

DIGNITY BEYOND THE HUMAN PERSON, ISSUES, RISKS AND PERSPECTIVES IN EHR LAW

Ludovic Benezech

University Clermont Auvergne, France
ludovic.benezech@uca.fr

BENEZECH, Ludovic. Dignity Beyond the Human Person, Issues, Risks and Perspectives in EHR Law. *International and Comparative Law Review*, 2023, vol. 23, no. 2, pp. 97–106. DOI: 10.2478/iclr-2024-0006

Summary: Human dignity is at the heart of the project of safeguarding and developing conventional fundamental rights. Dignity was conceived by the European Court as the foundation and purpose of the human person. However, the human person is no longer the only one to be the subject of protection, the Court having gradually integrated the question of the protection of animals in particular. If some authors wish to extend the concept of dignity to animals, the study will demonstrate that it is currently neither possible (*de lege lata*) nor desirable (*de lege ferenda*) to make this paradigm shift.

Keywords: Fundamental rights, human dignity, ECHR, animals

1 Introduction

Since the 1970s, particularly following the meteoric success of Peter Singer's "Animal Liberation," which has become a global reference, the issue of animals' place within the corpus of fundamental rights and freedoms has forcefully emerged. In the aftermath of World War II, the focus was primarily on recognizing and protecting human dignity and the fundamental rights derived from it. However, the silence of Charters and Declarations regarding animal protection was quickly criticized by animal rights advocates.

The European Convention on Human Rights offers a rich lesson in this regard. Following the outright denial of human dignity during World War II, the Council of Europe adopted the European Convention on Human Rights to ensure "the protection and development"¹ of fundamental rights and freedoms. Notably, the term "dignity" is absent from the Convention, as are references to animals. The Convention was designed primarily to safeguard and develop the fundamental rights of every human being under the jurisdiction of a State Party. Although the term "human dignity" is not mentioned, the concept inspires all provisions of the Convention. Human dignity appears as both the premise and the result of fundamental rights, as the cause of all rights and also as their consequence. It is

1 Preamble to the Statute of the Council of Europe.

because humans are deemed worthy that they enjoy fundamental rights, and it is because they enjoy fundamental rights that their dignity is realized.

The history of fundamental rights, of subjective rights, stems from a long construction. The Greco-Roman heritage first and then Christianity later sanctified the person by the importance it placed on the subject, the individual. Christianity's dual revolution was to establish both the sanctity of the person and individual freedom. One constant throughout the history of fundamental rights is the permanence of the concept of dignity, which is echoed in the Universal Declaration of Human Rights.

In this context, marked by the sanctity of the human person, the European Convention unsurprisingly does not address the animal question. This absence of reference is not surprising; the challenge in the aftermath of World War II was not to grant international protection to animals but to ensure an irreducible foundation of guarantees for every human person. It should be noted that no universal reference text, akin to the Universal Declaration of Human Rights, granted any importance to the animal cause. In this regard, the absence of reference to animal protection in the Convention's text cannot be seen as a gap or a surprise. On the contrary, such a presence within the Convention's text would be surprising for a document titled, it must be remembered, the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Yet, what seemed unimaginable yesterday has become unavoidable today. Since the late 1990s, the issue of legal protection for animals has become increasingly pressing. Fueled by a theoretical and philosophical current denouncing the omnipresence of humans within the living world (anti-speciesism) and responding simultaneously to social and societal aspirations, the animal cause continues to grow. Eager to ensure the Convention's evolutionary character as a "living instrument" to be "interpreted in the light of present-day conditions,"² the European Court could not remain indifferent to this major paradigm shift. Although the text offered no specific protection for animals, the European Court has been compelled, by necessity, to dynamically interpret the Convention's norms to integrate, alongside human dignity, the animal question. A genuine jurisprudence relating to animal protection is emerging in Strasbourg.

However, neither the letter nor the spirit of the Convention's text was designed to provide a platform for the animal cause. Indeed, despite its detractors, the principle of human dignity is a foundational principle around which the entire protection of fundamental rights is articulated. Thus, the predominant place of the human being within the conventional system (I) not only makes it difficult *de lege lata* to protect animals without the intermediation of the human being (II) but also inadvisable *de lege ferenda* to autonomously recognize dignity for the benefit of animals (III).

