The use of the notion of humanity in French law

Xavier Bioy

Professor of Public Law, Phd

University of Toulouse 1 Capitole

French law seems quite unique in how it uses the notion of humanity. It probably stems from the way we conceive of the collective group and the role of international law, since, in the French mind, an individual will belong to humanity and owe duties towards it. That is why French law aims at protecting humanity as well as mankind.

In French, there is no distinction between humanity and mankind (humankind). Hence any legal notion of humanity must therefore distinguish humanity as a collective group from humanity as a value, belonging to the first one conferring the latter one. Indeed, human beings are, in law, protected by their humanity, but they must also comply with the duties flowing from their humanity.

Humanity as a value may also reflect on the behavior to adopt when considering those who are not human. We, as humans, have to treat these non-humans with humanity (humaneness), as the debate on "the great apes' human rights" shows. Indeed, as Alain Finkielkraut beautifully explains, humanity is referred to sometimes as a separation from

animals or, in other times, from barbarians, sometimes as the mercy we show to them, "a royalty and its challenge."[1]

The ambiguity of the notion of humanity can easily be gauged, as soon as you realize that it refers either to the collective group (humankind) , or the quality of each of its members (humanness), or the human species (human race) or even the morality of certain acts (humaneness). "The conscience of mankind" mentioned in the preamble of the Universal Declaration of Human Rights alludes both to the collective group formed by all human beings and to their universal values and in a third meaning to the quality of being human, as a member of the human species. This third dimension seems to be established as a biological truth in the law. The expression "members of the human family" is used in the preamble of the Universal Declaration of Human Rights. According to Mireille DELMAS MARTY " beyond the "human rights" the question which must be considered is the legal construct of the idea of humanity. The notions that can be appealed to, such as "crime against humanity" or even "human" have long been confined to the person, while biotechnologies today concern humanity as a whole. Genetic engineering, for example, may jeopardize the integrity of the human species, not only physically, but also, as it were, metaphysically.

The legal concept of humanity is based on common features and a common sense of belonging fostering identity and equality and is fairly recent in the history of humanity. [2]Its strongest expression in law can be found in international institutions in the second half of the 20th century.Various international offences protect humanity, defined either as the characteristic quality of people (crime against humanity) or as a collective group (genocide).

Humanity, as we have conceived of it in the second half of the 20th century, is dignity, the duty (burden) carried by each individual as the result of his inherent worthiness as a human being. Humanity is both a community of belonging as well as of values. This double meaning is reflected in judicial rulings and the State, through the voice of the judges, denies seeing it as a power relationship and sometimes aims at ensuring ethical requirements more or less translated into traditional notions of law, such as the notions of "person" or "public order". The famous French dwarf-tossing case symbolizes the State's attitude towards limiting individual freedom physically, on the ground of what can be called "human (physical) subjugation".[3] Individual are legally compelled to become accountable for their being human. It is their duty as individuals.

[1] Alain FINKIELKRAUT, *L'humanité perdue. Essai sur le XX°siècle*, Editions du Seuil, Collection Points-Essai, 1996.

[2] « The concept of humanity, including, without distinction of race or culture, all forms of the human species, onset is very late and limited expansion», Claude Lévi-Strauss, Anthropologie structurale II, Plon, 1973, p. 383

In the dwarf-tossing case, the judge accepted as legal the decision taken by a mayor to forbid a dwarf being thrown for fun by other people in a night club. Most commentators clearly highlighted that this decision imposed a limitation on individual liberties but also laid the emphasis on the "wrong" done to humanity. Of course, the aspect that has been most commented upon in this case is the intrinsic worthiness of dignity for its owner, in other words, the protection against oneself. However, this aspect reveals that the mechanism of human dignity can be distinguished from the dignity of the person. The former is objective, shared by all, intrinsic and has to be combined with the latter that is related to individual personality and freedom of choice. The theme of this duty *a priori* linked to the renewal of ethics may be accounted for by the success of moral philosophies stemming from Judaism, mainly in its phenomenological branch. A genealogical research indeed brings us to retain the Judaic tradition as an important source.

So we are able to explain that the use of the notion of humanity is double. On one hand, the notion establishes a group protected by Law which is a link for all individuals, and one way to define human being and consequently human person. On the other hand, humanity legitimate an other judicial notion, the dignity; that is used to protect or limit freedom.

