UNIVERSITY OF LATVIA

European Master's Degree in Human Rights and Democratisation
Academic Year 2014/2015

DIGNITY AND HUMAN RIGHTS

The French and European legal approaches under consideration

Author: Lucie Jacques
Supervisor: Professor Artūrs Kučs

'La dignité de la personne humaine, du commencement de sa vie à son achèvement, est la clef de voûte du droit. La dignité de la personne n'est pas un droit de l'homme, elle est l'assise du concept de "Droit de l'homme"'.

Bernard Beignier, *Un droit à mourir ? L'euthanasie*, 2012.

ABSTRACT

In our societies, in which persons are called upon to live together, but where the individual interest to develop oneself in accordance with personal desires and feelings is to be taken into consideration, the concept of dignity is of fundamental importance. Able to be seen as the intrinsic value of the individual due to his belonging to humanity, and whereby he deserves respect for his human quality, but also as the individual's personal feelings and self-esteem, supposedly free to act according to his wishes, dignity would provide a basis for human rights requests.

In this context, the thesis aims at analysing and determining how and to what extent dignity plays a role in the realm of human rights.

Throughout a research based on the French and European - the Council of Europe – legal systems, the thesis attempts to analyse how dignity is used to protect human equality on the basis of a right to be respected as a human being. Then, on the same methodology, it tries to establish that dignity can provide a support for individual freedom in order to reach self-fulfilment. Finally, the thesis seeks to demonstrate that dignity should be able to justify solidarity, necessary in the frame of the individuals' 'quality of life'.

To Marie-Louise et Mauricette, my loves.

'What matters is not your thesis in itself but the path it takes you to explore. Even the highest mountain can be climbed. You have to take a step at a time, as mountaineers do. Climbing everyday a little bit more as you gradually assert yourself during this inward travel'. Thanks my Cathy.

Dad, Mum, thanks to you I have become the person I am today. Since my earliest childhood, you have supported me, trusted in me and you brought me beyond what can be expected from your parental duties. Your love has always been a source of strength and courage, helping me in every decision I had to take, especially the one that led me to Venice. My life would not have the same meaning or any meaning at all without you. I will eternally be grateful for what you have done and are still doing for me.

Mariette, Bastien, Olivier, Camille, your unconditional trust has supported me over the past year and enabled me to clear the doubts and fears I experienced. Thank you for being here and to love me as I actually am.

Laetitia, Maurane, the word 'friendship' is fully realised when I think that for fifteen years, a special love binds us. In your strength and affection, I could find the energy to write this thesis even being so far from one another.

Chris Glow, your presence, your zest for life and you comfort have been my driving force for those past five months in Riga. 'All of these things would be nothing without you'.

Professor Artūrs Kučs, your support, your supervision and advice throughout the second semester at the University of Latvia have been precious to me.

Professors Claire Vial, Katarzyna Blay-Grabarczyk, Christophe Maubernard and Frédéric Sudre, your trust and support during my academic journey and beyond are for me the proof that being a Teacher demonstrates much more than the actual duty of teaching.

I thank my family and friends from the bottom of my heart for their support for so many years now. Finally, I pay a special attention to my classmates from E.MA: I have now realised that 'if I had to go over my entire life, I would say that it has been made of encounters and people who reached for me (...), and that those encounters do forge a special destiny.'

TABLE OF ABBREVIATIONS

ACA	Administrative Court of Appeal
CA	Court of Appeal
CC	Constitutional Council
CCNE	Comité Consultatif National d'Ethique pour les sciences de la vie et de la santé
CE	Conseil d'Etat
DRMC	Declaration of the Rights of Man and of the Citizen
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
PHC	Public Health Code

TABLE OF CONTENTS

INTRODUCTION

'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'[1].

For several years now, it is undeniable that dignity has entered positive law, notably because 'interpretive and adjudicative bodies employ the concept regularly and doctrinal commentary and scholarly literature invoke and advance its use'[2]. Beside this jurisdictional and doctrinal use of dignity, attention must be drawn to law itself given that, since 1945, 'the concept of human "dignity" has been enshrined in various domestic and international laws'[3]. The very first occurrence to the word 'dignity' in human rights at the international level can be found in the preamble of the United Nations Charter adopted in 1945 wording as follows: 'We the peoples of the United Nations determined to reaffirm faith in fundamental rights, in the dignity and worth of the human person, (…)'. After that, 'from 1948 to the present, the formal instruments of international human rights make consistent reference to dignity'[4], as well as several domestic constitutional texts. Those instruments having been adopted at a specific time period, namely after the Second World War, it is important to understand that 'dignity play(s) a vital role in the framing of the Universal Declaration'[5] and further, other legal texts, because of its 'capacity to evoke an ideal (…) which clearly rejects the mid-twentieth century totalitarian ideologies that in both theory and practice massively denied the equal moral worth of all human beings'[6]. Thus, and referring to the preamble to the French Constitution of 1946 in its first sentence[7], the reference to dignity in the human rights discourse is to be understood as the will of the States to reaffirm and

[1] The Universal Declaration of Human Rights, Article 1.
[2] Carozza, 2013, p. 346.
[3] Chen, 2014.
[4] Cfr. supra footnote 2, p. 346.
[5] Ibidem, p. 348.
[6] Ibidem.
[7] 'In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights'.

protect the inherent value of all human persons as being part of humanity, without any distinction of any kind. However, as both the legal literature and the judicature seize the human dignity in their comments and analyses, the word inevitably becomes a real concept which may give rise to various interpretations and meanings.

The proliferation of references to the word has influenced both its content and its consistency. All around the world, many philosophical and legal studies have attempted to define dignity, trying to establish a common and unique understanding of the word. It follows from these studies that there seems to be three definitions of dignity, giving rise to a concept composed of three legal notions[8]. Beside that diversity of meanings, the use of dignity in the legal area – whether by legislators, judges or individuals – reveals that the concept does not have a single legal value but rather, a plurality of values going from a principle, to a core value or a human right as such.

1. The concept of dignity in law

Relying on a communication made by Xavier Bioy in 2008[9], the presentation of the content of dignity as a concept will be divided in three parts: dignitas, DIGNITY and Dignity. He explains that finally, dignity may be understood as a concept of 'hierarchy of values'[10]: a value attached to an office (as civil servant for example), and thus placing the individual belonging to this corporation in a more valuable state than the others, or a value directly attached to the person. These conceptions of dignity will have important repercussions especially as regards their effects on individuals, when legislature and judges use them.

It must be pointed out that most of the time, both in the legal literature and in case-law, two of the three notions are used and subjected to debate: the two last ones. Dignity understood as 'dignitas' is not controversial and therefore, while the notion will be explained in this part, it will not be addressed later in the thesis.

[8] Bioy, 2010, p. 16.
[9] Ibidem, pp. 13-51.
[10] Ibidem, p. 24.

a. Dignitas

Xavier Bioy describes dignitas as the 'dignity of public and corporate functions'[11]. In this frame, the person who belongs to the corporation or public service is considered as worthy because responsibilities are given to her and due to those eminent functions, she deserves a special status, different from the rest of society. He notes that if this notion of dignity was used in ancient times, it remains relevant and present in law today[12]. In respect of this dignitas, it must be pointed out that although deserving respect as a member of the public service for example, the person is to act in accordance with the responsibilities. It implies a duty to respect the honour attached to the function, and there is a possibility to sanction a dishonourable behaviour.

b. DIGNITY

Dignity can be seen as 'the value attached to humanity' and more specifically, to every person belonging to humanity: the human being. Xavier Bioy describes it as something 'unavailable which links the individual to the collective, namely humanity'[13]. This wording is commonly recognised as 'human dignity', referring to the principle of equality of all human persons as part of humanity and therefore deserving respect. Bernard Edelman explains that actually, when talking about dignity, the emphasis must be made on the human more than on the man[14] – understood as the individual. Therefore, it is much more about humanity, and dignity refers to the inherent quality of the human being. It can be observed that this understanding of dignity is the one enshrined in the domestic and international instruments for the protection of human rights after the Second World War.

This DIGNITY has given rise to the 'objective aspect' of dignity, often used in the legal literature and interpreted as such by judges. This notion has consequences for the individual, mainly because this DIGNITY would imply a duty on him: as dignity belongs to the individual as a part of humanity, he has to respect this common inherent

[11] Ibidem, p. 16.
[12] Ibidem, p. 26.
[13] Ibidem, p. 31.
[14] Edelman, 1997, p.185 et seq.

quality. This obligation requires respect both for other human beings and for himself, refraining from performing acts that may undermine their/his inherent and essential value. The person is the 'custodian of the human dignity' and therefore, this part of dignity is unavailable. The duty would be so important that the State would have the power to prevent an individual from acting against their/his own dignity – actually, the dignity of all human beings – as well as to punish him when the act has been committed. The problem arises when the obligation would weigh on the individual to respect his own dignity: the duty often appears as a limit to personal freedom insofar as it might aim to prevent him from acting according to his will[15].

c. Dignity

In this meaning, dignity can be seen as 'the value attached to the person', that is to say, the individual living freely in society. This wording is commonly named 'the dignity of the human person'[16] or 'personal dignity' and has given rise to the 'subjective aspect' of dignity. The French National Ethics Advisory Committee (CCNE) defines the dignity of the human person as the perception that the individual has of himself, according to his values, desires, and to the relationships with those around him (his family, friends)[17]. Thus, if the DIGNITY embodies the human quality in every individual, the Dignity may be considered as the personal expression of this quality: the individual is to be able to express and act in accordance with his will in order to be himself in society. In this context, dignity can be characterised in terms of respect: the individual is in perpetual search of self-respect and respect from others. He has the right to feel worthy in a world where human beings interact with each other.

As it will be seen in the study, it is possible to refer to the principle of liberty or freedom. Indeed, personal dignity seems to imply a freedom for the individual to act in accordance with his will in order to achieve personal development and self-fulfilment. Some scholars and authors did it, and numerous debate and controversies arose.

[15] Dreyer, 2008, p. 2730 et seq.; CE, *Commune de Morsang-sur*-Orge, no. 136727, 1995.
[16] See among others: Report adopted by the Assembly of the Conseil d'Etat, 2010, p. 28.
[17] CCNE, Opinion no. 121, 2013, p. 16.

Therefore, it appears that the conceptions of DIGNITY and Dignity are based on the notion of respect: the person – as part of humanity and as an individual in society – should respect herself and the others. All human beings, all individuals are valuable and worthy of respect. However, one distinction may be made: it is thinkable that when it comes to 'personal dignity', the person is continuously in search of that personal esteem, while in the 'objective dignity', the respect might be perceived as a unconditional right and a moral duty, something inherent to one's human condition. Throughout the thesis, respect will be a referential notion to understand and explain how dignity is used, or should be used, by judges.

2. The legal value of dignity

Since its entrance in the legal area, dignity has been used in different ways either by legislature, individuals when lodging a case with a court, or judges when ruling on this case, leading to an equivocal legal status of the concept. Indeed, reading the legal texts and case-law – both in parties' pleas and in judges' solutions – dignity has been qualified as a principle, a 'ordre de valeurs'[18] or a fundamental right as such. This question of the legal value is not devoid of interest insofar as, by definition, a principle – having an objective nature – cannot be invoked by the applicant during proceedings, whilst a right – having a subjective nature – can be relied on. Therefore, the nature of dignity in law is of such importance that it logically led to a will for a univocal solution. Ultimately, even though it is relevant to analyse the different theories, it cannot be expected to find a single answer.

a. Dignity as a principle

Unlike several foreign constitutions, notably in Europe, the French Constitution of 1958 does not refer to the respect for human dignity[19]. As many scholars have pointed in 1995, the first significant occurrence to the word 'dignity' in the French legal system appeared in the context of bioethics laws in 1994, and especially with the

[18] Glénard, 2015.
[19] Saint-James, 1997, p. 61 et seq.

decision of the French Constitutional Council (CC) about these laws. In its decision of 27 July 1994, the Council relying on the first sentence of the Preamble to the 1946 Constitution ruled that 'the protection of human dignity against all forms of enslavement or degradation is a principle of constitutional status'[20]. Thus, as Virginie Saint-James comments, by this decision the Council has bestowed 'its legal value to the dignity of the human person'[21]: a constitutional principle. However, beyond this recognition as a principle, Bertrand Mathieu notes that the concept of dignity in the Constitutional Council's decision goes further. Indeed, he explains that it follows from the paragraph 18 of the decision[22] that the protection of human dignity is a 'matrix principle'[23] insofar as it generates other rights and principles with different scopes and values. The respect for human dignity would thus be the 'fundament of all other fundamental rights'[24], the ultimate fundamental right on which the system of the protection of human rights would be based.

In this perspective, the link between dignity - as a principle and a fundamental right as such – and human rights is established, with a key and creator role attributed to the former. Some scholars disagree that position, even going so far as to explain that, if freedom constitutes the essence of human rights, dignity is the essence of humanity[25], thus placing, in a conceptual analysis, dignity outside the sphere of human rights.

b. Dignity as a 'ordre de valeurs'

Recently, a legal scholar attempted to demonstrate that dignity is actually a 'ordre de valeurs'. Based on the judgements of the French Conseil d'Etat (CE) in the 'Dieudonné case', Guillaume Glénard in his communication issued on 27 May 2015, notes that both the French public authorities in their administrative police powers and

[20] CC, *Respect for Human Body Act and Donation and Use of Parts and Products of the Human Body, Medically Assisted Reproduction and Prenatal Diagnosis Act*, 94-343/344 DC, 1994, § 2.
[21] Cfr. supra footnote 19.
[22] Cfr. supra footnote 20. § 18 'The legislation referred sets out a number of principles including the primacy of the human being, respect for the human being from the inception of life, the inviolability, integrity and non market ability of the human body and the integrity of the human race; these principles help to secure the constitutional principle of the protection of human dignity'.
[23] Mathieu, 1995, p. 211 et seq. Translated from French: 'principe matriciel'.
[24] See among others: Biletzki, 2009, p. 30; Pellegrini, 2008, p. 118; Dubout, 2010, p.80.
[25] Cfr. supra footnote 14.

the administrative judge are able to act in order to protect the values of the republican tradition. In its decision of 9 January 2014, the CE judged that the fact that remarks uttered by the comedian during his previous performances would not be reiterated in the cancelled spectacle, is not sufficient to exclude a serious risk of undermining the respect for values and principles, notably human dignity, enshrined by the Declaration of the Rights of Man and of the Citizen (DRMC) and the republican tradition[26]. He explains that the concept of dignity would actually constitute a 'ordre' in which French republican values such as, in the 'Dieudonné case', the principle of non-discrimination are materialised. At the European level, attention may be drawn to the judgement *S.W. v. the United Kingdom* in which the European Court of human rights (ECtHR) stated that respect for human dignity is the very essence of the Convention[27].

In this perspective, the link between dignity and human rights also appears. On the one hand, the principle of respect for human dignity would be the 'medium' whereby French republican values – corresponding to certain human rights – would be legally substantiated. On the other hand, all human rights protected by the European Convention on human rights (ECHR) should be interpreted in the light of dignity, insofar as it is the raison d'etre of the Convention.

c. Dignity as a fundamental right

Two examples can be used to prove that for some judges or even constituents, dignity – and more precisely, human dignity – is to be seen as a fundamental right, therefore giving a subjective right to individuals. Firstly, the Basic Law for the Federal Republic of Germany in its Article 1 dedicated to 'Human dignity – Human rights – Legally binding force of basic rights', proclaims that: '(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority'. Luc Heuschling points out that, although there are doctrinal controversies on whether this provision enshrined an objective principle or a subjective right, the German Constitutional Court recognises, for a long time now, human dignity as both the

[26] CE, *Ministre de l'Intérieur c. Société Les Productions de la Plume et M.D*, ord., no. 374508, 2014, § 6.
[27] ECtHR, *S.W. v. the United Kingdom*, no. 20166/92, 1995, § 44 '(…) with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom'.

fundament of all fundamental rights and a fundamental right as such[28]. Secondly, the European Court of Justice in its judgement *Kingdom of the Netherlands v. European Parliament and Council of the European Union* recognised that there is a fundamental right to human dignity under the European Union law[29].

To conclude those introductory remarks, one main observation can be made. It seems that if one agrees with Bernard Edelman to say that freedom constitutes the essence of human rights, the ability of dignity to be also the essence of some human rights, as a 'matrix principle', must not be excluded. It is undeniable that dignity – whether human dignity or the dignity of the human person – and human rights are linked.

Therefore, the question that arises is: *how and to what extent does the concept of dignity, that is to say both in its objective and its subjective aspects, play a role in the realm of human rights?*

3. Methodology of the thesis

a. The substantive scope of the study

Determining the 'substantive scope' means identifying what will be the research bases of the study. The aim of the present thesis is to determine the role of the concept of dignity on human rights in the legal area. Thus, in order to answer this question, the following reflections can be useful: how is dignity used to protect human equality, to support individual freedom, and to justify the existence of solidarity? What are the consequences on human rights? Therefore, it will be relied on legal materials such as law – domestic material laws and Constitution –, judgements, parties' pretensions and pleas when they bring a case before a court, and legal scholarly literature, to analyse and

[28] Heuschling, 2010, p. 135.
[29] ECJ, *Kingdom of the Netherlands v. European Parliament and Council of the European Union*, Case C-377/98, 2001, § 70: 'It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed'.

compare how legislature, individuals and judges understand and use the concept in the realm of human rights.

b. The geographical scope of the study

It has to be acknowledged that the use of dignity is a controversial topic in the legal area. Indeed, as the word refers to a concept from which derives different notions, it seems impossible to agree on a single understanding of the concept in law. However, as many authors have pointed out, why would it be necessary to limit the concept to one meaning[30]? The most important thing therefore is to admit the relativity of the concept and the plurality of meanings, and to try to improve their use in law. Furthermore, if this plurality appears undeniable when the analysis of the use of the concept takes into account divers States in the world, it can be also identified inside the legal system of a single State. For that reason of complexity, the scope of the study will be limited to the analysis of two legal systems. On the one hand, the French State for two sets of reasons. Firstly, because as it has already been mentioned, the principle of respect for dignity was not included in the 1958 Constitution and its legal consecration occurred in 1994, in the context of bioethics 'revolution' in order to protect the human being from biomedical drifts. Thus, unlike the German legal system in which human dignity was expressly included in the Constitution, in France the legitimacy of the concept was born from the CC. From that moment, legislature was inclined to employ to the word, and one of the aims of the study will be to analyse whether the French legislation refers to dignity either in its objective aspect, its subjective one, or both. Secondly, in the light of the current events – from the promulgation of the Law no. 2010-1192 of 11 October 2010 'prohibiting the concealment of one's face in public places' to the 'Vincent Lambert case' ruled by the ECtHR on 5 June 2015 – it must be admitted that the French legal system is interested in the use of dignity in law. On the other hand, the system of the Council of Europe in which the ECtHR constitutes the jurisdictional institution may be seen as a central and comprehensive element of analysis. Consequently, and to the purpose of the study as defined in the substantive scope, the focus made on the French and 'Conventional' legal systems appears justified.

[30] See among others: Bioy, 2010, p. 17.

c. The study outline

While it is incontestable that there has been a quantity of legal studies regarding the use of dignity in law, due to the current French events it seems legitimate to again address this topic. It must be observed that in the explanation of the different notions of dignity, two fundamental principles have emerged, taking place in the analysis. These are the principles of equality and liberty or freedom. Indeed, it seems that once included in law, dignity has been, and is still, used and interpreted in relation with those principles in support of legal pretensions or solutions related to human rights. From this observation, throughout the study, the analysis will be conducted in the light of the relations between dignity, equality, and freedom. Beside those elements, a last principle should be included – as provided for by the Universal Declaration of Human Rights (UDHR) and the French motto, 'Liberty, Equality, Fraternity' – the principle of solidarity.

It seems that dignity can be seen as an undeniable basis for a right to be respected and a duty to respect all human beings (Chapter I), a legitimate manifestation of the individual's right to self-fulfilment (Chapter II), and an admissible argument for requests as to 'the quality of life' (Chapter III).

CHAPTER I. Dignity: an undeniable basis for a right to be respected and a duty to respect all human beings

When talking about dignity, the first idea that comes to mind is the inherent value of all human beings due to their belonging to humanity. Thus, it has to be recognised that the objective aspect of dignity is the most common connotation of the word. One reason might be that having in mind the atrocities of the Second World War, States when they adopted their constitution and international human rights instruments wanted to recall to all persons that no one should be deprived of one's humanity. While the ECHR does not make express reference to dignity, the first sentence of Article 1 of the UDHR[31] manifests the determination to protect a person from being mistreated by one or several others. If all human beings are equal in dignity, they shall act towards one another with due consideration for their human quality and respect each other.

