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Human remains in French law: the snare of personification

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1 Introduction

In one of his last exhibits, entitled "Animal Body Worlds,"[351] shown at the Senckenberg Museum in Frankfurt, among other places, the now famous physician-plastinator Gunther von Hagens[352] invited us on a gripping journey in which we contemplated the anatomy of all sorts of animals. Sometime we saw their external appearance, sometimes their inner composition, including the fine red-lace circulatory system. After the sharks, the crabs, the ostrich and bear, the horse, camel, elephant, giraffe, and gorilla, visitors reached the exhibit's final animal: a man, named "Chatterbox," skinless, holding a cellphone to his ear. Here was a stunning reminder that humans too are animals. More fragile than many other animals but also the inventor of technologies as powerful as the mobile telephone – strong enough to kill them should they, for example, drive while telephoning – humans belong to a strange species that never stops asking itself questions: about its origins, about the point at which some anthropological fragment can really described as human, about the conditions of its survival, and about what it owes to future generations, about what it is to be human – or inhuman.

If von Hagens's exhibit ended so strikingly, it is not only because it provided a short cut to the view of humans as a singular animal species but also because it used a cadaver to do so. Why? Certainly, it is banal

I wish to thank Jo Ann Cahn for her responsiveness and her perceptive translation of this text.

[351] *Körperwelten der Tiere*. Note that *Körperwelten der Tiere* can be translated as "Worlds of the Body"/"Body Worlds" or "Worlds of the Bodies"/"Bodies' Worlds." See www.senckenberg.de/root/index.php?page_id=14961.

[352] Plastination, developed by G. von Hagens at the end of the 1970s, consists in impregnating the physical tissue with chemical substances called polymers to harden them and make the body hard and rot-proof; it is dry, odor-free and nontoxic.

to say that death and humanity are linked. When we look for what characterizes humankind, we find the following responses: humans are the animals that laugh, that have the ability to reason, that have *logos*. But we also frequently say: humans are the only creatures who know they are going to die, the only ones who bury their dead. It is therefore equally unoriginal to examine humanity through the lens of death, simultaneously as an abstraction and as a material object – a cadaver. Nonetheless, the point of view becomes slightly more original when a third party joins the picture – the law. That is, the law of cadavers, at least as a case study from a French perspective, seems to us, for two reasons, to be an appropriate entry point for an analysis of the humanity of humans.

First, at the end of the Second World War, and then again in the 1990s, new concepts sprang up in the law, especially the penal law: crimes against humanity, first, and then crimes against the human species. They juridicized, we might say, a concept, humanity, which until then had belonged more to the fields of political philosophy or biology. The advent in international law and then in domestic French law of these two offenses raises a crucial question: what humanity are we talking about? Humanity understood as a cultural, historical, and anthropological process, or as a biological fact? To put it simply: French law has criminalized reproductive cloning and eugenics as injuries to the human species, after having criminalized the acts of those who injured the humanity of humans; it thus draws a parallel between these two behaviors that, at the same time, it distinguishes. Although this demarcation is, we think, justified, it nonetheless establishes two visions of humanity in the law – one pulling toward the biological, the other toward the cultural.

Secondly, French law over the past twenty years has, like society, been fascinated not only by death, but also by cadavers, in precisely the same two dimensions, cultural or social, and biological.[353] Here we are, at the beginning of the twenty-first century, far from the denial of death that is claimed to have characterized the 1950s to the 1980s and about which so many historians, philosophers, sociologists, and anthropologists wrote, including Geoffrey Gorer, Philippe Ariès, Michel Vovelle, Norbert Elias, Jean Ziegler, and Edgar Morin. Two authors have demonstrated both this change and the biases and exaggerations of those arguments.[354]

[353] See *Raisons politiques* 41 (March 2011) on "Deaths and Body Parts."

[354] See D. Memmi, *La Seconde Vie des bébés morts* (Paris: Éditions de l'EHESS, 2011), in particular, 46 *et seq.* and A. Esquerré, *Les Os, les cendres et l'État* (Paris: Fayard, 2011), especially 8 *et seq.*

In any case, far from being masked or hidden, the cadaver today is offered for viewing and is the object of diverse practices (dressing and presentation of stillborns, dispersion of ashes, restitution by museums of human remains taken from the indigenous populations of other countries, exhibition of plastinated cadavers). In disputes, judges make decisions about these practices, decisions that demonstrate in any case that the cadaver is now an object affecting the balance between the power of the state and individuals' wishes.

