

# Dignity, Sentience, Personality: the Legal Relationship between Animals and Humans.

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## Summary

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In a new consideration of animals, whose fundamental critical point is the traditional consideration of them as things, it seems possible to identify three periods, or historic moments, that have marked an evolution in their treatment in the last decades, and precisely in the legal realm. These periods can be identified through the perceptible changes in legislation and jurisprudence. These three terms are: Dignity, Sentience and Personality. The antecedents of this proposal are examined the factors that appear to have provoked these changes are raised for discussion.

Keywords: legal status of animals, sentience, sentient beings, de-objectification, dignity, dignity of creation, dignity of creatures, person, legal personality, animal personality, global animal law

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## SUMMARY

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### I. CLASSIFY TO UNDERSTAND

The reference to animals, in thought and in culture, has been anchored in reality, and could express a relation as complex as it is enigmatic; that that links humans and animals, in an indelible but solid and constant manner.<sup>1</sup> The same has occurred with legal thinking. The Law has tried to find the most pertinent terms, which have been changing, to be able to more adequately specify how it must treat animals and how it regulates the relationship with them, at the core of an organised society. Reducing any reality to a name, to a term, will always be imprecise, but at the same time it is indicative of strength to understand how we must behave when confronted by this reality. From this the need, in the case of animals, to classify them, to try to better understand them, or of attributing to their position in the Law an expression that justifies the treatment bestowed upon them and the place it gives them.

Classifying animals with different perspectives and angles has been a constant throughout history.<sup>2</sup> These days, the widest classification is that which divides animals into: animals for companionship, for production, for experimentation, in shows, which is nothing more than a reflection of “use” that we make of animals. It is a classification marked strongly by economics and, for this reason, it is the classification employed most by Animal Welfare Sciences<sup>3</sup> and in fundamentally European Animal Welfare legislation.<sup>4</sup>

Another classification, from roman roots, of scholastic nature<sup>5</sup> and perpetuated in the majority of the continental and Latin American Codes,<sup>6</sup> is that which splits from of the distinction between domestic, endangered and wild animals, among those that include animals that are fished and hunted, as well as exotic animals, coming from far away lands, for which man has always felt an irresistible attraction. Although there exist variants, this

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<sup>1</sup>POLLO, S., *Umani e Animali: Questioni di Etica* (Rome 2016) 23ss.; rev. by CERSOSIMO R., en dA. 9/1 (2018) 106-109 (<https://doi.org/10.5565/rev/da.247>)

<sup>2</sup>With wisdom, on the anthropocentric need to classify animals, to indicate a dividing line between them and human beings, ONIDA, P.P., *Il problema della 'personalità' degli animali: l'esempio dell'orango Sandra*, in *Rome and America. Diritto Romano Comune* 36 (2015) 360ss.

<sup>3</sup>Animal welfare as an originally veterinary concept that is widely referred to, FRASER, D., *Understanding Animal Welfare*, en *Acta Veterinaria Scandinavica* 50 (2008), doi:10.1186/1751-0147-50-S1-S1

<sup>4</sup>Vid. In relation to Spain, VILLALBA, T., *40 años de Bienestar Animal: 1974-2014* (Madrid 2015); in the general area, BRELS, S., *Le droit du bien-être animal dans le monde. Evolution et universalisation* (Paris 2017).

<sup>5</sup>Gai.2, 14-16.

<sup>6</sup>GIGLIO, F., *Pandectism and the Gaian Classification of Things*, in *The University of Toronto Law Journal* 62/1 (2012) 3ss.

classification works alongside an eminently rural economy, that of the culture of Antiquity that saw it birthed.<sup>7</sup> For this reason, because this vision of animals is connected with the role that animals play in the life of the land,<sup>8</sup> in the concept of domestic animals, beasts of burden are equally included (oxen, donkeys, mules), those that serve as food (cows, pigs, goats, rabbits or chickens, which were certainly a species debated among jurists regarding their potentially threatened nature for their apparent inability to return to their corral: the *animus revertendi*<sup>9</sup>), as well as those that guarded the home (dogs) and those that cleared the area of rodents, cats, that also, as well as dogs, were used for company, but cats, certainly in their own way.

Beyond this typological classification, which is reflected by all classical authors and, of course, in Justinian's Digest and, by consequence, in all the contemporary Codes, there have been certain attempts to classify animals by natural observation (to which we will not refer right now); so the anthropocentric and economic perspective repeats itself, with some variation.<sup>10</sup> In reality, it would not be necessary to classify animals; classic Antiquity shows reluctance towards doing so, from the belief that animals formed a part of a respected nature known as the *scala naturae*.<sup>11</sup> In fact, if we follow the roman jurisprudential texts of the classical era there is a total absence of animal classification.