In its communication on human dignity in the German Constitutional Court's case-law, Luc Heuschling recalls that under the Nazi regime, Jews and other minorities have seen their status of human being undermined: they were described as 'subhuman' and treated in a discriminatory way, they were debased to the state of animal and treated as objects. He concludes that bearing in mind those atrocities committed by human persons, the German constituent in 1949 decided to 'reassert the respect owed to every human being as a human, as a member of humanity'[32]. That comment of History shows how a human behaviour is able to annihilate the very essence of humanity in a specific category of persons. There is an incontestable link between the equal worth of all human beings and the necessity to treat them with equality (Preliminary Section). In the realm of human rights, this connection between dignity and equality leads to the use of dignity both as an interpretative tool to prohibit ill-treatment (Section I) and a limitation tool to circumscribe freedom of expression (Section II).

[31] 'All human beings are born free and equal in dignity and rights'.
[32] Heuschling, 2010, p. 138.

Preliminary Section. Equality as a corollary of dignity

In this preliminary section aimed at bringing out that dignity and equality are consubstantially linked, it is necessary to define the different terms. First, the meaning of dignity has already been explained: in this part, it refers to the inherent quality attached to the person because she belongs to humanity. The person is to be seen as a part of humanity, living in society with other persons endowed with the same value. Second, 'corollary' can be defined as: 'a direct or natural consequence or result' of something[33]. Thus, human equality would be the result of human dignity, meaning that because all human beings – in their aspect of a collectivity based on humanity – are worthy, they shall be equal by essence and in every aspect. In other words, as persons share the same human quality, they deserve the status of equality, whatever their sex, religion, personal opinions: how would it be justified to treat a person differently if she has the same inherent human value of another one? Here arises the third element of the equation: equality. Robert Alexy argues that 'the general right to equality protected in the German Constitution (and European Convention) should be understood in terms of two rules: if there is no adequate reason for permitting an instance of differential treatment, then similar treatment is required; if there is an adequate reason for requiring differential treatment, then differential treatment is required'[34]. It follows from this definition, and notably from the terms 'adequate reason' and 'differential treatment', that in law the principle of equality refers to the principle of non-discrimination. As Katrin Wladasch explains, 'the right not to be discriminated against originates in the old idea that all human beings are equal before the law and should therefore also be treated equally'[35]. She adds: 'literally, discrimination means simply differentiation. When we talk about discrimination in legal terms, however, we mean differentiation that leads to unequal treatment without any objective justification'. Those two definitions show that if discrimination as such is absolutely prohibited, there can be, on the basis of an objective and reasonable justification, a differential treatment. Consequently, it appears

[33] www.oxforddictionaries.com
[34] Alexy, 2002, p. xliv.
[35] Wladasch, 2012, p. 307.

that the right to be treated equally owned by every person due to one's humanity would actually be relative. It can be thought that dignity – as protecting human equality – would be involved solely to establish and punish discrimination as such (not differential treatment), and that once discrimination would have been founded, then the right to be treated equally would be absolute. Different observations must be made regarding this statement.

First, in order to understand on what kind of bases dignity could be invoked and used in law, a legal definition of the principle of non-discrimination can be found in the ECHR. Article 14 provides for a non-exhaustive list of grounds of non-discrimination. It seems that at least two types of 'protected grounds'[36] derive from this list. On the one hand, grounds referring to personal features of an individual, and on the other hand, grounds related to his natural feature. For example, the mention to 'religion, association with a national minority' may be seen as a personal choice made by the individual enabling him to find and develop his own identity. On the contrary, the mention to 'sex, race, and colour' seems to reflect the 'biological condition' attached to the person: she does not make the choice to be a man or a woman, to be black or white. Thus, by prohibiting discrimination on those two categories of grounds, it appears that the aim of the Article is to provide a right to every person to be respected as a human being as such: in one's personal identity and in one's 'genetic' condition. It seems that the idea of human dignity is present in this Article and that is why in the context of discrimination, this non-exhaustive list is of importance.

Secondly, it is important to apprehend dignity as a general idea on the basis of which every person should be entitled to rely on to ask for an equal treatment. Indeed, in daily life, when a person is expecting to an equal treatment due to her human quality, it is a general request to respect her physical, psychological and moral integrity as a human being. It is in terms of respect that a person may require equality: she deserves respect because she represents the reflection of the person facing her. Therefore, when establishing a link between dignity and equality by referring to non-discrimination, that

[36] Ibidem.

requirement is to be seen through the lens of respect. As it has been exposed in the introduction, the notion of respect is the referential notion of the study, and in the context of equality as a consequence of dignity, it makes sense.

To conclude, it is in the context as described above that the following sections will be aimed at determining how and to what extent dignity is used in order to protect human equality when human quality is at issue. The analysis will be, first, on the direct protection of all persons – as human beings – against harm to their physical or psychological integrity, which has been notably enshrined in Article 3 of the ECHR. Then, it will be the analysis of the indirect protection of persons against harm to their moral integrity, through the possible limitation on the right to freedom of expression when it would be used in a way that undermines the human quality of a person.

Two observations must be made before going further on. First, the research conducted for the purpose of this section has led to many results, both at the national and the European levels. Therefore, and as a matter of synthesising, the demonstration will be based on a selection of judgements at both levels, trying to encompass the leading cases and recent judgements. Second, it seems important to stress that it is not because the word 'equality' is literally absent from the law or the case-law that the idea of equality as 'an important principle underlying the interpretation'[37] of the prohibition of ill-treatment or freedom of expression is as such. Thus, the idea of equality linked to dignity in the situation of ill-treatment or freedom of expression may be the result of an interpretation of the case-law.

[37] ECtHR, *Pretty v. the United Kingdom*, no. 2346/02, 2002, § 62.

Section I. Dignity as an interpretative tool: the absolute right not to be subjected to ill-treatment

The aim of this section is to analyse the prohibition to harm the physical or psychological integrity of human beings in the frame of equality as being a consequence of dignity. In other words, to demonstrate that when they refer to dignity in the context of ill-treatment, the legislature, individuals, and judges do it along the line of equality.

It appears that at both European and French levels, the legal system establishes a general prohibition of treatment violating human dignity (Paragraph I). Beside that general prohibition, in 2000, the ECtHR used dignity in order to protect the specific right for a prisoner 'to be detained in conditions compatible with respect for his human dignity' (Paragraph II), which derives from Article 3.

Paragraph I. The general prohibition of treatment violating human dignity

As part of this paragraph, Article 3 of the Convention is of importance because the concept of dignity has been used by the ECtHR to interpret one of its components – the degrading treatment. In its judgement *Tyrer v. the United Kingdom*[38], the Court has defined the degrading treatment in the light of dignity. In France, numerous provisions, for instance of the Civil Code, the Labour Code or the Criminal Code, provide for the protection of the individual against treatment violating his dignity.

A. The case of degrading treatment at the European level

In the judgement *Tyrer*, the ECtHR, before concluding that 'the judicial corporal punishment inflicted on the applicant amounted to degrading punishment within the meaning of Article 3 of the Convention', stated that 'the very nature of judicial corporal punishment is that it involves *one human being inflicting* physical violence *on another*

[38] ECtHR, *Tyrer v. the United Kingdom*, no. 5856/72, 1978.

human being. (…) Thus, although the applicant did not suffer from any severe or long-lasting *physical effects*, his punishment - whereby he was *treated as an object in the power of* the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment *may have had adverse psychological effects*'[39]. This fundamental paragraph provides a definition of what is to be considered as a 'degrading treatment' in the sense of Article 3. Several elements can be listed: at least two 'human beings' must be involved – one inflicting the ill-treatment and another undergoing it –, the act inflicted may result to physical or psychological effects, there shall be a debasement, and there is the idea of power between the two persons. It is in the light of those criteria that the idea of equality appears, as it will be demonstrated thereafter.

The ECtHR has recently reiterated that 'Article 3 cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering. Hence, the treatment can be qualified as degrading when it arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them'[40].

1. The case of physical integrity

In its case-law, the ECtHR established a distinction under Article 3 between the persons who are deprived of liberty and those who are not.

In the case *Tomasi v. France* delivered on 27 August 1992, reiterated in the case *Ribitsch v. Austria,* the Court stated the principle that applies in the context of deprivation of liberty: '(…) any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention'[41]. Two observations can be made in the light of that statement. Firstly, the conditions laid down in the *Tyrer*

[39] Ibidem, § 33.
[40] ECtHR, *Identoba and Others v. Georgia,* no. 73235/12, 2015, § 65.
[41] ECtHR, *Ribitsch v. Austria*, no. 18896/91, 1995, § 38.

case are met: there is one person inflicting the treatment and another one undergoing it –, the treatment will lead to physical effects and to a debasement of the 'victim' as to her physical integrity, and there is a power exercised by the person who uses physical force. In this situation, the idea of breach of equality between two human beings seems clear insofar as one person is subjected to another one able to recourse to physical force on her. Secondly, the Court sets a principle of necessity in the use of physical force by the state authority: if it was not 'strictly necessary', there was an assault to human dignity and a violation of Article 3. To resume, two persons are at stake – necessary condition to find a breach of equality –, and one of them is using physical force in circumstances which are not strictly necessary in view of the behaviour of the second. It appears that for the ECtHR, dignity is involved because the first person diminishes the equal value of the second by inflicting the treatment without justified reasons. No one should be legitimate to exercise physical force against someone else – except in circumstances laid down by the Court – because all human beings are equal in value, and to contravene to that principle constitutes an assault to human dignity, that is to say to the right to be treated with respect and equality. The ECtHR has continuously reiterated that principle of necessity after the two leading cases aforementioned[42].

Beside the case of deprivation of liberty, the ECtHR also protects persons who are at liberty from assault to their physical integrity[43]. For instance, in its judgement *Valiulienė v. Lithuania*, the Court found that 'the ill-treatment of the applicant, which on five occasions caused her physical injuries, combined with her feelings of fear and helplessness, was sufficiently serious to reach the level of severity under of Article 3 of the Convention (…)'[44] and concludes that there has been a violation of this Article. It shall be noticed that for persons at liberty, the criterion used to qualify degrading treatment – through dignity – is the 'level of severity' of the treatment undergone by the person.

[42] *Inter alia*: ECtHR, *Kitanovski v. the former Yugoslav Republic of Macedonia*, no. 15191/12, 2015, § 77-80; ECtHR, *Ertuş v. Turkey*, no. 37871/08, 2013, § 27-31.
[43] Sudre, 2010, p. 325.
[44] ECtHR, *Valiulienė v. Lithuania,* no. 33234/07, 2013, § 70.

2. The case of psychological integrity

The ECtHR recognises that a degrading treatment in the sense of Article 3 may result from harassment. The case of domestic violence constitutes a first illustration. In the judgement cited above, after reiterating that 'treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical or moral resistance', the Court found that it 'cannot turn a blind eye to the psychological aspect of the alleged ill-treatment. It observes that the applicant made credible assertions that over a certain period of time she had been exposed to threats to her physical integrity and had actually been harassed or attacked on five occasions. The Court acknowledges that psychological impact is an important aspect of the domestic violence'[45]. These statements undeniably show the link between a degrading treatment and the breach of equality. Indeed, insofar as it is capable of 'arous(ing) feelings of inferiority, capable of humiliating and debasing' the victim, it refers to a situation in which two human beings are not equal anymore because one of them is undertaking a ill-treatment on the other. Then, it is in the light of its intensity that the Court decided to qualify it as degrading treatment, thus involving dignity.

Another interesting illustration is the judgement *Đorđević v. Croatia* in which the Court considered that 'the harassment of the first applicant – which on at least one occasion also caused him physical injuries, combined with feelings of fear and helplessness – was sufficiently serious to reach the level of severity required to fall within the scope of Article 3 and thus make this provision applicable in the present case'[46]. In this case, the first applicant – a person divested of legal capacity owing to his mental and physical retardation – complained that the State authorities have not given him sufficient protection against verbal and physical harassment by children from his neighbourhood. Beyond the interest for the solution of the Court, what is important is the argument put forward by the applicant whereby according to studies on disability

[45] Ibidem, § 66 and 69.
[46] ECtHR, *Đorđević v. Croatia*, no. 41526/10, 2012, § 96.

hate crime, 'harassment against disabled persons (is) usually motivated by a perception of such persons as inferior'[47]. Therefore, even if the Court expressly refers neither to that argument nor to the word 'dignity', it is thinkable that the harassment experienced by the victim constitutes a degrading treatment because it is tantamount to a breach of equality between the 'children perpetrators' and the applicant – as a disabled person, and therefore undermines the dignity of the applicant.

In France, the prohibition of treatment violating human dignity is enshrined in multiple provisions of the law.

B. The enshrinement in multiple provisions at the French level

In France, the decision of the CC delivered in 1994 on bioethics laws is important. Besides, it must be pointed out that similar criteria to those defined by the ECtHR in the *Tyrer* case were used by Patrick Frydman in his conclusions in the 'Morsang-sur-Orge' case as well as by the CE itself in the judgement. Without referring to the word 'degrading', the CE found that the sideshow of dwarf launching undermines the dignity of the human person because its aim was to allow viewers to launch a dwarf and therefore, to use the latter as a projectile with the consciousness that the person was a physically disabled[48].

The French legal system appears in agreement with the European one as regards the application of dignity to physical and psychological integrities.

1. The case of physical integrity

An example of the protection of physical integrity in case of deprivation of liberty can be found in the context of 'fight against mental illnesses'. The French law establishes a difference between 'free hospitalisation' – that is to say the person asks for

[47] Ibidem, § 115.
[48] CE, *Commune de Morsang-sur-Orge*.

it – and 'hospitalisation without consent'. In the latter case, the protection of physical integrity may rely on the principle established in Article L.3211-3 of the Public Health Code (PHC) which states that when a person with mental disorders is the subject of psychiatric care, (…) in all circumstances, the protection of her dignity is respected. The '*Tomasi* principle' identified at the European level is here applicable: the person under hospitalisation by being deprived of her liberty is at the hands of doctors, and if physical force is used – what will have effects on physical integrity – without a strict necessity in view of the patient's behaviour, there will be an *unjustified* breach of equality and therefore, a violation of his dignity. Consequently, doctors will have to use physical force only when it will be strictly necessary in order not to create a situation in which the patient will appear illegitimately inferior to them. A judgement delivered by the Paris Administrative Court of Appeal (ACA) illustrates that principle of protection for the dignity of persons subject to psychiatric care. In this case, even though the patient was under a free hospitalisation, the statement of the Court denotes the requirement of strict necessity when physical integrity is at issue. The Court explained that the hospital couldn't be held liable because the doctors have followed the rules whereby a patient's physical restraint is to be used *in last resort* due to the harm to his dignity[49].

Regarding the situation of persons at liberty, it is possible to come back to the adoption of bioethics laws in 1994[50]. The first aim of these laws is to protect all persons – as human beings – in their physical integrity, and to protect them from biomedical drifts. The CC by stating that 'the protection of human dignity against all forms of enslavement or degradation is a principle of constitutional status' recalls that human equality exists between all human beings and that human quality implies a protection against offences to physical integrity by another person. The transcription of the laws in the Civil Code at Articles 16, 16-1 and 16-3 denotes the principle of respect for human dignity in the medical area and can be read in the light of a requirement to respect human equality. In a medical relationship, two persons at least are present – the doctor and the patient –, the doctor has a medical 'power' on his patient and is allowed to

[49] Paris ACA, *M. ...,* no. 13PA02584, 2014, § 5.
[50] Law no. 94-548 of 1 July 1994; Law no. 94-653 of 29 July 1994; Law no. 94-654 of 29 July 1994.

perform medical care on his body, the use of this medical power may been seen or felt by the patient as a superiority of the doctor in their relation. Therefore, this relation between the doctor and his patient must be subjected to a criterion in order to protect the dignity of the patient. The notion of consent is of importance in medical law because it plays that role of defender against the violation of human dignity. The relationship can be seen through the lens of equality: the doctor – a human being – will be able to perform acts on the body of his patient – another human being – if the latter, able to express his wish, agrees on it. In other words, when getting to the patient's physical integrity without his consent, the doctor unlawfully breaks the equality that exists between two human beings endowed with the same inherent value, and therefore diminishes his dignity. An illustration can be found in a judgement delivered by the Marseille ACA on 17 September 2012 in which it states, relying on Article 16-3 of the Civil Code, that the doctor's duty to inform his patient in order to obtain his consent prior to get to his body, is based on the protection of human dignity[51].

2. The case of psychological integrity

A reference to dignity in the context of psychological integrity can be found in the texts protecting persons from harassment. The law no. 83-634 of 13 July 1983 on rights and obligations of civil servants provides in its Article 6 quinquiès that 'no civil servant should be subjected to repeated acts of moral harassment which have as their object or effect a degradation of working conditions likely to prejudice his rights and dignity, to alter the physical or mental health or jeopardize his professional future'. Beside the civil service, the Labour Code in its Article L. 1152-1 provides, in the same words, a protection for the employee. To illustrate those provisions, two judgements of the administrative case-law can be given.

First, attention may be drawn to a judgement issued by the Bordeaux ACA in which it confirmed the dismissal of an employee. To reach this conclusion, the Court notes that the employee's behaviour was such that she repeatedly acted in a vexatious

[51] Marseille ACA, *Mme ...,* no. 10MA01803, 2012.

and humiliating way, and expressed vulgar and denigrating towards another employee under his responsibility. The fact that these acts and remarks were not justified in the needs of the work and as to undermine the human dignity of the person was sufficiently serious to justify the dismissal[52]. The mention to the dignity of the human person in this case is not based on Article 6 quinquiès of the law of 1983, but seems to result from the behaviour of the dismissed employee. First of all, it must be pointed out that in the context of labour relations, there is, *de jure*, an inequality between two persons insofar as the employee and his superior are in a hierarchical relation. Thus, in these situations the harm to dignity cannot rely only on a difference of status: there shall be another element that makes illegal the inferiority of the employee compared to his superior. In the present, this element was constituted both by the very nature and content of the remarks – which were aimed at showing the superiority of the perpetrator and the inferiority of the victim, thus creating a moral debasement – and by the unnecessary character of the remarks. Consequently, it appears that the conditions of necessity and severity can apply: if the superior has a hierarchical power and he is allowed to use it, he has to do it in a necessary and adequate manner. In other words, he does not have the right to break the equality unaffected by the hierarchical link: he must consider the employee as a human being worthy of respect.

Second, in a recent judgement, the Versailles ACA came to the conclusion that there has not been harassment because the acts taken by the municipal authorities for the functioning of the public service did not exceed the limits of the normal exercise of the hierarchical power, and therefore did not lead to working conditions incompatible with the dignity.[53]

[52] ACA Bordeaux, no. 12BX02971, 2014, § 7.
[53] ACA Versailles, *Mme ...,* no. 13VE01330, 2014, § 6.

Paragraph II. The specific right to be detained in conditions compatible with respect for human dignity

This right has been recognised by the ECtHR in its judgement *Kudla v. Poland*[54]. Here, the impact that dignity is able to have on human rights must be underlined. Indeed, the Court derived the specific right for a person to be detained in conditions compatible with her human dignity from the general right not to be subjected to ill-treatment. Insofar as dignity is used to qualify degrading treatment, the link between the principle of respect for human dignity and the recognition of that specific right appears evident. Therefore, and to rely on the assertion makes by Bertrand Mathieu, dignity may be seen as a 'matrix principle' because it constitutes the principle at the basis of a 'new right'[55] protecting the person's dignity. The French legal system is to be said respectful of that case-law on the right to be detained in conditions compatible with human dignity, as regards both the legislation and the jurisprudence.

A. The consecration of the right at the European level

In paragraph 94 of its judgement *Kudla*, the ECtHR states that: 'under this provision (Article 3) the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance'. By this statement, it is possible to assert that the Court wants to protect the equality that all persons deserve as human beings. It shall be recalled that the aim of this section is to demonstrate to what extent the use of dignity in the context of protection against harm to physical or psychological integrity may be seen as a will to preserve human equality that derives from human quality. In other words, in this judgement the Court, by

[54] ECtHR, *Kudła v. Poland* [GC], no. 30210/96, 2000.
[55] Sudre, 2010, p. 338.

referring to 'the respect for human dignity', would recognise to detainees a right to 'live' in prison in conditions which preserve – as much as possible – their equality with the outside world. The State is to implement the penalty of deprivation of liberty in a manner which respect the inherent value of the detainee. Two observations have to be made in the light of the judgement.

Firstly, as Frédéric Sudre points out, the right recognised by the Court gives rise to both negative and positive obligations for the State[56]. Concerning the negative obligation, he notes that the State has the usual duty not to subject the detainee to conditions of detention that constitutes an ill-treatment (Cfr. Paragraph I). Concerning the positive obligations, and that is the novelty of the judgement, the detainee has a right to be detained in what can be called 'physical living conditions' compatible with his human dignity. This right may be opposed by the detainee to the State, which can be held liable for a breach of its duty. In its case-law, the Court stated that 'an extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 3 of the Convention', as well as other elements including 'in particular, the availability of ventilation, access to natural light or air, adequacy of heating arrangements, compliance with basic sanitary requirements and the possibility of using the toilet in private'[57]. The reason for this specific right recognised by the Court is to protect the very essence of human quality presents in all detainees: even in prison they remain human beings and they deserve respect for that quality. Of course, this right will not imply for detainees unlimited requests regarding their conditions of detention because by essence, a detention measure will create a difference in the living conditions of a person at liberty and a person detained. Therefore, it weighs on the State, positive obligations that are necessarily framed by considerations such as maintaining the security and order in prisons, personal features of each detainee, and it is the second observation.