1. **Humanity as a group of humans, humankind as a legal value.**

First, the notion of humanity back to the question of the genome. Then we will see that French law has invented a new biotechnology-related offence : the crime against human species.

1.1 **The genome legal status, a notion both individual and collective.**

Humanity as a group can be dealt with diachronically, whereas humankind has to be analyzed synchronically, taking into account the very existence of the subject, be it human or not. As they seek a realistic basis to these terms, the legislators and the drafters will therefore tend to shift the meaning of the adjective human from describing biological belonging to qualifying the entire human species. However, they very often opt for a symbolic conception

[3] *«* I have no right to be happy in every way, and I'm not allowed to enjoy the ways that debase myself (...). debase myself any practice that makes me a thing. But ultimately it is the problem of freedom, since I treated myself as no longer a free subject *(...)* » wrote Max Marcuzzi, in Emmanuel Dockès et Gilles Lhuilier (Dir), *Le corps et ses représentations*, vol. 1, LITEC, Coll. CREDIMI Théories et droit, 2001, p. 73. (we translate)

of belonging, since they cannot assert with certitude what human identity is or what the relationships of individuals with the group are. That is why the human genome is symbolically seen as a heritage of humanity in the Universal Declaration of Human Rights.
It is illustrated in the way genetic data are dealt with in the law: they are both unique and common to all. The works of the International Bioethics Committee showed how genetic reductionism (reducing the person to their genome) remained and should remain outside the law, outside the "ought to be." The symbolical meaning of "the heritage of humanity" intends to prevent humans from being defined only by theirs genome. Against the racist doctrines which attempted to establish discrimination on biological grounds, contemporary law shares common roots with genetics and relies on it to prove the uniqueness of each individual. As established by the drafters of the Universal Declaration of UNESCO on the human genome and human rights in article 2 (b) "that dignity makes it imperative not reduce individuals to their genetic characteristics and to respect their uniqueness and diversity."

The position of the French *Conseil Constitutionnel* (*Constitutional Council*) must be understood in that sense when, in 1994, it linked the protection of the integrity of the human species to the dignity of the human person. The 1994 laws set the protection of the integrity of the human species as a legislative principle. This principle establishes some unknown duties to everybody, mainly for example the duty not to do changes to the transmissible heritage to future generations. The *Constitutional Council* stated the constitutional void of the issue and let parliamentarians decide on the limits to put on the alteration of the genome. The European Convention on bioethics established some sort of right to inherit unmodified genetic characteristics (resolution No. 934, 1982 of the Parliamentary Assembly of the Council of Europe relating to genetic engineering).

1.2 **Crime against the human species.**

By creating the offence of "crime against the human species" , the French legislature awkwardly recognized a legal reality to an entity ("species") which does not exist from a biological perspective. Between 1994 and 2004, the French criminal code included a section relating to the protection of the human species, punishing by twenty years' imprisonment for the organization and selection of persons. Since 2004, reproductive cloning has been added to the list of offences. The preamble of the Convention of the Council of Europe on biomedicine also mentions "the need to respect the human being both as an individual and as a member of the human species." However, one problem arises when the concepts of species and humanity

are both called upon. Indeed, the “human species” is an idea that falls under the protection of the law, although it is difficult to know very well what is prohibited beyond the now established offences of reproductive cloning and eugenic practices.

An individual can be genetically identified as human by analogy, but it does not imply the uniqueness of the human species. The idea of humanity cannot be limited to genetic data. The diversity of genetic origins and mutations characterizing the different populations challenges the establishment of something like an integrity of "species". Law cannot freeze humanity in its genome. The human species becomes the legal version of humanity that, since Aristotle, has been found in the individual face or, in the case of the "Monster", in the simple fact to be born of a woman, but never in the genome. Crimes against the human species would be, in this sense, the last avatars of a still dominant genetic determinism, of a naturalization of culture.

Article 16-4 of the French civil code provides that “nobody may invade the integrity of mankind. Any eugenic practice which aims at organizing the selection of persons is forbidden. Without prejudice to researches aiming at preventing and treating genetic diseases, there may be no alteration of the genetic characters with a view to changing the descent of a person.”