2 ECtHR, 25 April 1978, *Tyrer v. United Kingdom*, no. 5856/72, § 31 ; ECtHR, 21 March 2023, *Telek v. Turkey*, no. 66763/17, § 136.

2 The Preeminent place of Human Dignity within the European Convention

Despite its formal absence, dignity is substantially and essentially present within the Convention. Moreover, it is possible to assert that, in the current state of positive law, it is not possible to conceive of the Convention's fundamental rights without resorting to human dignity. The jurisprudence of the European Court of Human Rights has filled this original gap by emphasizing the very close link between fundamental rights and the human person. Thus, in the current state of positive law, fundamental rights under the Convention can only benefit human beings, who are their sole and exclusive recipients. Several arguments confirm this idea.

2.1 *A convention exclusively focused on the protection of fundamental rights*

Firstly, it must be recalled that the European Convention is exclusively and entirely intended to protect and promote fundamental rights. This is unprecedented. Fundamental rights exist within Constitutions, but a Constitution is not exclusively dedicated to the protection of fundamental rights; fundamental rights are within the Charter of the European Union, but the Union is not exclusively (and by far) oriented towards the protection of fundamental rights. In short, only the European Convention is entirely dedicated to this and thus enjoys a monopoly in the field and moral authority. Reading the preparatory works, it is clear that the Convention's objective was to ensure for every human being, national or foreign, present on the territory of a State's jurisdiction, a foundation of fundamental rights. Such a conception can only be explained in the name of an egalitarian and universal conception of belonging to humanity, generally referred to as dignity.

2.2 *The explicit consecration of human dignity*

Secondly, starting in 1995 with the marital rape case, the European Court made a very strong and important declaration. In a general demonstration, regarding a serious case that undermines the very idea of dignity, the Court declared: "the abandonment of the unacceptable idea that a husband could not be prosecuted for raping his wife was in line not only with a civilized notion of marriage but also, and above all, with the fundamental aims of the Convention, the very essence of which is the respect for human dignity and freedom."³ This obiter dictum was reaffirmed in a case of domestic violence concerning the Czech Republic⁴ as well as in a case related to the suicide of a psychiatrically troubled patient who threw himself in front of a train after escaping from a public hospital⁵.

3 ECtHR, 22 November 1995, (Grand Chamber), *S.W. v. United Kingdom*, no. 20166/92, § 44.

4 ECtHR, 27 January 2015, (Grand Chamber), *Rohlén v. Czech Republic*, no. 59552/08, § 71.

5 ECtHR, 31 January 2019, (Grand Chamber), *Fernandes De Oliveira v. Portugal*, no. 78103/14, § 112.

Thus, dignity is the very essence of the Convention's fundamental rights. This statement means that dignity makes fundamental rights what they are, that dignity is at the foundation of these rights. There is no more intense expression to articulate the existing link between human dignity and fundamental rights.

2.3 The human person, foundation and purpose of the Convention

Thirdly, in cases involving environmental protection, the Court relied on Articles 2 and 8 to establish the right to live in a healthy environment. However, it should be noted that the Court took into account the legitimate protection of the environment in the name of protecting the fundamental rights of the person. The right to a healthy environment is significant in this regard. Indeed, in the Cordella case⁶, the Court does not recognize "general protection of the environment as such" but finds a violation of Article 8 when environmental nuisances have a "harmful effect on a person's private or family sphere, and not merely the general degradation of the environment." In line with this, the Court recognizes that, "although the Convention does not expressly recognize the right to a healthy and quiet environment, an issue may arise under Article 8 when a person suffers directly and severely from noise or other forms of pollution or nuisances."⁷

Therefore, it is indeed around and from the human person that the extension of the Convention's field in environmental matters, in particular, can be unfolded.