This juridicization of the cadaver takes place logically through the standard categories of the law, although it fits them uncomfortably. Classically, as we know, in the Roman legal tradition, an object that has a legal life is either a person or a thing. For cadavers, which are, after all, dead bodies, things are more complicated. On the one hand, their materiality cannot be doubted; they decompose, can be reduced to ashes, can be (technically and physically, but not legally) dismembered, stolen, purchased, and so on. On the other hand, no one doubts that the cadaver was a person. The question, symmetrically inverse, of whether an embryo must be protected in the name of the person that it might some day become is infinitely more complex. To protect the cadaver, then, are we required to liken it to the person it once was? Ill at ease with the *summa divisio* (fundamental division) (I), French law tries to cope by likening the cadaver to the human, but we are not sure that doing so tells us anything about the humanity of humans (II).

2 The cadaver – between a thing and a person

Faced with the reification of the cadaver, French law takes an ambiguous position, simultaneously reifying the cadaver and humanizing it. In fact, it embraces the increasingly diverse forms that the disposition of cadavers and human remains now take (see (1), below). Concerned with imposing its vision of public policy, it checks this reifying momentum by surrounding the thing that is the cadaver with a halo of humanity. In so doing, French law seems to establish a third category, between people and thing – the human entity (see (2), below).

(1) It is essential to acknowledge that in French law a cadaver is a thing. This qualification is far from recent. The civil law classically held that the legal personality ends immediately with the subject's death. In contrast to the argument provoked when attempting to fix the moment that personhood begins, everyone agrees today that physical

> death – and it alone – ends legal personhood.[355] This is not to say, of course, that the medical or legal definitions of death are settled or unarguable. On the contrary, numerous technical and medical advances – in maintaining patients in a persistent vegetative state, in conserving organs after brain death, in reading the mind of non-communicative patients through various neuroimaging techniques,[356] as well as the recent discovery of living stem cells in cadavers – all support the idea that the barriers between the living and the dead, between people and things, are permeable. At this stage, however, we just want to stress that the law, and in particular the civil law, must ensure that a cadaver is a thing, at least insofar as the personhood it previously hosted has disappeared. It would be a contradiction, to say the least, to confer a semblance of personality on remains, on the tangible manifestation of the person now vanished.

Nonetheless, progressively and, today, strikingly, the law's interest has moved from the conditions of the person's appearance on the legal scene – the legal personality – towards the very materiality of the cadaver that manifests the subject's death. In recent years we have witnessed a multiplication of the legal uses of cadavers; I am thinking principally of the legalization of post-mortem organ removal for transplantation or for scientific research[357] – which incidentally but significantly has led the legislator to switch from the classical cardiological definition of death to the contemporary brain death criterion – and of the dispersion of ashes in the great outdoors, except on public roads.[358] And the law, or, more precisely, courts and judges, have also had to respond recently to strange questions: is a public exhibit of plastinated human cadavers legal?[359]

[355] B. Teyssié, *Droit civil: les personnes*, 12th edn (Paris: Litec, 2010), no. 128, 106. The specification "and it alone" refers to the institution of civil death that, until the law dated May 31, 1854, deprived convicts sentenced to afflictive and infamous penalties of a legal personality.

[356] See National Ethics Committee, Recommendation no. 116 (March 2012).

[357] See Public Health Code (Code de la santé publique), Articles L. 1232-1 *et seq*. The legalization of *post-mortem* organ removals in France dates to the so-called "Caillavet Act," enacted December 22, 1976, abrogated by Law no. 94-654, dated July 29, 1994, and modified several times since, most recently by Law no. 2011-814, dated July 7, 2011, relative to bioethics, *Journal Officiel* (July 8, 2011).

[358] Authorized by Article 16 of Law no. 2008-1350, dated December 19, 2008, relative to funeral legislation, codified in Article L. 2223-18-2 of the Local Government Code (Code général des collectivités territoriales).

[359] See n. 354, above.

Can the neighbor of a person who died during the 2003 heat wave be compensated for the damage that the oozing of the decomposing cadaver produced in her apartment?[360]

(2) Although the uses, serious or weird, of the cadaver are well attested, and even though individual wishes have more effect than they used to have, the domain remains largely imprinted by considerations of public policy. For public health reasons, it is the state that has the priority interest in cadavers, and no one can do whatever he wants with his last remains, his final fleshly home. Cryopreservation thus remains forbidden. The justifications, explicit or implicit, for this limitation have varied: earlier, public hygiene was invoked, or the need to be able to investigate suspicious deaths. Today, to oppose, in particular, the conservation of ashes in private places, the authorities talk about the harmful psychological effect that "privatizing" ashes might have on the needs of the living for consolation. Some authors, very critical of this movement, have gone so far as to link the recent transformation of the destination of ashes, by the law dated December 19, 2008, cited above, with a certain concept of the nation state: the fact that the public authorities do not authorize the maintenance of ashes at home, nor their anonymous dispersion in the great outdoors[361] is claimed to attest to a "living–dead community" promoted by a nation state concerned with controlling its territory and with taking steps so that no one and nothing, not even fragments of human remains, escapes it.[362]