[56] Ibidem.
[57] ECtHR, *Apostu v. Romania*, no. 22765/12, 2015, § 79.

Secondly, as the Court recalls in paragraph 92 of its judgement *Kudla*, 'it has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. On the other hand, the Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment'. What is important to understand is that, while the prohibition of ill-treatment is absolute, the Court admits that for a 'given form of legitimate treatment or punishment', there shall be a level of severity in the suffering or humiliation felt by the victim that goes beyond what every person is supposed to bear in this situation. In other words, the respect for human dignity is absolute and its violation will inevitably lead to a condemnation. But when assessing the treatment perpetrated by a person on another one in order to establish if there has been an violation of dignity, the Court uses an assessment in concreto: 'the assessment of the minimum of severity is relative'[58]. Therefore, if in the first paragraph of this section, that condition of level of suffering and humiliation is reflected by the use of either the condition of 'strict necessity' or the 'minimum level of severity', regarding the penalty of deprivation of liberty, the Court notes that if the conditions in which it is executed led to 'distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention', there will be a violation of Article 3 due to the harm to dignity.

The ECtHR has repeatedly stated that right for a prisoner to be detained in conditions which are compatible with respect for his human dignity. For instance, in its judgement *Vlasov v. Russia*, the Court finds that 'the fact that the applicant was obliged to live, sleep and use the toilet in poorly lit and ventilated cells with many other inmates for almost three years must have caused him distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. It follows that the conditions of his detention amounted to inhuman and degrading treatment', and concludes that there has been a violation of Article 3 of the Convention on account of

[58] ECtHR, *Kudla v. Poland*, § 91.

the conditions of the applicant's'[59]. This case shows how dignity may be understood as a tool to protect detainees from a severe breach of human equality with persons at liberty. Indeed, as it is obvious in the case, it is not because the person is detained that the State does not have to respect her as a human being and provide her with living conditions that take into account that human quality inherent to everyone – detainee or not. The State has the duty to do its best in order to minimise as much as possible the 'unavoidable level of suffering inherent in detention' resulting from a 'lawful' inequality between persons at liberty and detainees.

B. The protection of the right at the French level

First of all, it must be pointed out that in this development, the aim is not to analyse the French compatibility of detainees' conditions of detention to the Strasbourg Court's requirements[60] in reality, but to analyse how the national legal system provides for the protection of the right recognised by the ECtHR in its relation to dignity and equality.

Regarding the French legislation, the law expressly provides for the notion of protection and respect for the detainee's dignity. Since 2010[61], attention must be drawn to Article 22 of the Prison Act no. 2009-1436 of 29 November 2009 which provides, *inter alia*, that the prison authorities provides all detainees with respect for their dignity and rights. Beside that, the necessity to provide 'physical living conditions' of detention compatible with dignity for all detainees can be found in different Articles of the Criminal Procedure Code. Indeed, Article D. 349 states that 'imprisonment must be undergone in satisfactory conditions of hygiene and safety, both in regard to the development and maintenance of buildings …'. Besides, Article D. 350 provides that

[59] ECtHR, *Vlasov v. Russia*, no. 78146/01, 2008, § 84-85. See also: ECtHR, *Ślusarczyk v. Poland,* no. 23463/04, 2014, § 138-140.
[60] In a judgement of 25 April 2013, *Calani v. France*, no. 40119/09, the ECtHR condemned the French State for conditions of detention amounted to degrading treatment, leading to a violation of Article 3 ECHR.
[61] Decree no. 2010-1635 of 23 December 2010 implementing the Prison Act and amending the Criminal Procedure Code.

'the detention facilities (…) must meet the requirements of health, (…) particularly as regards the volume of air, lighting, heating and aeration'. Finally, Article D. 351 highlights that 'in all places where prisoners stay, windows should be large enough that they can read and work by natural light (…). The sanitary facilities are to be clean and decent. They must be distributed in a suitable manner and proportionate to the actual number of detainees'. In the light of all those provisions, it appears that the French legislation is in accordance with the required conditions laid down by the ECtHR and recalled in its judgement *Apostu v. Romania.*

One relevant judgement – among many others – can be mentioned in the context of the French protection of the detainee's right, to prove that the French judiciary system is in agreement with the Strasbourg's case-law. The legal reasoning adopted by the Nancy ACA in a recent judgement delivered on 12 March 2015 is noteworthy in this regard. Indeed, the Court, in order to assess whether the applicant's conditions of detention were such as to engage the responsibility of the State, recalled the relevant provisions and started by Article 3 of the ECHR, then exposed Article 22 of the Prison Act of 2009. It pursued by stating that 'it follows from these provisions that every prisoner has the right to be detained in conditions compatible with human dignity, so that the manner and method of the execution of the measure do not subject him to hardship exceeding the unavoidable level of suffering inherent in detention'[62]. This statement is of importance insofar as the Court applies the national provision in the light of Article 3 of the ECHR in order to assess whether the State could be held liable for the conditions of detention. Thus, it shows the respectful national application of the European case-law as regards the existence of a detainee's right.

While in the context of prohibition of ill-treatment the European and French Courts use dignity as a tool in a 'direct' protection of the person susceptible to undergo it, in the context of Article 10 – as well as Article 11 –, dignity would be used to reduce the freedom of one person in order to save human equality of one or several others.

[62] Nancy ACA, *M.* ..., no. 14NC00689, 2015, § 3-4.

Section II. Dignity as a limitative tool: the reducible right to freedom of expression

As the European and French Courts often recall, 'freedom of expression constitutes one of the essential foundations of a democratic society (…). Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (…). As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly'[63]. In the light of the latter observation, this section is aimed at examining how dignity is used, could or should be used, by legislature, individuals and judges to protect human equality when the right to freedom of expression is at stake. It must be recalled that the ECHR does not expressly refer to dignity. Thus, the 'public policy clause' in paragraph 2 does not literally provide that dignity could be a legitimate aim to restrict freedom of expression. Consequently, when researching dignity as a limitative tool at the European level, it shall be understood that this may require an interpretation of what the Court considers to be a legitimate aim. Moreover, it must be noted that sometimes, the case brought before the French or European judges is to be analysed under both Article 10 and Article 11 of the ECHR: freedom of expression and freedom of assembly. For the purpose of this development, it will be referred to 'freedom of expression' as a whole, even if sometimes the expression of views is materialised by a show or a manifestation.

Considering laws, individuals' complaints and judges' decisions, the analysis reveals that dignity in relation to freedom of expression is most of the time used in the context of criminal offences. In France, there is a specific text prohibiting and punishing them: the Freedom of the Press Act (FPA) of 29 July 1881. Article 24 punishes condoning war crimes and crimes against humanity, as well as incitement to discrimination, hatred or violence against a person or group of persons because of their

[63] Among others: ECtHR, *Handyside v. the United Kingdom*, no. 5493/72, 1976, § 49; CE, *Ministre de l'Intérieur / Soc. Les Productions de la Plume et M.D.*, ord., no. 374508, 2014, § 4.

origin or their membership or non-membership of an ethnic group, nation, race or religion, or because of their gender, sexual orientation or gender identity or disability. Article 29 condemns defamation defined as 'any statement or allegation of a fact that impugns the honour or reputation of the person or body of whom the fact is alleged', and insult defines as the use of 'any abusive or contemptuous language or invective not containing an allegation of fact'. Finally, Articles 32 and 33 state that either individuals personally or 'a person or group of persons because of their origin or their membership or non-membership of an ethnic group, (…)' may be the targets for defamation and insult. Therefore, it appears that the law concerns either individuals and their honour or reputation (Paragraph I), or a person or a group of persons and the harm to their humanity or personality (Paragraph II).

Paragraph I. Dignity and the personal honour or reputation

As a result of those criminal offences and their liability under the law, applicants often use the word dignity when they bring a case before the courts in a case of personal defamation or insult. It is interesting to analyse the answer and attitude of the French and European judges towards those allegations of a violation of dignity.

A. The appropriate answer of the French legal system

In many cases, French applicants invoke dignity as an argument in their complaint against statements violating their 'honour and reputation'. An example can be found in a judgement delivered by the Pau Court of Appeal on 14 March 2005[64] in which the applicant, in order to seek compensation for that kind of statements, relied on Article 16 of the Civil Code which prohibits harm to the dignity of the person. Thus, he established a link between respect for his dignity and the criminal prohibition of statements that impugn the honour and reputation of a person. The solution of the Court is interesting and appears appropriate: it recalled that the concept of dignity as provided

[64] Pau CA, Civ. 1, *Louis X... c. Thierry Y...,* no. 03/03465, 2005.

for in Article 16 is 'intended to penalise conducts involving the integrity of the human person in her physical appearance or the essence of what constitutes her personality and humanity' and concluded that 'in this case, the statements (…) were clearly aimed at discrediting M. Y, however, were not likely to undermine what makes his humanity'. The Court finally ruled that 'the statements, which are aimed at depreciating the professional value of Mr. Y ... being allegations that adversely affects the honour and reputation, constitute defamation defined by Article 29 of the Law of 29 July 1881'. Consequently, the link between dignity and the reputation and honour of a person is not as evident as what the applicant argued. One observation can be made in the light of this judgement. The reasoning of the Court regarding the conditions in which dignity should be used – 'the integrity of the human person in the essence of what constitutes her personality and humanity' – appears in compliance with the ideas mentioned in the preliminary section of this chapter. Indeed, it has been explained that certain protected grounds described in Article 14 of the ECHR are either grounds referring to the personal identity of an individual, or grounds related to his 'biological' condition. As a matter of result, except for what constitutes the very identity of the person (for instance: origin, nation, sexual orientation, religion) or her human condition (for instance: sex, race, colour), dignity might not be used as an argument to restrict or condemn the use of freedom of expression. In other words, in cases of personal attacks towards an individual related to – for example – his political views, the proper words to use are 'reputation and honour'. The conducted researches show that at the French level, it appears that one judgement related to defamation or insult establishes an express link between dignity and honour in its solution[65].

B. The adequate attitude of the European Court of human rights

At the European level, it is interesting to notice that while applicants invoke their 'right to respect for (their) reputation and dignity, including his right to respect for private life'[66] when complaining about verbal statements or publications, the ECtHR

[65] Cass. crim., *M. ...,* no. 11-84235, 2012.
[66] ECtHR, *Jalbă v. Romania*, no. 43912/10, 2014, § 16 and 22.

always rules in terms of '(…) the competing interests, namely the applicant's right to protection of his reputation and the right of the journalist to freedom of expression'[67]. However, there seems to be cases in which the ECtHR refers to dignity alongside the applicant's reputation or honour. In its judgement *Palomo Sánchez and Others v. Spain*, the Court, while using the word 'reputation' in the context of Article 10, quotes the relevant parts of the Spanish judgements that assimilate honour and dignity. Two conclusions can be drawn from these findings.

Firstly, the absence of reference to dignity in a case of harm to personal reputation and honour may be seen as a will of judges not to make an extensive use of dignity as a limitative tool of freedom of expression. Indeed, both in the FPA and in the ECHR, limitations on freedom of expression are expressly formulated as statements that impugn 'reputation and honour' of the person and it seems to be relevant and sufficient. The reason may be, as Judges Raimondi and Sajó explain in their joint concurring opinion in the judgement *Perinçek v. Switzerland*, because 'dignity as a ground for restriction of rights is ambiguous, even if dignity is often understood as a fundamental value for human rights protection'[68].

Secondly, in that context of reputation and honour of the person, it is legitimate to note that the use of dignity is not to be seen as a means to protect human equality of a person because it does not refer to the very essence of the person as a human being: either one's 'personality' or one's 'humanity' to quote the Pau Court of Appeal. Therefore, it may be better not to use the concept and to preserve it for a real breach of human equality through freedom of expression.

Beside the utilisation of dignity in a context of harm to personal reputation, it must be analysed whether the actors refer to the word in cases of harm to their personal identity or to humanity, either individually or collectively.

---

[67] Ibidem, § 27.
[68] ECtHR, *Perinçek v. Switzerland*, (referral to the GC on 2 June 2014), no. 27510/08, 2013, p. 55.

Paragraph II. Dignity and the harm to humanity or to personality

In this context of dignity in relation to the harm to humanity or to personality, if the French legal system provides an explicit answer, the attitude of the European system appears to be implicit.

A. The explicit answer of the French legal system

It is reasonably defendable that the FPA provides for a protection of individual or groups of individuals against defamation, insult or incitement to discrimination, hatred or violence on grounds of personality – personal identity – or humanity (Articles 24, 32 and 33). However, as the word dignity is not literally present in these Articles, the question is whether the idea can emanate from them.

In this context, attention must be drawn to the 'Dieudonné case', which happened in France at the beginning of the year 2014. As Jacques Petit rightly points out, the three judgements delivered by the CE sitting as urgent-applications judge[69] have raised – from a legal point of view – 'contrasting appreciations': while criticised by many legal scholars, approved by some, other scholars remained neutral or reserved[70]. The aim of this development is less to assess the legality of the administrative measures taken to cancel the shows and to make a legal analysis of the validity of the judgements at stake, than to demonstrate that dignity has been used in a legal manner consistent with the protection of human equality. To briefly present the case, at the end of the year 2013, Dieudonné gave a new show '*Le Mur*' in Paris, which was then supposed to be performed in other cities in France. After the first performance, the media exposed that this show actually contained various anti-Semitic remarks or hints. It is to be clarified that since early 21st century, Dieudonné has been condemned

[69] Article L. 521-2 of the Administrative Courts Code: 'Where such an application is submitted to him or her as an urgent matter, the urgent-applications judge may order whatever measures are necessary to protect a fundamental freedom which has allegedly been breached in a serious and manifestly unlawful manner by a public-law entity or an organisation governed by private law responsible for managing a public service, in the exercise of their powers'.
[70] Petit, 2014, p. 866 et seq.

several times for criminal offences such as defamation, and incitement to racial or religious discrimination, hatred or violence, either in his shows or in public statements[71]. It appears that none of these condemnations have prompted the humourist to stop uttering such remarks and statements, notably against the Jewish people. It is in this frame that the administrative authorities, and more precisely different mayors of France, decided to use their general administrative police power on the basis of Article L. 2212-2 of the General Local Authorities Code to cancel the comedian's shows. This Article is an administrative tool in the hands of mayors in order to maintain public policy. In 1995[72], the CE ruled that 'the respect for the dignity of the human person' is a component of public policy, and to that extent, may constitute a legal basis to limit individuals' freedoms in order to maintain this general public policy.

Turning to the present case, the question was whether the Dieudonné's show was likely to undermine the respect for the dignity of the human person. If so, the authorities and the CE were – under conditions – legitimately founded to restrict his freedom of expression in order to maintain public policy. The CE stated that 'in view of the planned show, as it was announced and programmed, the allegations whereby the criminally reprehensible remarks, likely to seriously undermine the respect of values and principles such as the dignity of the human person and to incite to racial hatred and racial discrimination, raised at performances held in Paris, would not be reiterated (…) are not enough to prevent a serious risk that the planned show itself constitutes a threat of such a nature to public policy'[73]. Those 'criminally reprehensible remarks' refer to criminal offences such as anti-Semitic remarks, incitement to hatred against Jewish people, and his condoning the discriminations and persecutions that occurred during the Second World War. Consequently, and as Camille Broyelle points it out, while the legislature did not expressly lay down that incitement to racial discrimination and racial hatred constitutes infringement to the dignity of the human person, 'the junction

[71] Ibidem.
[72] CE, *Commune de Morsang-sur-Orge*.
[73] CE, *SARL Les Productions de la Plume et M.D.*, ord., no. 374528, 2014, § 8; CE, *SARL Les Productions de la Plume et M.D.,* ord., no. 374552, 2014, § 8.

between the criminalisation and respect for dignity is made by the judge'[74]. Insofar as the remarks made by the comedian are most of the time directed to the Jewish community, they have the effect of breaching equality that exists between it and the rest of human community. He manifests his lack of respect for human equality, and specifically for equality that deserves the Jewish community. He creates a hierarchy between people who deserve respect, and those who can be subject to criticism and discrimination by others. It is in that sense that Guillaume Glénard refers to dignity as a 'ordre de valeurs' in which the prohibition of discrimination and the right to equality are materialised. Consequently, it can be understood that the use of dignity in this case to protect human equality was legitimate to restrict the freedom of expression of the comedian.

Regarding the consequences of dignity as an argument to restrict freedom of expression, in a case such as the 'Dieudonné case', they are extremely important: his show was cancelled and therefore, he was not allowed to express his views through the performance. Invoking dignity as limitative tool of freedom of expression, when it comes to the *public policy area* is the 'fatal' argument. In its judgement *Benjamin*[75], the CE stated that for a public policy measure to be lawful, it has to be 'necessary and proportionate'. As Jacques Petit recalls, 'necessary' means that the show or remarks must be such as it contains a risk for public policy, and 'proportionate' signifies that this risk has to be so serious that only an interdiction would be able to overcome it[76]. Then, he pursues in explaining that as soon as dignity enters public policy as a component thereof and that the necessity has been proved, the 'proportionality test' will not, *de facto*, occur insofar as dignity – being an 'immaterial' component of public policy – can only be protected by a total prohibition[77]. Indeed, measures such as security measures will not be sufficient to prevent dignity from a verbal transgression.

[74] Broyelle, 2014, p. 521 et seq.
[75] CE, *Benjamin*, nos. 17413 et 17520, 1933.
[76] Cfr. supra footnote 70.
[77] See also: Baranger, 2014, p. 525 et seq.

It is relevant to look at the International Convention on the Elimination of All Forms of Racial Discrimination[78] at the UN level in order to understand what could be the protected grounds under the use of dignity in France. Article 1.1 provides that: 'in this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference *based on race, colour, descent, or national or ethnic origin* (…)'. These grounds are those of Articles 24, 32 and 33 of the FPA. However, one question is whether dignity could be used – in public policy – to protect the other grounds referred to by those Articles, such as religion, sexual orientation, or disability when freedom of expression is at issue. If unfortunately the analysis of the case-law has not brought possible answers in the area of freedom of expression, it has revealed two judgements delivered in the area of gatherings in which dignity was used to protect persons from discrimination based on disability and religion.

First, the *Morsang-sur-Orge* case concerned a show in which viewers launched a dwarf as a projectile. The CE, judging that the show constituted harm to the dignity of the human person because the dwarf was used as an object and it had effect to diminish his human and equal value, prohibited it. While freedom of assembly has not been used in this case, insofar as the result of the interdiction is to cancel the show and to limit the dwarf's freedom, it is relevant to use this judgement in order to illustrate that dignity was used to protect the human equality of a disabled person. Indeed, Patrick Frydman explains in his conclusions that the solution would have not been the same if it were not a dwarf, a disabled person[79]. The second judgement[80] is related to the challenge by an association of the interdiction of a manifestation decided by the Prefect of Paris using his administrative police powers. The CE – sitting as urgent-applications judge – noted that the aim of the gatherings at issue was to distribute to homeless people food supplies containing pork, and that consequently, part of those people would be discriminated: Muslim people. The CE concluded that the interdiction, due to its likely harm to the

[78] Adopted by General Assembly resolution 2106 (XX) of 21 December 1965 and entered into force on 4 January 1969.
[79] Frydman, 1995, p. 1204 et seq.
[80] CE, *Ministre d'Etat, Ministre de l'Intérieur et de l'aménagement du territoire c. association "solidarité des français"*, ord., no. 300311, 2007.

dignity of the persons excluded, has not constituted a serious and manifestly unlawful breach of the association's freedom of assembly. This solution demonstrates that in the area of public policy and gatherings, discrimination against religion and dignity are linked: the latter has been used in order to prevent Muslim people from being discriminated against and treated unequally by other people. In the light of these judgements, it is defendable that in a society in which personal identity is of such importance, the answer to the question whether dignity should be used to protect grounds such as religion, sex, sexual orientation, and disability, should be yes.

The fact that the case-law is not abundant in the public policy area regarding the restriction of freedom of expression or assembly on the basis of dignity may be perceived as a use of the concept in circumstances of the utmost importance: when there is a proven discrimination[81], a grave violation of human quality. Moreover, it can be seen as in agreement with the importance of freedom of expression, especially in the light of the statement made in the judgement *Handyside v. the United Kingdom*[82].

