at the heart of the work contract introduces a situation which, it has been argued, is in itself a source of indignity for the worker.[45] This objectification and exploitation of labour, the reduction of the worker to a factor of production, and the inherent lack of respect for dignity which the work contract implies, may offer an explanation for legal measures which seek to protect individuals from further assaults upon their integrity once they are in employment.

In this respect, both French and UK law have adopted measures to sanction forms of degradation in the work place. Once more the link between these measures and respect for human dignity is more explicit in France, being explained by the more intensive process of the juridification of human dignity there. These developments concern notably the protection of workers from harassment and from inhuman working conditions.

Given the emphasis placed in French law upon privacy, it is hardly surprising that the question of intrusions by employers into the private life of their employees has been of particular concern there. In principle employers have no right to intervene in the private lives of their employees unless this has some effect upon the latter's work. Thus, personal beliefs, dress and appearance may not result in measures being taken against an employee except in cases of professional necessity and in strict conformity with the principle of proportionality.[46] More generally, the new Penal Code contains a series of offences which seek to protect workers against conditions of work which are contrary to their dignity. Thus, Article 225-13 states that to obtain services from a vulnerable or dependant person without giving any, or only inadequate, remuneration is unlawful and Article 225-14 continues that to submit someone to modes of employment or living arrangements which are undignified likewise constitutes an offence.[47]

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[45] Revet T., *ibid.*, p. 150.

[46] Employment Code, Article L. 120-2 and L. 122-35. See Hassler T. and Lapp V., 'Droit à la dignité: le retour!' *LPA*, 1997, 14, 12-14; and Tissot de O., 'Pour une analyse juridique du concept de "dignité" du salarié' *Dt Soc*, 1995, 12, 972-977, at p. 976.

[47] Article 225-13: *'[l]e fait d'obtenir d'une personne, en abusant de sa vulnérabilité ou de sa situation de dépendance, la fourniture de services non rétribués ou en échange d'une rétribution manifestement sans rapport avec l'importance du travail accompli est puni de cinq ans d'emprisonnement et de 150 000 euros d'amende.'* Article 225-14: *'[l]e fait de soumettre une personne, en abusant de sa vulnérabilité ou de sa situation de dépendance, à des conditions de travail ou d'hébergement incompatibles avec la dignité humaine est puni de cinq ans d'emprisonnement et de 150 000 euros*

In the UK, equally, developments are in progress which may contribute to a heightened respect for the dignity of workers through an application of their rights under Article 8 ECHR. While such developments may be hampered by the continued judicial refusal to find a general right to respect for private life in UK law, it has been noted by commentators, that certain employment practices may infringe the Convention, such as for example an abuse by employers of the usual requirement that they be provided with the personal telephone number of employees should this result in them habitually contacting employees at home and out of office hours.[48]

A second sphere of protection for workers against degrading treatment in employment is the law on harassment. Given the developments at European Union level in this domain which explicitly link harassment, both sexual and non-sexual, to the protection of the dignity of workers,[49] it is not surprising to see similar trends at the national level too. For example, UK law has acted to stem the practice of bullying in the work place.[50] In such cases the victim may bring a negligence action against the employer for the stress, and hence deterioration in health, generated by such working conditions.[51] In addition the civil and criminal law guarantees set out in the Protection from Harassment Act 1997 may be called upon by the harassed employee given that these apply to conduct in private locations.[52]

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d'amende.' Article 225-13 has been applied in the case of a young woman who provided unremunerated domestic services for a couple and their four children, sleeping on a mattress on the children's bedroom floor and having never had a day off: Cass. crim., 11 December 2001, D IR 2002, 695. Article 225-14 has been found to cover the abusive conduct of an employer who routinely insulted and humiliated employees in public and exploited their economic and social vulnerability resulting from a high local unemployment rate: Cass. crim., 4 March 2003, JCP G, 2003, IV 1804; D somm. 2004, 181, note by T. Aubert-Monpeyssen. The *Cour de cassation* has decided furthermore that it is not a prerequisite that an individual be the employer or landlord of the victim in order for a charge to be brought under Articles 225-14: Cass. crim., 23 April 2003, JCP, 2004, II 10 015, note by M.-B. Salgado.

[48] Keating M., 'Employers who Call Staff at Home "Risk Being Sued" under Human Rights Law', *The Guardian*, 24 August 2001.

[49] See above Chapters 2 and 5, p. 94 and pp. 258-261. A further European Union development of note in this regard is the guarantee in Article II-31-1 of the Charter of Fundamental Rights that '[e]very worker has the right to working conditions which respect his or her health, safety and dignity.' While the limits to the personal scope of the Charter have been noted in Chapter 2 above, p. 98, the right contained in Article II-31-1 in its material scope is, nevertheless, capable of being applied to a more broad range of situations than simply harassment at work.

[50] O'Donnell T., 'The Sweat of the Brow or the Breaking of the Heart?' in *Feminist Perspectives on Employment Law* eds. Morris A. and O'Donnell T., (London: Cavendish, 1999) 61-88.

[51] *Walker v. Northumberland County Council* [1995] IRLR 35.

6.1.2.ii Dignity and the right to a decent life

If one of the applications of human dignity to the economic sphere concerns the right to work and earn a living, it may be suggested by implication that this right – in order to be meaningful – should encompass the enjoyment of a certain minimum standard of living, in other words a decent life. To this end, the European Union has included in Article II-34-3 of the Charter of Fundamental Rights concerning social security and social assistance, a principle to the effect that '[i]n order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources...'. The Article continues, however, that this principle applies 'in accordance with the rules laid down by Union law and national laws and practices.' It, thus, needs to be investigated how far the requirement to respect human dignity obliges the state to ensure that individuals may enjoy a decent life through the provision of favourable economic and social conditions. Using the two examples of poverty and housing, it will be suggested that the link between respect for dignity and the ability to enjoy a decent life is mediated by good intentions but ultimately a lack of public resources, meaning that the 'principle' of ensuring a dignified life to all rarely translates into 'rights' capable of bringing about this reality.

Dignity and poverty The idea that the ability to lead a decent life supposes in part that an individual has sufficient financial means to maintain a minimum level of subsistence, has traditionally conflicted with liberal disdain for using law to redress the problem of poverty, preferring instead its construction as a moral or philanthropical matter.[53] That said, French and UK laws alike have responded to the challenge of poverty by trying, to a certain extent, to protect individuals who are vulnerable in this regard. Their approaches are, however somewhat different. True to their respective legal traditions, it will be explained below that, while French law has benefited from legislative intervention to construct a right to a decent life on the back of criminal provisions aimed at combating the exploitation of vulnerable persons, UK

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[52] Section 8(1), Protection from Harassment Act 1997.
[53] Pech, T., 'La dignité humaine. Du droit à l'éthique de la relation' *D* 2001, special issue, 20, 90-112, at p. 102.

law has tackled the question of how to respond to economic dependency through the development of case law in this area.

In France it is the new Penal Code which seeks to tackle poverty through the criminalisation of attempts to exploit vulnerable individuals, notably at work. Thus, Article 225-13, cited above, creates the offence of obtaining services (usually economic) from vulnerable or dependent persons without proper remuneration. The following Article in turn makes it an offence to submit such individuals to undignified conditions of work. While laudable in their recognition of the need to protect dependant persons from exploitative employers, these provisions are, nevertheless, quite precise in their field of application and do no not cover all instances of exploitation through work. For example, while the dwarf-throwing cases suggest that the *Conseil d'Etat* viewed this form of employment as exploitative of the handicap of the dwarf,[54] there was no criminal prosecution brought over the issue. Moreover, the court refused to accept the argument put forward by the dwarf based upon his economic situation, according to which the ban on the competitions would leave him in a difficult financial position, without sufficient resources to lead a decent life. Thus, the dwarf was not entitled to trade his dignity in order to earn a living: dignity as a value has no price. The result, however, was that he would lose his job and find himself substantially impoverished by the court's decision.

In the UK, the question of poverty and the right to lead a decent life has been considered especially from the angle of rights to social assistance. In this regard, it is useful to first note a precedent in this domain from the European Court of Justice which held in the *Stauder* case that an individual who, in the context of the distribution of butter at a reduced cost, was required to present a ticket to the vendor carrying his name and indicating that he was a recipient of social assistance (and consequently poor) amounted to an assault upon his dignity.[55] This economic perspective on dignity demonstrates an extension of the protection of an individual's personality through the requirement that everyone be entitled to an assurance that the image they wish to present of themselves in public be properly respected.[56]

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[54] CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence*, Rec. p. 372.
[55] *Stauder v. City of Ulm* Case 29/69 [1969] ECR 419.
[56] Robert J. and Duffar J., *supra* n. 28, p. 426.

As far as the UK is concerned, the common law imposes upon public authorities an obligation to assist persons without means. This appears to create a social right implying respect for the individual's life and dignity. For example, the Court of Appeal in its decision in *R v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants,*[57] sought to develop this right in order to ensure that persons lacking financial resources would benefit from other rights, notably those to social security. The case concerned the introduction of measures aimed at refusing social assistance to asylum seekers which the Court found would render it impossible for asylum seekers to remain in the UK or would place them in a situation of poverty that no civilised nation should tolerate.[58] Founding its decision upon the obligation to save the poor from starvation, created by the common law in *R v. Eastbourne (Inhabitants),*[59] the Court created a clear requirement that the state assist individuals who themselves lack sufficient means of subsistence. Unfortunately, the Court added that only an express legislative provision could put an end to such an obligation to which parliament responded by enacting measures to facilitate the introduction of the regulations.[60]

A second jurisprudential development regarding the enjoyment of a certain level of economic independence has arisen in the UK in the case of divorce. Traditionally judges have not always been terribly anxious that upon the break-up of a marriage the assets of the couple should be equally divided, being of the view that the wife (usually) had not provided an economic contribution to the household equivalent to that of her husband. Nevertheless, more recently, the Court of Appeal in *White v. White*[61] has employed the concept of fairness to permit a better distribution in favour of the ex-wife. Thus, the Court found that non-economic contributions, such as housework and raising a family, which freed the husband to pursue his career outside of the home, were as valid as economic contributions and that Mrs White should have

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[57] *R v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385. See the discussion of this case by Feldman D., 2000, *supra* n. 17, pp. 61-62.
[58] *R v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants, ibid.*, p. 401, *per* Simon Brown LJ.
[59] *R v. Eastbourne (Inhabitants)* (1803) 102 ER 769, at p. 770, *per* Lord Ellenborough.
[60] See further the discussion by Feldman D., 2000, *supra* n. 17, p. 62 and subsequent developments regarding the provision of accommodation and social assistance to destitute asylum seekers, discussed below, pp. 316-317.
[61] *White v. White* [2000] 2 FLR 981. See Diduck A., 'Fairness and Justice For All? The House of Lords in *White v. White* [2000] 2 FLR 981' (2001) 9 *FLS* 173-183.

been accorded a greater share of the family's assets than had at first been allocated. In this development the judges demonstrate their appreciation that the economic standing of the individual is at the heart of her capacity to lead a decent, and therefore dignified, life and, while not using the latter term explicitly, appear to read it into their more progressive interpretation of other concepts such as justice and fairness.[62]

Furthermore, while the above situation applies to divorcing couples, plans are also in progress to introduce legislation to deal with the financial position of cohabiting non-married couples upon break-up of their relationship. Thus, the Law Commission has argued in favour of new measures which would put former cohabitees in the same position as former spouses.[63] They would then benefit from the new interpretation of the notion of fairness in the division of assets as set out in *White*. In addition, it has been suggested that the Human Rights Act 1998 could begin to reinforce protection in this area through the application of the principle of non-discrimination in Article 14 ECHR which might be invoked to demonstrate an unjustifiable difference in treatment on the basis of marital status.[64]

Dignity and housing While it appears that UK law, through judicial intervention, is in the process of development with regard to the protection of the economic well-being of individuals, in France the socio-economic dimension of dignity has been explored rather more in the context of housing. It was noted above that Article 225-14 of the new Penal Code has created a new offence linked to the provision of living conditions that are contrary to human dignity. The *Cour d'appel de Paris* has since applied the Article in the case of a rental agreement for a dwelling of less than 20 square metres which was occupied by a man, his pregnant wife and their one and a

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[62] It is interesting to note that in France in the case of a breakdown of relations cemented under a Civil Solidarity Pact (*PACS*) the Constitutional Council has found that the decision to end the relationship, even if unilateral, is contrary 'neither to the principle of human dignity, nor to any other principle of constitutional value' (*'[contraire] ni au principe de la dignité de la personne humaine, ni à aucun autre principe de valeur constitutionnelle'*): Decision no. 99-419 DC of 9 November 1999, *PACS*.