The ban on reproductive human cloning spreads across all legal orders. Banning cloning equals to incriminating a technique (or a set of techniques) in itself or the harmfulness of all its applications. This is probably mainly because this technique is, in an unprecedented way, straying away from the natural and hitherto preserved model of human generation. Following the additional protocol to the Oviedo Convention, article 16-4 of the Civil Code still provides that "any action having the purpose of causing the birth of a child genetically identical to another person alive or dead is forbidden” and is relayed by the Code of Public Health (art. 2151-2). This prohibition relies on the dignity of the human person insofar as it mainly seeks to prohibit reproductive cloning that would undermine the dignity of the clone. Section 214-2 punishes by thirty years’ imprisonment and a fine of €7,500,000 euro any infringement on this prohibition. The criminalization of cloning is characterized by the anticipation of the commission of the first offence. A 30-year limitation period runs from the majority of the eventual clone. A €45,000 fine and three years’ imprisonment sanction the person whose gift, promise, threat, agenda, abuse of authority or power, convinced others to lend themselves to a collection of cells or gametes, in order to bring about the birth of a child genetically identical to another person alive or dead, or made any propaganda or advertising for eugenics or reproductive cloning.

However, therapeutic cloning seems less shocking. It only applies to embryos which are the subject of totipotent cell samples. According to article L.2151-4 of the Public health code, It is prohibited to create an embryo by means of cloning with therapeutic purposes. The criminalization of therapeutic cloning is not as severely penalised as that of reproductive cloning: criminal sanctions do not target the purpose of the operation but the general principle of the use of embryos. Carrying out *in vitro* fertilisation or cloning human embryos for commercial or industrial purposes, therapeutic purposes or research purposes is punished with with seven years' imprisonment and a €100, 000 fine (articles 2163-3 and s).

Referring more and more to the notion of "species" seems to pose problems, not only in terms of the criminalizing of reproductive cloning, but in the very principle of the legalizing of the concept of species itself.[4] Indeed, the concept of species is yet difficult to define outside the law, which is the first hurdle for the lawyer. Its biological definition is traditionally a scientific battlefield where scientists, more precisely "essentialists" (there is a limited number of recombined universals known as species) compete against "nominalists" (the species is a conventional association of zoological objects ("taxa")).

Thus, the concept of species does not seem well-adapted to the legal field. It can legitimately be understood as a rhetorical instrument that uses data relating to the body to serve a political end linked to the scientistic and progressive ideology which has framed genetics since its inception.[5] This scientism is what "new naturalism" is implicitly and paradoxically based on; humans are objectively defined by criteria that distinguish them from other species.

However, the eminent dignity of mankind has no link with the concept of species, even though the integrity of the latter may indirectly protect the dignity of the person, by establishing the intangibility of the genome. In fact, the reference to "human species" under the guise of an objective and scientific reference really institutionalizes it associates a false criterion to it: chance in sexual reproduction. However, if one focuses on the two crimes against the species, the incriminations condemn artificial changes to human reproduction, in both cases, be it a collective eugenic policy on the one hand, or the end of genetic uncertainties on the other hand.

---

[4] Philippe DESCAMPS, *Un crime contre l'espèce humaine ? Enfants clonés, enfants damnés*, Ed. Les empêcheurs de tourner en rond, 2004.

[5] Jacques TESTART, *Le désir du gène*, François Bourrin-Juillard, 1992 ; Bernard DEBRE, *La Grande Transgression,* Michel Lafon, 2001 ; Franck MAGNARD et Nicolas TENZER, *Le spermatozoïde hors la loi : de la bioéthique à la biopolitique,* Calmann-Lévy, 1991 ; James WATSON, *Gènes, génomes et société*, Odile Jacob, Sciences, 2000, p. 284 (the author recommends governments keep away from genetic issues).

Normality and abnormality are social constructs which can more and more often leave aside the naturalistic artefact and nevertheless remain efficient.

Mark Hunyadi opens an essential critical perspective: individual autonomy has always been built on the confrontation between the "natural" as a model for humanity and the “human nature” as the ability to move beyond the natural model;[6] but today biotechnologies enable to change man and not to talk about nature anymore: "it is not the human nature which dictates what we should be, it is what we are that tells what human nature is." Human nature becomes an object to be shaped.