This very critical assertion is perplexing: the law dated December 19, 2008 clearly continues to authorize the dispersion of ashes in natural settings, the major demand of cremationists[363] in the 1970s; there is no inconsistency at all in requiring that this action be reported. It is logical to require information about the location of both births and deaths and

[360] Cour d'appel de Paris, January 28, 2009. See the comments by D. Bert in *Dalloz* (2009), 1804 *et seq*.

[361] Article L. 2223-18-3 of the Local Government Code provides that "the person responsible for arranging the funeral shall report it to the town hall of the municipality of the deceased's place of birth. The identity of the deceased and the date and place of dispersion of the ashes shall be recorded in a registry created for this purpose."

[362] This argument is developed by Esquerré, *Les Os, les cendres et l'État*, 132 *et seq*. n., and 305 *et seq*.

[363] Term designating those in favor of cremation. Several of their demands were met by the adoption of decree no. 76-435, dated May 18, 1976.

to treat all dead bodies equally, both those decomposing underground and those that were cremated. Accordingly, French law requires that the bodies of stillborn children that are not claimed by the parents must be cremated or buried. If the parents claim them, the hospital must return them, but not before recording all the relevant information about the body. "Wandering is now forbidden for children's cadavers and professional intervention is increasingly codified for this purpose."[364]

Nonetheless, it is certainly interesting to seek to understand the new reasons that motivate the state's regulation of cadavers and, perhaps, especially to pinpoint the legal forms this regulation takes. It seems to me that in recent years the protection of the dead body against violations considered, rightly or wrongly, unacceptable has taken place not by the legally implausible personification of the cadaver but by its humanization, even its overhumanization, demonstrated in both the Penal and the Civil Codes.

Since 1810, the Penal Code has criminalized as an "offense against the laws of burial" the violation of graves, tombstones, etc.[365] Since the new Penal Code went into effect on March 1, 1994, the offense has been expanded to concern not only the container – the grave or tomb or tombstone – but also its contents – the cadaver.[366] Moreover, the offense is now classified in the section on crimes against the human person, and, more precisely, on injuries to their dignity.[367] Certainly, the titles of the Penal Code are not normative but only descriptive. The legislature's choice could not, however, be any clearer: to protect the cadaver is to

[364] Memmi, *La Seconde Vie des bébés morts*, 31.

[365] This involves the former Article 360 of the Penal Code: "Anyone who is guilty of violating graves or tombs shall be punished by imprisonment for three months to one year, and by a fine of 500 F to 15,000 F; without prejudice to the penalties for the crimes or offenses associated with it." Significantly, this was included in a subsection (VI) of the section on "crimes and offenses against persons" and is entitled "crimes and offenses tending to prevent or destroy proof of the civil status of a child or compromise his or her existence, to lead to the kidnapping of minors, family abandonment (and thus to offenses against the laws about burial)." Thus, the violation of a grave or tombstone is a transgression of the social inscription of the deceased.

[366] "Any damage to the integrity of the cadaver, by any means whatsoever, shall be punished by a year of imprisonment and a fine of 15,000 euros. The violation or profanation, by any means whatsoever, of graves, tombs, urns, or monuments built to the memory of the dead shall be punishable by a year of imprisonment and a fine of 15,000 euros. The penalty shall increase to two years in prison and a fine of 30,000 euros when the offenses defined in the preceding paragraph are accompanied by damage to the integrity of the cadaver."

[367] Subsection 4 of section V of title II of book II of the Penal Code.

protect the dignity of the human being who sheltered/held the dead body and which survives death and the consequent disappearance of the legal personality.

The Civil Code changed too, albeit later. The law dated December 19, 2008, which significantly modified the legal status of ashes, a status created in the section on the body, itself included in the section on persons, Article 16-1-1, para. 2, which states that "[t]he respect due to the human body does not cease with death. The remains of people who have died, including the ashes of those whose body was cremated, must be treated with respect, dignity and decency."