B. The implicit attitude of the European Court of human rights

Insofar as the Convention does not expressly mention the word, it is through the analyse and interpretation of the Court's case-law that one can be understand how dignity is, or could be, used as an argument to restrict freedom of expression. In France, when dignity refers to 'racial hatred or discrimination' its use is able to fully prohibit the expression of personal views. At the European level, in order to determine whether and to what extent dignity is capable of limiting the expression, attention can be drawn to Article 17 of the ECHR. In a case in which an applicant alleges a violation of his right to freedom of expression under Article 10 due to a domestic condemnation, by using Article 17 the ECtHR is able to declare his application inadmissible and the domestic condemnation will not be reviewed and will have to be seen as lawful. Thus, it is worth analysing Article 17 so as to determine whether the ECtHR in the frame of

[81] For an illustration: CE, *CDPDCA*, ord., no. 386328, 2014; CE, *CRAN*, ord., no. 389372, 2015.
[82] Cfr. supra footnote 63.

freedom of expression implicitly uses dignity. The judgement *Perinçek v. Switzerland*[83] referred to the Grand Chamber is interesting in two aspects.

Firstly, ruling on the admissibility of Article 17, the ECtHR reiterated why an application can be declared inadmissible on the grounds of abuse of right to freedom of expression. It recalls that it 'draws attention to the vital importance of combating *racial discrimination* in all its forms and manifestations. It notes in this connection that incitement to hatred does not necessarily require a call for specific acts of violence or other offences. Personal attacks by means of insults, ridicule or defamation directed *at certain specified sectors or groups of the population*, or incitement to discrimination, are sufficient for the authorities to make it a priority to combat *racist discourse* when faced with irresponsible use of freedom of expression that undermines the dignity, or even the safety, of these population groups or sectors'[84]. The use of dignity in this statement constitutes the justification for the allowed limitations on freedom of expression in a racial discourse. Thus, the Court seems to have the same guideline that France in the ability to resort to dignity as a limitative tool. Then, as to the question whether the ECtHR would recognise the application of Article 17 as to the expression of personal views when the remarks lead to discrimination and hatred because of personal identity appears to be yes. In paragraph 48, the Court recalled the decision *Molnar v. Romania* in which it founded that 'the messages containing references to the Roma minority and the homosexual minority' and that 'through their content, these messages sought to arouse hatred towards the minorities in question, constituted a serious threat to public order and ran counter to the fundamental values underpinning the Convention and a democratic society', and then concluded that 'in accordance with Article 17 of the Convention, the applicant could not rely on the provisions of Article 10'. Consequently, it appears that racial – as well as homosexual – hatred and discrimination are prohibited because running counter dignity, and are able to lead to the application of Article 17 in order to counter freedom of expression.

[83] Cfr. supra footnote 68.
[84] Ibidem, § 46.

Secondly, as the Court considered that 'the rejection of the legal characterisation of the events of 1915 was not in itself sufficient to amount to incitement of hatred towards the Armenian people' and that 'in any event, the applicant has never been prosecuted or punished for incitement to hatred (…), nor does it appear that the applicant has expressed contempt towards the victims of the events in question', it concludes that 'the applicant cannot be said to have used his right to freedom of expression for ends which are contrary to the text and spirit of the Convention, and thus to have deflected Article 10 from its real purpose. It is therefore unnecessary to apply Article 17'. The Court considered that the applicant has never denied the massacres and deportations and has only disputed the legal characterisation of 'genocide'. He has not incited to racial hatred and his aim was not to discriminate on racial or ethnic grounds the Armenian people. Consequently, it seems justified – in relation to Article 17 – not to use dignity as a 'legitimate aim' to restrict his freedom of expression. In paragraph 75, the Court referred to the protection of 'the rights of others, namely *the honour* of the relatives of victims of the atrocities', and not to the protection of 'their dignity'. It is of importance because it shows that the Court is not inclined to recognise the use of dignity on other grounds than the prohibition of racial discrimination and racial hatred, or also sexual orientation.

Conclusion Chapter I

Because dignity constitutes the intrinsic value of human persons, their common belonging to humanity, it must be recognised that it founds a basis for a right to be respected and a duty to respect others. However, as regards the implications that a person might expect from her objective dignity, the conclusion seems to be the following: the use of dignity to protect human equality should be qualified as 'relative'. By this word, it shall be understood that dignity in the French and European systems would be used to prevent and punish the deepest situations of inequality which may occur between human beings.

Regarding the protection against harm to physical or psychological integrity, it refers to breaches of equality that cannot be seen as justified. Under Article 3 ECHR, dignity appears to be used when the treatment was not 'strictly necessary', or has 'reached the level of severity'. In France, the same conclusion can be drawn in that dignity appears to be used when the act was 'unlawful' or 'unnecessary' and 'inadequate'.

Regarding the limitation on freedom of expression, it refers to acts that called into question the deepest human quality: either a person or a group's humanity or personal identity, and not honour or reputation. This may appear justified if the importance of the word 'dignity' is considered. At both levels – either explicitly in the area of French public policy, or implicitly under Article 17 ECHR, it appears that dignity shall be perceived as protecting human beings against racial discrimination and racial hatred, as well as discrimination based on personal identity grounds (religion, disability or sexual orientation).

Beside its ability to be a basis for a right to be respected and a duty to respect all human beings, dignity can be also seen as a manifestation of a right for every individual to self-fulfilment.

CHAPTER II. Dignity: a legitimate manifestation of the individual's right to self-fulfilment

If it is undeniable that dignity is attached to every person due to one's belonging to humanity, and if it is indisputable that every person is to be seen as part of human society, it should not be forgotten that in modern times the notion of 'individual' is of the utmost importance. Alongside the life in society, which implies some duties and behaviour, every person – characterised as an individual – is free to live one's own life. This freedom exists both in the private sphere of the individual and in the public sphere of society. Indeed, the ECtHR through its interpretation of the ECHR as a 'living instrument'[85] recognised that Article 8 includes elements related to the very strict intimacy of the individual, and others more connected to his development in his social life[86]. In this context, and as the CCNE recalls, dignity – beside its objective aspect – is also related to the individual himself. Thus, in this chapter dignity will be analysed through the lens of the person as an individual more than as a human being. Dignity in its subjective aspect refers to the personal feelings of the individual, the way in which he perceives himself from inside and in the eyes of others. In other words, when the individual refers to his dignity it is to explain how he personally feels in his body and mind. That is why in some cases, an individual may say that he is not worthy anymore: he does not feel valuable because of a loss of physical or moral capacities for example. Hence, insofar dignity may be perceived by every individual as the permanent search for self-respect and self-fulfilment in his life – physically and mentally –, and insofar as in our societies every individual should have the right to self-fulfilment and to reach personal respect, it appears that dignity manifests this right.

It follows that in order to reach that self-fulfilment, the individual should be able to establish the details of his life and to make his own choices concerning it. Thus, freedom seems to be a condition for the fulfilment of dignity (Preliminary Section). Moreover, from the human rights perspective, insofar as dignity constitutes a support

[85] ECtHR, *Tyrer v. the United Kingdom*, no. 5856/72, 1978, § 31.
[86] Sudre, 2010, pp. 495-529.

for personal freedom, it can be seen as a creative tool for the recognition of a principle to personal autonomy and a right to personal development (Section I). However, while every individual should be endowed with freedom, the latter is not unlimited: restrictions can be put, thereby limiting dignity (Section II).

Preliminary section. Freedom as a condition for the fulfilment of dignity

In an article entitled 'Dignity and freedom: towards an insoluble contradiction?'[87], Pierre Le Coz points out that dignity sometimes seems to be confused with the 'quality of life' or even with the 'degree of freedom of the person' in our modern societies [88]. He therefore wondered whether would freedom became 'consubstantial to the concept of dignity'? When the focus is put on the legal literature, it is undoubted that dignity may be linked to the individual's freedom, the question is rather to determine how and how far[89]. In a sense, it appears that freedom is essential for dignity insofar as someone who is not free to act in accordance with his free will, will never be able to reach self-fulfilment. In this context, freedom may be understood in two ways: as the ability to make choices, and freedom from external limits. In law, it refers to legal capacity and external interference. In modern times, and for instance in France, since 1789 the society has become more and more 'individualistic' and 'liberal'[90], the individual having been placed at its heart. Articles 1 and 2 of the Declaration of the Rights of Man and of the Citizen provide a legal basis for individual's freedom of choices and no 'predestination'[91] able to be imposed on them. In this frame of liberty laid down by legal systems, the major problem is then to determine whether the individual – in our current societies – shall always do the 'proper choice', take the 'suitable decision' towards himself in order not to offend the society in which he lives, or whether his freedom shall be unlimited. Two points must be analysed in order to answer this question.

---

[87] Translated: 'Dignité et liberté: vers une contradiction insoluble?', Le Coz, 2010, pp. 15-27.
[88] Ibidem, p. 18.
[89] See among others: Dreyer, 2008, p. 2730 et seq.; Roman, 2007, p. 1284 et seq.; Fabre-Magnan, 2008, p. 31 et seq.
[90] Roman, 2007, p. 1284 et seq.
[91] Ibidem.

Firstly, the issue is related to the definition of freedom, because as Thierry Machefert points out, there can be 'two different meanings of liberty'[92]. On the one hand, he explains that it is possible to understand the person's freedom as independence, implying that the only limit to freedom would be the consent of the individual. In other words, any behaviour should be allowed as soon as the individual has consented to it. To his point of view, that conception of freedom leads to 'individualism', that is, to a vision of the world and of man in which everything is reduced to the individual's with no limit other than one's own choice[93]. On the other hand, the person's freedom may be understood as autonomy. In this case, he explains that if the individual acts in accordance with his personal choices, these are not limited only by his consent. There would be something 'common to humanity' that would provide structure for his actions: the 'reason'. Thus, every individual would actually think and act by himself but in the framework of a 'human rationality materialised in inter-individuals' discussions and meetings of their subjectivities'[94]. Here the author – as well as others – refers to Immanuel Kant and his theory whereby the individual is free insofar as he is able to make 'reasonable' choices, that is to say choices that would be acceptable to the society[95], and effectively does it[96]. However, one element must be taken into account to understand that first issue: the distinction between the individual perceived as alone with himself or linked to others. In other words, the two definitions of freedom should be seen through the lens of the presence or involvement of others – either one person or society as a whole – in the individual's choices, or not. It is assertable that as long as the individual does not seek help from a third party to carry out his own choices and desires, no outer limit could legitimately be put to his actions. On the contrary, from the moment he asks help from someone – either the State, doctors, or a third person – to carry out his personal choice, it appears legitimate for the State to be allowed to limit

[92] Machefert, 2009, p. 28.
[93] The author is critical of that freedom understood as independence. To his point of view, it would lead to a society in which there would be no values anymore, no outer limits to the individual which could constitute 'living standards', p. 33.
[94] Ibidem, p. 29.
[95] Cfr. supra footnote 87, p. 22.
[96] Contra. Hennette-Vauchez, 2004, p. 3154 et seq.: the author explains that autonomy would essentially be the ability to produce choices that would be acceptable for the society, not so much the concretisation of these choices.

this choice. It is in this context that the distinction between freedom as independence and as autonomy should be understood. Thus, insofar as some scholars – notably Muriel Fabre-Magnan and Diane Roman – stress that nowadays, most of the time the individual is not in a 'relationship to the self' but in a 'relation to others'[97], the question is less to know to what extent the individual should be allowed to act without external moral rules when he is alone with himself, than to observe what could or should be the limits to the individual's *autonomy*.

Secondly, it must be recalled that if Article 2 of the DRMC and Article 8§1 of the ECHR provide that in the individual's personal sphere there should be no external interference, Article 4[98] and Article 8§2 lay down the reasons why there could be limitations on this liberty. It is noticeable that the ECtHR usually refers to the principle of 'personal autonomy' of the individual and not to a 'personal independence': it may show the relation established by the Court between individual's freedoms and their possible limitations put by the State authorities on the basis of 'legitimate aim(s)' provided by Article 8§2.

To conclude, it is in a context such as defined above that the following sections will try to determine how and to what extent dignity is, or should be, used in order to support personal freedom of every individual when others are involved in a direct or indirect way. It seems that there should not be any need to refer to dignity in a context in which the individual is alone with himself insofar as the State or the society are supposedly not to be allowed to enter into the self-relation. In those situations, freedom shall be unlimited and self-fulfilment would not require the invocation of dignity to be reached.

[97] Fabre-Magnan, 2008, p. 31 et seq.
[98] 'Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same right'.

Section I. Dignity as a creative tool: the existence of a principle to personal autonomy and a right to identity and personal development

The section is aimed at analysing how dignity is used in the French and European legal systems to support individuals' freedom, and what are the consequences in terms of human rights, notably whether this utilisation has led to the recognition of specific rights. It appears that if that recognition is explicit in the European case-law (Paragraph I), its identification is difficult in the French system (Paragraph II).

Paragraph I. An explicit recognition in the ECHR case-law

The two first references to dignity in relation to freedom in the ECtHR's case-law were made by Judge Martens in his dissenting opinion in the judgements *Cossey v. the United Kingdom* delivered on 27 September 1990 concerning transsexualism, and *Kokkinakis v. Greece* on 25 May 1993 concerning freedom of religion[99]. In the first case, the Judge stated that 'human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality'[100]. It seems evident that the reference to 'human dignity' and 'human freedom' actually refers to the individual's dignity and freedom in a subjective way. The reference to the verb 'imply' after the combination of both individual's features can be seen as an argument to manifest the existence a right for every individual to live in accordance with his personality and to be able to use his personal freedom to reach the state of 'well-being'. Thus, while there was no express mention to a 'principle of personal autonomy' or a 'right to identity and personal development' in the dissenting opinion, it is arguable that the idea was there.

The important judgement *Pretty v. the United Kingdom* delivered by the ECtHR in 2002 can be seen as the recognition of the legal existence of those principle and right

[99] ECtHR, *Kokkinakis v. Greece,* no. 14307/88, 1993, § 14-15 'since respect for human dignity and human freedom implies that the State is bound to accept that in principle everybody is capable of determining his fate in the way that he deems best (…)'.
[100] ECtHR, *Cossey v. the United Kingdom*, no. 10843/84, 1990, § 2.7.

in the context of the individual's dignity. The Court first considered under Article 8 that 'the notion of personal autonomy is an important principle underlying the interpretation of (its) guarantees', notably 'elements such as, for example, gender identification, name and sexual orientation and sexual life' as different aspects individual's physical and social identity; as well as 'a right to personal development'. Then, in a separate paragraph the Court stated that 'the very essence of the Convention is respect for human dignity and human freedom. (…) many people are concerned that they should not be 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'.[101] Consequently, if it assertable that the principle and rights are to be read in the light of the individual's dignity and freedom, the solution of the Court appears disjointed. The definitive and coherent statement of the Court has been delivered three months later in two judgements related to the issue of transsexualism[102].

It must be pointed out that in all cases in which there is a use of dignity in relation with freedom, personal autonomy and/or the right to identity and personal development, the existence of individual's suffering seems to be a constant element. It shall be recalled that dignity in its subjective aspect refers to self-respect and self-fulfilment. Thus, when the Court uses dignity in combination with freedom, it can be seen as a will to protect individuals from suffering of lack of self-esteem or malaise by allowing them to obtain respect for their personal choices made to reach self-respect.

In the context of the 'right to identity and personal development' protected by Article 8 ECHR[103] and the principle of personal autonomy, dignity seems to be used by the Court as a means to justify actions that individuals would be entitled to ask the State to carry out in order to reach self-fulfilment and no longer suffer, or to prevent a third person to override individuals' will.

---

[101] ECtHR, *Pretty v. the United Kingdom*, no. 2346/02, 2002, § 61 and 65.
[102] ECtHR, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 2002, § 90; *I. v. the United Kingdom* [GC], no. 25680/94, 2002, § 70.
[103] ECtHR, *Bensaid v. the United Kingdom*, no. 44599/98, 2001, § 47 'Article 8 protects a right to identity and personal development'.

A. The necessity to take actions

Two examples can illustrate that first situation, in which the use of dignity would refer to an idea of *direct* suffering.

Firstly, regarding transsexualism Judge Martens explained that 'if a transsexual is to achieve any degree of well-being, two conditions must be fulfilled: by means of hormone treatment and gender reassignment surgery his (outward) physical sex must be brought into harmony with his psychological sex; the new sexual identity which he has thus acquired must be recognised not only socially but also legally'[104]. In cases brought before the Court, applicants used to complain about the impossibility to have a full legal recognition of their changed status. In the light of the two conditions, the legislation does not allow them to fully reach their self-fulfilment. After several cases in which it was said that there was no positive obligation upon the State to provide for a legal recognition of the sex change 'having regard to the existence of little common ground between the Contracting States, an area in which they enjoy a wide margin of appreciation'[105], in the judgement *Christine Goodwin v. the United Kingdom*, the ECtHR stated that nowadays, 'society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost'[106]. In that case, the Court in paragraph 90 used 'human dignity' combined to 'human freedom' to give transsexuals 'a right to personal development' allowing them to seek for legal recognition in order not to suffer anymore from pain and to be fully accomplished as a transsexual and reach self-fulfilment.

Secondly, the issue of same-sex marriage can be raised. It is legitimately thinkable that the notion of 'personal development', 'identity' or even 'personal autonomy' could apply in that context. Indeed, being homosexual is part of the individual's identity and every homosexual – on the same basis of transsexuals – should

[104] Cfr. supra footnote 100, § 2.2.
[105] Ibidem, § 40.
[106] Cfr. supra footnote 102, § 91.

be entitled to develop himself in society. Thus, the ECtHR could use the combination of dignity and freedom to recognise a positive obligation of the State to allow homosexuals to reach self-fulfilment and not suffer from the impossibility to be legally recognise as spouses. However – and as transsexual issue before the 'Goodwin case' – insofar as there is still no European common view, the Court does not seem inclined to use neither the reasoning, nor the word dignity.

B. The protection of the individual's will

The main issue is the individual's consent: the State is claimed either to protect it or to grant it a legal value. It seems that dignity would refer to an idea of *indirect* suffering because of the intervention of a third party in the individual's will.

Firstly, in the judgement *Evans v. the United Kingdom* delivered on 10 April 2007 the ECtHR was called to decide whether the British legislation, which permitted the man to withdraw his consent after the fertilisation of the woman's eggs with his sperm, infringed the right to private life of the latter. The Court apprehended this case through the State's positive obligation to ensure that the individual's consent is respected; it is also possible to say that there shall be an abstention from the woman. She should not have a right to override the withdrawing of consent of her former husband. The Court first stated that '"private life", encompassing aspects of an individual's physical and social identity including the right to personal autonomy, personal development (…), incorporates the right to respect for both the decisions to become and not to become a parent'[107]. It added in paragraph 89, when assessing the compliance of the legislation, that 'respect for human dignity and free will, (…) underlay the legislature's decision to enact provisions permitting to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent'. Thus, it can be said that the combination of dignity and free will seems to be completely related to personal freedom of the man to choose how to lead his life: to be a

[107] ECtHR, *Evans v. the United Kingdom* [GC], no. 6339/05, 2007, § 71.

father or not, to reach self-fulfilment with or without a child. Furthermore, it seems that there would be a suffering because if the man were forced to become a father, it would lead to a lack of consideration for his personal will and therefore, it would prevent him from being himself, to feel comfortable with himself: without a child.

The second example is the refusal of medical treatment on the grounds of religious beliefs: in this case, it appears that there would be a personal suffering of the individual if he were obliged to accept the treatment. Indeed, it would lead to override the individual's will, and his self-respect and self-fulfilment would be unable to be reached. The ECtHR considered the case in the judgement *Jehovah's Witnesses of Moscow v. Russia*. The Court first recalled that 'the very essence of the Convention is respect for human dignity and human freedom and the notions of self-determination and personal autonomy are important principles underlying the interpretation of its guarantees. The ability to conduct one's life in a manner of one's own choosing includes the opportunity to pursue activities perceived to be of a physically harmful or dangerous nature for the individual concerned'. It then added that 'the freedom to accept or refuse specific medical treatment, or to select an alternative form of treatment, is vital to the principles of self-determination and personal autonomy. A competent adult patient is free to decide, for instance, whether or not to undergo surgery or (….) and must have the right to make choices that accord with (his) own views and values'[108]. By those statements, it is visible that the Court established a link between dignity and freedom in order to protect the individual's will to refuse medical treatment when it goes against one's personal beliefs and could have the effect of diminishing his self-respect and preventing him from reaching self-fulfilment. Consequently, dignity is used to support the right to act freely with consent in accordance with religious beliefs in order to reach self-fulfilment and self-respect.

Thirdly, the judgement *Tysiąc v. Poland* related to the abortion system in Poland may be seen as highlighting the necessity for the State to grant a legal value to the will of a woman to lawfully terminate her pregnancy. The ECtHR decided to rule the case

[108] ECtHR, *Jehovah's Witnesses of Moscow v. Russia*, no. 302/02, 2010, § 135-136.

on State's positive obligation to provide women with a procedural system enabling them to contest a refusal to terminate the pregnancy on therapeutic grounds, and found that 'having regard to the circumstances of the case as a whole, it cannot therefore be said that (…) the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion'[109]. While the ECtHR did not mentioned dignity, the arguments of a third-party intervener in paragraphs 86-89 are interesting: 'the central issue in the present case was whether a State Party which had by law afforded women a right to choose abortion in cases where pregnancy threatened their physical health, but failed to take effective legal and policy steps to ensure that eligible women who made that choice could exercise their right, violated its obligations under Article 8'. It means that from the moment the State gives a woman the possibility to make a choice – under conditions – concerning her own body and how to live her own life with self-respect and without damages for her health, there shall be a duty for the State to guarantee their personal choice as manifesting personal autonomy and search for self-fulfilment. Otherwise, there would be a violation of one's subjective dignity.