Proponents of criminalizing cloning initially campaigned for its assimilation to a crime against humanity. In that sense, humanity does not refer to human species as natural sciences understand it, but rather to the "human family" as intended in the preamble of the Universal Declaration of Human Rights. It is necessary to distinguish explicitly culture from nature, the human rights man and the biotechnological man. Mireille Delmas-Marty thus wrote "protecting humanity as such, I think, is first accepting the separation between the human rights man and the biological man." However, crimes against the species are made to follow exactly the opposite logic; namely, it is the biological man that is put forward to protect the human rights man. Hence, we prefer the wording used in article 1 of the Universal Declaration on the Human Genome and Human Rights adopted by the UNESCO on 11 November 1997 which states "the human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity."

2. Humanity as dignity.

In that sense, humanity is protected, not as a group but as the quality that lies in each individual. The concept of humanity used here is understood symbolically. Humanity is defined by a political convention and not by a biological repository. Yet, many problems remain. Human dignity is used in law to prohibit certain behaviours that tend to treat people as objects. This assessment relies on philosophical conceptions. The judges then have difficulties to hide that they relied on moral principles to make their decisions.

2.1 Humanity and the individual subject of law

[6] Mark HUNYADI, *Je est un clone, l’éthique à l’épreuve des biotechnologies,* Seuil, La couleur des idées, 2004, p. 26.

The term "human being" now plays a growing role in international declarations (what the Universal Declaration of human rights in its preamble calls “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want"). Even if human beings are essentially defined by their corporeality, by their mere biological existence deprived of any social dimension, nonetheless, the legal qualification of facts applies to them. “Human being” is a legal concept such as that of "person". It allows the concept of humanity regarding the subject of law to enter into law.

It appears that the “natural person” is first and foremost a human being, a person belonging to humanity. Thus, the legal term “human being” encompasses the legal representations of being a human and being an individual, and it allows in turn to better identify a part of the concept of “human person” as coextensive with the notion of human being, whereas the moral person is a juristic person. This correlation is less based on biological data than on the genealogical principle or the achievements of civilization thanks to the law. In that sense, humanity takes on a dimension that can be named “humanhood”. (human condition) but which remains linked to the biological existence of a human person. Every human person is a human being; yet not every human being is a person, as exemplified in the status granted to the embryo, who is referred to as a human being in the Civil Code, but who only becomes a human person once given legal personality. The notion of person thus gives an extra dimension to that of human being: it is understood as the actor, the subject, the will encompassed in the notion of legal personality. The latter disappears with the death of the human being who ceases to live and to be subject of law, however, he remains the object of the law, protected as a human subject, protected as a human by the law.

The concept of human being leads us to understand the subject of the law, that is often the object of the law, bearing in mind the notion of humanity; it relies on the biological data which equate the belonging to humanity with the possession of a human genome. The Convention for the Protection of Human Rights and Dignity of the Human Being dated 16 November 1996 clearly illustrates this configuration in its preamble, paragraph 10, which states that the signatories are: " Convinced of the need to respect the human being both as an individual and as a member of the human species and recognizing the importance of ensuring the dignity of the human being”

2.1.1 The humanity of the *in vitro* embryo

The *in vitro* embryo is protected under French law, on account of humanity. Bioethics laws (currently articles L. 152-l and seq. of Public health code) provide some elements to protect the *in vitro* embryo that contribute to the notion of "respect". First, the embryo may only be conceived *in vitro* for medically assisted reproduction purposes and not for research purposes. But researchers may use embryos given by parents. However, they cannot be used for commercial and industrial purposes. The procreating couple's consent is required (6 August 2004 Act, art.25 = Loi du 6 août 2004), under the control of the Biomedicine Agency. However, the destruction of embryos (in case there be no parental project, or donation be impossible, or conservation extend for more than five years) attests that a temporal limitation is set to the notion of respect, which, in essence, runs counter to that very notion of respect. "Orphaned embryos" can exceptionally be greeted by another couple (2 November 1999 embryo donation Act = Décret du 2 novembre 2009), or else, they are destroyed.

At the opposite of the body's history, the corpse must also be respected as un element of humankind.