Finally, more generally, the Court unequivocally consecrates the "particular nature of the Convention, an instrument of European public order for the protection of human beings."⁸ This explicit synthesis of the Convention's purpose has been reiterated numerous times in major cases such as Mozer⁹, Neulinger¹⁰, and the inter-State case Cyprus v. Turkey¹¹. It is thus easily understood that the Convention was not instituted for anything other than the protection of human beings. In the law of the European Convention, the human being remains the alpha and omega of the protection system, and the dignity inherent to it remains largely unsurpassable¹². Consequently, the protection of the animal cause can legally come before the European Court only through the intermediary of the human person.

6 ECtHR, 24 January 2019, Cordella v. Italy, no. 54414/13, § 100–101.

7 ECtHR, inadmissibility, 31 May and 14 June 2022, Thibaut v. France no. 41892/19, § 38.

8 ECtHR, 23 March 1995, (Grand Chamber), Loizidou v. Turkey (Preliminary Objections), no. 15318/89, § 93.

9 ECtHR, 23 February 2016, (Grand Chamber), Mozer v. Republic of Moldova and Russia, no. 11138/10, § 136.

10 ECtHR, 6 July 2010, (Grand Chamber), Neulinger and Shuruk v. Switzerland, no. 41615/07, § 133.

11 ECtHR, 10 May 2001, (Grand Chamber), Cyprus v. Turkey, no. 25781/94, § 78.

12 FIKFAK, Veronika, IZVOROVA, Lora. Language and Persuasion : Human Dignity at the European Court of Human Rights. *Human Rights Law Review*, September 2022, vol. 22 : in an original contribution, the authors perfectly show that dignity is used as an argument of authority to reinforce the symbolic charge of the condemnation of the defending State.

3 The Challenge of protecting animal welfare beyond human persons

3.1 *Protect the animal through fundamental human rights*

Fundamental rights under the Convention have developed through and for the human person. In many cases involving the status of animals, the European Court has endeavored to give greater consideration to animal protection without overturning the human-centered paradigm of the conventional system. Thus, if animals cannot enjoy autonomous protection, it is the human persons responsible for their defense and protection whose fundamental rights will expand. In the *VGT v. Switzerland* case¹³, an animal protection association was denied the opportunity to broadcast an advertisement criticizing battery farming methods. However, the Court noted that “it is not disputable that, in many European societies, the protection and farming methods of animals were and still are the subject of general debate” and thus “the extent of the margin of appreciation must be reduced in this case, since the issue was not about the strictly ‘commercial’ interests of any individual but about his participation in a debate of general interest.”¹⁴ Therefore, in the absence of relevant reasons, such a ban constitutes an excessive infringement on the fundamental right to freedom of expression of the applicant association.

Here, the protection, fueled by participation “in the ongoing general debate on the protection and farming of animals,” therefore passed through the classic relay of freedom of expression which, in a democratic society, particularly applies to ideas that “offend, shock or disturb.”¹⁵

3.2 *Illustration in French law*

Before the French domestic judge, the common judge of the European Convention, the mediated protection of the animal cause was once again illustrated. The association L214, known for its striking positions in support of the animal cause, posted on its website and social media a film shot after unlawfully entering the buildings of a rabbit farm. Considering this a manifest infringement of its right to property, among others, the Rabbit Farming Company requested the judge in summary proceedings to order the withdrawal of the contentious film and its prohibition under penalty, which it obtained. Citing Article 10 of the Convention and after extensively recalling the relevant jurisprudence of the European Court in this area, the Court of Cassation quashed the decision on the grounds that the Court of Appeal had not balanced the interests at stake, namely, the obligation to reconcile the right to property and the freedom of expression of animal cause defenders. The Court further specified that while “the violation of the law

13 ECtHR, 28 June 2001, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland*, no. 24699/94.

14 ECtHR, 28 June 2001, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland*, no. 24699/94, § 70–71.

15 ECtHR, 7 December 1976, *Handyside v. United Kingdom*, no. 5493/72, § 49.

constitutes a relevant reason in assessing the legitimacy of a restriction, it is not sufficient, in itself, to justify it, the national judge always having to balance the interests at stake.” By this decision, the mediation of animal protection, through the fundamental right to freedom of expression of association members, is both reaffirmed and strengthened since it is now likely to overturn¹⁶, following a detailed balancing act, the right to property.