[63] Wong S., 'Property Rights for Cohabitees in the UK: The Potential Effect of Human Rights on Legislative Reform' (2001) 23 *JSWFL* 491-500.

[64] Wong S., *ibid.* The autonomy of Article 14 with respect to the application of other ECHR rights (by the signature of additional protocol no. 12) must, however, be awaited as, even if the first protocol to the Convention guarantees the right to property, this presupposes that a property right is already in existence in order for the right to be protected. It is, however, precisely this interest that the person seeking to exercise the right must first establish.

half year-old child.[65] While the court did not establish a clear minimum standard for dignified living conditions, it found that the health of the inhabitants was put at risk through the humidity and heating appliances in the flat and that there was a breach of sanitary regulations regarding the low ceiling, thin walls and toilet opening directly onto the kitchen.[66] Moreover, the judges took account of the vulnerability of the victim who was settled unlawfully in France and constrained to accept the landlord's offer in order to settle and work in Paris.

In introducing this offence into the Penal Code, the French parliament anticipated the judgment of the Constitutional Council in its decision on the constitutionality of new legislation on diversity of habitat.[67] It was noted above, in the course of discussion upon the juridification of the principle of respect for human dignity, that the Council's decision established an objective of constitutional value encompassing the possibility for all individuals to enjoy decent accommodation.[68] It is clear, therefore, that, in the area of housing at least, the Council has sought to combat social exclusion,[69] a move which has been further supported by its more recent decision in 1998 on the constitutional conformity of legislation on the fight against exclusion.[70]

Nevertheless, this does not mean that the constitutional objective automatically translates into a 'right to housing'. In fact, it was not until the decision of the *Cour d'appel de Paris* in the *rue du Dragon* case of 15 September 1995, that the judiciary was required to reflect upon the relationship between the objective of constitutional value of providing decent accommodation and a real 'right' to housing.[71] The court, responding to the organisation by the association *'Droit au logement'* ('Right to Housing') of the occupation of a building which had been empty for a long time but

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[65] CA de Paris, 26 June 1996, Dt Pén, 1996, no. 243, commentary by M. Véron.

[66] See further, Koering-Joulin R., 'La dignité de la personne humaine en droit pénal' in *La dignité de la personne humaine* eds. Pavia M.-L. and Revet T., *supra* n. 38, 67-84, and Cass. crim., 11 February 1998, D IR, 1998, 89. Further clarification of the type of dwellings that constitute an affront to dignity, in particular those which are delapidated and insalubrious, is given in CA de Paris, 19 March 2002, JCP, 2003, I 115.

[67] Decision no. 94-359 DC of 19 January 1995, *Diversity of habitat*; AJDA, 1995, 455-462, note by B. Jorion; RFDC, 1995, 23, 583-584, note by P. Gaïa.

[68] See Chapter 2 above, p. 103.

[69] Pavia M.-L., 'La dignité de la personne humaine' in *Libertés et droits fondamentaux* eds. Cabrillac R., Frison-Roche M.-A. and Revet T., *supra* n. 18, pp. 121-139, p. 133.

[70] Decision no. 98-403 DC of 19 July 1998, *Fight against exclusion.*

belonged to a property company, found that 'the right to housing is considered a fundamental right and an objective of constitutional value'.[72] Moreover, this right trumped the property right of the owners, it being found that the occupants were entitled to remain in the accommodation for a certain period. Thus, the court was prepared to respond to the problem of social exclusion through the invocation of this particular constitutional objective founded upon human dignity.[73]

The problem, of course, remains that if the right to housing becomes an entitlement then it clearly conflicts with other pre-existing rights, notably as in the above case, those of property owners.[74] The solution of the court does not present a panacea for the future, but merely sets out that in certain exceptional circumstances the rights of unauthorised occupants of a building may prevail over those of the owner who, in leaving property unoccupied for a lengthy period, has behaved in a socially unacceptable way.[75] Commentators on the decision have, nevertheless, situated it within a movement towards an understanding of property rights which is less individual and more social in orientation.[76] This suggests too that the collective interpretation of dignity in French law, as observed above in the domain of work, extends also to housing. Through this interpretation, the French judiciary has, thus, acted positively to combat the social exclusion of the most vulnerable members of society.[77]

As far as the UK is concerned, there is no equivalent movement towards the consolidation of a right to housing. Moreover, there would seem to be substantial resistance to any interpretation of economic and social rights which would allow them to prevail should they conflict with property rights. Thus, Dawn Oliver, in her study

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[71] *Le Monde*, 17 and 18 September 1995; see also 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. 38, 3-34, at p. 15, and Pavia M.-L., 2000, *supra* n. 69, pp. 133-134.

[72] *'[L]e droit au logement est considéré comme un droit fondamental et un objectif de valeur constitutionnelle'. Ibid.*

[73] Pavia M.-L., 2000, *ibid.*

[74] Pech T., *supra* n. 53, p. 102.

[75] Pavia M.-L., 2000, *supra* n. 69, p. 134.

[76] Pavia M.-L., 2000, *ibid.*

[77] The concern of public authorities to protect the unfortunate, however, may produce more constraining consequences. For example, during the freezing winter of 1996, a number of mayors employed their administrative police powers to introduce measures based upon respect for human dignity requiring those without shelter to sleep in hostel accommodation, even against their wishes: *Le*

of the values which found public and private law in the UK, underlines the fact that among the values employed by the common law are personal freedom and autonomy, that is values which ground the institution of property, and that these have to be reconciled with (but not trumped by) other values, such as dignity.[78] This is equally the conclusion at which Simone Wong arrives in her commentary on the development of the rights of cohabitees, and notably their compatibility with the Human Rights Act, finding that the (fundamental) right to property is unlikely to give way to other rights which are socio-economic in orientation.[79]

Nevertheless, the difference between France and the UK regarding the incremental beginnings of a right to housing is not total. Jurisprudential developments in the UK suggest that a certain *rapprochement* is in process through the recognition by the courts that legislative constructions of the distribution and transfer of property rights may be in need of revision. Once again, even if the judges do not expressly use the notion of human dignity, the House of Lords has made an implicit nod in its direction in recognising a violation of the principle of non-discrimination in the context of a refusal to extend certain housing rights to homosexuals. Thus, in *Fitzpatrick v. Sterling Housing Association,*[80] the Law Lords found that the gay male partner of the tenant of publicly owned accommodation should be allowed to succeed to the tenancy upon the death of his partner under the Rent Act 1977, while up until this point in time homosexual couples had not been able to avail themselves of rights under the Act. In a welcome move in terms of promoting social inclusion, the Court drew a parallel between the situation of homosexual couples and that of cohabiting heterosexuals and extended the field of application of property rights to individuals who might otherwise risk discriminatory, and hence degrading, treatment.

A rather more explicit recognition of the link between respect for dignity and the right to decent accommodation has been made more recently in a case regarding a number

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Monde, 4 January 1997. See Weil L., 'La dignité de la personne humaine en droit administratif' in *La dignité de la personne humaine* eds. Pavia M.-L. and Revet T., *supra* n. 38, pp. 85-106, at pp. 95-96.

[78] Oliver D., *Common Values and the Public-Private Divide* (London: Butterworths, 1999) pp. 56-65 and p. 70.

[79] Wong S., *supra* n. 63, pp. 493-495.

[80] *Fitzpatrick v. Sterling Housing Association* [1998] 1 FLR 6 (CA); [1999] 4 All ER 705 (HL). See further, Sandland R., 'Not "Social Justice": The Housing Association, the Judges, the Tenant and his Lover' (2000) 8 *FLS* 227-239.

of asylum seekers one of whom, a Chinese man named T, having travelled from Malaysia, spent four days sleeping rough at Heathrow airport while trying unsuccessfully to claim asylum at the Canadian embassy. In the High Court, Maurice Kay J found that the state's failure to provide accommodation and food amounted to inhuman and degrading treatment under Article 3 of the ECHR.[81] However, the Home Office subsequently successfully appealed against the judgment on the basis that T was still in possession of £200 three weeks after arriving in the UK and had survived without having to turn to a soup kitchen or begging. His treatment thus fell short of what was required to establish a violation of Article 3.[82] This decision follows the Court of Appeal's earlier findings in the case of *'Q' and others*[83] that, while '[d]estitution is an emotive word, and it might be argued that denying support to the destitute is necessarily inhuman and degrading treatment', there is a margin between the condition that renders an asylum seeker destitute for the purposes of the Asylum Support Regulations (and therefore entitled to state support) and the condition to which an individual must sink in order to claim to be a victim under Article 3.[84]

Despite this rather pessimistic conclusion, viewed more generally the above developments in the areas of poverty and housing can, it is suggested, be read as requiring that respect human dignity sometimes generate rights in the socio-economic sphere. Of course, this process is far from complete and the rights which have so far been recognised are both piecemeal and provide only a minimal level of guarantees. Thus, while not implying that respect for the capacity of individuals to lead a decent life necessarily creates a right to particularly favourable conditions of existence, it is evident that both France and the UK do guarantee some sort of basic minimum level of economic and social protection for the most vulnerable members of society and

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[81] *R (S and others) v. Secretary of State for the Home Department* [2003] All ER 14 (HC, Admin). See Travis A., 'Halving of Asylum Claims in Sight', *The Guardian*, 28 August 2003.
[82] *R ('T') v. Secretary of State for the Home Department* [2003] All ER 149 (CA). See Travis A., 'Minister Welcomes Ruling on Asylum Seekers', *The Guardian*, 24 September 2003.
[83] *R (Q and others) v. Secretary of State for the Home Department* [2003] 2 All ER 905.
[84] *Ibid.*, para. 59, *per* Lord Phillips MR. This conclusion drew upon the decision of the European Court of Human Rights in *O'Rourke v. United Kingdom,* App. no. 39022/97, judgment of 23 June 2001, that the treatment received by an applicant who had been evicted from temporary accommodation provided for him when he came out of prison and who went on to live on the streets to the detriment of an asthmatic condition and chest infection from which he suffered, was not sufficiently severe to engage Article 3.

that this salvation from destitution is in accordance with a measure of respect for their dignity.