If one were to examine the roman sources without prejudice, one would be presented with an entirely different picture regarding the legal treatment of animals.<sup>12</sup> The romans considered animals, from a natural point of view, as a legal object on which laws, and above all property laws, could be based, and that could be objects of trade. Until recent decades, there have not been great changes in this approach. However, the common reproach that in Rome animals were considered to be a material without life, and that the notion of ownership over animals is the starting point of animal cruelty or, at least, of the inferiority of animals and their lack of recognition by contemporary law,<sup>13</sup> can easily be refuted, aside from by its serious inaccuracy, by forgetting the "natural" notion of Law (*ius naturale*), that is common also to animals, at least in the often contested opinion of Ulpian.<sup>14</sup>

<sup>7</sup>Of the wide specific literature, we distinguish for orientation, RITVO, H., History and Animal Studies, en *Society and Animals* 10/4 (2002) 403-406; KALOF, L. (ed.), A Cultural History of Animals in Antiquity (Oxford 2013); KITCHELL Jr., K. F., Animals in the Ancient World from A to Z (London 2014); CAMBELL, G. L. (ed.), The Oxford Handbook of Animals in Classical Thought and Life (Oxford University Press 2014).

<sup>8</sup>BODSON, L., Le témoignage de Pline l' Ancien sur la conception romaine de l' animal, in CASSIN, B & LABARRIÈRE, J.L. (Ed) L' animal dans l' Antiquité (Paris 1997) 339ss.; GILHUS, I.S., Animals, Gods and Humans (London/New York 2006) 12ss.

<sup>9</sup>Gai. 2,68.

<sup>10</sup>Always useful, DIERAUER, U., Tier und Mensch im Denken der Antike (Amsterdam 1976) esp. 100ss.; 178ss.; 253ss.

<sup>11</sup>WILDBERGER, J., Beast or God?. The intermediate Status of Humans and the physical Basis of the Stoic *scala naturae*, en ALEXANDRINIS, A., WILD, M., WINKLER-HORACEK (Ed.), Mensch und Tier in der Antike. Grenzziehung und Grenzüberschreitung (Wiesbaden 2008) 49ss.

<sup>12</sup>ONIDA, P.P., Studi sulla condizione degli animali non umani nel sistema giuridico romano (2<sup>a</sup>ed. Torino 2012).

<sup>13</sup>Although with nuances and different results, it is important to take into account the influence of FRANCIONE, G., Animals, Property and the Law (Philadelphia Temple University Press, 1995); REGAN, T., The Case for Animal Rights (University of California Press 1983); ROCHA SANTANA, L., La teoría de los derechos animales de Tom Regan. Ampliando las fronteras de la comunidad moral y de los derechos más allá de lo humano (Valencia 2018); Rev. by SALZANI C., dA 9/2 (2018) 128-131 <https://doi.org/10.5565/rev/da.332>; WISE, S., Rattling the Cage. Toward Legal Rights for Animals (New York 2000); WISE, S., Sacudiendo la jaula (Valencia 2018).

<sup>14</sup>The discussion remains open on the genuine weight of Ulpian's text, D.1,1,1,3. For all, FILIP-FRÖSCHL, J., Rechtshistorische Wurzeln der Behandlung des Tieres durch das geltende Privatrecht, in HARRER/GRAF (Ed.) Tierschutz und Recht (Vienna 1994); ONIDA, Studi sulla condizione degli animali non umani nel sistema giuridico romano. Part. I, Cap.III, 110 y n.18, regarding Cicero's famous text de Officiis, Cic. *Off.*, 1,17,53-54, on the meaning of *natura commune animantium*, extended to all

After revising the sources, one can conclude that the romans considered animals – respecting their essence as living beings – as *res sui generis*. The animals appear in texts as compared with lifeless objects, and are considered to be living beings, frequently uncontrollable and with special attributes, like the need to feed themselves, the capacity to reproduce or the possibility to move by their own volition. Furthermore, it is also clear from the classical texts that animals were differentiated in themselves by their basic needs. For this, the legal treatment of the animal has always been accompanied with the difficulty of encompassing (and containing) the animal phenomenon within the legal concepts. Ordering animals in legal categories means, a lot of the time, ignoring their natural characteristics. For this reason alone Roman Private Law hardly did it, in contrast to current private Law, which still insists upon it.

Notwithstanding the previous observations, our difficulty of encompassing the animal phenomenon and, in spite of this, the need to provide legal rules to be able to order their relation with human beings in conformity with organised society, has led to framing them – almost naturally – in the realm of property, which we always mistakenly consider to be an immutable institution destined to never change, that which could not be more imprecise; so property, as with the majority of relationships, categories and legal institutions, is destined to change and to adapt to specific and variable circumstances, of the society to which the regulation corresponds.<sup>15</sup>

The proprietorship over animals and the consideration of them to be things – which constitutes a real legal dogma – began to break in through philosophical, not legal, thinking, as the Law did not see the need to change this relation of domination between man and animal, given that society continued to be identical in itself: essentially rural and anthropocentric. However, leaving aside the fundamental critical thought on animals of Humanism<sup>16</sup> and of the Enlightenment<sup>17</sup> –the imprints of which have made themselves known in philosophical thought and in society – two centuries later, specifically in the 1980s and in the dawn of the 21st century, have indeed produced changes in legal systems, which have drawn into question whether animals should be things. The factors that explain these changes, the so-called “animal turn”,<sup>18</sup> are of a different entity and nature, and this turn also presents variants that can be found temporally as much as geographically.