The Civil Code takes a decisive step here, still more than the Penal Code did, by linking the cadaver and humanity. In the legislative formulation, no words are left to chance: decency is more a moral and social concept than a legal one but the application of common sense makes it easy to understand its use in this context;[368] respect is more a legal concept that, while vague beyond its classic use between people,[369] has the advantage of transcending the boundary between things and persons, since the term is used to qualify the relation that the law imposes with regard to embryos, human beings that have not been personified.[370] What is more surprising is that human remains must be treated with dignity. Nonetheless, jurisprudence has followed the legislature's footsteps, applying the Article quite notably in the *Our Body* case.

From February through May 2009, a private museum exhibited a show of plastinated human cadavers (like those of von Hagens although he was not the organizer of this particular exhibition) that had already toured the world. In March 2009, two human rights groups sued to ban the exhibit. Remarkably, from the perspective of artistic freedom, which is an aspect of freedom of expression, the Court approved the ban.

[368] The discourses pronounced during the Revolution for or against it, analyzed by A. Esquerré, often fell within this register. See Esquerré, *Les Os, les cendres et l'État*, 25 *et seq*.

[369] See Civil Code, Article 371: "The child, at any age, must honor and respect his or her father and mother."

[370] We refer here to Article 16 of the Civil Code, which provides that "[t]he law ensures the primacy of the person, prohibits any violation of its dignity, and guarantees respect for every human being from the beginning of his or her life." This Article recognizes the decoupling of the status of the living person, in a situation of primacy and to whom dignity is due, and the human being (in other words, the embryo-fetus), to whom only respect is owed.

To understand this remarkable decision, it must be placed in its context.

First, remember that the initial plaintiffs were two human rights organizations that claimed, among other arguments, that most of the cadavers thus exposed were those of executed Chinese prisoners or victims of torture, whose consent to plastination and to exhibition might *ipso facto* be placed in doubt. That was, indeed, the argument that convinced the Court of Appeals, which, without affirming the trial judge's reasoning based on public order (dead people must be in cemeteries, any other location being indecent and "derealizing"), held that the proof of consent supplied by the organizers was insufficient. Some will probably criticize the fact that the judiciary became a policy arena, but this is neither new nor rare. In this sense, we can understand that the plaintiffs used every available means, even if it meant criticizing here what they defend elsewhere – freedom of expression.

Next, we quote the words of the Court of Cassation: "under the terms of Civil Code, Article 16-1-1, para. 2, the remains of people who have died must be treated with respect, dignity and decency; the exhibition of cadavers for commercial purposes ignores this requirement."[371]

Accordingly, what the Court condemned was not the exhibition of human cadavers as such but the profit that could be made by such an operation. The Court was clever enough not to rely directly on the principle of non-patrimoniality (Civil Code, Articles 16-1, para. 3 and 16-5), which requires that human body parts and products must only be given, freely and without consideration. From what or where did the Court draw such a principle? By its interpretation of Civil Code, Article 16-1-1, the somewhat vague, not to say incantatory, expression of the respect and decency due to the cadaver takes form: marketing a cadaver violates these principles. Certainly, this decision has been the object of substantial criticism, which has especially underlined the fact that this commercial aim is not easy to determine.[372] The Court of Cassation is interpreting; it is not leaving the principle of non-patrimoniality on hold but anchoring it to a text that, otherwise, might appear to be begging the

[371] Civ. 1st, September 16, 2010, Bull. civ. I, no. 174, *Dalloz*, 2010, p. 2754 n. B. Edelman; M. Reynier and F. Vialla, "Perinde ac cadaver," *Médecine et droit* (May–June 2011), 108. See also the (very hostile) ethics opinion issued by the national ethics advisory committee in this case: Comité consultatif national d'éthique (CCNE), opinion no. 111 on the ethical problems presented by using cadavers for conservation or exhibit in museums, January 7, 2010, www.ccne-ethique.fr/.

[372] See the very illuminating pages devoted by A. Esquerré to this critique: Esquerré, *Les Os, les cendres et l'Etat*, xx *et seq*.

question. This motivation also stems from the spirit of the French bioethics statute, which has clearly replaced the principle of unavailability by that of non-patrimoniality at a time when the latter is sometimes under attack (for example, by the proposal, made repeatedly although until now still rejected, to set up a regulated market in organs or gametes).