6.2 Dignity, equality and identity

In addition to assaults upon honour, reputation and personal standing, respect for an individual's non-physical integrity may also be compromised through an assault upon his or her identity. In this sphere it is the unjustified discriminatory nature of the conduct which constitutes the violation of mental integrity and which prevents the person from leading a dignified life. Combating discrimination is, therefore, closely linked to the requirement not to differentiate or operate forms of selection between individuals for reasons of their personal status[85] and the prohibitive principle of non-discrimination operates to reinforce its positive mirror, the principle of equality whose relationship to dignity lies in the recognition that all human beings are inherently of equal worth.[86]

Both French and UK law have undertaken a number of initiatives with the aim of tackling discrimination. In France, the new Penal Code prohibits discrimination on a large number of grounds: origin, sex, family situation, health, handicap, morals, political opinion, trade union activity, ethnicity, nationality, race and religion.[87] In the UK, legislation is more targeted to the employment field prohibiting acts which discriminate on the grounds of sex (Sex Discrimination Act 1975), race (Race Relations Act 1976; Race Relations (Amendment) Act 2000; Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003, no. 1626), disability (Disability Discrimination Act 1995) and more recently sexual orientation (Employment Equality (Sexual Orientation) Regulations 2003, SI 2003, no. 1661) and religion or belief (Employment Equality (Religion or Belief) Regulations 2003, SI 2003, no. 1660). Here the influence of the European Union, particularly in the area of sex

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[85] Koering-Joulin R., *supra* n. 66, p. 69.

[86] Sandra Fredman, thus, argues that 'a commitment to the underlying value of human dignity can provide a valuable underpinning to the concept of equality' (*Discrimination Law* (Oxford: Oxford University Press, 2002) p.119). See also Feldman D., *Civil Liberties and Human Rights in England and Wales* 2nd ed. (Oxford: Oxford University Press 2002), chapter 3, 'Equality and Dignity'.

[87] Article 225-1 of the new Penal Code.

discrimination, has been heavily felt[88] and is being further built upon since the Treaty of Amsterdam's inclusion of a new Article 13 in the EC Treaty, giving competence to the Council to take all necessary steps to tackle discrimination, including that founded upon sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[89] These initiatives have been further consolidated by the Charter of Fundamental Rights which contains a whole chapter on equality provisions, headed by Article II-20 which provides that '[e]veryone is equal before the law'.

The concern demonstrated by both national and European legal systems to ensure that certain categories of persons are not discriminated against is intimately linked to the desire to protect the identity of these individuals. This does, however, generate a paradox. On the one hand, the application of the principle of non-discrimination requires that individuals be treated equally with no distinctions made based upon their

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[88] Article 141 EC; Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ 1975 L45/19; Directive 76/207/EEC of 9 February 1976 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 1976 L39/40; Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ 1979 L006/24; Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; OJ 1986 L225/40; Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ 1986 L359/56; 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.
See Hervey T. and O'Keeffe D. (eds.), *Sex Equality in the European Union* (Chichester: John Wiley, 1996); Rambaud P., 'L'égalité des sexes en droit communautaire' *D* chron, 1998, 10, 111-116; Sohrab J., *Sexing the Benefit: Women, Social Security and Financial Independence in EC Sex Equality Law* (Aldershot: Dartmouth, 1996).

[89] Article 13 EC has provided the legal basis for two new Directives: Directive 2000/43/CE of 29 June 2000 implementating the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L180/22 and Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L303/16. These have given rise in the UK to a number of legislative initiatives: the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003, no. 1626, the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003, no. 1661 and the Employment Equality (Religion or Belief) Regulations 2003, SI 2003, no. 1660. Amendments to the Disability Discrimination Act 1995 are expected to come into force in October 2004 and new legislation outlawing discrimination on the grounds of age by the end of 2006.
In France these directives have been implemented by Law no. 2001-1066 of 16 November 2001 on the fight against discrimination which has amended Article L. 122-45 of the Employment Code. This provision prohibits discriminatory measures on the basis of an employee's origin, sex, life-style, *sexual orientation, age*, family circumstances, race, actual or alleged *belonging to an ethnic minority, nation or* race, political opinions, trade union activities, religious beliefs, *physical* appearance, *name* and health or disability (emphasis indicates the modifications brought about by the 2001 Act). See futher, Berthou K. ,'New Hopes for French Anti-Discrimination Law' (2003) 19 *Int J of Comparative Labour Law* 109-137 ; Keller M., 'La loi du 16 novembre 2001 relative à la lutte contre les discriminations' *D* 2002, 17, 1355-1358.

different qualities and attributes. On the other hand, law requires a certain respect for the identity of individuals which is precisely the factor which differentiates them from others. Respect for identity, therefore, demands respect for individual difference. There is in addition a collective dimension to personal identity in so far as it is through their identity that individuals develop an attachment to particular communities. In this respect, it is possible to identify a third layer of social life which mediates between the individual and the rest of humanity which is that of social groups. The situation is further complicated by the fact that identity is in fact best understood in the plural as it is multi-faceted with all individuals enjoying a myriad of associations with communities based upon their sex, ethnic origin, age, sexual orientation, etc. Likewise, identities are not necessarily fixed for all time and their very fluidity may generate uncertainty.[90]

The concept of identity, like that of non-discrimination, is thus difficult to grasp and its translation into law is equally complicated. Nevertheless, it can be mediated through the call, sometimes explicit and sometimes implicit, to respect human dignity. Dignity permits the establishment of a connection between individuals in view of its 'profoundly *relational* dimension.'[91] This relationship is often only two-dimensional, that is it links the individual to the rest of humanity. Nevertheless, the question of identity and its implication that individuals belong to particular social groups adds a third dimension to dignity protection with the need to ensure respect for the dignity of the group. This phenomenon has been noted above in the case of the dwarf-throwing competitions where one aspect of the dignity violation was precisely that which affected the dignity of the dwarf community as a whole. The result is that, once more, a very fine balance has to be weighed between competing identities and the corresponding claims for respect for dignity which they generate. It will be seen below too that often this requires the courts to make choices which have more to do with policy and politics than with law.

Thus, we will examine in this final section the choices made by legislators and judges in the wake of this challenge. It will be seen that the legal picture is frequently

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[90] Woodward K. (ed.), *Questioning Identity: Gender, Class, Nation* (London: Routledge and The Open University, 2000) p. 2.
[91] *'[Sa] dimension profondément* relationnelle'. Pech T., *supra* n. 53, p. 91.

changing in order to respond to the evolution of ideas and social opinions. Fortunately, these changes do seem to move in the direction of boosting the protection offered to individuals against discriminatory and undignified treatment which would otherwise seek to differentiate them from the rest of humanity. Nevertheless, because of the paradox mentioned above, this protection has the effect of creating a plurality, even divergence, within humanity to the extent that it generates distinct communities which seek respect for their group identity. Taking a thematic perspective which opposes fixed identities, such as those founded upon sex[92] and race, with non-permanent characteristics, such as age and health, the remainder of this chapter seeks to analyse from a comparative perspective the diverse legal applications of the principle of non-discrimination in France and the UK, concluding that fixed identities are more widely respected than those of a temporary nature and that this is a common position in both legal systems.

6.2.1 Fixed identities

With regard to identity factors which are established at birth, the discussion here concentrates on two key examples – sex and race. In both cases the assault upon dignity generated by discriminatory treatment appears obvious in so far as the characteristics of sex and race are intimately entwined with the individual's perception of him or herself and position in society. Yet, it will be seen that these aspects of identity are not always protected by law and that, consequently, there may be instances where distinctions made according to the permanent attributes of an individual do not amount to unlawful discrimination.

6.2.1.i Dignity and sexual identity

Sexual identity is, of course, a matter which can be viewed from a number of angles. First, and perhaps most obviously, sex based differences between men and women

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[92] It is acknowledged that sexual identity may be a fluid and, therefore in some cases, a relatively unfixed, attribute of the individual. It is included in this section on the basis that in most instances it is

may generate discrimination against one or other group leading to practices which more and more frequently constitute an assault upon human dignity and are made the object of legal sanctions. Secondly, sexual identity comprises sexuality. In this area, a rather more conservative legal approach may be noted which, for the moment at least, appears to permit certain undignified practices without characterising them as unlawful discrimination.

Sex and dignity violations Discriminatory treatment which has sex at its root touches the very heart of personal identity and human dignity. It has been noted above, for example, that dignity may be compromised through acts of sexual harassment which have been classified as discriminatory by European and national legal systems.[93] Sexual harassment is not, however, the only context in which discrimination upon the basis of sex may amount to an assault upon dignity. UK law offers two key examples in the area of immigration and asylum which demonstrate the liaison which can be made in law between dignity and sex discrimination revealing also the ways in which the intersection of various components of individual identity and adhesion to different social groups has to be weighed in the balance when judging discrimination claims.

The first example is provided by the case of *Abdulaziz, Cabales and Balkandali v. United Kingdom*[94] in which the European Court of Human Rights was asked to extend the scope of Article 3 ECHR to differential treatment based on sex in the light of the refusal to allow the applicants, non-British nationals with a legal right of residence in the UK, to be joined by their husbands when men under the same circumstances were allowed to be joined by their wives. It was argued on behalf of the women that the non-discrimination principle in Article 14 of the Convention had also been violated. Yet, while the Court found that there was sexual discrimination, it added that this did not denote any corresponding contempt or lack of respect for the personality of the applicants and did not humiliate or debase them. Thus there was no contravention of Article 3. Adopting this perspective, the Court appeared to focus upon the individual context of the discriminatory treatment and did not recognise the existence of an assault upon the dignity of the social group constituted by non-British women with a

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generated and remains fixed from the moment of conception. The exception of the changing identity of transgendered persons is discussed further below, pp. 326-327.

[93] See above, chapter 5, pp. 258-261.

right of residence in the UK. Had the Court considered the question more broadly, it might have identified an attempt to undermine the collective dignity of this particular group and the lowering of its status when compared with other groups (in this case male residents) placed in a similar situation.

It is precisely this wider vision of an assault upon group identity which inspired the more recent decisions of the House of Lords in *Islam* and *Shah,*[95] cases which concerned a group of female asylum seekers. The Law Lords, adopting a more fluid approach to the definition of a 'social group' able to benefit from the protection of the Geneva Convention of 28 July 1951, found that women who had suffered discrimination in Pakistan did constitute such a group and rejected the idea that it was necessary to establish some kind of relationship between all members of the group as victims of persecution. Their common characteristic was rather their sex.[96] Thus, the judges extended the guarantees provided by the Geneva Convention to an infinite number of Pakistani women who had nothing else in common besides the threat to their personal security and dignity.[97] From this reading the national judges appear more willing than their European counterparts to accept the claims of social groups and to safeguard their rights in the case of undignified treatment. This necessarily demands that the assault upon identity be viewed as collective, or at least as related to the community to which the individual belongs, in order that the lack of respect to all the group's members be legally recognised.

In France, in a rather different context, the Constitutional Council has likewise been asked to pronounce upon the collective dimension to sex discrimination.[98] Hence, in its decision of 30 May 2000, the Council examined and accepted the constitutionality

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[94] *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 EHRR 471.

[95] *Islam v. Secretary of State for the Home Department* [1999] 2 All ER 545; *R v. Immigration Appeal Tribunal, ex parte Shah* [1999] 2 WLR 1015. See Kirvan S., 'Women and Asylum: A Particular Social Group *Islam v. Secretary of State for the Home Department*; *R v. Immigration Appeal Tribunal and another, ex p Shah*' (1999) 7 *FLS* 333-342. See also Harvey C., *Seeking Asylum in the UK: Problems and Prospects* (London: Butterworths, 2000) pp. 158-168.

[96] One of the judges in the majority, Lord Hutton, added that the women should also have in common that they be married. Lord Millet, in the minority, however, preferred a definition which required a clear and coherent tie binding the social group, such as the establishment of a voluntary association between members.