2.1.2 The corpse : the case of Maori warrior heads.

Since the 19th century, French cities have kept heads of New Zealand warriors in their museums. These heads are tattooed. They have an ethnographic and aesthetic value. Under French law, these heads are public properties: they cannot be sold. The act of 18 May 2010 allowed a procedure to delist the heads of Maori warriors, in order to return them to New Zealand so that they be interred. The legislature, guided by respect for humanity, thus granted special treatment to human remains.

According to article 16-1-1, inserted into the French Civil Code by the Act of December, 19th 2008: "respect for the human body does not cease with death." The remains of deceased persons, including the cremate remains, should be treated with respect, dignity and decency." French Courts (C.A. Paris, 30 April 2009, Cour de cassation, Civ. 1, 16 September 2010) banned an exhibition that featured "plastinated" ecorché corpses, on the grounds that seeking commercial gains from exhibiting dead bodies clearly violated the respect owed to the deceased. ("pursuant to article 16-1-1, paragraph 2, of the Civil Code, the remains of deceased persons should be treated with respect, dignity and decency;" ("exhibiting dead bodies for commercial purposes ignores this requirement"). The judge may prescribe all measures to prevent or stop unlawful violation of the human body or of its parts, even after

death. Indeed, the constitutional principle of dignity extends beyond the strict legal personality and is applied to the human person.

In order to protect the body of a young man in a brain death state, the *Conseil d'Etat* (Council of State) (C.E. Ass. 2 July 1993, Milhaud) intended to apply ethical principles regarding the respect for the human person which govern the relationship between doctors and patients ("considering that fundamental ethical principles relating to the respect for the human person, that apply to the physician in his relationship with his patient, still apply after the death of the patient").

The *Conseil d'Etat*, made reference to the dignity of the dead in a case where the owner of a dog had buried it in the family vault (C.E., April 17, 1963, *Epoux Blois*). The *Conseil d'Etat* acknowledged the legality of a municipal decree ordering the dog to be withdrawn from the municipal cemetery in respect for the dead. In a ruling dated 26 November 2008 (*Syndicat mixte de la vallée de l'Oise, Oise Valley local authority waste management services)* the *Conseil d'Etat* allowed the setting up of a waste processing facility located on a World War One battle site, holding the remains of some three hundred soldiers. Acknowledging that the principle of dignity could operate in the regulations of environmental industries, yet, in this case, the judge weighed it up against the project needs and minimized the damage done to the human remains.

The Criminal Penal Code contains a section (articles 225-17 et seq.), included in the chapter about offences against the human person, entitled "violation of the respect for the dead". Any violation of the physical integrity of a corpse committed by any means is punished by one year's imprisonment and a fine of € 15,000. The violation or desecration of tombs, burial grounds, funerary urns or monuments erected to the memory of the deceased, is punished by one year's imprisonment and a fine of € 15,000. The penalty is increased where the offences were accompanied by any discriminatory intent. The case law retains the actions accomplished before burial as possible infringements (stripping the body, taking pictures of it). Any tom deterioration, even uprooting flowers, falls within the ambit of the code, when there is intent to harm the respect for the dead.

The judicial judge acknowledged image right so that the rest of the dead should not be disturbed. In the cases relating to the stolen photographs of the lifeless bodies of François Mitterrand (CA Paris 2 July 1997 and Cour de Cassation Crim. 20 October 1998) and Claude Erignac (Cour de cassation Civ. I, 20 Dec. 2000), the ruling was pronounced in the sense of a

remedy based on respect for the human person in the former case, and on respect for the dignity of the human person in the latter case.

2.2 **Humanity as a limit to social exclusion**.

Dignity being inalienable to all, the issues that are thoroughly discussed in legal doctrine and by political philosophy thinkers are whether dignity is the basis of all human rights or only one among other rights, whether it comes before liberty or reinforces it, whether it is a subjective right or an objective and transcendental principle. In fact, dignity seems to be all of the above at the same time. Its establishing is a real legal phenomenon and takes on any forms or any values, which enables a great variety in its judicial use.