This decision thus confirms a judgment rendered on February 2, 2022¹⁷, where the DXE association (fighting against animal cruelty) unlawfully entered a pigsty to film the conditions and share them on social media.

It is evident that the defense of animals under European Convention law, like environmental protection, is not autonomous and does not occur as such. It is mediated, technically and philosophically, through the enjoyment of an individual's fundamental rights. This open yet unruptured approach of the Convention to the animal cause is particularly clever in that it allows the Court to give greater consideration to the animal issue without renouncing the particular nature of the Convention aimed at protecting human beings.

3.3 Animal welfare linked to the preservation of public morality

In a recent judgment of February 13, 2024, regarding the prohibition of animal slaughter without prior stunning, the Court notes, on two occasions, “unlike European Union law, which establishes animal welfare as a general objective of EU law (paragraphs 35 and 37 above), the Convention does not aim to protect this welfare as such.”¹⁸ In this case, the applicants, of Jewish and Muslim faith, contested this ban as contrary to their freedom of conscience and religion. Interestingly, the Court broadened the protection of animal welfare by linking, for the first time, the protection of animal welfare to the legitimate aim of protecting “public morals” under Article 9. Thereby, the Court confirms that the protection of morals, which is an argument that can justify interference, cannot be interpreted “as solely aiming at protecting human dignity in interpersonal relations.”¹⁹ To this end, the European Court declares unprecedentedly that just because the Convention in its Article 1 recognizes “rights and freedoms for persons only” does not mean it could be interpreted “as promoting the absolute gratification of the rights and freedoms it enshrines without regard to animal suffering.” In essence, while the Convention primarily protects the fundamental rights of the human person, it cannot be insensitive to animal suffering, particularly in light of the requirement for public morality. The legitimate aim of animal welfare can thus justify interference with the exercise of fundamental rights.

16 NEFUSSY-VENTA, Nathalie. No longer the monarch in his own home who harms the animal cause ! *Les petites affiches*, May 2023, no. LPA202h2.

17 Court of Cassation, 2 February 2022, no. 20-16.040.

18 ECtHR, 13 February 2024, Executive of the Muslims of Belgium v. Belgium, 16760/22, § 93; 107.

19 Ibidem, § 95.

While this decision further broadens the protection of animals, it nevertheless does not overturn the value system of conventional law. Indeed, and perhaps to avoid any hasty interpretation, the Court reminds in its necessity review that it is not a question, in this case, “of balancing two rights of equal value under the Convention,”²⁰ namely between the right to freedom of conscience and religion and a supposed fundamental right to animal welfare. By refusing this conflict of rights, the Court by the same token refuses to elevate animal welfare to the status of “a right of equal value under the Convention,” with animal welfare only justifying a limitation on the exercise of a right in terms of public morality.

It follows that, at the risk of overturning the letter and spirit of the conventional text, the European Court cannot recognize any autonomous enjoyment of fundamental rights for the benefit of animals. This compulsory passage through the vector of the human person, or more broadly through the vector of public morality, goes far beyond the technical issue of representing interests in proceedings. In reality, not only cannot animals – materially and technically – present themselves before the court²¹ and therefore need the relay of the human person, but more importantly, they do not enjoy, as such, autonomized fundamental rights. The issue of representation is technical, procedural, while the issue of the enjoyment of fundamental rights is philosophical and societal.

Their defense is conceived and expressed only through the enjoyment of traditional freedoms, such as freedom of expression.

4 The impracticality of protecting animal welfare beyond human dignity

The issue of the entitlement to dignity and fundamental rights is gaining momentum and significance. Increasingly, the anthropocentric vision of the legal order faces intense criticism. Modernity would imply rethinking the protection of living beings and thus surpassing the subject as the sole axiological reference point. In this new paradigm, humans would no longer be automatically considered sacred individuals by virtue of their humanity but could enjoy protection as part of the living world. Thus, they would be just one living entity among other living entities.