[97] See the commentary by David Feldman on this decision: 2000, *supra* n. 17, pp. 63-64. Feldman argues in support of the dissenting opinion of Lord Millet for its conformity with the view of the international community as expressed by LaForest J in the Canadian Supreme Court decision in *Canada v. Ward* (1993) 103 DLR (4e) 1.

of new legislation designed to promote the equal access of men and women to electoral mandates and elective functions.[99] The decision resulted from a constitutional revision, the purpose of which was to introduce a new paragraph into Article 3 of the Constitution to the above effect[100] and to insert into Article 4 a provision stating that parties and political groups should contribute towards putting into practice the new principle set out in Article 3 in accordance with conditions set out by legislation.[101] Marking a reversal of its previous case law on the unconstitutionality of quotas aimed at augmenting the number of women in parliament (on the grounds that these violated the principle of equality and the indivisibility of the Republic) the Council accepted in its most recent decision that the fact of constitutional revision had the effect of removing these constitutional obstacles.[102]

In this decision may be seen quite clearly a consideration of sex discrimination as a collective and group issue, despite this being highly controversial from a strict reading of the French Constitution, the very first Article of which states that France is an 'indivisible' Republic, thus permitting no stratification based upon status or identity. In admitting a derogation to this principle for women in the context of public electoral functions, the constitutional judges appeared willing to accept the clear intention of the constitutional constituent power to authorise parliament to introduce binding rules to promote women's equal access to electoral mandates. While opinion was divided on the suitability of the (constitutional) solution adopted to tackle the problem of the under-representation of women in political institutions, seeing it as generating a risk of social and democratic incohesion,[103] the new system had a degree of initial success with the number of women being elected to municipal councils increasing from 22%

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[98] Decision no. 2000-429 DC of 30 May 2000, *Quotas on sex III.*

[99] For background information on the case see the discussion by Noëlle Lenoir, former member of the *Conseil constitutionnel*, in 'The Representation of Women in Politics: From Quotas to Parity in Elections' (2001) 50 *ICLQ* 217-247.

[100] Article 3-5, Constitution of 1958: *'La loi favorise l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives.'*

[101] Article 4-2, Constitution of 1958: *'Ils [les partis et groupements politiques] contribuent à la mise en oeuvre du principe énoncé au dernier alinéa de l'article 3 dans les conditions déterminées par la loi.'* Legislative intervention came in the form of Constitutional Law no. 99-569 of 8 July 1999 on equality between women and men.

[102] Decision no. 2000-429 DC of 30 May 2000, *Quotas on sex III.* See also Decision no. 82-146 DC of 18 November 1982, *Quotas on sex I*; and Decision no. 98-407 DC of 14 January 1999, *Quotas on sex II.* On the history of the parity debate in France, see further Helft-Malz V. and Lévy P., *Les femmes et la vie politique française* (Paris: PUF, coll. Que sais-je?, no. 3550, 2000) pp. 99-121.

to 47.5% when the measures were applied for the first time in March 2001.[104] That said, the sceptics have been proved prophetic with regard to the more important legislative elections in June 2002 when the main political parties from all sides of the political spectrum demonstrated themselves to be more willing to pay the financial penalties imposed upon parties for non-compliance with the parity principle than to risk fielding women candidates.[105]

Of course, the problem with formal parity measures, whether they are successful in practice or not, is that they can be viewed as inducing further discrimination – this time against men who are denied the opportunity to present themselves for election. Just such an argument was made with success in the UK case of *Jepson and Dyas-Elliot,*[106] in which two men who had not been placed upon short lists of candidates by the Labour Party (pursuing its policy of all women short lists) complained that they had been discriminated against on the grounds of their sex and that this amounted to a violation of the Sex Discrimination Act 1975. The industrial tribunal which heard the case found that the Labour Party's policy did indeed introduce discriminatory treatment against male candidates. This would suggest that a form of undignified treatment was being inflicted upon particular men unable to pursue their chosen profession – a reading which offers a more individualised perspective on the issue of quotas than that adopted in France where the collective (more general) problem of a lack of female participation in political life is recognised. Moreover, in the UK context the issue lost all of its constitutional significance becoming a low level matter of employment law with no consideration of the wider context. Fortunately, in this case, the Labour government has pursued its policy to increase the number of women in parliament by other means. This has resulted in the adoption of the Sex Discrimination (Election Candidates) Act 2002, amending the Sex Discrimination Act

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[103] Halft-Malz V. and Lévy P., *ibid.*, p. 108.
[104] *Le Monde*, 27 March 2001.
[105] 'La parité ridiculisée', *Le Monde,* 13 July 2002. The result of the 2002 elections to the National Assembly was to increase by only six the number of women in the Assembly as compared with the elections of 1997 (a rise from 10.91% to 11.78% or 62 to 68 women): *Le Monde,* 18 June 2002. This means that France still has one of the lowest levels of female parliamentary participation in the European Union (the UK standing at 17.9% or 118 women). See further, Léon M., Mateo Diaz M. and Millns S., '(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) p. 31.
[106] *Jepson and Dyas-Elliott v. The Labour Party* [1996] IRLR 116.

1975 so that it no longer applies to measures adopted by a political party to reduce inequality in the numbers of men and women selected as candidates.

Sexuality and (a lack of) dignity violations In the area of sexuality, legal responses have again varied in their interpretation of discrimination as an individual or collective issue, depending on the degree of significance attached to an individual's belonging to a particular social group. However, in so far as sexuality, like sex, lies at the centre of human identity, discrimination perpetrated on this basis will undoubtedly impact upon the standing, and therefore, dignity, of those concerned. Unlike sex discrimination, however, the assault is not so easily recognised in law; this being the case in the two examples of differential treatment on the grounds of sexuality which will be discussed here – those of transsexuality and sexual orientation.

With regard to the former, it is precisely the (im)mutability of sexual identity which is the focus of law's regard. Viewed comparatively, there exists a strong divergence between French and UK responses to the issue of correcting identity documents to correspond to the new gender of transsexuals with French law being more clement as a result of a ruling by the European Court of Human Rights. This found that transsexuals in France have the right to be publicly recognised in their new sexual identity, given the ease with which entries in the civil status register might be amended.[107] Viewing the issue as a violation of Article 8 ECHR and the right to respect for private life, it is notable that the Court refused to find, however, a violation of Article 3's more serious prohibition on inhuman and degrading treatment in the case.

The issue having been resolved satisfactorily in France, it nevertheless remains open in the UK given that here the birth certificate is a permanent record of the sex of an individual as this appears at birth. The European Court maintained over many years that the refusal to rectify the birth certificate to reflect a transgendered person's post-

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[107] *B v. France* (1993) 16 EHRR 1. See Millns S., 'Transsexuality and the European Convention on Human Rights' [1992] *PL* 559-566. This solution has since been applied by the *Cour de cassation*: Cass. ass. plén., 11 December 1992, JCP, 1993, II 21991, conclusions by M. Jéol, note by G. Mémenteau; RTDC, 1993, 97, observations by J. Hauser. See Pech T., *supra* n. 53, p. 109.

operative sexual identity was not a violation of the right to respect for private life.[108] Only recently, in the cases of *Goodwin v. United Kingdom* and *I v. United Kingdom*[109] has the Court happily moved on from its previous position to take account of changing social circumstances and to find violations of Convention guarantees on the rights to respect for private life and to marry and found a family. Thus, despite making no finding under Article 14 on the grounds that all the issues had been dealt with under Articles 8 and 12, the Court demonstrated in fact a new commitment to protect individuals from discrimination on the basis of a personal conviction over their sexual identity. The decisions in *Goodwin* and *I* would suggest that the differential treatment experienced by transsexuals on either side of the Channel ought now to be ended and that, in the UK, circumstances such as those which gave rise to the case of *X, Y and Z*[110] need now to be reconsidered in the light of the more recent European Court rulings.[111] That said, the House of Lords in *Bellinger v. Bellinger*,[112] when asked recently to decide on the validity of the marriage of a male to female transsexual to a man, refused to legitimate the arrangement and, while making an historic declaration of incompatibility between English law on marriage and the fundamental rights of transgendered persons, has left it up to parliament to change the law.[113]

There has been a similar traditional refusal to recognise in law assaults upon mental integrity in the context of differential practices founded upon sexual orientation. It is true that the jurisprudence of the European Court of Human Rights has provided a certain degree of protection for individuals against discrimination on this ground

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[108] *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.

[109] *Goodwin v. United Kingdom* (2002) 35 EHRR 18; *I v. United Kingdom* [2002] 2 FLR 518. See Sandland R., 'Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights, *Goodwin v. UK, I v. UK*' (2003) 11 *FLS* 191-209.

[110] *X, Y and Z v. United Kingdom* (1997) 24 EHRR 143. This case is discussed in Chapter 3 above, pp. 161-162.

[111] The approach of the Strasbourg institutions is now more aligned to that of the European Court of Justice in *P v. S and Cornwall County Council* Case C-13/94 [1996] ECR I-2143 in which the EC's Equal Treatment Directive 76/207/CEE of 9 February 1976 was held applicable to a transsexual who had been dismissed following gender reassignment surgery.

[112] *Bellinger v. Bellinger* [2003] 2 All ER 593.

[113] 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. Parliament is currently considering a draft Bill on Gender Recognition which if passed would allow transsexual people to have their birth certificates changed and their new gender recognised for the purpose of marriage. Details of the proposal may be found on the website of the campaign group 'Press for Change' (www.pfc.org.uk). See also below, p. 161.

(viewed as an aspect of respect for private life) notably in the case of finding a violation of Convention rights where national legislation prohibited homosexual relationships between adult men.[114] However, it has been seen in the preceding chapter that other instances of differential treatment between homosexuals and heterosexuals are not necessarily viewed as problematic by the courts. Thus, the decision in *R v. Brown*, with its criminalisation of the activities of homosexual sado-masochists was contrasted with that in *R v. Wilson* where similar practices between husband and wife did not result in any legal penalty being applied.[115]

Likewise in terms of apparently lawful instances of differential treatment based upon sexual orientation, it was noted in Chapter 3,[116] that French and UK parliaments have sought in various ways to exclude lesbians from access to assisted conception services. In this respect, it will be recalled that section 13(5) of the Human Fertilisation and Embryology Act 1990 and Article 8 of Law no. 94-654 of 29 July 1994 result in differential treatment based upon sexual orientation which could arguably constitute a violation of Articles 8 and 14 ECHR.[117] Of course in this matter the interests and the dignity of others (notably those of the future child) have to be taken into account. Nevertheless, in the absence of evidence that the children of gay parents are less well integrated into the community than children brought up in heterosexual households,[118] it would seem that a lack of respect for the dignity and equality of lesbians who wish to have a child using assisted conception services still persists.

6.2.1.ii Dignity and race

Alongside sexual identity, racial and ethnic identities too create powerful sentiments of belonging to particular social groups. As in the case of sex discrimination, legal

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[114] *Dudgeon v. United Kingdom* (1982) 4 EHRR 149; *Norris v. Ireland* (1991) 13 EHRR 186; *Modinos v. Cyprus* (1993) 16 EHRR 485.
[115] *R v. Brown* [1993] 2 All ER 75; *Laskey, Jaggard and Brown v. United Kingdom* (1997) 24 EHRR 39; *R v. Wilson* [1996] 3 WLR 125.
[116] At p. 150.
[117] See the discussion in Chapter 3 below, pp. 166-167.
[118] Golombok S. and Rust J., 'The Warnock Report and Single Women: What About the Children?' (1986) 12 *J Med Ethics* 182-186.

responses to the need for equal treatment on the basis of race seem to oscillate between recognition of the individual component to discriminatory practices and the more collective assault upon the group or community to which the victim belongs. A consideration of these individual and collective aspects of race discrimination will be followed by discussion of a more specific nature on one aspect of the issue, that of incitement to racial hatred, where notable divergences in Anglo-Saxon and French perspectives are readily discernable.