Two famous cases judged by the *Conseil d'Etat* on 27 October 1995 (*Commune de Morsang sur Orge*) gave birth to a genuine paradigm of the judicial use of dignity linked to public order, which comes to limit the individual's right to own and control his own body when it infringes on dignity (shared by all equally). The Conseil d'Etat acknowledges that mayors could ban dwarf-tossing on account of public order. The individual is legally compelled to be accountable for his human condition. He therefore becomes liable to it. Most commentators clearly highlighted that this decision imposed a limitation on individual liberties but also laid the emphasis on the "wrong" done to humanity. Of course, the aspect that was most commented upon in this case was the intrinsic worthiness of dignity of its owner, in other words, the protection against oneself. However, this aspect shows that the mechanism of human dignity can be distinguished from the dignity of the person.

The idea of "wrong against humanity" implies the legalization of morality, but that of dignity would even go further. Patrick Frydman who was then *Commissaire du gouvernement*[7], stated "a bar attraction, aiming at encouraging the most basic instincts, and consisting in reducing a disabled person to the level of object, precisely because of this disability, can't obviously find its place in a civilized society." In that sense, it is much more than a moral wrong, an ethical misconduct that works against the interest of the civilization in the true sense of the word, against the institution of the subject's civility. The pernicious effect of this attitude which is, at first glance, praiseworthy, is that the State intervenes to highlight disabilities and to stigmatize vulnerable persons who are deprived of the freedom of action acknowledged to others.

[7] A magistrate who have to comment and prepare the case before judgement in front of french administrative courts.

The refusal of care also shows that dignity can limit the individual freedom to own and control one's body. The administrative judge (CE, Ass 26 October 1001*, Mme Senanayake* et CE, 16 August 2002, *Mme Feuillatey*), basing himself implicitly on dignity, reckoned that doctors are not wrongdoers when they give a blood transfusion to a person who objects to it but who does not have the capacity to consent. For the judge, administering a medical treatment without the patient's consent does not seem to run counter to the ban on degrading treatments, when the healthcare treatment is life-saving, or else it would mean that some lives do not deserve to be lived.

To conclude, we can see that the notion of humanity shows a conflict between two dignities or two forms of dignity: the one of the person, and the one of humankind.
The dignity of the human person seems to be different than human dignity. The dignity of the person is a concept that enables to defend a vulnerable person's rights against abuse of power. A vulnerable person is easily exploited by another one. Vulnerability reduces the person to the level of object. That is why the law refers widely to "dignity" and "human person" in the case of vulnerable people or people victims of social exclusion. The law, focusing on the person, thus establishes for example palliative care, infrastructures to socialize the dying, or incorporates the elderly dependants or patients in a chronic vegetative state (26 April 1999 Act = décret du 26 avril 1999).

Criminal law uses vulnerability to gauge how far the person's dignity has been infringed on, for example, when the owner of an insalubrious rental dwelling who was taking advantage of vulnerable people in precarious situation was condemned (TGI, Paris, 1997), when the odious behavior of the sexual attacker of an elderly woman was stigmatized (Cass. Crim. 29 January 1999), or when pimping was condemned as the exploitation of prostitutes. It is particularly the case with foreigners, especially illegal immigrants who are subject to forced labour and live in disgraceful housing conditions (Cass Crim. 6 May 1997). In the case of the persons who were deliberately excluded from the group, such as prison inmates and the mentally ill, vulnerability has an objective base which can even be adjusted by society to protect itself. Article L. 332-3 of the Public Health Code lays emphasis on the protection of the mentally-ill in-patients. This protection is justified on two grounds: individual liberties on the one hand and the dignity of the person on the other hand.

Human dignity and the dignity of the person: the two faces of dignity, one referring to the human being, the other one to the human person, entail some material hierarchy where the

human being is not as well protected as the person. We talk about the respect for human beings and the dignity of the person. The second paragraph of the *Conseil Constitutionnel* ruling on Bioethics distinguishes the respect for human being when his lives begin, according to the law on the termination of pregnancy. The second decision on abortion law (2001), explain that the respect for human being is derived from the preservation of the dignity of the human person, the only constitutional principle. This ruling sets down that when the legislature allowed the termination of pregnancy, they put on the same footing the dignity of the person and the liberty of the woman whose distress situation was the prerequisite not to ignore the respect for the human being.

Humanity gives great freedom of interpretation that judges may decline with dignity.