4.1 Anti-speciesism or the announced dilution of dignity

In its most radical form, the anti-speciesist movement posits that humans should no longer enjoy a special place, consideration, and thus a privileged legal regime simply because of their humanity. Dignity, as the primary support of protection, should no longer be exclusively granted to humans but shared. Anti-speciesism,

20 Ibidem, § 107.

21 This fundamentally differs for vulnerable applicants unable to appear before the court : the Court has never denied them the possibility to fully and autonomously enjoy all the conventional fundamental rights.

therefore, opposes any form of axiological hierarchy based on belonging to any living species.

Often, this philosophical-political project is driven by good intentions, such as combating the cruel treatment suffered by animals due to humans. Such ambitions are perfectly legitimate and acceptable within a democratic society. However, how far can, and should, we go? Should we, in the name of a perfectly legitimate cause – the defense of animal welfare – strip humans of the exclusivity of enjoying dignity? Because if the principle of dignity is no longer reserved only for humans, they will no longer be the sole bearers of primary and supreme value.

Similarly, just as inevitable conflicts of fundamental rights arise from the moment the same rights are recognized for multiple persons, conflicts of fundamental rights between two or more competing dignities will inevitably emerge. However, following a detailed balancing act, this competition between dignities could favor the interest of the animal over that of the human if the latter is no longer perceived as the most legitimate.

The risk is nothing less than endorsing a new form of subjugation and desacralization of the human person. A possibly caricatural and hypothetical case study serves to illustrate this.

4.2 Tom Regan's Lifeboat Theory Perspectives

Consider the example of Tom Regan, author of the famous book “The Case for Animal Rights” published in the United States in 1983. In a rich essay supported by a considerable philosophical corpus, the author presents one of the famous hypotheses of analytic philosophy through the so-called “lifeboat theory.” Following a shipwreck, there are five survivors: four normal adults and one dog. However, the lifeboat, at risk of capsizing, only has four places. One of the survivors must leave, or all will capsize. What to do? Tom Regan believes that all survivors are “subjects of a life,” but in these exceptional circumstances, the sacrifice of the dog for the benefit of humans is imperative. On what principle? On a consequentialist approach to death: “no reasonable person would deny that the death of any of the four humans is a *prima facie* more significant loss, and thus a *prima facie* greater harm, than it would be in the case of the dog.”²²

However, “what if the men on board were no longer adults or normal?”²³ This terrible question was not evaded by Tom Regan. In his 2004 preface²⁴, while regretting that readers and analysts attach so much importance to a minor part of his demonstration, he revisits his lifeboat theory, this time composed of three human beings, a dog, and a human being in an irreversible coma. Positioning

22 REGAN, Tom. *The Case for Animal Rights*. Translated from English by E. Utria, Hermann Éditions, 2012, p. 610.

23 VIAL, Claire. *What if animals had fundamental rights?* [online]. Available at : <<https://revuedlf.com/personnes-famille/et-si-les-animaux-avaient-des-droits-fondamentaux/>> Accessed: 30.01.2024

24 The Case for Animal Rights : Updated with a New Preface by Tom REGAN (2004-09-14).

himself always regarding the damaging consequences of one death or another, Tom Regan concludes that he would clearly sacrifice the person in a coma.

“A step further towards the unsustainability regarding Human Rights was taken” when Tom Regan specifies that, applying the principle of the lesser evil, the dog should be saved “if one of the humans was anencephalic or so bereft of ordinary human capacities as to lack memory or to register awareness of common objects.” There is, to use a well-known phrase, a risk of falling into “the incongruities of anti-speciesist human rights.”²⁵ The refusal to hierarchize, as such, the value of human and animal life inevitably leads to no longer privileging, as a matter of principle, the sanctity of human life. Worse still, by evacuating the question of the sanctity of human dignity to focus on the social and emotional cost of death, this thought leads to classifying and hierarchizing human lives, thus denying the elementary principle of equal dignity for all human persons.