The individual and collective aspects of dignity violations The tendency in UK law has been to construct race discrimination in terms of an individual rather than collective problem, a position which is somewhat different from the perspectives adopted in France and by the European Commission on Human Rights. Thus, targeted legislation in the form of the Race Relations Act 1976, amended by the Race Relations (Amendment) Act 2000 and Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003, no. 1626, is designed to tackle individual instances of race discrimination. Nevertheless, as in the case of the Sex Discrimination Act 1975, the legislation is rather limited in so far as it is incapable of application to groups of individuals who suffer discrimination based upon their common racial or ethnic origin.[119] Thus, any sanctions applied to discriminatory conduct are individual and offer only compensatory damages for the non-physical injury suffered. Yet, the legislation does cover incidents such as that resulting in the claim made by two waitresses against their employer for failure to protect them from verbal racial abuse inflicted during an evening's 'entertainment' provided by the comedian Bernard Manning.[120] Furthermore, the Race Relations Act 1976 (Amendment) Regulations 2003 sets out a new prohibition against harassment on the grounds of a person's race or ethnic or national origins which applies in the areas of employment, social protection, social advantage, education and access to and supply of goods and services. Significantly, this inserts a new Article 3A into the 1976 Act defining harassment as 'unwanted conduct which has the purpose or effect of ... violating ... dignity.' Such legislative development is to be welcomed in so far as it may both

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[119] The revision of the 1976 Act by that of 2000, while not modifying this aspect of the legislation, does have the effect of extending the application of the legislation to public authorities and imposes upon them an obligation to eliminate all discrimination on the basis of race and to promote equality between individuals of different races (sections 19B and 71, Race Relations Act 1976).
[120] *Burton and Rhule v. De Vere Hotels Ltd* [1997] ICR 1.

compensate individuals who suffer race discrimination and also seek to alter public attitudes in response to the broader problem of embedded systemic discrimination.

In France, the collective nature of the assault constituded by race discrimination is recognised to a certain extent by the Law of 1 July 1972 on the fight against racism. This Law oscillates between forms of individual and collective protection, depending on the perpetrator of the discriminatory act. Thus, where it is the *press* which is behind the assault, the legislation recognises the collective character of the violation of mental integrity setting out three offences which may be committed either by an individual or a group: (i) incitement of discrimination, hatred or violence against an individual or group of individuals on the basis of their origins or their belonging or not to a particular ethnicity, national, race or religion; (ii) defamation against the same individuals for the same reasons; (iii) insults which are not preceded by any incitement.

Beyond these offences which apply to the press only, other acts of a more individual nature are also sanctioned by the Law of 1972. Thus, conduct will be unlawful where it takes the form of a refusal by any public official to confer a right on a person to which he or she is entitled for reasons of religious or racial belonging; a refusal to supply goods or services to an individual, association or society on the basis of origin or national, religious or racial belonging by someone who would normally provide such goods and services; and finally the refusal to hire someone or the act of firing them for the same reasons. French law, therefore, goes some way towards recognising the collective component of race discrimination at least in so far as this is perpetrated by the press.

The picture is slightly different again at the European level where the collective nature of the assault has been more readily recognised in the past, at least by the European Commission of Human Rights. It was noted above in the course of discussion of the case of *Abdulaziz, Cabales and Balkandali v. United Kingdom*[121] that the European Court failed to find a violation of Article 3 ECHR by UK legislation on immigration which drew a distinction between rights of residence

[121] *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 EHRR 471.

accorded to male and female spouses, preferring instead to construct the issue as one involving isolated and individual acts of sex discrimination which fell short of humiliation or debasement. There was, therefore, no recognition of the effects of the legislation which were to undermine the dignity of the group constituted by non-British women who held a right of residence in the UK. However, a markedly different approach from that taken by the Court has been demonstrated by the European Commission which has recognised a violation of Article 3 in the case of immigration law which imposed stricter controls upon immigrants from the New Commonwealth than on those from the old.[122] According to the Commission, the legislation distinguished between East African Asians and those from the Old Commonwealth on the basis of their race and contributed towards the former being lowered both in their own estimation as well as in that of others. The link made here between the collective aspect of the discrimination, which opposed one ethnic group against others, and its effect upon the dignity of those debased through this distinction, is important in offering the possibility of a form of group protection in cases of discriminatory treatment.

Incitement to racial hatred The (partial) recognition at the European level of the collective harm of race discrimination does have one particular form of application at the national level in both France and the UK, with regard to the incitement of racial hatred. From a comparative perspective, this example is extremely interesting to the extent that it reveals large differences between Anglo-Saxon and continental approaches. In a comparative study covering three countries (France, Germany and the United States), James Whitman argues that in France, in the light of heightened respect for the honour and reputation of individuals in society, the legal system has sought to promote this by a process of 'levelling up', ie ensuring that all persons are treated in the most noble and dignified way possible. On the other hand, the Anglo-Saxon tradition does the opposite by 'levelling down', ie ensuring that nobility is not privileged in any way. Whitman, thus, welcomes the more 'civilised' French perspective upon respect for honour, noting its commitment to a more subjective interpretation of respect for the person.[123] This, in turn, requires not only that all

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[122] *East African Asians* Case App. no. 36/92, DR, 78-A, p. 5.

[123] Whitman J.Q., 'Enforcing Civility and Respect: Three Societies' (2000) 109 *Yale LJ* 1279-1398, at pp. 1281-2. The comparatively intense protection of honour and reputation in French law has been

persons be treated equally (which is the case in the US too), but that protection should be of the best and most noble quality possible. 'Egalitairanism in France', Whitman suggests, 'proclaims we are all aristocrats now.'[124] The American interpretation of the principle of equality, however, reflects the opposite view, being 'an egalitarianism of *leveling down,* which proclaims, in effect, that *there are no more aristocrats*', meaning that the level of treatment is of the lowest standard possible which consequently results in an equality of lack of respect.[125] Of course, it is important not to generalise Anglo-Saxon traditions here - American culture is different from that of the UK, particularly with regard to the importance of social class[126] - nevertheless it is possible to observe a parallel approach between UK and US systems in the domain of incitement to racial hatred which can, in turn, be viewed in opposition to the French perspective with its special respect for personal honour, interpreted to include racial and ethnic identity.

The latter perspective can be seen clearly in the uniquely French example of an offence aimed at prohibiting the violation of the sacred character of burial grounds (*'la profanation des cimetières'*). The introduction of this offence into the new Penal Code responded to the tide of public emotion expressed by the violation of the Jewish cemetery at Carpentras in 1990 and aimed to protect identity in its racial, national, ethnic or religious forms.[127] In fact, the new Penal Code sets out two distinct offences which protect human dignity beyond death in cases of acts committed because of the belonging of the individual to a particular ethnicity, nation, race or religion during his or her life-time.[128] Article 225-17, paragraph 2, criminalises the violation of tombs and burial grounds, while the preceding paragraph creates the offence of 'assaulting the integrity of the corpse by whatever

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noted already above, pp. 298-305. See also Whitman's discussion of the specifically European quality of the protection of personal honour in 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. 329-334.

[124] Whitman J.Q., 2000, *ibid.*, p. 1285.

[125] Whitman J.Q., 2000, *ibid.*

[126] See Woodward K. (ed.), *supra* n. 90, p. 2, arguing that social class is the third essential component of identity (with sex and national belonging).

[127] This is not to suggest that race, ethnicity, nationality and religion may be assimilated, notably because the latter two statuses are non-permanent. Nevertheless, differences between these forms of belonging are not operable with respect to incitement to hatred which is uniformly unlawful if founded upon any of the four characteristics.

[128] For further discussion of the respect to be accorded to the dead, see Chapter 4 above, pp. 230-246.

means'.[129] Where an act constitutes both crimes, the penalty is doubled (Article 225-17-3).[130]

It is, however, Article 225-18 which demonstrates most obviously the extent to which respect for dignity, even that of the deceased, is reinforced in this area, providing that the offences set out in the preceding Article are aggravated when the corpse has been desecrated for reason of its belonging or not, in truth or supposedly, to a specific ethnicity, nation, race or religion.[131] The combination of these offences in terms of their promotion of respect for the dignity of racial and ethic, national and religious minorities is highly significant. As Renée Koering-Joulin accurately observes, '[i]n terms of human dignity the progress accomplished here is symbolically considerable.'[132] Even death does not detach the person from his or her roots and attachments, but conserves in tact the individual's identification and integration within a particular social group.[133] In this way, French law seeks to ensure respect for personal identity in its social and collective dimension. All persons – regardless of origin, attachment or belief and whether alive or dead - merit being treated in the best, most noble and dignified, manner possible.

UK law has no equivalent of these offences. Even if, in the case of the living, the third part of the Public Order Act 1986 protects the dignity of groups to a certain extent from attacks which are aimed at the incitement of hatred based upon race or

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[129] Article 225-17-1: *'Toute atteinte à l'intégrité du cadavre, par quelque moyen que ce soit, est punie d'un an d'emprisonnement et de 15 000 euros d'amende.'* Article 225-17-2: *'La violation ou la profanation, par quelque moyen que ce soit, de tombeaux, de sépultures ou de monuments édifiés à la mémoire des morts est punie d'un an d'emprisonnement et de 15 000 euros d'amende.'*

[130] Article 225-17-3: *'La peine est portée à deux ans d'emprisonnement et à 30 000 euros d'amende lorsque les infractions définies à l'alinéa précédent ont été accompagnées d'atteinte à l'intégrité du cadavre.'*

[131] Article 225-18: *'Lorsque les infractions définies à l'article précédent ont été commises à raison de l'appartenance ou de la non-appartenance, vraie ou supposée, des personnes décédées à une ethnie, une nation, une race ou une religion déterminée, les peines sont portées à trois ans d'emprisonnement et à 45 000 euros d'amende pour les infractions définies aux deux premiers alinéas de l'article 225-17 et à cinq ans d'emprisonnement et à 75 000 euros d'amende pour celle définie au dernier alinéa de cet article.'* In an effort to mark the severity of all crimes motivated by the victim's ethnicity, race, national origin or religion, Law no. 2003-88 of 3 February 2003 has inserted into the new Penal Code an Article 132-76 which states that such crimes will automatically receive a higher penalty. See Le Gunehec F., 'L'institution d'une circonstance aggravante de "racisme" – Loi no. 2003-88 du 3 février 2003' *JCP, Actualité*, 2003, 20, 252.

[132] *'En termes de la dignité humaine le progrès accompli est ici symboliquement considérable.'* Koering-Joulin R., *supra* n. 66, p. 73.

[133] *'[La mort] conserve intact [le statut de la personne] d'être intégré dans un groupe social déterminé.'* Koering-Joulin R., *ibid.*

ethnicity, its scope is very limited. In fact, it only covers the most serious cases of abuse leaving other behaviour and practices without legal redress.[134] It seems, therefore, that UK law could learn a lesson from its French counterpart with regard to the benefits of 'levelling up' in order to begin to tackle racial hatred in a more elevated and complete manner.

6.2.2 Non-fixed identities

The application of the principle of non-discrimination to acts which differentiate between people on the basis of their sex or race might be justified by the permanent and fixed quality of these aspects of identity which are inherent to the human person and greatly impact upon an individual's life experiences. Can the same thing be said about human characteristics which are not fixed and not permanent? Viewed from the perspective of assaults upon human dignity, it may be observed that the mutable aspects of personal identity are not necessarily less important than the immutable ones. To the contrary, the former may also constitute the basis or key element of identity and social belonging. Once more, two illustrative examples have been chosen to demonstrate the way in which such questions may be regarded for their impact upon the dignity of individuals who face discriminatory treatment based upon aspects of their identity which change or develop over the course of a human life-time. Thus, first under scrutiny will be differential treatment on the basis of a person's age and, secondly, that resulting from their state of health.