Paragraph II. A difficult identification in the French legal system

Difficult does not mean impossible. It is 'difficult' insofar as both the legislature and judges do not make explicit reference either to dignity, personal development, right to identity, or personal autonomy. However, it does not seem that it should lead to the conclusion that the idea of dignity as supporting the individual's freedom and implying those rights and principle does not exist in the French legal system. Indeed, the analysis and interpretation of both the law and the jurisprudence led to many allusions to those topics. Actually, it just has to be acknowledged that the words are not used. But the idea is there and it seems to be the most important. The analysis has been led in the same areas than at the European level: transsexualism, same-sex marriage, abortion, and medical assistance.

[109] ECtHR, *Tysiąc v. Poland*, no. 5410/03, 2007, § 128.

A. The necessity to take actions

Regarding transsexualism, as it has been seen the issue brought at the European level was the difficulty for individuals who had undergone a gender reassignment surgery to obtain the legal recognition of their new sexual identity, notably by the modification of their civil status on birth certificates. It is in this context that the ECtHR used dignity to support individuals' freedom and to promote their right to personal development and identity as transsexuals. It must be noted that before the recognition of a positive obligation in the *Goodwin v. the United Kingdom* case, the Court condemned the French State in its judgement *B. v. France* delivered on 25 March 1992[110]. It judged that because of serious daily inconveniences on the applicant's life – who had undergone a reassignment surgery –, and taking into account the factors which distinguish the present case from the Rees and Cossey cases, the refusal of national authorities – notably the French judicature in numerous decisions quoted in the judgement – to allow the change of civil status breached Article 8 of the ECHR. After that condemnation, the French judicature changed its position and admitted the possibility for transsexuals to obtain modification of their civil status on birth certificates under certain circumstances. It is important to note that at that time, the ECtHR did not refer either to dignity, or freedom, and make no mention of a right to personal development for transsexuals. The reasoning was exclusively based on Article 8: respect for private life of the applicant as regards his sexual identity.

At the French level, it must be pointed out that the legislator has never modified the law and it is only through the case-law that the situation of transsexuals is addressed. While the French courts do not make reference to dignity, personal development or personal freedom, one observation must be made to show that judges are in compliance with the ECtHR. Nine months after the *B. v. France* case, the Court of Cassation delivered two judgements in which it literally applied the European

[110] ECtHR, *B. v. France*, no. 13343/87, 1992.

solution[111]. Thus, as it has been explained for the ECtHR, the reasoning is based on Article 8 and respect for private life in its aspect of sexual identity. Consequently, it is legitimately arguable that the sexual identity as a fundamental right is recognised and used to allow the modification of civil status of transsexuals, and to able them to reach personal development and self-fulfilment.

Another important issue on transsexualism is the conditions under which the French judicature deems that a gender reassignment occurred. It appears necessary that the French legislature passes a law that would lay down the conditions to recognise the existence of the reassignment insofar as it determines the possibility to change civil status. Indeed, it is of importance for transsexuals to be aware of the legal consequences of their decision to become part of the other sex. The legislature should make explicit reference to dignity and personal freedom, as well as to personal development and identity, in order to support the legitimacy of the modification as regards the right to identity of transsexuals. The question whether the reassignment surgery shall constitute a condition for the modification of the civil status is something that goes beyond the scope of this study. However, it is arguable that the harder the conditions are, the higher the harm to dignity of transsexuals will be.

The issue of same-sex marriage is important in France insofar as the Law no. 2013-404 providing for same-sex marriage of 17 May 2013, re-enacts in its Article 1, Article 143 of the Civil Code, which is dedicated to the characteristics and conditions which are prerequisites for contracting marriage, as follows: 'Marriage may be contracted by two individuals of a different sex or of the same sex'. If the law does not mention expressly dignity, freedom, personal autonomy or personal development, attention must be drawn to the Constitutional Council's decision delivered on 17 May 2013. In this decision, it was called upon to assess the conformity of the law with the French constitution. Two elements are of importance in its ruling, as they have to be

[111] Plenary Assembly, *M. Y.*, no. 91-12373, 1992; Plenary Assembly, *M. X.*, no. 91-11900, 1992, 'Vu l'article 8 de la (CEDH), Attendu que lorsque, à la suite d'un traitement médico-chirurgical, subi dans un but thérapeutique (...), le principe du respect dû à la vie privée justifie que son Etat civil indique désormais le sexe dont elle a l'apparence'.

interpreted as the recognition of the right for homosexuals to lead their life in accordance with their personal choices in order to reach development and self-fulfilment, and that marriage is part of that personal dignity.

Firstly, ruling on the applicable provisions of the Constitution to the deferred law, the Council stated that 'considering that the right to lead a normal family life stems from the tenth subparagraph of the Preamble to the Constitution of 1946, which stipulates that: The Nation provides individuals and families with the necessary conditions to their development'[112]. It is positively arguable that the Council, by connecting the 'right to lead a normal family life' to the development of individuals and families, recognises that every individual – homosexual or not – has a right to personal development and that its concretisation can be seen as a right to lead a family life in accordance with one's personality. It seems to indicate that the Nation – understood as the society and the State – should provide elements for every individual's personal development in order to live his own family life. It is defendable that the idea of personal development and self-fulfilment are at the heart of that statement. It would have been interesting that the CC adds the reference *personal* development after the recalling of that subparagraph.

Secondly, ruling on the applicants' arguments, the Council in paragraph 23 stated that ' (…) freedom to marry, which amounts to a personal freedom protected under Articles 2 and 4 of the 1789 Declaration (…)'. It is of the utmost importance that it made an explicit reference to 'personal freedom' in the context of freedom to marry. Indeed, as the right to lead a normal family life stems from the development of individuals, and insofar as marriage is part of family life, it is possible to establish a connection between the personal development and the personal freedom of every individual. In other words, every individual has a right to use one's personal freedom to reach personal development in one's family life. In these terms, the general ECtHR's case-law on Article 8 seems to be applied by the Council in its decision. It must be

[112] CC, *Law providing for same-sex marriage*, no. 2013-669 DC, 2013, § 16.

stressed that it would have been laudable for the Council to make explicit reference to dignity to support personal freedom in Articles 2 and 4 to marry: marriage shall be seen as a means to reach self-fulfilment, and to provide this legal opportunity to persons of the same-sex constitutes an indispensable way to enable them to reach it.

B. The protection of the individual's will

In the context of the individual's will, the French system manifests that dignity and personal freedom are involved to assert the existence of a principle of personal autonomy and a right to personal development.

Regarding abortion, attention must be drawn to the PHC and to two decisions delivered by the Constitutional Council.

Firstly, Article L. 2212-1 of the Code provides that: 'a pregnant woman who does not want to continue a pregnancy may request a doctor to interrupt her pregnancy. Such interruption may be practised only before the end of the twelfth week of pregnancy'. Two elements must be stressed. First of all, it is undeniable that this Article lays down the principle of personal autonomy understood as the right for every pregnant woman to operate choices concerning one's own body. The woman is endowed with a personal right to decide to continue or to terminate her pregnancy as illustrated by the wording 'does not want', which indicates that the decision exclusively belongs her. The second element constitutes the limits to the woman's personal freedom. On the one hand, the doctor, being the one who is allowed to carry out the abortion, may be seen as a limit. Nevertheless, the latter is relative: if he does not want to perform the abortion, he has the legal duty to 'communicate immediately the name of practitioners who may perform this procedure'. Therefore, the only real limit to the woman's will is the time limit: the abortion is possible only 'before the end of the twelfth week of pregnancy'. It is important to stress it since before the law no. 2014-873 of 4 August 2014 for Real Equality between Women and Men, abortion could be legally performed on a woman who was 'because of her condition, in a situation of distress'. To conclude, it appears

that since 2014 the French legislature fully recognises the personal autonomy of the woman who can decide to continue her pregnancy, to become a mother, or not. It must be seen as a manifestation of a right to lead one's life in accordance with one's personal wishes in order to reach self-fulfilment.

Secondly, in its decision of 27 June 2001, the CC expressly recognised that the decision of a woman whose 'pregnancy may be voluntarily terminated where (she) is, because of her condition, in a situation of distress'[113] constitutes the 'woman's freedom under Article 2 of the DRMC'. It is important to notice that, even if at that time there was another limit – the 'condition' of the woman – therefore limiting the personal freedom, the legislature and the Constitutional Council intended to substantiate the principle of personal autonomy of pregnant women to operate choices on their own body. Furthermore, in its decision of 31 July 2014 the CC reiterated its point of view by stating that the modification of Article L. 2212-2 whereby the condition of 'situation of distress' has been removed does not violate any constitutional requirement insofar as the former wording of the Article reserved the appreciation of this 'situation' only to the woman, thus endowing her with a free choice as regards her personal development[114]. It would have been interesting for the Council to mention explicitly that the decision of every pregnant woman to terminate one's pregnancy is based on the personal freedom to develop and shape oneself in accordance with one's choices in order to have respect for *one's dignity*.

Regarding the refusal of medical treatment, insofar as it will be studied latter with respect to the limitations on subjective dignity, only the general principles will be explained here. Firstly, Article 16-3 of the Civil Code states that 'there shall be no invasion of the integrity of the human body except in case of "medical" necessity for the person. The consent of the person concerned must be obtained previously except when his state necessitates a therapeutic intervention to which he is not able to consent'.

[113] CC, *Voluntary Interruption of Pregnancy and Contraception Act*, no. 2001-446 DC, 2001, § 5.
[114] CC, *Law for Real Equality between Women and Men*, no. 2014-700 DC, 2014, § 4.

Secondly, Article 1111-4 of the PHC[115] provides, *inter alia*, that 'the doctor must respect the individual's wishes after informing him or her of the consequences of the choices made. If the wish of the person to refuse or discontinue any treatment endangers one's life, the doctor must do everything possible to convince her to accept indispensable care (…). No medical act or treatment may be administered without the free and informed consent of the patient, which may be withdrawn at any time'. As the French CE recalled in its judgement of 14 February 2014, this Article enshrines a 'patient's right to consent to medical treatment'[116]. Consequently, these provisions enshrine a principle of personal autonomy through the freedom for every 'mentally competent adult patient' to make choices concerning medical treatment or assistance – even if the wish constitutes a refusal which can endanger his life. As previously quoted, the ECtHR stated that 'the freedom to accept or refuse specific medical treatment, or to select an alternative form of treatment, is vital to the principles of self-determination and personal autonomy. A competent adult patient is free to decide, for instance, whether or not to undergo surgery or treatment or, by the same token, to have a blood transfusion'[117]. In this frame, the CCNE in an opinion published in 2005, pointed out that 'the analysis of the law and case-law reveals the gap between the expressed legislative intent and its application made case by case by judges'[118]. Although the law provides for the principle of personal autonomy and freedom of consent, judges have interpreted it in a way limiting the principle of autonomy regarding medical treatments.

To conclude, it seems that both the French legislature and the judges should explicitly use dignity more frequently in its subjective sense so as to support the individual's freedom in his personal choices to live his life in order to reach self-fulfilment. Even though the French system appears in harmony with the European one, it would be beneficial for individuals to be able to rely on their subjective dignity to promote their free will and to support their right to personal development and identity.

---

[115] As amended by the Law no. 2005-370 of 22 April 2005 on patients' rights and end of life issues.
[116] CE, *Mme F…I… et autres*, nos. 375081, 375090, 375091, February 2014, § 5.
[117] Cfr. supra footnote 108, § 136.
[118] CCNE, Opinion no. 87, 2005, p. 18.

Although constituting a human rights' creative tool such as identity and personal development through the support to individual's freedom, insofar as the law may restrict the latter, dignity may therefore appear limited in some cases.

Section II. Limited dignity: the limitations on the principle to personal autonomy and the right to identity and personal development

In this section, focus will be on the legitimate aim that a State may invoke in order to lawfully interfere in the right to private life. The analysis of the case-law has put forward two aims which deserve attention. First, it raised the view that 'dignity as opposed to the individual'[119] would actually be an unused limitation aim insofar as it would have been used only once by the French judges, and that the ECtHR does not seems to have ever used it in those terms (Paragraph I). Second, it appeared that the protection of life and of the rights of others constitutes a limitation aim at both levels. Although with respect to different situations, it seems that it would lead to similar consequences (Paragraph II).

Paragraph I. Dignity as opposed to the individual: an unused limitation aim

Deriving from the objective aspect of the concept whereby there shall be a duty for every individual not to contravene to the value of humanity expressed in every human being, and therefore, to always act in accordance with this human quality and to never undermine it, 'dignity as opposed to the individual' would impose this duty to the individual himself as regards the actions on his own body, and not towards others.

In France, the first administrative judgement referring to the concept of dignity is the *Morsang-sur-Orge* case, in which judges found the prohibition of a sideshow lawful. On the one hand, a dwarf accepted to be launched by other persons, what – as he explained – 'allowed him to integrate into a theatre troupe, to ensure a monthly

[119] Translated from French 'la dignité opposée à la personne', Dreyer, 2008.

income of 20000 F, and so nourish for the first time in his life true ambitions, both personal and professional' while previously he lived in solitude and was unemployed. Thus, it can be seen that dignity understood as the research for self-fulfilment was at stake and that the show enabled him to satisfy his personal dignity. On the other hand, it appeared to the administrative authorities and to the Conseil d'Etat that the show was contrary to the respect for dignity of the human person insofar as it led to use the dwarf as an object and implied other individuals in that dehumanisation. The legal literature was, and is still, divided on the solution and its impact on the protection of human rights. Indeed, some scholars agree on the fact that an individual's free will may be restricted – subjective dignity – when his behaviour leads or will lead to diminish *his* human quality – objective dignity. On the contrary, for other scholars human dignity cannot be used as a concept 'opposed to the individual' so as to limit his personal freedom to act in accordance with his will in order to reach personal development and to develop his personal identity. As the French legal literature is abundant on this point, the analysis will focus on some authors as well as on a recent judgement delivered by the ECtHR: *S.A.S. v. France*[120].

First of all, different scholars dispute the fact that objective dignity might be applicable to the individual in such a way as to limit his personal autonomy. For instance, Emmanuel Dreyer, recalling that 'the dignity of the person, which makes man a living being distinct from all others, is one's capacity to understand and one's ability to want what she does', concludes that 'this conception of dignity (opposed to the individual) seems inconsistent because it heavily disregards what is the human essence: the intellect and the will'[121]. Furthermore, Diane Roman observes that 'if respect for the dignity of others as an obligation constitutes an indisputable imperative, the command becomes much more ambiguous when applied to the individual himself. In other words, if there is an absolute obligation to respect the dignity of others, does this obligation require the individual to respect himself and refrain from placing himself in a degrading

[120] ECtHR, *S.A.S. v. France* [GC], no. 43835/11, 2014.
[121] Dreyer, 2008, p. 2730 et seq.

situation for himself?'[122]. She pursues by explaining that 'to respect the dignity of the human person implies above all to guarantee personal freedom, insofar as it is intrinsic to man'. That is why, in the light of these observations, the author concludes that dignity should not be used as a limitation on personal autonomy – understood as the right to make choices about one's own body – and that other aims might be used, for example 'fraternity'.

However, if it has to agree on the comments made by those authors, the analysis provided by Muriel Fabre-Magnan is interesting insofar as she explained that 'in all situations where others are involved, law may legitimately intervene, and its primary objective is not a paternalistic desire to protect the person against herself (…) but to protect others'[123]. Therefore, it appears that dignity would not be used against the individual to compel him to act in accordance with his belonging to humanity, but rather to require him to act in accordance with the dignity of others. In other words, the argument would refer to dignity as equality and a duty to respect all human beings and their equal humanity. With respect to this observation, Thibaut Leleu has raised an important point in the conference which took place in Douai in May 2015[124]. He pointed out that actually, dignity in the *Morsang-sur-Orge* case was used to protect viewers and the 'community of dwarfs' rather than the dwarf himself. He emphasised that the impact on his personal freedom was indirect in that the prohibition of the show was not directly directed against him and his free will. In other words, the decision was not to oppose his human quality, but to prohibit a show that led to diminish human dignity of dwarfs in general and to protect viewers from acting with disrepute for him. This is interesting as that helps understand why it seems, from the analysis of the case-law, that judges have never directly used the individual's own dignity to limit personal autonomy.

In the light of that final remark, it is worth mentioning the *S.A.S. v. France* judgement in which the ECtHR was called to rule on the conventionality of the Law of 11 October 2010 prohibiting the concealment of one's face in public places. The

[122] Roman, 2007, p. 1284 et seq.
[123] Fabre-Magnan, 2008, p. 31 et seq.
[124] Leleu, 2015.

applicant complained that the ban deprived her of the possibility of wearing the full-face veil in public. She alleged that there has been – notably – a violation of Articles 8 and 9 of the ECHR. Two observations can be made.

Firstly, it must be noticed that here the Court does not refer to dignity in relation to freedom in the context of personal autonomy, right to identity and personal development. Although it recognised that Article 8 of the ECHR is applicable because 'personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life (…) and that this is also true for a choice of clothing', and thus, 'the ban on wearing clothing designed to conceal the face in public places, pursuant to the Law of 11 October 2010, falls under Article 8 of the Convention', it decided that 'it mainly raises an issue with regard to the freedom to manifest one's religion or beliefs' and concluded to focus on Article 9[125]. However, it is arguable that if the Court had not decided to focus this Article, it would have been legitimate to refer to 'human dignity and human freedom' as the essence of the Convention in order to stress and to justify that women who want to wear the full-face veil do it in accordance with personal autonomy in order to reach self-fulfilment – dignity. Indeed, Manfred Nowak recalls that 'the right to privacy is central to the liberal notion of freedom and individual autonomy and protects the area of private life in which human beings strive to *achieve self-realisation* through action that does not interfere with the rights of others'[126]. He pursues in saying that 'some of the most controversial human rights issues (…) relate to the right to privacy', included 'social and religious dress codes'. Thus, it seems that in the case at issue, dignity in its subjective aspect was involved.

Secondly, as to the limitation on the wearing of the full-face veil, the Government argued that, *inter alia*, the legitimate aim would be to ensure 'respect for the minimum set of values of an open and democratic society', referring to three values: respect for equality between men and women, respect for human dignity and respect for

[125] Cfr. supra footnote 120, § 106-109.
[126] Nowak, 2012, p. 371.

the minimum requirements of life in society. It submitted that this aim could be linked to 'the protection of the rights and freedoms of others'[127]. Further, it argued that the blanket ban 'was a matter of respect for human dignity, since the women who wore such clothing were therefore "effaced" from public space', added that 'in (its) view, whether such "effacement" was desired or suffered, it was necessarily *dehumanising* and could hardly be regarded as consistent with human dignity'[128]. It is noticeable that the Government tried to explain that wearing the veil is harmful for women themselves, that they are *de facto* 'dehumanised' because 'effaced' from society, and that the law would allow them to recover their humanity. It has to be seen as an argument opposing their objective dignity – the human quality – to women, against their personal will and freedom to wear the veil in accordance with their personal convictions so as to reach self-esteem[129]. What must be emphasised is that the ECtHR did not apprehend dignity in the same way: it ruled on whether dignity of others – the members of society – would be undermined by the practice, and not that of women themselves. Indeed, in paragraph 120 the Court judged that 'it does not have any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend *against the dignity of others*'. Consequently, it appears that dignity, as a concept likely to be opposed to the individual himself, may not constitute an aim to restrict personal autonomy.

If 'dignity as opposed to the individual' as a limitation aim appears not to be used, the protection of life and of the rights of others as a legitimate aim is exploited.

Paragraph II. The protection of life and of the rights of others

In this development, the choice has been made to focus on the refusal of medical treatments by a patient able to express his wishes[130], particularly the wish of Jehovah's

[127] Cfr. supra footnote 120, § 116.
[128] Ibidem, § 82.
[129] Contra. CC, *Law prohibiting the concealment of one's face in public places*, no. 2010-613 DC, 2010, § 4 in which it is only referred to the constitutional principles of 'freedom and equality'.
[130] Unlike the '*Vincent Lambert'* case, in which the patient is unable to express his wishes.

Witnesses to refuse potentially life-saving treatment on religious ground. The issues of euthanasia, assisted suicide and palliative care will be discussed in the Concluding Chapter.