4.3 Risk of desacralization of the dignity of the human person

There is a risk that humans lose their sanctity and thus the absolute nature of their dignity, which cannot be balanced against anything other than another human dignity. Extending dignity and thus the enjoyment of fundamental rights beyond the human person thus poses, in the name of legitimate claims, the risk of an unprecedented weakening of the value of the human person²⁶. The hypothesis of a dilution of the sacred character of the human person cannot be excluded and should not be encouraged. The growing prominence in the media²⁷, political²⁸, or philosophical²⁹ field of the expression “non-human animals” is striking in this regard as it implies that humans are merely another animal. Some activist associations, by mobilizing contemporary conceptual apparatus, call to surpass the exclusivity of human dignity³⁰ to make sentience³¹ the primary axiological principle.

25 MARGUENAUD, Jean-Pierre. *The theory of rights of Tom Regan in the light of European human rights law* [online]. Available at : < <https://idedh.edu.umontpellier.fr/files/2021/04/RSDA-1-2013.pdf> > Accessed : 05.02.2024.

26 DELAGE, Pierre-Jérôme. *The Animal Condition: A Legal Essay on the Just Places of Man and Animal*. Mare and Martin, 2016 : “This humanizing temptation, however, must be rejected, for it carries the peril of the animalization of Man: by equalizing the conditions of the human and the animal, there is a risk, indeed, rather than treating the beast like a Man, of treating the human like a beast”. The author also introduces an interesting concept : esseity. Esseity would be to the animal what dignity is to the human being and would allow for better consideration of animals’ specific needs, avoiding treating them as inanimate objects.

27 [online]. Available at : < <https://blogs.mediapart.fr/edition/droits-des-animaux/article/260813/humans-and-non-human-animals-we-are-all-sentient-living-beings> > Accessed: 10.02.2024.

28 See in this sense, the association The Nonhuman Rights Project, [online]. Available at : <https://www.nonhumanrights.org/>.

29 See the thesis by PIAU, Lucile. *Deconstructing discourses on the inferiority of non-human animals*. Normandy University, 2022.

30 [online]. Available at : < <https://269life-france.fr/> >.

31 JEANGENE VILMER, Jean-Baptiste. Chapter One. Sentience. In JEANGENE VILMER, Jean-Baptiste (ed). *Animal Ethics*. Presses Universitaires de France, 2018, pp. 7–18.

In this respect, it is fortunate that the European Court has not yielded on this point in the name of a so-called evolutionary and progressive conception of the Convention. For, in many respects, not all evolution in the history of thought is necessarily progressive but can, on the contrary, result in an unprecedented regression of fundamental rights.

5 Conclusion

The strengthening of the protection of animals by the European Court meets a legitimate objective and can only be accepted if this protection does not lead to a weakening of the dignity of the human person

The balance found by the jurisprudence of the European Court seems satisfactory. Indeed, the jurisprudence has not relativized or weakened the effectiveness of fundamental rights while giving greater consideration to the legitimate interest in animal welfare in the broadest sense. Such an approach thus allows for reconciliation, if there was ever a need to oppose them, of fundamental rights and the protection of the animal cause. It also demonstrates that, without overturning the European conventional system forged around the principle of dignity, a broad space can be given to a plurality of interests aimed at greater protection of both the environment and animals.

List of references

- DELAGE, Pierre-Jérôme. *The Animal Condition : A Legal Essay on the Just Places of Man and Animal*. Mare and Martin, 2016
- FIKFAK, Veronika, IZVOROVA, Lora. Language and Persuasion : Human Dignity at the European Court of Human Rights. *Human Rights Law Review*, September 2022, vol. 22
- JEANGENE VILMER, Jean-Baptiste. Chapter One. Sentience. In JEANGENE VILMER, Jean-Baptiste (ed). *Animal Ethics*. Presses Universitaires de France, 2018, pp. 7–18
- MARGUENAUD, Jean-Pierre. *The theory of rights of Tom Regan in the light of European human rights law*
- NEFUSSY-VENTA, Nathalie. No longer the monarch in his own home who harms the animal cause ! *Les petites affiches*, May 2023, no. LPA202h2
- PIAU, Lucile. *Deconstructing discourses on the inferiority of non-human animals*. Normandy University, 2022
- REGAN, Tom. *The Case for Animal Rights*. Translated from English by E. Utria, Hermann Éditeurs, 2012, p. 610.
- VIAL, Claire. *What if animals had fundamental rights ?*