Beyond the decision, what explanations may be found for this upgrading of the cadaver, which, without being a person, has now borrowed the most majestic aspect of the person, its dignity? In France, the massive irruption of the principle of dignity, made constitutional by the Constitutional Council in a very famous decision in 1994,[373] has been the object of inexhaustible controversy: the gap seems insurmountable between those who see in it an unjustified injury to individual freedom, because dignity can be opposed to the individual to prevent him or her from taking up an activity, and those for whom the promotion of the principle of dignity to the rank of an ultimate value signals common membership in humanity.[374] As the cadaver is no longer a person and cannot manifest its will, judges can, without offending anyone, proclaim its right to dignity. In this hypothesis, to limit the damage that the cadaver as material thing might experience, we connect it to the person rather than creating a secularly sacred status.[375] The idea is simple, almost obvious (the cadaver was a person, unlike an embryo, which may never be), and it is parsimonious (the standard dichotomy between persons and things remains undisturbed).

From the perspective of values, we could ultimately be satisfied with this situation. Is there something to be gained conceptually? Nothing is less certain.

3 The strange nobility of human things

Contemporary French law seems ill at ease with its own construction, which consists not in turning the cadaver into a person but in emphasizing that it belongs to the human, so that the law can attach to it attributes

[373] Decision DC, July 27, 1994. See M. Verpeaux et al., *Droit constitutionnel: les grandes décisions de la jurisprudence* (Paris: Presses universitaires de France, 2011), 445 *et seq.*

[374] On the different meanings of the term "dignity," see C. Girard and S. Hennette-Vauchez (eds.), *La Dignité de la personne humaine: recherche sur un processus de juridicisation* (Paris: Presses universitaires de France, 2005). See also the chapters by Jan C. Joerden and Kristof Van Assche and Sigrid Sterckx in this volume.

[375] See X. Labbée, *La Condition juridique du corps humain avant la naissance et après la mort* (Presses universitaires de Lille, 1990); H. Popu, *La Dépouille mortelle, chose sacrée: à la redécouverte d'une catégorie juridique oubliée* (Paris: L'Harmattan, 2009).

usually attached to people, because they are human. The expression "human remains," used by Civil Code, Article 16-1-1 is revealing in this regard. The expression is well known to archeologists and museum curators, who have dealt with demands for the restitution of human remains they have held for a long time, but is less used in law. It means exactly what it says: a cadaver is made up of human remains, that is, it is what remains of the person who no longer exists, and these remains are human, a sort of irreducible leftover of the person's existence.

What we might call the upgrading of the cadaver is in many ways not surprising, as it is part of a characteristic perspective of contemporary French law. We can compare it to the situation of the embryo; when we do, we see that this category of "humanity," a sort of third category that combines things and persons, makes it possible to escape the embarrassing aspects of the *summa divisio*. Let us recall that Article 16 of the Civil Code qualifies the embryo/fetus not as a person but as a "human being." At the other end of the life span, a recent French statute regulating forensic autopsies provides, using wording apparently derived directly from the Civil Code: "Access to the body takes place in conditions that guarantee (to the family and friends), respect, dignity, decency, and humanity."[376] At this stage, we are not even sure which or whose humanity the legislator is talking about: the humanity of the deceased as a person? The humanity of the relatives? The humanity of the remains? At the least, a new legal category is emerging, one that tries to embrace the complex nature of humanity. But it is still, at least for now, difficult to interpret.

On the one hand, we assume that the law, like society, is interested not only in abstractions, not only in individuals, but also in the stuff we are made of and that places us in a culture. Two examples demonstrate this.

The first is the case of the so-called Maori head, held in a museum of Rouen. Maori cultural militants demanded its return. The National Assembly finally[377] decided that the object should leave the national collections and be returned to the descendants of the ancestors from whom it had been taken. This dispute, long and complex, illustrates the association between mortal remains, the history of colonization, respect for the dignity of indigenous peoples, and the obligation to bury human remains.[378]

[376] Article 230-29 § 3 Code of Criminal Procedure.
[377] Law no. 2010-501, dated May 18, 2010, *Journal Officiel* (May 19, 2010).
[378] This history is told, notably, by Esquerré in *Les Os, les cendres et l'État*, 234 *et seq*. See also M. Cornu, *Le Corps humain au musée, de la personne à la chose* (Paris: Dalloz, 2009), 1907 *et seq*.

The second is the entry into effect on December 21, 2010 of the Convention against Enforced Disappearances. It attests, in a rather low-profile way, to acceptance of the need to provide a status and protection to the victims, both direct (the disappeared/*disparecidos*) and indirect (their families and friends), of these very particular international crimes that are characterized by the fact that the victim's body cannot be found, either for a period of time or even ever. These particularly horrible crimes plunge family and friends into undefined anxiety because they cannot know the victim's fate. Moreover, problems of civil law follow (inheritance shares, remarriage, etc.). Outstanding by its absence, the body of the "disappeared" does not prevent the legal person from existing and denies, on the other hand, the existence and identity of the flesh-and-blood person.