The French legal framework has already been mentioned[131]. Article 16-3 of the Civil Code and Article L. 1111-4 of the PHC lay down a principle of personal autonomy insofar as 'a medical intervention can not escape the patient's consent'[132], and that every mentally competent adult patient has a right to refuse a medical care or treatment, whatever the outcome. However, although the law seems clear and unambiguous, providing for an absolute right to accept or refuse medical treatment, the French judges - and especially the administrative ones – ruled several times that under some circumstances precisely defined, the doctor would not be held responsible if he decided to override his patient's refusal to a medical treatment, even for religious beliefs. The leading judgements expressed this circumvention to the patient's personal autonomy in these terms: 'the fact that doctors, after doing everything possible to convince the patient to accept indispensable care, perform, in order to try to save him, an indispensable act for his survival and proportionate to his condition, shall not affect the right for the patient to consent to medical treatment'[133]. It follows from these judgements that judges established an exception to the principle laid down by the Civil Code and the PHC. However, it is essential to notice that different conditions are imperatively required for doctors not to be held responsible if they override the expressed consent to refuse medical treatment – the blood transfusion. The doctor has to 'do everything possible to convince his patient to accept indispensable care' (1), if it is not successful, then the medical treatment may be imposed on the patient 'in order to try to save his life' (2), if it is 'indispensable for his survival' (3) and 'proportionate to his condition' (4). Thus, it can be said that the imposed medical treatment is to be the 'last resort' (1) in a situation characterised by emergency (2) in order to avert the actual

[131] Cfr. p. 55.
[132] Houser, 2013, p. 671 et seq.
[133] CE, *Mme Senanayake,* no. 198546, 2001; CE, *Mme Feuillatey*, ord., no. 249552, 2002; ACA Nantes, *Mme Luce X*, no. 04NT00534, 2006.

threat to life (3)[134] if it appears to the doctor that this treatment will be successful (4). This solution clearly puts forward the difficulty for every doctor to be confronted on the one hand, to his duty to save every patient's life and, on the other hand, to the principle laid down by the law to respect every competent adult patient's consent to medical treatment. It is observable that two high imperatives are at stake: the protection of life by doctors and the State, and the personal autonomy of the patient, whose respect leads to self-fulfilment and therefore to dignity in its subjective aspect. The ECtHR emphasised in a judgement aforementioned concerning the choice of Jehovah's Witnesses to refuse blood transfusion, that 'in the sphere of medical assistance, even where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity and impinge on the rights protected under Article 8'[135]. Consequently, the question is whether the judicature limitation on the refusal of a blood transfusion would be based on a legitimate aim as notably defined by the ECHR.

In order to answer the question, attention can be drawn on the judgement *Pretty v. the United Kingdom* in which the ECtHR was called to rule on the conventionality of a blanket ban on assisted suicide. Even though it is not the same situation, it appears that the solution of the Court is interesting for the issue of medical treatment[136]. The applicant who was paralysed and suffering from a degenerative and incurable illness, alleged that the prohibition in domestic law on assisting suicide infringed – notably – her rights under Article 8 of the Convention. The ECtHR, after declaring Article 8 applicable to the case, had to assess the compliance of the blanket ban with the second paragraph. As to the legitimate aim, it found that 'it being common ground that the restriction on assisted suicide in this case (pursued) the legitimate aim of *safeguarding life* and thereby *protecting the rights of others*'[137]. It went on with the proportionality of

[134] Cfr. supra footnote 118, p.8.
[135] ECtHR, *Jehovah's Witnesses of Moscow v. Russia*, § 135.
[136] ECtHR, *Pretty v. the United Kingdom*, § 63.
[137] Ibidem, § 69.

the ban[138], on which the applicant argued that 'the blanket nature of the ban as failing to take into account her situation as a *mentally competent adult* who knows her own mind, who is free from pressure and who has made a fully informed and voluntary decision, and therefore cannot be regarded as vulnerable and requiring protection'. The Court, although noticing that the domestic courts, 'while emphasising that the law was there to protect the vulnerable, did not find that the applicant was in that category', ruled that 'the law in issue in this case was designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life. (…) *Many will be vulnerable* and it is *the vulnerability of the class* which provides the rationale for the law in question'. It finally concluded that 'the interference may be justified as "necessary in a democratic society" *for the protection of the rights of others* and, accordingly, that there has been no violation of Article 8'.

In the cases concerning the Jehovah's Witnesses in France, they expressed their refusal to blood transfusion before being in a need for medical treatment: for example in a life-threatening situation. Therefore, the lawfulness of the imposed transfusion is called into question insofar as the general statement of the French judges does not take into account the situation of persons who are capable of expressing their will in full mental capacity, without pressure of any kind, and therefore not vulnerable. Furthermore, as Stéphanie Hennette-Vauchez points out, their vulnerability could not be found in their choices to accept death by refusing blood transfusion just because they do not conform to 'universal choices'[139]. The question is thus to what extent doctors are legitimate to override a free and informed consent when it will lead to a fatal outcome? The difficulty appears to determining the extent to which the protection of life could legitimately outweigh the individual's personal autonomy, essential to reach self-fulfilment by respecting one's religious beliefs when the person is wholly legally capable and not vulnerable.

[138] Ibidem, § 70-74.
[139] Hennette-Vauchez, 2004, p. 3154 et seq.

It can be relied on the solution in the *Pretty* case so as to find the legal answer to the lawfulness of the French judicature limitation. As it has ruled that it was to protect vulnerable people in general that the blanket ban was designed, and that therefore, there had been no violation, the ECtHR would probably conclude the same as regards the French judicature limitation. Therefore, it seems that it is due to the vulnerability of other patients susceptible to refuse a medical treatment, and not directly directed to the Jehovah's Witnesses one, that the French judicature limitation would appear legitimate. Indeed, it must be stressed that judges did not make specific reference to the Jehovah's Witnesses situation, but to every potential refusal of an adult patient.

As Matthieu Houser recalls, 'Dean Carbonnier defined "the inviolability of the human person as an immaterial freedom, which is headquartered less in the body than in the will"'[140]. Thus, as the right to consent to medical treatment can be seen as protecting the individual's immaterial freedom – his choice –, it seems evident that when the State violates voluntarily and consciously the individual's autonomy in order to protect him, this intervention necessarily conflicts the subjectivist logic of the human person and her dignity[141]. Therefore, it appears that in France, it is both the 'cardinal value of human life'[142] and the situation of emergency in which a successful dialogue established on a long time period between the doctor and the patient cannot be fulfilled, which may allow doctors to override the principle of personal autonomy enshrined in the patient's right to consent. Moreover, it is important to insist on the conditions laid down by the French judges to find their general statement lawful because proportionate. Indeed, 'the primacy of human life is not absolute and general. It is assessed on a case-by-case basis, taking into account the assessment of the degree of urgency (2), the means used to ward off the danger (1) & (3), and their proportionality to the expected benefit (4)'[143]. It can be said that meeting those conditions, the 'right not to undergo medical treatment

[140] Cfr. supra footnote 132.
[141] Ibidem.
[142] Roman, 2007, p. 1284 et seq.
[143] Ibidem.

resulting from unreasonable obstinacy'[144] will be respected by the doctor, as prescribed by Article L. 1110-5 PHC.

Conclusion Chapter II

Because it also refers to the personal feelings of the individual, his self-respect and his 'way of existing', it is of the utmost importance to recognise that dignity manifests a *right* to self-fulfilment. Thus, the use of dignity to support individual freedom in order to reach this self-fulfilment must be seen as legitimate in law. Regarding its concrete use and application, two conclusions can be drawn.

Firstly, regarding the use of dignity to support freedom in order to *create* a principle of personal autonomy and a right to identity and personal development, the European and French approaches can appear different. Insofar as in certain cases, the recognition of personal autonomy and personal development will imply a positive action of the State, the ECtHR sometimes seems unwilling to use dignity in relation with freedom to enshrine these rights. The explanation can be found in the reference made by the Court to issues of 'political', 'social (or) cultural connotations' in order to provide States with a large margin of appreciation[145]. However, it must be pointed out that, once the Court will find out a consensus among the Member States of the Council of Europe, things will be able to change, as it has been the case regarding transsexualism[146]. On the contrary, as it is for the domestic level to decide whether or not it is possible to recognise those rights, the situation is different in France. The recent example of same-sex marriage is important because, even though there is no explicit reference to dignity or to personal autonomy, it has been demonstrated that the CC's decision on the constitutionality of the law can reveal the idea of dignity in relation with personal freedom in order to allow same-sex marriage.

---

[144] CE, *Mme F…I… et autres*, nos. 375081, 375090, 375091, June 2014, § 13.
[145] In this context, reference is to be made to the same-sex marriage issue and the judgement of the ECtHR, *Schalk and Kopf v. Austria*, no. 30141/04, 2010.
[146] ECtHR, *Christine Goodwin v. the United Kingdom* [GC].

Secondly, the principle of personal autonomy and the right to identity and personal development undoubtedly appear 'relative' because possibly subjected to *limitations*. The ECtHR will first look at the legitimate aim of the limitations made by the State. Then, it will assess their proportionality. It appears from the *Pretty* case that when cases will be related to national issues or values, the Court will give a wider margin of appreciation to the State. For instance, as it has been demonstrated, in the situation of Jehovah's Witnesses the ECtHR would probably recognise the proportionality of the limitation on the right to refuse a medical treatment because the safeguarding of life is at stake and that the limitation is subjected to conditions. What can be questionable here is that, to defend the interests of a minority – the vulnerable – has the effect of denying the interests of another minority, yet attached to a personal choice necessary for self-fulfilment.

Besides its two first uses previously studied, dignity can be also seen as an argument for special requests: the quality of life.

CHAPTER III. Dignity: an admissible argument for requests as to 'the quality of life'

In a recent judgement[147], the ECtHR recalled that 'the very essence of the Convention (is) respect for human dignity and human freedom; indeed, it (is) under Article 8 that *notions of the quality of life* took on significance because, in an era of growing medical sophistication combined with longer life expectancies, many people were concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflicted with their strongly held ideas of self and personal identity (Pretty, § 65)'. It added that 'although the facts of the present case differ significantly from those of Pretty, insofar as the present applicant believed that the level of care offered by the local authority would have undignified and distressing consequences, she too was faced with *the possibility of living in a manner which "conflicted with [her] strongly held ideas of self and personal identity*". It follows that the Court explicitly recognises a link between the quality of life and dignity in its subjective aspect to conclude that the contested measure fell within the scope of Article 8 and the State's responsibility could be engaged. Indeed, for the applicant, the quality of life was to have access to night-care service so as to be able to safely access a toilet to urinate. The withdrawal of this service required her to use incontinence pads, even though she was not incontinent, causing a feeling incompatible with her personal 'ideas of self and personal identity' – her dignity understood as self-respect, thus resulting in decreases in her quality of life. Frédéric Sudre points out that it is tantamount to 'open the door to enshrining the right to the quality of life compatible with human dignity'[148], and that the State would appear to be a direct actor into this right for an individual to live his life with dignity.

[147] ECtHR, *McDonald v. the United Kingdom*, no. 4241/12, 2014.
[148] Sudre, 2014, p. 690.

It is worth mentioning the difference put forward by Peggy Ducoulombier between 'a certain quality of life' and 'a life of a certain quality'[149]. She notes that in the Strasbourg's case-law, two situations occur regarding the quality of life issues.

Firstly, as to a request for 'a certain quality of life', she stresses that the ECtHR 'is extremely wary on the extent to which deteriorated socio-economic conditions, negatively influencing the quality of life, may violate the Convention'. For instance, in the area of housing, while the Court recognised that 'it is clearly desirable that every human being have a place where he or she can live in dignity', it added that 'Article 8 does not in terms recognise a right to be provided with a home' and that the question 'whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision'[150]. On the contrary, the French system – in the law and case-law – seems to include a 'right' concerning the opportunity to have a decent housing in the context of dignity and the quality of life.

Secondly, concerning a demand for a 'life of a certain quality', she describes it as the respect for the individual's fundamental choices as when determining whether his life is still worth living and the conclusions to be drawn from a life whose quality has deteriorated in his eyes. She refers to issues of the individual's choice to die – the request for assisted suicide or euthanasia – or to live. Here, the notion of personal autonomy understood as the possibility for an individual to make choices about his own body would directly be involved.

As the notion of 'the quality of life' in relation with dignity is recognised at the European and French levels, it appears necessary to understand how dignity intervenes. It seems that the answer can be found in solidarity as an implication of respect for equal dignity (Section I). Then, it appears important to analyse a concrete example of what recovers the notion, what it implies. The choice has been made, especially in light of recent debate in France, to focus on end-of-life issues and palliative care (Section II).

[149] Ducoulombier, 2014, p. 1047 et seq.
[150] ECtHR, *Chapman v. the United Kingdom* [GC], no. 27238/95, 2001, § 99.

Section I. Solidarity as an implication of respect for equal dignity

'The idea of dignity founds our duties of respect, solidarity, particularly towards the most vulnerable among us...'[151]. In other words, every person deserves respect for one's dignity and it may happen that, under certain circumstances[152], the effectiveness of dignity goes through the support of the State – its agents, society, or individuals at work. The individual may need an external actor in order to see his dignity satisfied. In this chapter, 'solidarity' shall be understood as synonym of 'fraternity', 'brotherhood', with for relevant definition: 'friendship and mutual support within a group'[153].

This section is aimed at demonstrating that in general, when reference is made to dignity in the context of the quality of life, it is possible to view it as a justification for solidarity and its development. Further, it appears that solidarity would refer to respect for dignity in both its objective – 'the fact of belonging to human kind, as the deep-seated attribute of equality, a moral reality which characterises the existence of human beings and qualifies them for the recognition of certain rights' – and its subjective – 'the way of existing, the satisfactory self-image which is presented to oneself or to the outside world, or being "presentable" in the light of standards which vary in different times or places, the concept of decency'[154] – aspects. However, it shall be specified that the notion of personal autonomy in the frame of self-fulfilment for every individual is not necessarily involved.

Talking about fraternity, and quoting Michel Borgetto, Diane Roman explains that far from being solely a moral or altruistic feeling implying help to disadvantaged people, tolerance and respect for others, fraternity became a fully-fledged principle of French law[155]. Two aspects derive from this observation: solidarity would apply to

[151] Hirsch, 2009, p. 46.
[152] On the notion of vulnerability, see among others: Roman, 2007, p. 1284 et seq.
[153] www.oxforddictionaries.com
[154] CCNE, Opinion no. 121, 2013, p. 16.
[155] Roman, 2007, p. 1284 et seq.

socio-economic (Paragraph I), and solicitude to medical situations (Paragraph II), to allow the achievement of dignity.

Paragraph I. Dignity and solidarity in socio-economic situations

In this paragraph, the analysis covers the 'minimum living conditions'[156] that every person should be entitled to have – and if not, to receive help from the State – in order to live as a human being. Roger Mislawski explains that although it is essential for every individual to be free and 'autonomous' in order to live in accordance with his personal values, 'autonomy without a material sufficiency is meaningless, hence the development of diversified social guarantees. The need for assistance has unfortunately survived and grown with precarious and exclusion situations. It is necessary to help *certain categories of people* to allow them to be autonomous or to lead a better life'[157]. Thus, it appears that solidarity and dignity are involved in the context of the quality of life, here understood in the sense of 'a certain quality of life'.

At the French level, attention must be drawn to a decision of the Constitutional Council and the social action and family Code (SAFC). Firstly, in a decision delivered in 1995[158], the CC ruled that 'considering that, by virtue of these principles, the opportunity for everyone to have decent housing is an objective with the force of constitutional law'. The principles on which the Council based its decision are: the tenth subparagraph of the Preamble to the Constitution of 1946, which stipulates that 'the Nation provides individuals and families with the necessary conditions to their development', the eleventh subparagraph of this Preamble providing that 'the Nation shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working shall have to the right to receive suitable means of existence from society', and the principle for

[156] Cfr. supra footnote 149.
[157] Mislawski, 2010, p. 272.
[158] CC, *Law on diversity of housing*, no. 94-359 DC, 1995.

'the protection of human dignity against all forms of degradation'. Two observations can be made to demonstrate that dignity in its both aspects has led to develop solidarity in order to provide a certain quality of life to every individual. On the one hand, by referring to the protection of dignity against degradation in the light of a right for specified categories of persons - who might have difficulties to afford them – to have support from society for their 'material security' or 'suitable means of existence', it can be said that the Council applies objective dignity. Indeed, in this aspect, dignity refers to the inherent quality of the individual, his belonging to humanity and for which he deserves respect. Therefore, every individual shall be protected from a loss or degradation of his human quality, notably because of his living conditions. Solidarity intervenes because everybody – in the frame of equality of all human beings – shall have a right to live in 'suitable conditions of existence'. Solidarity shall be there to maintain or to restore the individual's human quality and to reinstate equality. On the other hand, by referring to dignity in the light of 'the necessary conditions to (the) development' of individuals and families, it can be said that the subjective aspect is applied – as it has been developed regarding same-sex marriage. Thus, solidarity shall help the individual to access to living conditions that allow – in a secure minimum – his personal development in order to reach self-respect, personal dignity. However, it is possible to consider that dignity – as self-fulfilment – would be less related to personal autonomy than to personal development[159]. The reference to development would seem to be more related to the 'minimum living conditions' for all individuals in general, than to an individual's freedom to make a personal choice on how to live[160]. In other words, it would be related to a 'suitable' individuals' self-respect: e.g. to live in a house in order to be in respect with oneself in 'the way of existing'.

Secondly, two Articles of the SAFC can be mentioned as illustrating that solidarity of the State constitutes an implication of respect for equal dignity of all human beings. For instance, Article L. 116-1 provides that 'the social and medico-social action tends to promote (…) autonomy and protection of people (…), to prevent

[159] ECtHR, *K.A.& A.D. v. Belgium,* nos. 42758/98 and 45558/99, 2005, § 83.
[160] Contra: Dupéré, 2008, p. 4.

exclusion and correct its effects. It is based on an ongoing assessment of needs and expectations of members of all social groups, especially disabled and elderly people and vulnerable families in a precarious situation or poverty, and on the provision of benefits in cash or in kind'. Article L. 116-2 provides that this action 'is led in respect for the equal dignity of all human beings with the aim to address appropriately the needs of each of them'. Dignity in its objective aspect is applied insofar as the action is aimed at protecting persons from exclusion and at attempting to maintain a level of quality of life compatible with the human quality of all individuals, and especially specific categories who are 'particularly' concerned. Thus, the aim is to intervene in the living conditions of individuals in order to maintain or restore human quality and to reinstate equality as much as possible. Further, interestingly, unlike the observation made as regards the Constitutional Council's decision, it seems that in these Articles, dignity would imply a more personal aspect of the individual in that the help from the State or its institutions is led with consideration for the individual's needs to whom it is provided.

To conclude, with respect to human rights it is important to defend that an individual, because he is vulnerable, shall have a support in order to reach dignity: he should be entitled to expect a minimum of help from the State, notably concerning a decent housing. Although in practice there can be the issue of the State's financial resources, these economic difficulties do not have to lead to the conclusion that objective and subjective aspects of dignity could not justify and be the basis for solidarity in our society. Beside those socio-economic situations, dignity also justifies solidarity in medical situations to ensure the quality of life.

Paragraph II. Dignity and solicitude in medical situations

Paul Valadier, talking about the relationship between the doctor and the patient, notes that when a patient brings his distress or his despair to a doctor, it is in the name of these miseries that the latter will use all his human qualities and scientific skills to

help the one who relies on his *solicitude* to regain self-esteem[161]. Thus, in the medical area, solidarity would refer to solicitude in the sense of 'care or concern for someone': it shows that there is a special consideration in the situation of medical solidarity.

The idea here is to demonstrate that, in general, in the field of health professions there is a duty to act with solicitude towards the patient, and that this duty finds its justification in the respect for equal dignity. As many authors point out, in France, respect for dignity was first enshrined as an ethical duty of all carers, and later, it became more than that: a right for every patient to be treated with respect for his dignity[162]. Anne-Marie Duguet highlights that 'to respect the patient's dignity is to treat him as an equal, and not to place him in a position of inferiority. Carers – both doctors and nurses – shall protect all interests of the patient: his physical, psychological and cultural integrity'[163]. She adds, and it is of importance, that for a patient able to express himself, 'to respect the *hospitalised* patient's dignity, is *first* allowing him to express his will and to be treated according to his convictions respecting his decency, beliefs and intimacy of his private life'. Solicitude is justified by the patient's particular vulnerability: he is ill, sometimes obliged to remain at hospital, and dependant on the action of doctors to heal. This situation can be seen as a justification to solicit the carers to see one's dignity respected and realised. Regarding the objective aspect, the patient needs that carers treat him as if he were an individual without illness, alive and with all his capacities. It is important for the individual to be treated as a peer by the carers, to see his human quality respected both *to justify the care* and *in their processing*. He deserves that doctors act to preserve his human quality from 'degradation' by relieving his physical pain, and do it as equal. Regarding the subjective aspect, on the one hand, as Paul Valadier explains, the healing act shall allow the patient to regain self-esteem. On the other hand, during the care delivery, the patient needs that carers take into account his personal wishes and desires, that they respect his personality in order to allow him to have self-respect despite his being sick.