6.2.2.i Dignity and age

Individuals may, of course, be subjected to degrading treatment at any age. Nevertheless, there is a notable tendency for ill treatment to be experienced at the two extremities of life: in youth and old age. The vulnerability of persons belonging to these two social categories would suggest that they deserve particularly sensitive and

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[134] See Feldman D., 2000, *supra* n. 17, p. 74. Feldman argues that UK law in this regard is far from offering the standard of protection required by Article 20 of the International Covenant on Civil and Political Rights of 1966, with respect to which the UK has entered a reservation.

dignified consideration. This, however, is not, always provided by law. Adopting a longitudinal perspective on life, therefore, the following section examines each end of the age spectrum for the discriminatory treatment which may occur at these points in the life cycle.

Youth Youth, like old age, is not easily definable. Neither has definitive outer contours except in so far as these are provided by the facts of conception and death. Profiting from this flexibility and taking a wide perspective we will begin by revisiting the uncertain legal position of the human embryo to see how an application of the principle of non-discrimination plays out in its regard at the earliest stage in human development.

It will be recalled from Chapter 3 that the concern to respect dignity is particularly acute at the beginnings of life. In so far as a link can be made between dignity and non-discrimination at this point in time, it should be recalled too that one of the especially controversial features of both the Human Fertilisation and Embryology Act 1990 and the French Law no. 94-654 of 29 July 1994 is their characterisation of the status of embryos and the ends to which they may be employed. In both cases the creation of embryos outside the human body is possible according to strict conditions.[135] The embryos which are produced *in vitro* may, furthermore, be used for the purposes of medically assisted conception, for research purposes (including in the UK for therapeutic cloning)[136] and even ultimately destroyed.

Given that the principle of non-discrimination requires that no unjustifiable selection be made between individuals, however, it deserves to be asked how far this principle is applicable to embryos subjected to a process of selection for research purposes or destruction. It will be remembered that, while neither French nor UK law accords the embryo the legal status of human person, both acknowledge to differing degrees that the embryo and foetus during the course of their development may enjoy the legal

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[135] The conditions are stricter in France than in the UK, particularly as far as the use of embryos for research purposes is concerned. See Chapter 3 above, pp. 137-139.
[136] *Human Fertilisation and Embryology (Research Purposes) Regulations 2001*, Statutory Instrument, 2001, no. 188. Reproductive cloning is prohibited: section 1, Human Reproductive Cloning Act 2001. See above, pp. 141-142.

recognition of certain of their interests.[137] Despite the relatively stricter measures surrounding the use of embryos in France compared to the UK, Bertrand Mathieu has nevertheless questioned the extent to which pre-implanted embryos are protected at the highest constitutional level.[138] Concluding that they are not and that this results in a denial of the personhood and humanity of the embryo,[139] Mathieu is critical of the decision of the Constitutional Council in the *Bioethics* case for the contradictory way in which, on the one hand, it recognises the right to life from the moment it begins while, on the other, it deprives certain embryos of this right.[140] The issue of embryo selection is more sensitive still with regard to its eugenic implications as it is often due to the diagnosis of genetic diseases *in vitro* that the choice to use or destroy certain embryos is made.[141] From this apparently unjustifiable distinguishing process it might be concluded, as Mathieu argues, that 'it is highly dangerous to consider that certain embryos must be treated as if they have nothing to do with human dignity.'[142]

If due respect for the dignity of certain embryos is cast aside by both French and UK law, the situation is rather different once the child is born given the attribution to it of legal status and personality. It was observed in the previous chapter that, with regard to the dignity of children, their right to be free from inhuman and degrading treatment metered out in the form of corporal punishment at school is protected under Article 3 ECHR.[143] Welcome too in this regard are the findings of the European Court of Human Rights which have led to the elimination of such practices in both public and private schools.[144]

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[137] See Chapter 3 above, especially pp. 134-139.
[138] Mathieu B., 'La dignité de la personne humaine: quel droit? Quel titulaire?' *D* 1996, 33, 282-286, at p. 283.
[139] Mathieu B., *ibid.* See also Mathieu B., 'Bioéthique: un juge constitutionnel réserve face aux défis de la science' *RFDA*, 1994, 1019-1032.
[140] Decision no. 94-343-344 DC of 27 July 1994, *Bioethics*. Mathieu B., *ibid.*, p. 284.
[141] See Gillan L., 'Prenatal Diagnosis and Discrimination Against the Disabled' (1999) 25 *J Med Ethics* 163-171; Jackson E., 'Abortion, Autonomy and Prenatal Diagnosis' (2000) 4 *SLS* 467-494.
[142] *'[I]l est particulièrement dangereux de considérer que certains embryons doivent être traités comme s'ils ne participaient en rien à la dignité de la personne humaine.'* Mathieu B., 1996, *supra* n. 138, 1996, p. 284. A similar critique of the variable legal responses to the treatment of embryos, this time drawing a distinction between those which are *in vivo* and those *in vitro*, is advanced by Claire Neirinck, 'L'embryon humain: une catégorie juridique à dimension variable?' *D* chron, 2003, 13, 841-847.
[143] See Chapter 5, above pp. 257-258.
[144] *Campbell and Cosans v. United Kingdom* (1982) 4 EHRR 293; *Costello-Roberts v. United Kingdom* (1982) 19 EHRR 112. See also *A v. United Kingdom* (1999) 27 EHRR 611 with regard to corporal punishment inflicted in the private sphere.

In France, the principle of respect for human dignity has been clearly applied in schools and this would seem to contribute to the phenomenon of 'levelling up' identified in French law by James Whitman and discussed above.[145] Thus, the *Conseil d'Etat* has been called upon to intervene in cases involving pupils who sought to assert their right to wear Islamic headscarves at school.[146] It has been affirmed that the exercise of freedom of expression does not permit pupils to exhibit signs of belonging to a particular religion where these are ostentatious or aimed at the promotion of that religion and infringe the dignity of both pupils and other members of the educational establishment. This solution is likely to be confirmed by legislation in the near future following President Chirac's decision to implement the recommendations of the Stasi Commission on secularity delivered in December 2003.[147] In this light, the dignity of all those within the scholastic community is given primacy over the dignity of particular individuals in having their religious identity respected. The position would, therefore, seem to confirm the tendency in French law to privilege the collective rather than individual aspects of human dignity.

Old age Like youth, old age has no precise definition. Yet, as with childhood too, it is a period in which individuals may, for reasons of their vulnerability or dependency, experience diverse forms of degrading treatment. In order to stem such practices, Article II-25 of the European Union's Charter of Fundamental Rights provides that '[t]he Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.' The interpretation to be given to this Article, however, remains particularly obscure – what precisely is a 'life of dignity' for elderly persons? Given the fairly limited scope of European Union law, confined to free market, economic and some social issues, it is likely that what is envisaged is the non-discriminatory provision of financial guarantees in the area of pensions, tax and social advantages, which permit the elderly to continue to lead independent and meaningful lives. Despite the difficulties associated with the

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[145] Whitman J.Q., 2000, *supra* n. 123, p. 1285. See CE, 8 December 1982, *Ministre de l'Education c/ Mme Royer,* Rec. p. 632, concerning the application of regulations to schools in Paris which imposed reciprocal obligations of respect on the part of teachers pupils and parents.

[146] CE, 2 November 1992, *Kherouaa,* Rec. p. 389. See Dubourg-Lavroff S., 'L'expression des croyances religieuses à l'école en Grande-Bretagne et en France' in *Droits et libertés en Grande-Bretagne et en France* eds. Dubourg-Lavroff S. and Duprat J.-P., (Paris: L'Harmattan, 1999) 99-125. More recently, the wearing of a headscarf by a civil servant while carrying out public duties has been held to be a breach of professional obligations: CAA de Lyon, 27 November 2003, D IR, 2004, 32.

[147] Garay A. and Tawil E., 'Tumulte autour de la laïcité' *D* chron, 2004, 4, 225-229.

exercise of social and economic rights, in terms of the obligations they place upon the state to provide the necessary resources to enable enjoyment of such rights, the Union's stance is welcome for its symbolic recognition that a dignified life should be an entitlement at any age and that particular vigilance may be needed to ensure that the possibilities for its achievement are maximised with regard to certain sectors of society otherwise at risk of falling into a state of destitution.

Nevertheless, other (perhaps more important) questions remain regarding first generation, fundamental rights which call for reflection upon the relationship between dignity and age. These concern notably the right to life (and death) and the right not to be subjected to inhuman and degrading treatment. With regard to the former, it was observed in the discussion in Chapter 4 on dignity and death (particularly in the context of assistance to commit suicide) that the movement towards acceptance of forms of physician assisted suicide is gathering momentum.[148] Of course, assistance to commit suicide may be requested by a person affected by severe illness at any stage in their life. Nevertheless, it is important to view the practice through the lens of a person's age as the elderly are, more than most other sectors of society, prone (or made) to feel useless, of no value and a burden upon family and friends.[149] In such circumstances, they may seek before time to rid their loved ones of this burden. The application of dignity in this area was identified above as being particularly tricky. It is not simply the indignity inherent in discriminatory attitudes towards the elderly which causes a lack of respect for dignity, but also their loss of freedom, autonomy and ultimately life. In this regard both French and UK law are particularly demonstrative of their duties to safeguard dignity and life through the criminalisation of assisted suicide. The movement for law reform, however, will certainly continue to demand that the discriminatory impact of the law as it currently stands (discussed in the case of Diane Pretty only for its capacity to differentiate between the disabled and able-bodied) be further explored for all its discriminatory implications.[150]

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[148] See above, pp. 206-219.

[149] La Marne P., *Ethiques de la fin de vie: acharnement thérapeutique, euthanasie, soins palliatifs* (Paris: Ellipses, 1999) p. 29.

[150] It is not only with regard to age discrimination that the application of Article 14 ECHR to this area might be further considered. The possibility was raised in Chapter 4 that the current prohibition on assisted suicide also raises an issue of sex discrimination. See above, p. 217.

A second dimension to the question of discriminatory treatment against the elderly which also raises questions of freedom and autonomy has arisen with regard to the rights of older prisoners. An interesting French example is provided by the case of Maurice Papon, former civil servant under the Vichy regime and sentenced in 1998 to 10 years imprisonment for complicity in crimes against humanity. Bringing a complaint before the European Court of Human Rights against the French government for his alleged inhuman and degrading treatment, Papon was aged 90 when the Court finally delivered its decision on 7 June 2001.[151] The allegation was rejected on the basis that in no member states of the Council of Europe was age considered to be an obstacle to detention. Moreover, no provision of the ECHR prohibited detention beyond a certain age. Adding that 'in certain conditions' the detention of an elderly person might pose a problem under Article 3 ECHR, the Court maintained that this was not the case for Papon. In fact, it was noted that even if he had health problems which restricted his freedom of movement, he benefited from regular check-ups and medical care and that his situation was not sufficiently serious to be brought within the sphere of application of Article 3.[152]

With regard to the dignity of the elderly, therefore, it appears that detention does not constitute in itself a form of degrading treatment. To do so it would have to be combined with aggravating factors. This would seem to be perfectly in accordance with the European Court's requirement for a particular degree of severity in treatment for it to fall within Article 3 ECHR.[153] The solution would seem to be appropriate also in order to avoid a further banalisation of the notion of human dignity in law. That said, the question posed in the *Papon* case was not related purely to the age of the applicant, but also to his state of health which, it will be seen in the subsequent section, may be a further source of discriminatory treatment.

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[151] *Papon v. France* [2001] 12 HRCD 447; see *Le Monde*, 10-11 June 2001.

[152] In a further application to the European Court, this time based upon an alleged violation of Article 6 ECHR, Papon enjoyed more success, the Court accepting that there had been an infringement of his right to a fair hearing as a result of his being denied access to the *Cour de cassation* in order to challenge his conviction by the *Cour d'Assises*: *Papon v. France*, App. no. 54210/00, decision on admissibility of 15 November 2001; judgment of 25 July 2002, D IR 2002, 31, 2451. Subsequently, the Court of Appeal of Paris pronounced a suspension of Mr Papon's sentence due to the gravity of his state of ill-health: CA de Paris, 18 September 2002, D jur. 2893, note by M. Herzog-Evans. This decision was confirmed by the *Cour de cassation*: Cass. crim., 12 February 2003, D IR 2003, 865.