Two Articles of the Convention require consideration. Article 15 states that

> state-parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.

In the same vein, Article 17, about the conditions of deprivation of liberty, requires each state party to assure the compilation and maintenance of one or more up-to-date official registers that shall include specific information about persons deprived of their liberty and the conditions and circumstances of their detention. The Article also specifies that the register shall include "in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains."[379]

The very close link, due as much to biolaw as to international law, between the materiality of the cadaver and the need to respect the human person or restore the integrity that has been violated is perfectly logical: neglecting the body is, at best, adding disrespect to the violation of integrity, and, at worst, attempting at any cost to hide the wrongdoing. The need to apply to this situation what we have called upgrading of the cadaver is not self-evident.

[379] Article 17.3.g of the International Convention for the Protection of All Persons from Enforced Disappearance. We should also mention Article 24.3: "Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains."

On the other hand, the humanity that emerges from all these different conflictual situations is not at all homogeneous.

The criminalization of enforced disappearances with all the legal consequences that flow from it, especially relative to the body, whether absent or found, and the more general respect due to the cadaver and its burial, arise from concepts of humanity that I will call cultural. Equally, however, biolaw has become renowned for its questionable temptation to biologize humanity. For example, in considering the criminalization of reproductive cloning, French specialists first wondered if this step should not be designated as a crime against humanity. For a long series of good reasons, this option was finally not chosen. Crimes against humanity must retain their specificity, historic in particular. Moreover, as we know, these crimes are committed against people already born and not beings to be born, as in reproductive cloning; it is curious, to say the least, to place in the same category, birth, however questionable its origin, and extermination.[380] Sensitive to these arguments, the French legislature chose not assimilation but juxtaposition. Alongside crimes against humanity, the Penal Code has contained, since 2004, crimes against the human species, specifically eugenics and reproductive cloning.[381] This separation is praiseworthy, but it has had a harmful effect, as well, through its implication that beyond the value of "humanity," shared by each of us and that the crimes against humanity aim specifically to abolish,[382] there is another socially protected value whose violation is punished by the penal law: the integrity of the human species, supposed to be violated by eugenics, which consists in the selection of the people

[380] See Frank Haldemann, Hugues Poltier and Simone Romagnoli (eds.), *Le Clonage humain en arguments* (Geneva: Georg, 2005); s.v. "Clonage," S. Dumitru, in M. Marzano (ed.), *Dictionnaire du corps* (Paris, Presses universitaires de France/Quadrige, 2007), 205 *et seq.*

[381] Penal Code, Articles 214-1 *et seq.*

[382] See R. Antelme, *L'Espèce humaine* (Paris: Gallimard, 1947). In his foreword, the author says: "To say that one felt that one's status as a human, as a member of the species was disputed might appear to be a retrospective feeling, an after-the-fact explanation. It was nonetheless what was most immediately and constantly felt and experienced, and it was, moreover, exactly what the others wanted. The challenge to one's quality as a human provokes an almost biological claim to belong to the human species. It can then be used to meditate on the limits of this species, its distance to nature and its relation to it, a certain solitude of the species therefore, and finally, especially to develop a clear view of its indivisible unity." We might think that Antelme also biologizes humanity but, precisely, he explains that this does not follow an *a posteriori* intellectual construction but an individual, spontaneous reaction, concomitant to the event that, as he says, makes it possible to link nature and culture. See also C. Sevely, "Réflexions sur l'inhumain et le droit. Le droit en quête d'humanité," *Revue science criminelle* (2005): 483–484.

to have children, and cloning, the selection of identical reproductions as the children to be born. If eugenics and reproductive cloning must both be criminalized, they must nonetheless be clearly distinguished: eugenics was for a long time massively practiced by democratic states; it consists in selecting, according to varied criteria, people who are already born; reproductive cloning is still experimental, and consists in, it is said, making specific people be born. In addition, and this is true for both offenses, to say of the human species that it is a socially protected value is extremely strange: the human species is certainly a biological concept, but from there to make it an object of the penal law! Certainly, the law can construct objects, as it has, for example, normatively constructed humanity, especially via crimes against humanity or, in the field of public international law, the concept of the common heritage of humanity (such as the moon). But the human species is, at the least, a questionable category in law, for it is undefined and vague. This certainly does not mean that we must deny the biological dimension of humanity.[383] Penal definitions, however, must be clear and specific because their normative effect is determinant. It would therefore have been better to say that eugenics is, depending on the methods used, a crime against humanity[384] or a crime against reproductive freedom. Similarly, reproductive cloning could be said to infringe personal dignity, understood as including the right to be born by random genetic mixtures. M. Delmas-Marty designates this as the "double refusal" that underlies these criminalizations: "refusal of the inhuman, in other words, respect for otherness, and refusal of the 'ahuman' . . . in other words refusal to deliberately change humanity."[385] What is especially interesting in her analysis is that it