---

[161] Valadier, 2006, p. 13.
[162] Duguet, 2010, pp. 93-94: 'la loi du 4 mars 2002 a repris ces principaux devoirs en les transposant en droits pour les patients'.
[163] Ibidem, p. 95.

Therefore, it can be said that there is a *human* right to be treated with dignity in the medical area. However, the understanding and the implementation of this right depend on a political and ethical choice of the State. The issue of the end of life is particularly at stake, involving the 'quality of the end of life'.

Section II. Dignity: the involvement of the concept in end-of-life issues and palliative care

Relying on different Articles of the French PHC, the terms 'end-of-life' in this section refer to situations in which there is a decision – of the patient and his doctor – to limit, withhold or withdraw treatment, either because the patient 'in an advanced or terminal phase of a serious and incurable disease, for whatever reason, decides to limit or withdraw any treatment'[164], or because it appears that continuing treatment would demonstrate unreasonable obstinacy[165]. The latter situation is the one which has been applied to Vincent Lambert, for who a decision to withdraw life-sustaining treatment has been taken.

There is a difference between a 'right to die with dignity' and a 'right to end one's life with dignity'[166]. The difficult question of the end of life raises debate. It seems important to understand how dignity is involved into euthanasia and assisted suicide (Paragraph I), even though in France, the law does not authorise either euthanasia or assisted suicide, but permits life-sustaining treatment to be withdrawn or withheld only in certain specific circumstances (Paragraph II).

Paragraph I. Euthanasia, assisted suicide and dignity: the terms of the debate

The leading case on the question of assisted suicide is the '*Pretty*' case, mentioned several times throughout this thesis. Recently, in the judgement *Lambert and*

[164] Article L. 1111-10.
[165] Articles L. 1110-5 and L. 1111-4.
[166] Mathieu, 2013, p. 517 et seq.

Others v. France ruled in Grand Chamber, the ECtHR recalled that 'on the question of assisted suicide (it) noted, in the context of Article 8 of the Convention, that there was no consensus among the member States of the Council of Europe as to an individual's right to decide in which way and at which time his or her life should end, and therefore concluded that the States' margin of appreciation in this area was "considerable"'[167]. While those different judgements were delivered on the question of assisted suicide, it appears from the study led by the authors of the book '*Un droit à mourir? L'euthanasie*'[168] – still relevant, that there is no consensus euthanasia among the member States of the Council of Europe. Therefore, what is important in this paragraph is not to determine whether euthanasia or assisted suicide should be allowed in the member States, but to analyse how dignity is used in debate held in favour of or against their legalisation.

As numerous articles dealt with that question, there will be a summary of the various arguments[169]. Dignity in its two aspects is at the heart of the argumentation, either calling for the recognition of a right to die with dignity, or its rejection. When the subjective aspect is invoked, it is to refer to the individual's personal feelings toward himself, to his self-respect. Thus, in this context when it appears to the individual that his life is not valuable anymore, that his suffering – physical and/or mental – and pain are so strong that they degrade him; there should be a right for him to ask for 'dying with dignity'. It would mean asking to die in order not to suffer anymore either from physical or mental pain, or from a loss of physical or mental capacities capable of reducing the individual's autonomy, and to pass away in decency and with the self-esteem he still has. As Marc Gheza and the CCNE point out, the patient's demand to end his life in a certain quality would be founded on his personal autonomy and freedom. When the objective aspect is invoked, it is to refer to the inherent value present in every human being, his humanity. Thus, it would not be possible for the

[167] ECtHR, *Lambert and Others v. France* [GC], no. 46043/14, 2015, § 145. See also: ECtHR, *Haas c. Suisse*, no 31322/07, 2011, §55; ECtHR, *Koch v. Germany*, no. 497/09, 2012, §70.
[168] Aumonier, Nicolas, Beignier, Bernard & Letellier, Philippe, 2012.
[169] See among others: CCNE, Opinion no. 121, 2013; Fabre-Magnan, 2008, p. 31 et seq; Gheza, 2008, p. 1071 et seq.; Mathieu, 2013.

patient to ask for dying because his dignity is unavailable: his human quality would be opposed to him to limit his personal wishes. However, as Muriel Fabre-Magnan points out about euthanasia and assisted suicide, insofar as a third party is involved – the doctor or a person –, the prohibition would not be based on a direct restriction of personal freedom but on a protection of this third party. It is to be seen as the protection of equality between all human beings due to their inherent humanity: a person shall not be allowed to intentionally take the life of another one. Therefore, as the CCNE stresses 'the problem is not so much ranking these concepts of dignity, as of measuring what each of them intends to convey in the debate on choosing when to die. The differences between the two concepts are very significant at this level'[170]. Thus, insofar as the two aspects of dignity might justify either the legalisation of euthanasia or assisted suicide, or its rejection, it seems that the debate will never end. In the light of this observation, the legislation established in France appears to be an appropriate solution to apprehend the end of life in dignity.

Furthermore, in the '*Lambert'* case, in paragraphs 147-148, the ECtHR noted that 'no consensus exists among member States in favour of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appear to allow it', to conclude that 'accordingly, (it) considers that in this sphere concerning the end of life, (…) States must be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy'. In these circumstances, it is relevant to analyse how the French system guarantees the respect for the end-of-life patient's dignity.

[170] CCNE, Opinion no. 121, 2013, p. 17.

Paragraph II. Withdrawal of treatment, palliative care and dignity: an appropriate solution at the French level

First of all, in end-of-life situations, the notion of solicitude – solidarity – is of importance. As the French system does not allow euthanasia or assisted suicide, solicitude will not result from the act of deliberately taking the life of a patient who suffers, but has to be apprehended in the carer's behaviour: they shall act with carefulness and attentiveness for the patient and his family, they shall do the maximum to help him to ensure the quality of his end of life by preserving his objective and subjective dignity. This respect for dignity can be seen through two cumulative aspects.

First, it is important to observe that the French system must be seen as compatible with the respect for patients' dignity. Indeed, the PHC provides, on the one hand, that 'care must not be continued with unreasonable obstinacy. Where they appear to be futile or disproportionate or to have no other effect than to sustain life artificially, they may be discontinued or withheld'. On the other hand, it is possible for a patient 'in an advanced or terminal phase of a serious and incurable disease (to decide) to limit or withdraw any treatment', and the doctor shall do it. Thus, it follows that when doctors will observe that there is nothing more to do, that the patient cannot be saved, they must accept to let the patient end his life with dignity, that is, with his human quality. The former notion of 'acharnement thérapeuthique' is important because by prohibiting it, the law preserves the patient's dignity: if doctors observe that the treatments are not, or will not be, able to heal, they have to take the decision to let the patient end his life as a human being, and not as an object of medicine, trying to use treatments in an 'unreasonable obstinacy'. The human quality of every patient shall prevail over the will to heal when it appears that treatments will not achieve this aim.

Secondly, once the decision to withdraw treatment has been taken, the respect for dignity and the carers' solicitude is to be observed through the delivery of 'palliative care' in two aspects. In end-of-life situations, understood as exposed at the beginning of the section, Articles L. 1110-5 and L. 1111-6 provide that in such cases, 'the doctor

shall *preserve* the *dignity of the dying patient* and *ensure his or her quality of life* by dispensing the care referred to in Article L. 1110-10'. Palliative care is defined as 'active and ongoing care intended *to relieve pain*, ease psychological suffering, *preserve the patient's dignity* and *support those close to him or her'*. Firstly, palliative care is aimed at relieving the patient's physical pain and psychological suffering. This must be understood as an act with the objective of preserving the patient's human quality: it is important to note that in end-of-life situations, dignity is to be 'preserved' insofar as death coming, the patient shall see his dignity maintained until the last moment. It is avoiding the most painful suffering that would dehumanise the patient, degrade him in his human quality. Secondly, as explained in the book: '*Un droit à mourir? L'euthanasie*', the aim of palliative care is to support and comfort the patient and his family in the end of life, trying to make it less painful, without, as much as possible, moral pain and suffering. In the same sense, Anne-Marie Duguet explains what palliative care implies as regards dignity in the end of life: 'the environment and premises are arranged such as to preserve privacy and ties with relatives: to have family pictures, to avoid catheters become useless, to promote physical contact with family members and to develop an indispensable privacy for the last moments'[171]. In this context, it must be stressed that Article L. 1110-11 is also of importance in end-of-life situations. It provides that 'volunteers, trained to accompany the end of life and belonging to associations can, with the consent of the patient or his family and without interfering with the practice of medical and paramedical care, bring them cooperation to the care team by participating in the ultimate support of the patient and by reinforcing the psychological and social environment of the patient and his entourage'. Finally, one would like to give an example where active care aiming at relieving pain can be adapted in order to preserve the patient's self-respect and thus, his personal dignity. The medical team shall try to adapt, as much as possible, the patient's care so that, while relieving his pain, it allows him not to be confused in order to receive his family and to be presentable and conscious. It is in this way that the patient will be able to preserve his self-respect: he will feel love in the eyes of his family, thus giving him comfort and 'well-being' in his end of life.

[171] Cfr. supra footnote 162, p. 97.

Conclusion Chapter III

Because it refers both to the inherent value of the person, deserving respect for the human quality as other persons, and to the personal feelings and self-respect, dignity is legitimately founded to constitute an argument for requests as to 'the quality of life'. Thus, it seems important for every individual to be able to rely on the State or society as a whole, another individual, when it appears that he faces either economic or social difficulties having an impact in his existence, or a deterioration of his health. Thus, solidarity can be perceived as a duty to help this individual to preserve or regain his dignity. Regarding its application, two conclusions can be drawn.

Firstly, it appears that the French level is respectful of the individual's dignity. Indeed, the problem of financial resources does not constitute an obstacle to the *recognition* of solidarity as a means to provide an individual in difficulty, vulnerable, with minimal conditions of living – here a decent housing – which will allow him to have a certain quality of life. However, insofar as financial resources can be an issue for the State, the effectiveness of a life in dignity in the frame of solidarity appears relative because subjected to external factors.

Secondly, in the medical area, financial resources shall never constitute an obstacle to the *effectiveness* of solicitude towards a patient. Solicitude is free of charge, and carers shall act with respect for the patient's dignity. Especially in end-of-life situations, the State – as well as health professionals in general – must draw attention on palliative care in order to provide every patient with care which will allow him to end his life in quality, that is, with dignity: with humanity and self-respect.

CONCLUSION

The existence of the concept of dignity in the French and European legal systems is well established today, and its use in the realm of human rights is indisputable, insofar as legislators, individuals and judges refer to it. The question was therefore to determine how and to what extent does the concept play a role in that realm, and it appears that there is not one but multiple answers, which are connected to each other.

Dignity undoubtedly plays an *important* role in human rights. The scope of its action can be perceived through a sentence of Marc Gheza who explains, in the context of euthanasia, that there is an 'equation "suffering = harm to human dignity"'. What is important to emphasise is that this 'equation' generally guides the use of dignity in human rights law. Indeed, it appeared from the analysis of both systems that dignity is used in order either to establish a principle of prohibition of harm to physical, psychological or moral integrity, or to punish such harm when it occurred. This assertion results from the use of dignity both in its objective aspect: to protect human equality, and in its subjective aspect: to support the individual's freedom. Regarding the use of objective dignity, it leads to protect the human quality of every person, in her belonging to humanity and deserving respect from others. It will prevent or punish from suffering resulting in harm to integrities in relation to the intrinsic value of individuals. Regarding the use of subjective dignity, it leads to protect the individual from harm to his integrities which may result of a lack of respect for his personal freedom and choices to live his life in accordance with his convictions and feelings in order to reach self-fulfilment.

However, it appeared from the analysis of the case-law in the first chapter, that dignity plays a *relative* role when it comes to the protection of human equality. Indeed, and especially under Article 3 ECHR, for example for persons who are at liberty the ECtHR will require a 'level of severity' in the breach of equality, that is, in the suffering of the person. Therefore, it may happen that an individual, while having undergone a

treatment contrary to his dignity – as human quality – will not obtain satisfaction under Article 3 ECHR. It is incontestable that this constitutes a problem regarding the human right to be protected against harm to one's integrity.

Thus, appears here a very important point: dignity is often called to play a *comprehensive* role. In other words, both objective and subjective aspects actually play together: when one does not work, the other will take over. Thus, in a case before the ECtHR where the complaint could not fall under Article 3 because the level of severity would not be reached – for instance when there is violation of the patient's refusal to consent to a medical treatment –, Article 8 will be called to play under the notion of respect for personal freedom and personal choice. Thus, the inapplicability of Article 3 to punish harm to dignity in its objective aspect will be relieved by the applicability of Article 8 to protect from harm to subjective dignity. The comprehensive role appears suitable to protect the individual in his human rights.

However, another problem occurs: applicability does mean condemnation of the State or person for the suffering of the person. It appeared that dignity in its subjective aspect has a *limited* role because there can be reasons to justify the harm to physical or moral integrity by a third party. Under Article 8 ECHR, dignity is used to support personal freedom in order to create a right to personal development and identity, and a principle of personal autonomy. It will be through those rights that self-fulfilment will be reached. If it has been demonstrated that at both levels such rights are recognised, it must be borne in mind that the State – understood as the national legislator and Courts – has the possibility to limit them for legitimate aim(s). Unfortunately, and as the recent judgement *S.A.S. v. France* highlights[172], very often and because it will be related to national issues or values, under the European system the State will have a large margin to appreciate whether or not a limitation on the principle of personal autonomy and the human right to personal development is justified.

[172] § 157: The Court judged compatible with the Convention the blanket ban because 'it can be regarded as proportionate' to ensure the preservation of the conditions of 'living together', as interpreted by the French State.

Despite this last observation, dignity keeps an *essential* role when it is associated with solidarity in order to help individuals to maintain or regain their dignity. The French legislation on end-of-life situations as described in the last chapter shows that dignity is needed and is welcome to guarantee a human right to end one's life without suffering, that is to say, in a quality compatible with one's human quality and self-respect.

BIBLIOGRAPHY

I. Articles in journals and on the Internet

Afroukh, Mustapha, 'La dignité humaine comme instrument de résolution des conflits de droits dans la jurisprudence de la Cour européenne des droits de l'homme', pp. 99-110, in *Revue de la Recherche Juridique*, vol. 2014-1, XXXIX - 151, 2014.

Baranger, Denis, 'Retour sur *Dieudonné*', p. 525 et seq., in *RFDA*, no. 03, 2014.

Biletzki, Anat, 'La dignité inhérente : l'essence des droits de l'homme', pp. 27-34, in *Diogène*, vol. 2009/4, no. 228, 2009.

Broyelle, Camille, 'Retour sur *Dieudonné*', p. 521 et seq., in *RFDA*, no. 03, 2014.

Chassang, Céline, 'La CEDH et la loi du 11 octobre 2010 : une validation en demi-teinte de la loi prohibant la dissimulation du visage dans l'espace public', p. 1701 et seq., in *Recueil Dalloz*, no. 30, 2014.

Chen, Bo, 'Dignity and the incomplete grounding of International human rights', at http://www.fichl.org/torkel-opsahl-academic-epublisher/, Policy Brief Series no. 21, 2014.

Cossalter, Philippe, 'La dignité humaine en droit public français : l'ultime recours', at http://www.revuegeneraledudroit.eu, études et réflexions no. 4, 2014.

Delvolvé, Pierre, 'Glissements', p. 702 et seq., in *RFDA*, no. 04, 2014.

Dieu, Frédéric, 'Le Conseil d'État, gardien des valeurs essentielles de la société française', p. 175 et seq., in *Constitutions*, no. 02, 2014.

Dionisi-Peyrusse, Amélie, 'Actualités de la bioéthique', p. 335, in *AJ Famille*, no. 06, 2014.

Dreyer, Emmanuel, 'La dignité opposée à la personne', p. 2730 et seq., in *Recueil Dalloz*, no. 39, 2008.

Ducoulombier, Peggy, 'Qualité de la vie et Convention européenne des droits de l'Homme', p. 1047 et seq., in *RDSS*, no. 06, 2014.

Duguet, Anne-Marie, 'Le respect de la dignité à l'hôpital', pp. 93-101, in *Journal International de Bioéthique*, vol. 21, no. 4, 2010.

Dupéré, Olivier, 'Dignité de la personne humaine et logement décent', at http://www.droitconstitutionnel.org, Congrès de l'Association Française de Droit Constitutionnel, Paris, 2008.

Edelman, Bernard, 'La dignité de la personne humaine, un concept nouveau', p. 185 et seq., in *Recueil Dalloz*, no. 23, 1997.

Fabre-Magnan, Muriel, 'Le domaine de l'autonomie personnelle. Indisponibilité du corps humain et justice sociale', p. 31 et seq., in *Recueil Dalloz*, no. 01, 2008.

Franc, Michel, 'Une relecture de l'arrêt *Commune de Morsang-sur-Orge*', p. 106 et seq., in *AJDA*, no. 02, 2014.

Francillon, Jacques, 'Liberté d'expression et atteinte à la dignité humaine. Pénalisation de la négation du génocide des arméniens', p. 125 et seq., in *RSC*, no. 01, 2014.

Frydman, Patrick, 'L'atteinte à la dignité de la personne humaine et les pouvoirs de police municipale. À propos des « lancers de nains ». Conclusions sur Conseil d'État, Assemblée, 27 octobre 1995 (2 espèces), 1) *Commune de Morsang-sur-Orge*. 2) *Ville d'Aix-en-Provence*, p. 1204 et seq., in *RFDA*, no. 6, 1995.

Gervier, Pauline, 'L'interdiction de dissimulation du visage dans l'espace public. Regards croisés des jurisprudences constitutionnelle et européenne sur "un choix de société"', p. 1866 et seq., in *AJDA*, no. 33, 2014.

Gheza, Marc, 'Essai de déconstruction juridique du droit à la mort', p. 1071 et seq., in *RDSS*, no. 06, 2008.

Hauser, Jean, 'Transsexualisme : prouver ou simplement vouloir ?', p. 502 et seq., in *RTD Civ*., no. 03, 2012.

Hauser, Jean, 'Transsexualisme : où en est-on des conditions du changement de sexe ?', p. 855 et seq., in *RTD Civ.*, no. 04, 2014.

Hennette-Vauchez, Stéphanie, 'Kant contre Jéhovah ? Refus de soins et dignité de la personne humaine', p. 3154 et seq., in *Recueil Dalloz*, no. 44, 2004.

Hirsch, Emmanuel, 'Plus digne la vie. Pour une dignité en acte', pp. 46-47, in *Le Journal des psychologues*, vol. 2009/3, no. 266, 2009.

Hirt, Jean-Michel, 'L'avenir de la dignité humaine', pp. 101-113, in *Libres cahiers pour la psychanalyse*, vol. 2011/2, no. 24, 2011.

Houser, Matthieu, 'Protéger la vie et la dignité de la personne humaine : une obligation source de responsabilité pour l'État', p. 671 et seq., in *RDSS*, no. 04, 2013.

Le Coz, Pierre, 'Chapitre 1. Dignité et liberté : vers une contradiction insoluble ?', pp. 15-27, in *Journal International de Bioéthique*, 2010/3, vol. 21, 2010.

Le Gac-Pech, Sophie, 'Pour une légalisation de l'euthanasie', p. 117 et seq., in *AJ Famille*, no. 02, 2014.

Mathieu, Bertrand, 'Bioéthique : un juge constitutionnel réservé face aux défis de la science. À propos de la décision n° 94-343/344 DC du 27 juillet 1994', p. 1019 et seq., in *RFDA*, no. 05, 1994.

Mathieu, Bertrand, 'La dignité de la personne humaine : quel droit ? Quel titulaire ?', p. 282 et seq., in *Recueil Dalloz*, no. 33, 1996.

Mathieu, Bertrand, 'Fin de vie : liberté, droits et devoirs, l'impossible conciliation ?', p. 517 et seq., in *Constitutions*, no. 04, 2013.

Mislawski, Roger, 'Dignité, autonomie, vulnérabilité : approche juridique', pp. 262-280, in *Emmanuel Hirsch, Traité de bioéthique ERES "Poche - Espace éthique"*, 2010.

Pedrot, Philippe, 'Existe-t-il un droit de mourir dans la dignité ?', p. 475 et seq., in *RDSS*, no. 03, 2002.

Pellegrini, Bernard, 'Grandeurs et apories de la notion de "dignité de la personne humaine" comme catégorie juridique', pp. 118-127, in *La revue lacanienne*, vol. 2008/1, no. 1, 2008.

Petit, Jacques, 'Les ordonnances *Dieudonné* : séparer le bon grain de l'ivraie', p. 866 et seq., in *AJDA*, no. 15, 2014.

Roman, Diane, '« A corps défendant ». La protection de l'individu contre lui-même', p. 1284 et seq., in *Recueil Dalloz*, no. 19, 2007.