[153] See, for example, the discussion of Article 3 and the characterisation of treatment as inhuman and degrading in the context of detention, notably in the case of *Ireland v. United Kingdom* (1979) 2 EHRR 25: Chapter 5 above, p. 250.

6.2.2.ii Dignity and health

The image of illness in society is generally negative and this perspective can generate comparatively poor treatment for the sick *vis-à-vis* those who enjoy good health. A concern to stem such discriminatory attitudes was evident in the decision of the *Cour d'appel de Paris* concerning the Benetton advertising campaign (showing nude parts of the human body stamped with the initials HIV) which was sanctioned for its lack of respect for the dignity of AIDS victims.[154] It is clear that the court in this case perceived the assault upon the mental integrity of those suffering from the disease to result from their exclusion from the human community through the objectification of their naked flesh. The twin themes of inclusion and exclusion are, thus, important signifiers in the requirement to respect the dignity of the sick who, as in the case of elderly and young persons, may feel highly vulnerable and dependent upon family and social assistance. The question is particularly sensitive in two areas. The first which will be considered is that of the treatment of the disabled who may suffer discriminatory and degrading treatment in a number of respects. The second area of contention is more general, being the position of sick individuals who are refused certain treatments for a variety of reasons. Such refusals, it will be seen, may result in 'tragic choices' being required, ultimately involving life and death decisions.

The disabled Disability may be the source of discriminatory practices which have the effect of violating the dignity of the victim. It was noted earlier in this chapter that processes of selection between embryos before they are implanted will often result in the rejection of those which are in some way abnormal. Furthermore, both French and UK laws admit the practice of therapeutic abortion in cases of foetal handicap[155] which has also led to concern that a form of discrimination is being operated founded upon disability.[156]

Once more, there are two facets of dignity (and discrimination) apparent. First of all, there is an apparently discriminatory act against the foetus, that is an *individual* assault, evidenced through the practice of selection. Certain embryos and foetuses

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[154] CA de Paris, 28 May 1996, D jur. 1996, 617, note by B. Edelman.
[155] The issue of therapeutic abortion is discussed in Chapter 3 above, pp. 181, 185 and 191.
[156] Gillan L., *supra* n. 141.

will be rejected quite simply because they are unhealthy. Thus, while both French and UK legislation imposes conditions with regard to the gravity of handicap in order for therapeutic abortion to be lawful,[157] this does not efface the assault upon foetal dignity and integrity if all foetuses are presumed to have an equal interest in life. In other words, the value of human life should not depend upon the severity or not of an individual's disability. Secondly, therapeutic abortions may be viewed for the *collective* assault they imply upon human dignity, this time with regard to all those persons who are born with a form of disability. The discrimination here results from a lowering of the disabled in the eyes of society which is the symbolic impact of the admission of therapeutic abortion. The practical effect is even more significant: a reduction in the number of disabled people in society and thus the impoverishment of their community.

These potential consequences of therapeutic abortion were vividly brought to the fore in the French *Perruche* case.[158] The admission by the *Cour de cassation* of the harm caused to a disabled child from the fact of his birth has to be viewed for its capacity to call into question not only the dignity of the claimant but also that of all disabled persons, the value of whose lives was put under the spotlight by the decision. Moreover, the dignity of parents in such cases could be compromised, notably that of the mother who risks being subjected to pressure to have an abortion in case of foetal handicap in order that doctors avoid liability for damage to the resulting child.[159] The consequence is a lack of respect for the woman whose autonomous decision-making capacity is reduced in this most personal area of reproductive choice.[160]

Discrimination against the disabled does not only operate at the point of conception and pregnancy but may well continue for the rest of their lives. Two clear examples of this have been identified in the previous discussions of French and UK case law. First, in the dwarf-throwing cases, the handicap of the dwarf lies at the very heart of

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[157] Section 1(1)(d), Abortion Act 1967; Article L. 2213-1-3 of the Code on Public Health.
[158] Cass. ass. plén., 17 November 2000; *Epx X c/ Mutuelle d'assurance du corps sanitaire français et a. (affaire Perruche).* See Chapter 3 above, pp. 188-194.
[159] Jackson E, *supra* n. 141. For a French perspective see 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.
[160] Jackson E. *ibid.*, pp. 474-478.

his degrading treatment.[161] According to the conclusions of the *commissaire du gouvernement*, Mr. Frydman, the spectacle generated an objectification of the dwarf who was treated as a thing, a projectile, which was enough to compromise not only his personal dignity but that of all dwarves too.

A second example is the discriminatory practice of compulsory sterilisation of young women with learning difficulties.[162] In this case, it should be emphasised that the discrimination stems not only from the disability but also from the sex of the individual, the practices being rarely carried out on men with disabilities who, unlike women, are not generally viewed as being at risk of sexual abuse.[163] Here the objectification of the disabled body operates in its instrumentalisation for sexual purposes which may bring about degrading and humiliating treatment. While, on the one hand, the practice of compulsory sterilisation might be seen as an attempt to ensure respect for the dignity of those women concerned as a measure to protect them from unwanted sexual advances, on the other hand, the solution would seem to be disproportionate to the problem, having the effect of bringing about a serious assault upon dignity through the deprivation of a woman's reproductive capacity.

The unfortunate: 'tragic choices' and the allocation of resources Discriminatory practices based upon health may be noted too outside the confines of physical and mental disabilities. They persist particularly with regard to the more general problem of the allocation of resources to care for the sick. Inevitably, the question of the financial costs of medical treatment carries with it an implication that some people will be treated while others may not; once more permitting (indeed requiring) a selection to be made between patients with competing needs. Frequently, circumstances will demand the making of a 'tragic choice', that is a choice rendered necessary by the lack of public resources to fund health care, and with regard to which a conflict exists between the competing implicit values taken into account in the

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[161] CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge*; *Ville d'Aix-en-Provence*, Rec. p. 372, conclusions by P. Frydman.
[162] See the discussion in the preceding chapter, pp. 277-279.
[163] Keywood K., 'Sterilising the Woman with Learning Difficulties – In her Best Interests?' in *Law and Body Politics: Regulating the Female Body* eds. Bridgeman J. and Millns S., (Aldershot: Dartmouth, 1995) 125-150.

process of their allocation.[164] The tragic solution in such cases often lies with the option being taken to allow death rather than to promote life.

In considering the relationship between dignity and death in Chapter 4 it was observed that the question of how best to allocate financial resources can have an effect upon the fate of a patient, even if the judiciary and the medical profession do not say so explicitly. This was, for example, clearly a consideration in the decision to allow life-sustaining treatment to be withdrawn from Tony Bland.[165] Despite the appeal to considerations of human dignity in this case, the question of whether to keep a patient alive in a persistent vegetative state has important financial implications; it hardly needs to be spelled out that the cost of keeping Tony Bland alive greatly exceeded that of allowing him to die.[166] This 'tragic choice' was, nevertheless, justified legally by reference to the patient's state of health, deemed so undignified that the House of Lords found his best interests lay in death rather than life.

The question of finite financial resources has been posed too in the UK in the poignant case of B, a young girl suffering from leukaemia.[167] While at first instance the decision of Cambridge Health Authority refusing medical treatment (costing around £70,000) on the grounds of its expense and the slim chance that it would benefit the girl, was annulled, this was overturned on appeal. Although the judge at first instance was of the view that the Health Authority had not taken seriously the right of the patient to life, the Court of Appeal reasoned that the Authority had not acted unreasonably in the light of all the demands for medical treatment which it received.

The question merits reconsideration, however, in the light of the Human Rights Act 1998 and the guarantee provided by Article 2 ECHR which, especially since its interpretation in the case of Diane Pretty, clearly requires that life be highly prioritised over death. The need for review may be further strengthened by reference to Article 14 ECHR and the principle of non-discrimination (understood here as applying between the healthy and the sick). Above all, as David Feldman in his commentary

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[164] Morgan D., *Issues in Medical Law and Ethics* (London: Cavendish Publishing, 2001), p. 39.
[165] *Airedale NHS Trust v. Bland* [1993] 1 AC 789.
[166] Morgan D., *supra* n. 163, p. 220.

on the *B* case notes, respect for the dignity of patients would seems to imply a more global consideration of their whole existence than that displayed in *B*.[168] This means taking account of the patient's quality as a human being and making a broader assessment of the care needed, rather than simply focusing on one particular facet of her condition. In this way, respect for the dignity of the sick requires at once both respect for their life and for the provision of the means necessary to ensure a certain quality of life.

If the link between human dignity and resources is important in the 'tragic choices' which may ultimately result in death, this is equally so with regard to the question of creating life.[169] More precisely, the relationship between resources for health care and human dignity has been brought to light in the area of medically assisted conception. In Chapter 3 it was noted that the legal conditions governing access to new reproductive technologies may result in discriminatory treatment *vis-à-vis* certain women.[170] Yet, it is often in the name of a scarcity of resources that health authorities justify decisions to refuse treatment although this means that the provision of services can vary widely from one health authority to another creating evident discrimination based simply upon postcode.[171] This suggests that, as in the case of *B* above, the question of a possible violation of fundamental rights, notably the right to respect to private life and the principle of non-discrimination, needs to be seriously reviewed. It is only with such reconsideration that the respect for dignity inherent in giving all individuals meaningful (and not tragic), life-enhancing (and not debilitating) choices can be fully realised.

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[167] *R v. Cambridge Health Authority, ex parte B* [1995] 1 WLR 806.
[168] Feldman D., 2000, *supra* n. 17, p. 71.
[169] It has been noted above how the decision of the *Conseil constituionnel* on the constitutionality of the bioethics legislation established a direct link between beginnings of life issues and respect for dignity: Decision no. 94-343-344 DC of 27 July 1994, *Bioethics.*
[170] See Chapter 3 above, pp. 149-157.
[171] *R v. Sheffield Health Authority, ex parte Seale* (1994) 25 BMLR 1. In response to concerns about uneven rationing of assisted conception services, the National Institute for Clinical Excellence has recently put forward guidelines suggesting that all couples who have unsuccessfully tried to conceive for two years should have a right to three cycles of fertility treatment on the National Health Service. The Institute was not asked to consider the cost but (conservative) estimates suggest that if only 20,000 more couples are affected this would require extra funding of £100 million. See Boseley S., 'Huge NHS Bill for Infertility Rights', *The Guardian,* 26 August 2003.

CONCLUSION

The aim of the thesis has been to compare responses by two national legal systems, the French and UK, to the profound question of how to ensure respect for human dignity. Their approaches, clearly not uniform, nevertheless have certain common points. Many instances of difference and resemblance, divergence and convergence have been discussed, in addition to which an attempt has been made to illustrate the extent to which both systems have been influenced by developments at the European level. To summarise the findings of the thesis, it is suggested that the process of juridification of human dignity may be traced according to four distinct phases: (i) a common point of departure, (ii) from which different routes have been pursued, (iii) which are beginning to converge, (iv) upon a still unknown destination.

A common point of departure The point of departure for the process of juridification of human dignity in France and the UK is similar. In fact, it does not concern only these two countries as it results from the global phenomenon of scientific and technological progress, notably in the sphere of the life sciences. This external shock has provided the catalyst for legal consideration of human dignity since the risk of its violation appears to augment as science and technology forge ahead with new discoveries and ways to intervene in the processes of human life. Facing a challenge of such magnitude, the common response in France and the UK has been to establish new forms of regulation and protection for individuals. These have often been formulated within the context of consideration for fundamental rights, something which is not at all surprising given the matters affected by assaults upon dignity, particularly those touching upon life and death. Thus, one of the legal consequences of scientific and technological developments has been a heightened regard for fundamental rights and dignity in law, both being placed at the very heart of national and European legal systems.