[383] See s.v. "Espèce humaine," F. Bellivier, in Marzano, *Dictionnaire du corps*, 351 *et seq*.; chapter by George Annas in this volume. For an extensive concept of crimes against humanity that also includes ecocide, see L. Neyret, "La Transformation du crime contre l'humanité," in M. Delmas-Marty et al., *Le crime contre l'humanité* (Paris: Presses universitaires de France/Que sais-je?, 2009).

[384] In French law, genocide consists in "the execution of a concerted plan tending toward the total or partial destruction of a national, ethnic, racial or religious group, or a group determined from any other arbitrary criterion, to commit or have committed against members of this group" an act among a list enumerated in the code, including taking "measures intended to impede births" (Penal Code, Article 214-1).

[385] M. Delmas-Marty, "Hominisation et humanisation," UMR Paris 1/CNRS, *Mireille Delmas-Marty et les années UMR*, Société de législation comparée, vol. 9 (Paris, 2005), 549. About transhumanism, see also M.-A. Hermitte, "De la question de la race à celle de l'espèce: analyse juridique du transhumanisme," in G. Canselier and S. Desmoulins (eds.), *Les Catégories ethno-raciales à l'ère des biotechnologies*, Société de législation comparée, collection de l'UMR de droit comparé de Paris, vol. 24 (Paris, 2011), 155 *et seq*.

attempts to build a categorization on the basis of a cultural conception of humanity rather than solidifying legal concepts around a biological conception of it, such as "human species."

Instead, we have contented ourselves with incantations that are either futile or dangerous.

Finally, and more profoundly, a complete analysis remains to be conducted of the positive features that characterize this newly juridicized "human" status. It must necessarily involve a total challenge to our certitudes: about the frontier between the animal and human kingdoms, about pushing back the limits of death, of sexual reproduction, and more. In attributing to the human thing that is the cadaver the attributes of the person, we put ourselves at odds with certain rules, some of which, by the way, merit criticism, such as those allowing the post-mortem removal of the organs or tissues of a person if he or she did not object during their lifetime. At the same time, we are also going in circles conceptually: if, in 1994, French law endowed the person with these attributes (dignity, non-patrimoniality), it was not because the person is a legal personality (a simple legal technique that creates something subject to rights and obligations) but because he or she is a human being. But then what is being human?[386] There is probably something to find in this humanity that is searching for itself through the human in the question of time, suspension, and destruction. In this regard, the fascinating opinion no. 112 published on December 1, 2010 by the Comité consultatif national d'éthique pour les sciences de la vie et de la santé (National Ethics Advisory Committee for the Life and Health Sciences)[387] suggests, without taking a position for or against the research, that the community may have a duty not to leave embryos in a kind of suspended time that no longer has anything human about it, and that when the embryo is no longer part of a parental project destruction is basically preferable to the act of omnipotence that decides on the indefinite extension of a biological existence. It is here that we close the circle, for it is the preservation outside any body – possibly indefinitely – that begot this bioethical interrogation in all its depth. Carbonnier said about the

[386] See Delmas-Marty, "Hominisation et humanisation," 549 *et seq*. She defines hominization as a biological evolution and humanization as cultural learning. See also Delmas-Marty, "Humanité, espèce humaine et droit pénal," *Revue de science criminelle* (2012): 495 *et seq*.

[387] "Une réflexion éthique sur la recherche sur les cellules d'origine embryonnaire humaine, et la recherche sur l'embryon humain *in vitro*," www.ccne-ethique.fr/.

cryopreservation of cadavers that the desire for immortality may be contrary to the public order.[388] Fifteen years later, although the idea remains the same, its formulation is more concrete and more material: human matter – our clay or stuff or cells – must be able to live or cease to exist and not be suspended for an indefinite duration of technical preservation. We can also look at euthanasia and the question of post-mortem embryo transfer through this prism. It may be that the quintessential human remains, the cadaver, may launch a stream of consciousness that lets us think deeply and thoroughly about these difficult mechanisms and demands. But to do so there is no need to raise it to the rank of a person, either directly by attaching it forcibly to a branch of the *summa divisio*, or indirectly, in assigning to it all the qualities reserved for the person.