Saint-James, Virginie, 'Réflexions sur la dignité de l'être humain en tant que concept juridique du droit français', p. 61 et seq., in *Recueil Dalloz*, no. 10, 1997.

Sopena, Antonin, 'La dignité à l'épreuve du sadomasochisme, et inversement', pp. 74-77, in *Vacarme*, vol. 2010/2, no. 51, 2010.

Sudre, Frédéric, 'Vers un droit à la qualité de la vie', p. 690 et seq., in *JCP G.*, no. 24, 2014.

Thouvenin, Dominique, 'L'arrêt de traitement mettant fin à la vie d'un patient hors d'état de s'exprimer : qui prend la décision ?', p. 506 et seq., in *RDSS*, no. 03, 2014.

Truchet, Didier, 'L'affaire *Lambert*', p. 1669 et seq., in *AJDA*, no. 29, 2014.

Valadier SJ, Paul, 'Dignité incertaine', pp. 7-17, in *Laennec*, vol. 2006/2, tome 54, 2006.

Vialla, François, 'Droits des malades en fin de vie', p. 1797 et seq., in *Recueil Dalloz*, no. 27, 2005.

Vialla, François, 'Responsabilité : refus transfusionnel', p. 1848 et seq., in *Recueil Dalloz*, no. 26, 2007.

Vialla, François, 'Transsexualisme : l'irréversibilité en question', p. 1648 et seq., in *Recueil Dalloz*, no. 25, 2012.

II. Articles in edited books

Bioy, Xavier, 'Rapport introductif. Le concept de dignité', pp. 13-51, in Laurence Burgorgue-Larsen (dir.), *Actes de la journée d'études du 23 mai 2008, La dignité saisie par les juges en Europe*, Bruxelles : Bruylant, 2010.

Burgorgue-Larsen, Laurence, 'La dignité dans la jurisprudence de la Cour européenne des droits de l'homme', pp. 55-78, in Laurence Burgorgue-Larsen (dir.), *Actes de la journée d'études du 23 mai 2008, La dignité saisie par les juges en Europe*, Bruxelles : Bruylant, 2010.

Carozza, Paolo, 'Human Dignity', pp. 345-358, in Shelton, Dinah (eds.), *The Oxford Handbook of International Human Rights Law*, Oxford: Oxford University Press, 2013.

Dubout, Édouard, 'La dignité dans la jurisprudence de la Cour de justice des communautés européennes', pp. 79-111, in Laurence Burgorgue-Larsen (dir.), *Actes de la journée d'études du 23 mai 2008, La dignité saisie par les juges en Europe*, Bruxelles : Bruylant, 2010.

Heuschling, Luc, 'La dignité de l'être humain dans la jurisprudence constitutionnelle allemande', pp. 115-162, in Laurence Burgorgue-Larsen (dir.), *Actes de la journée d'études du 23 mai 2008, La dignité saisie par les juges en Europe*, Bruxelles : Bruylant, 2010.

Larralde, Jean-Manuel, 'Libre disposition de son corps et préférences sexuelles', pp. 281-290, in Jean-Manuel Larralde (dir.), *La libre disposition de son corps : actes du colloque de Caen, les 16 et 17 octobre 2008*, Bruxelles : Bruylant, 2009.

Lebreton, Gilles, 'Le changement de sexe, droit de l'individu ?', pp. 291-307, in Jean-Manuel Larralde (dir.), *La libre disposition de son corps : actes du colloque de Caen, les 16 et 17 octobre 2008*, Bruxelles : Bruylant, 2009.

Machefert, Thierry, 'Peut-on fonder une éthique sur la liberté ? Les apories de l'individualisme dans la philosophie morale contemporaine', pp. 19-43, in Jean-Manuel Larralde (dir.), *La libre disposition de son corps : actes du colloque de Caen, les 16 et 17 octobre 2008*, Bruxelles : Bruylant, 2009.

Nowak, Manfred, 'Right to Privacy and Family life', pp. 371-375, in Nowak, Manfred, M. Januszewski, Karolina & Hofstätter, Tina (eds.), *All Human Rights for All – Vienna Manual on Human Rights*, Vienna: Intersentia, 2012.

Roman, Diane, 'Libre disposition de son corps et protection de la santé', pp. 199-236, in Jean-Manuel Larralde (dir.), *La libre disposition de son corps : actes du colloque de Caen, les 16 et 17 octobre 2008*, Bruxelles : Bruylant, 2009.

Sueur, Jean-Jacques, 'Conclusions. La dignité : une catégorie critique ?', pp. 217-260, in Laurence Burgorgue-Larsen (dir.), *Actes de la journée d'études du 23 mai 2008, La dignité saisie par les juges en Europe*, Bruxelles : Bruylant, 2010.

Wladasch, Katrin, 'Right to Equality and Non-Discrimination', pp. 307-310, in Nowak, Manfred, M. Januszewski, Karolina & Hofstätter, Tina (eds.), *All Human Rights for All – Vienna Manual on Human Rights*, Vienna: Intersentia, 2012.

III. Books and Theses

Alexy, Robert, *A theory of constitutional rights*, Oxford: Oxford University Press, 2002.

Aumonier, Nicolas, Beignier, Bernard & Letellier, Philippe (eds.), *Un droit à mourir ? L'euthanasie*, Paris : PUF, 2012.

Lavaud-Legendre, Bénédicte, *Où sont passées les bonnes mœurs ?*, Paris : PUF, 2005.

Sudre, Frédéric, *Droit européen et international des droits de l'homme*, Paris : PUF, 2010.

IV. Legal Acts

International

Universal Declaration of Human Rights, General Assembly of the United Nations, Paris, 10 December 1948.

Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, 4 November 1950.

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, Council of Europe, Oviedo, 4 April 1997.

Recommendation 1418 (1999), 'Protection of the human rights and dignity of the terminally ill and the dying', Parliamentary Assembly, 25 June 1999.

Recommendation Rec(2003)24 of the Committee of Ministers to member states 'on the organisation of palliative care', 12 November 2003.

Resolution 1743 (2010), 'Islam, Islamism and Islamophobia in Europe', Parliamentary Assembly, 23 June 2010.

Resolution 1859 (2012), ‘Protecting human rights and dignity by taking into account previously expressed wishes of patients’, Parliamentary Assembly, 25 January 2012.

France

Declaration of the Rights of Man and of the Citizen, National Constituent Assembly, Paris, 26 August 1789.

Freedom of the Press Act of 29 July 1881.

Decree no. 59-322 of 23 February 1959 on the application of the Criminal Procedure Code.

Law no. 83-634 of 13 July 1983 on rights and obligations of civil servants.

Law no. 94-548 of 1 July 1994 on the processing of nominative data with the objective of research in the health field, and amending Law No. 78-17 of 6 January 1978 on informatics, personal card-indexes, and freedoms.

Law no. 94-653 of 29 July 1994 on respect for the human body.

Law no. 94-654 of 29 July 1994 on the donation and use of parts and products of the human body, Medically Assisted Reproduction and Prenatal Diagnosis Act.

Law no. 2002-303 of 4 March 2002 on Patients’ Rights and Quality of the Health System.

Law no. 2005-370 of 22 April 2005 on Patients’ rights and end of life issues.

Prison Act no. 2009-1436 of 24 November 2009.

Law no. 2010-1192 of 11 October 2010 prohibiting the concealment of one’s face in public places.

Decree no. 2010-1635 of 23 December 2010 implementing the Prison Act and amending the Criminal Procedure Code.

Law no. 2013-869 of 27 September 2013 amending certain provisions from Law no. 2011-803 of 5 July 2011 on the rights and protection of persons under psychiatric care and arrangements for their care.

Private members' bill 'creating new rights in favour of patients and persons in end-of-life' of 21 January 2015.

V. Other documents

French National Ethics Advisory Committee (CCNE), 'Treatment refusal and personal autonomy', Opinion no. 87, Paris, 14 April 2005.

French National Ethics Advisory Committee (CCNE), 'The End of Life, Personal Autonomy, the Will to Die', Opinion no. 121, Paris, 13 June 2013.

Glénard, Guillaume, 'La notion de dignité de la personne humaine', Colloque *Les vingt ans de l'arrêt Commune de Morsang-sur-Orge – À propos de la dignité de la personne humaine*, Douai, 2015.

Leleu, Thibaut, 'La dignité, fondement de la protection des personnes par la police', Colloque *Les vingt ans de l'arrêt Commune de Morsang-sur-Orge – À propos de la dignité de la personne humaine*, Douai, 2015.

Plenary General Assembly of the Conseil d'Etat, 'Study of possible legal grounds for banning the full veil', Report adopted on 25 March 2010.

ANNEX

LIST OF JUDGEMENTS AND DECISIONS
(In alphabetic order)

I. European Courts

European Commission of Human Rights

3 East African Asians British protected persons v. the United Kingdom (dec.), nos. 4715/70, 4783/71 and 4827/71, 6 March 1978

European Court of Human Rights

Adeishvili (Mazmishvili) v. Russia, no. 43553/10, 16 October 2014

Aksu v. Turkey [GC], nos. 4149/04 and 41029/04, 15 March 2012

Aksu v. Turkey, nos. 4149/04 and 41029/04, 27 July 2010

Apostu v. Romania, no. 22765/12, 3 February 2015 (request for referral to the GC pending)

Atudorei v. Romania, no. 50131/08, 16 September 2014

B. v. France, no. 13343/87, 25 March 1992

Bensaid v. the United Kingdom, no. 44599/98, 6 February 2001

Burghartz v. Switzerland, no. 16213/90, 22 February 1994

Case "relating to certain aspects of the laws on the use of languages in education in Belgium", nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968

Chapman v. the United Kingdom [GC], no. 27238/95, 18 January 2001

Christine Goodwin v. the United Kingdom [GC], no. 28957/95, 11 July 2002

Ciubotaru v. Moldova, no. 27138/04, 27 April 2010

Cossey v. the United Kingdom, no. 10843/84, 27 September 1990

Delfi AS v. Estonia, no. 64569/09, 10 October 2013 (referral to the GC on 17 February 2014)

Dikme v. Turkey, no. 20869/92, 11 July 2000

Đorđević v. Croatia, no. 41526/10, 24 July 2012
E.B. v. France [GC], no. 43546/02, 22 January 2008
Elberte v. Latvia, no. 61243/08, 13 January 2015
Ertuş v. Turkey, no. 37871/08, 5 November 2013
Evans v. the United Kingdom [GC], no. 6339/05, 10 April 2007
Fernández Martínez v. Spain [GC], no. 56030/07, 12 June 2014
Frérot v. France, no. 70204/01, 12 June 2007
Fretté v. France, no. 36515/97, 26 February 2002
Gross v. Switzerland [GC], no. 67810/10, 30 September 2014
Gross v. Switzerland, no. 67810/10, 14 May 2013
Gündüz v. Turkey, no. 35071/97, 4 December 2003
H. v. Finland, no. 37359/09, 13 November 2012 (referral to the GC on 29 April 2013)
Haas c. Suisse, no 31322/07, 20 January 2011
Hämäläinen v. Finland [GC], no. 37359/09, 16 July 2014
Horych v. Poland, no. 13621/08, 17 April 2012
Ireland v. the United Kingdom, no. 5310/71, 18 January 1978
I. v. the United Kingdom [GC], no. 25680/94, 11 July 2002
Identoba and Others v. Georgia, no. 73235/12, 12 May 2015
Jaeger v. Estonia, no. 1574/13, 31 July 2014
Jalbă v. Romania, no. 43912/10, 18 February 2014
Jane Smith v. the United Kingdom [GC], no. 25154/94, 18 January 2001
Jehovah's Witnesses of Moscow v. Russia, no. 302/02, 10 June 2010
Johnston and Others v. Ireland, no. 9697/82, 18 December 1986
K.A.& A.D. v. Belgium, nos. 42758/98 and 45558/99, 17 February 2005
Kitanovski v. the former Yugoslav Republic of Macedonia, no. 15191/12, 22 January 2015
Koch v. Germany, no. 497/09, 19 July 2012
Kokkinakis v. Greece, no. 14307/88, 25 May 1993
Konovalova v. Russia, no. 37873/04, 9 October 2014
Kudła v. Poland [GC], no. 30210/96, 26 October 2000
L. v. Lithuania, no. 27527/03, 11 September 2007

Lambert and Others v. France [GC], no. 46043/14, 5 June 2015
Lindon, Otchakovsky-Laurens and July v. France [GC], nos. 21279/02 and 36448/02, 22 October 2007
Marckx, no. 6833/74, 13 June 1979
McDonald v. the United Kingdom, no. 4241/12, 20 May 2014
Mouisel v. France, no. 67263/01, 14 November 2002
N.B. v. Slovakia, no. 29518/10, 12 June 2012
Odièvre v. France [GC], no. 42326/98, 13 February 2003
Palomo Sánchez and Others v. Spain [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, 12 September 2011
Perinçek v. Switzerland, no. 27510/08, 17 December 2013 (referral to the GC on 2 June 2014)
Petrova v. Latvia, no. 4605/05, 24 June 2014
Popov v. France, nos. 39472/07 and 39474/07, 19 January 2012
Pretty v. the United Kingdom, no. 2346/02, 29 April 2002
Rachwalski and Ferenc v. Poland, no. 47709/99, 28 July 2009
Ribitsch v. Austria, no. 18896/91, 4 December 1995
S.A.S. v. France [GC], no. 43835/11, 1 July 2014
S. and Marper v. the United Kingdom [GC], nos. 30562/04 and 30566/04, 4 December 2008
Schalk and Kopf v. Austria, no. 30141/04, 24 June 2010.
Schuler-Zgraggen v. Switzerland, no. 14518/89, 24 June 1993
Selmouni v. France [GC], no. 25803/94, 28 July 1999
Sheffield and Horsham v. the United Kingdom [GC], nos. 31–32/1997/815–816/1018–1019, 30 July 1998
S.H. and Others v. Austria [GC], no. 57813/00, 3 November 2011
S.W. v. the United Kingdom, no. 20166/92, 22 November 1995
Ślusarczyk v. Poland, no. 23463/04, 28 October 2014
Tekin v. Turkey, no. 52/1997/836/1042, 9 June 1998
Timishev v. Russia, nos. 55762/00 and 55974/00, 13 December 2005
Tomasi v. France, no. 12850/87, 27 August 1992

Tyrer v. the United Kingdom, no. 5856/72, 25 April 1978

Tysiąc v. Poland, no. 5410/03, 20 March 2007

Ünal Tekeli v. Turkey, no. 29865/96, 16 November 2004

Uzun v. Germany, no. 35623/05, 2 September 2010

Valiulienė v. Lithuania, no. 33234/07, 26 March 2013

Van Kück v. Germany, no. 35968/97, 12 June 2003

Vereinigung Bildender Künstler v. Austria, no. 68354/01, 25 January 2007

Vlasov v. Russia, no. 78146/01, 12 June 2008

Wainwright v. the United Kingdom, no. 12350/04, 26 September 2006

Y.Y. v. Turkey, no. 14793/08, 10 March 2015

European Court of Justice

Kingdom of the Netherlands v. European Parliament and Council of the European Union, Case C-377/98, 9 October 2001

II. French Courts

Constitutional Council

Law for Real Equality between Women and Men, no. 2014-700 DC, 31 July 2014

Law on anti-exclusion, no. 98-403 DC, 29 July 1998

Law on diversity of housing, no. 94-359 DC, 19 January 1995

Law prohibiting the concealment of one's face in public places, no. 2010-613 DC, 7 October 2010

Law providing for same-sex marriage, no. 2013-669 DC, 17 May 2013

Respect for Human Body Act and Donation and Use of Parts and Products of the Human Body, Medically Assisted Reproduction and Prenatal Diagnosis Act, no. 94-343/344 DC, 27 July 1994

Voluntary Interruption of Pregnancy (Abortion) and Contraception Act, no. 2001-446 DC, 27 June 2001

A. Administrative Courts

Administrative Courts

Châlons-en-Champagne, ord., no. 1400029, 16 January 2014

Lille, *M. et Mme G.*, ord., no. 02-3138, 25 August 2002

Nantes, *Société Les Productions de la Plume et M. D.*, ord., no. 1400110, 9 January 2014

Nice, *Conseil représentatif des associations noires (CRAN)*, ord., no. 1501179, 26 March 2015

Paris, *Centre Dumas-Pouchkine des diasporas et cultures Africaines (CDPDCA)*, ord., no. 1430123/9, 9 December 2014

Pau, *Société Les Productions de la Plume et M. D.*, ord., no. 1400010, 8 January 2014

Administrative Courts of Appeal

Bordeaux, no. 12BX02971, 3 February 2014

Bordeaux, *M. ...*, no. 14BX01988, 17 February 2015

Bordeaux, *M. ...*, no. 13BX02461, 10 March 2015

Douai, *M. ...*, no. 13DA00952, 31 December 2014

Douai, *M. ...*, no. 13DA01827, 26 March 2015

Lyon, *Ville de Saint Étienne*, no. 96LY00430, 10 February 2000

Lyon, *M. ...*, no. 13LY03124, 29 January 2015

Marseille, *Mme ...,* no. 10MA01803, 17 September 2012

Marseille, *M. ...*, no. 13MA03115, 21 May 2015

Nancy, *Commune de Verdun,* no. 98NC02529, 4 December 2003

Nancy, *M. ...*, no. 14NC00689, 12 March 2015

Nantes, *Mme Luce X*, no. 04NT00534, 20 April 2006

Nantes, *M. ...*, no. 13NT02085, 31 December 2014

Nantes, *Mme ...,* no. 13NT03070, 21 April 2015

Nantes, *Mme ...,* no. 14NT00643, 30 April 2015

Paris, *M. ...,* no. 13PA02584, 6 March 2014

Paris, *Mme ...*, no. 14PA01897, 18 March 2015

Versailles, *Mme ...*, no. 13VE01330, 25 September 2014
Versailles, *Mme ...*, no. 14VE00212, 30 April 2015

Conseil d'Etat

Association "Ici et Maintenant", no. 173514, 19 March 1997
Benjamin, no. 17413-17520, 19 May 1933
CCI Nice-Côte-d'Azur, no. 375121, 21 November 2014
Centre Dumas-Pouchkine des Diasporas et Cultures Africaines (CDPDCA), ord., no. 386328, 11 December 2014
Commune d'Arcueil, no. 171134, 8 December 1997
Commune de Cournon d'Auvergne, ord., no. 387726, 6 February 2015
Commune de Morsang-sur-Orge, no. 136727, 27 October 1995
Conseil représentatif des associations noires (CRAN), ord., no. 389372, 16 April 2015
Garde des sceaux, Ministre de la Justice, ord., no. 284803, 8 September 2005
Ministre d'Etat, Ministre de l'Intérieur et de l'aménagement du territoire c. association "solidarité des français", ord., no. 300311, 5 January 2007
Ministre de l'Intérieur c. Société Les Productions de la Plume et M.D., ord., no. 374508, 9 January 2014
M. ..., no. 250889, 19 March 2003
Mme F…I… et autres, (Assembly), nos. 375081, 375090, 375091,14 February 2014
Mme F…I… et autres, (Assembly), nos. 375081, 375090, 375091, 24 June 2014
Mme Feuillatey, ord., no. 249552, 16 August 2002
Mme Senanayake, (Assembly), no. 198546, 26 October 2001
SARL Les Productions de la Plume et M.D., ord., no. 374528, 10 January 2014
SARL Les Productions de la Plume et M.D., ord., no. 374552, 11 January 2014
Société Vortex, no. 167694, 20 May 1996

B. Judiciary Courts

Courts of Appeal

Limoges, Civil Division, *Y... X...,* no. 12/00175, 11 December 2012

Lyon, *M. Patrick X...*, no. 08/08857, 14 February 2011

Pau, Civil Division, *Louis X... c. Thierry Y...,* no. 03/03465, 14 March 2005

Versailles, *AFI,* no. 04/05632, 26 May 2005

Court of Cassation

Civil Division, *Mme Françoise X...*, no. 93-10730, 18 October 1994

Civil Division, *Mme ...*, no. 06-15290, 6 December 2007

Civil Division, *Société Encore Events*, no. 09-67456, 16 September 2010

Civil Division, *Mme ...*, no. 11-22490, 7 June 2012

Civil Division, *M. ...*, no. 12-11949, 13 February 2013

Criminal Division, *AGRIF*, no. 02-82288, 25 March 2003

Criminal Division, no. 04-84463, 15 March 2005

Criminal Division, *Ligue internationale contre le racisme et l'antisémitisme*, no. 05-85885, 3 April 2007

Criminal Division, *M. ...*, no. 11-84235, 19 June 2012

Criminal Division, *M. Dieudonné / association HCCDA*, no. 11-82866, 16 October 2012

Criminal Division, no. 13-90010, *M. ... et M. ...,*16 April 2013

Plenary Assembly, *M. Y.*, no. 91-12373, 11 December 1992

Plenary Assembly, *M. X.*, no. 91-11900, 11 December 1992

Plenary Assembly, *Le Consistoire central union des communautés juives de France*, no. 06-81785, 16 February 2007