While, on the one hand, the recent legal preoccupation with dignity is welcome in demonstrating a universal concern to ensure respect for this inviolable element of human nature, on the other, it presents a number of problems which are common to the two countries. First of all, there is the problem of dignity violations themselves:

their recognition in law is rendered necessary precisely because dignity is presently, or in the future may be, compromised. In this regard it has been observed in the thesis that legislative and judicial interventions to protect human dignity consistently materialise at points in time when dignity is most at risk of assault. That these are presenting themselves with increasing frequency suggests that it is not only at the two extremities of human life, but for its entire duration, that a multiplicity of opportunities exist for the unconcerned or uncaring to infringe human integrity.

A further common difficulty is of a more technical legal nature. France, like the UK has had to respond to the challenges of systematising and interpreting the relatively new concept of human dignity alongside other legal concepts, such as autonomy, consent, freedom and non-discrimination, which are more highly developed and historically more firmly embedded in the two legal systems. Thus, the complexity of inserting dignity into law has necessitated considerable reflection upon its significance as a constitutional 'principle' (in France) and basic 'value' (in the UK), both constructions permitting dignity to be reconciled with established national legal discourses.

A paradoxical divergence Moving on from this common departure point, it has been further noted that different routes are pursued in France and the UK towards the consolidation of human dignity in law. This has a number of elements to it but above all the process is of interest in comparative terms as it seems to contradict the legal traditions of both countries. Hence, the traditional distinction between the common law and continental legal systems, with their respective emphases on (unwritten) case law and (written) legislation would suggest that national approaches to dignity should take the form of jurisprudential development in the UK and the introduction of new legislation in France. This was found not to be the case, demonstrating surprising degrees of elasticity in the legal systems which, while suggesting a degree of welcome flexibility, may be dangerous should it lead to a lack of consistency and transparency.

Thus, the key moment in the juridification of dignity in France was judicially inspired when the Constitutional Council 'discovered' the principle of respect for human dignity in its creative reading of the preamble to the Constitution of 1946. Following this example, the principle has been employed since by all jurisdictions, civil,

criminal and administrative, and in a hugely wide-ranging set of circumstances. This demonstrates *par excellence* the phenomenon of 'spill over', if not contagion, of human dignity in French law as it has oozed from one legal domain and one factual scenario to another; a further danger, of course, being that human dignity risks becoming banalised through excessive and trivial usage.

In the UK, on the contrary, the judiciary have been much more reticent, even silent, with regard to the development of the concept of human dignity in law. It is, in fact, through legislation - the Human Rights Act 1998 - that it may yet receive its most direct application within the national system through the requirement that account be taken of ECHR guarantees such as the prohibition on degrading treatment and through the interpretation of the Convention to ensure respect for dignity as this has been laid down by the Strasbourg institutions. In this respect, a number of aspects of UK law were highlighted as being problematic in terms of their (in)compatibility with Convention guarantees, notably in the areas of abortion, bioethics, and assisted suicide.

Where the UK judiciary has (indirectly and implicitly) juridified dignity, it has leaned more towards its opposite, that is the characterisation of certain situations as *undignified.* This was noted in the area of medical interventions and, particularly, in order to justify decisions to withdraw treatment from patients. It is, thus, through a consideration of death and dying that the UK has discovered dignity, while in France the concept has been most extensively developed in the context of beginnings of life issues. Moreover, the UK preference for developing the concept of *indignity* has provided the opportunity to pay closer attention to the unique situation of the individual (whose existence is characterised as degrading) than to the more collective and universal interpretation of dignity as a common feature of all humanity which is preferred in France. This suggests that in the former country it is *personal* dignity which is targeted for protection as opposed to *human* dignity which is the latter's objective.

From this paradoxical diversity of approaches, there is nevertheless one common element: *uncertainty.* In both countries, legal responses to the question of how best to ensure respect for dignity demonstrate the imprecision and instability of the concept

which, it is suggested, is more worrying from a French than a UK legal perspective. France, having developed the principle through jurisprudence, has sought to tame the beast according to its traditions of systematising law in codified, legislative form, thus showing concern that it should find its proper place within the hierarchy of constitutional norms and that its content and application should be rendered more precise. The UK, on the other hand, rather more at ease with the idea of a progressive development of law through the 'seamless web' of jurisprudence, appears comfortable with an unsystematised approach to the application of (in)dignity, using the concept when it is pertinent and useful, but without troubling to place it within a more organised and comprehensive legal framework.

A trace of convergence Having noted the divergent components of French and UK efforts to insert dignity into law, consideration of the fuller picture requires acknowledgment of the beginnings of a certain *rapprochement* between the two systems. Patterns of convergence are, above all, linked to the impact of European law upon the national systems. Hence, in the course of the thesis, many instances of the instrumentalisation of dignity by both the European Union and the European Court of Human Rights have been identified and their impact upon the national systems noted. This trend is only the beginning of what will be an increasing call upon human dignity in European constitutional discourse as its status as the crowing glory of the Union's Charter of Fundamental Rights is given full recognition and meaning.

Nevertheless, this process too is not without risk. First of all, it means that conflicts of interpretation will increase, particularly in the area of fundamental rights with a three-way tussle between the European Union, European Court of Human Rights and national systems apparently set to intensify as each seeks to establish its own (sovereign) interpretation of basic concepts such as the right to life, to private life and to equality. Furthermore, with regard to fundamental rights themselves, conflicts are inherent in their construction, with rights claims on the part of one individual continually coming up against those made by another. Called upon to decide the balance between competing rights claims, the courts of each legal system will be required to pay close attention to developments in the others if a coherent pan-European system of human rights protection is to be established.

In short, the legal framework of human dignity is a complex one which comprises a plurality of national and European, legislative and judicial perspectives. The impact, however, of European law cannot be denied and the common process of mainstreaming human rights in all the legal systems discussed in the thesis at both national and supra-national levels suggests that, while the future interpretation of human dignity in Europe presents many challenges, it is a universal concern and one which is taken most seriously by all concerned. That interpretations of dignity conflict is inevitable. That all its facets should be considered is, however, vital.

An unknown destination Finally, the question remains as to where the common quest to uphold respect for human dignity leads. As already intimated, a definitive response is quite impossible. It seems appropriate, however, to come full circle and return to the initial problem posed at the beginning of the thesis: how can respect for human dignity best be ensured? Of course, the role of law in this process is crucial. To that extent, constant reflection upon the capacity of existing norms to deal with the new requirements of the technologies of life and death is required in order to ensure that legal responses are appropriate, progressive, informed and sensitive to the rights and interests of the individuals concerned. The call to law, of course, will create problems in its own right: those of interpretation, legal authority, and the resolution of competing rights claims have already been noted. However, these have to be faced, assessed and dealt with accordingly, a process which may be assisted by academic, political, judicial and legislative dialogues at both intra- and international levels. Inevitably though, in what is an area of rapid and sometimes unsettling change involving core matters of life and death, there is no easy solution - choices are inevitably tragic and cases hard.

One certitude is that science and technology, and thus legal reforms, do not stop here. If this means that the future of the legal construction of human dignity is uncertain then it implies that human destiny is too. The important thing is that the one corresponds with the other and, while this provides a challenge, it also presents the prospect of a very exciting future. The dynamism of the concept of human dignity has been demonstrated many times in the thesis, sometimes being viewed critically for its plasticity and inherent malleability. Yet, if conflicts over its meaning, and its personal and material scope persist, this is surely quite rightly so. However they are

ultimately resolved (and this will depend greatly upon perceptions of dignity at particular moments in time, space and circumstance) the key challenge for national and supra-national lawmakers alike is to create a climate in which the dignity of *all* human beings may flourish.

Table 2

The principle of respect for human dignity: an Anglo-French comparison

Summary of conclusions

	France	**United Kingdom**
Meaning of the 'principle'	Emphasis on constitutional principles	Lack of general principles but emphasis on values
of 'respect'	Respect = safeguard = paternalism	Respect = individualism
for 'human'	Traditional legal distinction between persons and things lacks clarity with regard to embryo and foetus	Legal personality conferred at moment of birth
'dignity'	Judeo-Christian and philosophical origins (self-worth and the regard of others)	Judeo-Christian and philosophical origins (self-worth and the regard of others)
Juridification of dignity	Written Constitution and creative role of *Conseil constitutionnel* Principle of constitutional value followed by case development	Unwritten Constitution, creative role of the judiciary, but also HRA Case law predominant - but increasing ECHR / HRA implications
Dignity and life	Important dignity concerns surrounding the preservation of life from its beginnings	Less emphasis on dignity concerns especially during first 14 days following conception
Dignity and death	Dignity respected again in terms of the preservation of life	Important (in)dignity concerns permitting the ending of life
Dignity and the body	State intervention to enhance a more collective form of dignity	Less state intervention with greater emphasis on individual autonomy
Dignity and the mind	High degree of respect for private life, reputation and image, together with a strong application of the principle of non-discrimination	Less protection of reputation and private life and piece-meal approach to discrimination issues

Annex 1

Questionnaire destiné au personnel du Conseil constitutionnel -
recherches sur le raisonnement des juges français

Questionnaire distributed to members of the Constitutional Council –
for the purposes of research into the reasoning of the French judiciary

I Généralités / *General issues*

Date de naissance / *Date of birth*:

Sexe / *Sex*:

Titre / fonction / *Title / function*:

Nombre d'années de service au Conseil constitutionnel / *Number of years spent working at the Constitutional Council* :

Profession antérieure / formation / *Former profession / Education*:

II Votre emploi / Your work

1. Expliquez votre rôle au Conseil constitutionnel.
Please explain your role in the Constitutional Council

III Sur le Conseil constitutionnel / *On the Constitutional Council*

1. A votre avis, le Conseil constitutionnel est-il un organe juridique ou politique?
In your view, is the Constitutional Council a legal or political body?

2. A votre avis, quel est son rôle principal?
In your view, what is its principal role?

3. Quelles sont ses fonctions incidentes?
What are its ancillary functions?

4. Dans quelle mesure l'exécution des fonctions du Conseil constitutionnel est-elle conforme au texte de la Consitution?
To what extent does the execution of the functions of the Constitutional Council conform to the letter of the Constitution?

5. Quelle est la perception du grand public de cette institution?
How would you describe the public's perception of this institution?

6. L'institution est-elle surchargée d'affaires?
Is the institution overburdened by cases?

7. A votre avis, dans quelle mesure le Conseil assure-t-il une protection efficace des droits de l'homme?
In your view, to what extent does the Council ensure effective protection of human rights?

8. Faut-il forcément une Cour constitutionnelle (ou juriddiction équivalente) pour assurer le respect de l'Etat de droit?
Is a Constitutional Court (or equivalent judicial body) necessary in order to ensure respect for the rule of law?

9. Quel est le rapport entre le Conseil constitutionnel et les autres juridictions, notamment:
- Le Conseil d'Etat,
- La Cour de cassation?

What is the relationship between the Constitutional Council and the other courts, particularly:
- the Conseil d'Etat,
- the Cour de cassation ?

<u>Réformes / *Reforms*?</u>

10. La saisine devrait-elle être ouverte:
- aux particuliers?
- au Conseil constitutionnel lui-même?
- et pourquoi?

Should requests for a ruling be opened to:
- individuals?
- the Constitutional Council itself?
- and why?

11. Devrait-on permettre le contrôle de constitutionnalité de la loi après sa promulgation?
Should constitutional review of legislation be permitted after its promulgation?

12. Devrait-on réformer le système de nomination des membres du Conseil constitutionnel?
Should the system for nomination of members of the Constitutional Council be reformed?

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