The European Court of Human Rights understood this when it determined that because the quality of human being (in the language of French law: the human person) is extinguished at death, the ban on abuse in Article 3 of the European Convention on Human Rights no longer applies to cadavers.[389] In this perspective, the French Penal Code, on the other hand, clouds the issue, since infringements of the respect due to the dead are classified among the violations of the dignity of the human being (again, in French law, the human person).[390] Beyond the fact that this is unnecessary, it is also a mistake, because the protection of the person is situated either on the side of the abstraction of the subject of the law or in the field of the universality of the human being. Respect for the cadaver, although universal, is nonetheless combined with promoting cultural diversity. Let us content ourselves, therefore, with a third category, the human thing, marginally consecrated by the French law in reference to the bodies of some stillborn babies, qualified in those specific circumstances, as "human anatomical specimens."[391] These many "things" truly human that we have seen here, following in the wake of the things of human "origin or destination" brought to light long ago,[392] deserve

[388] J. Carbonnier, *Droit civil: les personnes* (Paris: Presses universitaires de France, 1992), 37, n. 20.

[389] CEDH, February 27, 2007, *Akpinar et Altun c/ Turquie*, req. 56760/00.

[390] Penal Code, Article 225-17 *et seq*.

[391] Circular DGCL/DACS/DHOS/-DGS:/-DGS: no. 2009–182, dated June 19, 2009, "relative to the recording of the civil status of children who died before the declaration of their birth."

[392] M.-A. Hermitte, "Les Produits du corps humain, choses d'origine humaine et à destination humaine," in R. Drai and M. Harichaux (eds.), *Bioéthique et droit* Centre Universitaire de Recherches sur l'Action Publique et le Politique (CURAPP), no. 304 (1988): 220 *et seq*.

respect and decency; they must, in their materiality, find their place to reassure, if needed, the living,[393] contribute to the dignity of the person that they were or could have been (or could not be), and, finally, provide their small stone to humanity, all the while remaining clearly separate from the "people" who really matter.

In conclusion, let us return to this notable coincidence of events that occurred in 1994. That was the year that the new French Penal Code came into effect. It defined crime against humanity for the first time and also ranked it highest among the crimes included or modified that year. The same year saw the birth of the so-called Bioethics Law, which for the first time gave a status to the human body and established the principle of the integrity of the human species. The early 1990s can thus be described by four characteristics:

- general normative enhancement of the person, in particular through recognition of human dignity (constitutionalized);
- the law's notable and new attention to the fabric of the individual, the stuff we are made of, at the same time that individual bodies, their integrity and inviolability loudly proclaimed, are legally cut into pieces, stored and used more than ever before;
- a blurring of boundaries between living and dead, persons and things, animals and humans, and so on;
- the strengthening of the concept of humanity in an attempt to unite these fragmentary ideas.

The conception of the cadaver that can be inferred from French statutes and case law fits each of these four characteristics. Recent law has reified, humanized (and re-humanized) and even personified the cadaver.

It is, I think, essential to channel this profusion of categories, understandable at a time when humanity has not only the desire, which it has had since time immemorial, but also the technical means to create, improve or destroy itself. To be operational, legal categories must be not necessarily impermeable or immutable but at least identifiable. We should be able to discern an animal or a person, an embryo or a corpse, a plant or a stone, in the law designed to protect it. If lawmakers consider

[393] See Convention européenne des droits de l'homme (CEDH), October 30, 2001, Pannullo c/ France, Requête no. 37794/97: Excessive delay (more than seven months) in restoring to the family the body of a child who underwent an autopsy, regardless of the cause of the delay, violates Article 8 of the European Convention of human rights (right to respect for private and family life).

the *summa divisio* of things and people is too narrow, and if they think the law must cover a hybrid category of human entity (applicable to the embryo, to cadavers, either whole or in parts, and to products of the human body), they must subordinate it to the existence of a specific legal framework that does not let the concept of person stain the human entity. Furthermore, the human entity, although corporeal, made up of material, must not be reduced to a biological entity. The human entity will never be a pure biological material, whether it has a history (cadaver, body part) or not (e.g. a frozen embryo that can be destroyed). No human interest is served by assignment to an immutable status or category; on the contrary, we know to what extent crimes against humanity, past and present, have been based on a deterministic concept (biologically or culturally determined) of humanity. If French law's recent humanization of the cadaver is accompanied by the promotion of a common humanity that might link us in time and space, it will be good news. Otherwise it will be either just a play on words (the person for the human and vice versa) that will accomplish nothing, or the legal recognition of a mere biological category, which will cost us dearly in solidarity.