## II. CLASSIFY TO ADDRESS

In this new consideration of animals, whose fundamental critical point is the traditional consideration of them as things,<sup>19</sup> in coherence with the Gaian *summa divisio* between persons and things,<sup>20</sup> it seems possible to distinguish three different periods, or moments, in recent that have marked an evolution in their treatment precisely within the legal realm.

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living being, which also appears in Seneca’s thinking, Sen. *Clem.* 1,18,2.

<sup>15</sup>A profound critical review offers, SHERMAIER, M., *15Dominus actuum suorum*. Die willenstheoretische Begründung des Eigentums und das römische Recht, in SZ 134 (2017) 50ss.

<sup>16</sup>BOUDOU, B., *Montaigne et les animaux* (Paris 2016); GONTIER, T., *Intelligence et vertus animales: Montaigne lecteur de la zoologie antique*, in Rursus 2 (2017) 5ss.

<sup>17</sup>DE FONTENAY, E. *Le silence des bêtes* (Paris 1998); GUICHET, J.L., *Rousseau, L’animal et l’homme. L’animalité dans l’horizon anthropologique des Lumières* (Paris 2006).

<sup>18</sup>RITVO, H., *On the Animal Turn*, in *Daedalus*. Journal of the American Academy of Arts & Sciences 136 (2007) 118ss.

<sup>19</sup>Among others, ARAUJO, F., *A hora dos Animais* (Coimbra 2003) 286ss.; RESCIGNO, F., *I diritti degli animali. Da res a soggetti* (Torino 2005) 89ss.; SULLIVAN, D. & VIETZKE, H., *An Animal is not an iPod*, in *Journal of Animal Law* 41 (2008) CERINI, D., *Il diritto e gli animali: Note Gius-privatistiche* (Torino 2012) 18ss.; STUCKI, S., *Rechtstheoretische Reflexionen zur Begründung eines tierlichen Rechtssubjekts*, in *Tier und Recht. Entwicklungen und Perspektiven im 21. Jahrhundert* (Zürich 2012) 147ss.

<sup>20</sup>Gai.2,1.; cfr. ESPOSITO, R., *Persons and Things: from the Body’s Point of View* (New York 2016).

These periods can be identified, I believe, by the three terms that constitute the core of reflection that leads to perceptible changes in legislation and in Jurisprudence. These three terms are: Dignity, Sentience and Personality.

#### a. Dignity

An express reference to the Dignity of creature (“Würde der Kreatur”) as a governing principle of the treatment and consideration that is owed to animals<sup>21</sup> appears only in the Swiss Constitution of 18 April 1999, Art. 120.2;<sup>22</sup> this notion was renewed in 2008, then transformed into “dignity of animals”, in the Swiss Animal Protection Act, that had been completely revised.<sup>23</sup>

**Art. 1** Zweck dieses Gesetzes ist es, die Würde und das Wohlergehen des Tieres zu schützen.

*The purpose of this act is to protect the dignity and welfare of animals.*

**Art. 3 a.** Würde: Eigenwert des Tieres, der im Umgang mit ihm geachtet werden muss. Die Würde des Tieres wird missachtet, wenn eine Belastung des Tieres nicht durch überwiegende Interessen gerechtfertigt werden kann. Eine Belastung liegt vor, wenn dem Tier insbesondere Schmerzen, Leiden oder Schäden zugefügt werden, es in Angst versetzt oder erniedrigt wird, wenn tief greifend in sein Erscheinungsbild oder seine Fähigkeiten eingegriffen oder es übermässig instrumentalisiert wird.

*Dignity: Intrinsic value of the animal, which has to be respected when dealing with it. The dignity of the animal is not being respected if the distress imposed on it cannot be justified by overriding interests. In particular, distress is present if pain, suffering or damages are inflicted upon the animal, if fear is caused or the animal is subject to humiliation, if the appearance or features are significantly changed or if it is excessively instrumentalised.*<sup>24</sup>

In this respect, Switzerland must be considered to be the absolute precursor and pioneering country in this ambit.<sup>25</sup> Already by 1893 the Swiss nation voted in favour of a constitutional prohibition of certain methods of slaughter without stunning before exsanguination. Therefore Switzerland was the first country in the world that imposed the obligation of stunning animals before slaughter, for which reason ritual slaughter continues to be prohibited. Switzerland was also the first European country to include animal welfare as a specific theme in its Constitution, as soon as by 1973, as can be seen in article 80 of the Federal Constitution.

But what is truly outstanding is that in 1992 a second constitutional order reinforced the position of animal welfare in a very unique way. As a result of a national referendum, Switzerland had to amend the Constitution by adding an order that obliged the legislative to

<sup>21</sup>SITTER-LIVER, B., Recht und Gerechtigkeit auch für Tiere. Eine konkrete Utopie, in Tier und Recht (cit.) 29ss

<sup>22</sup>Bundesverfassung des Schweizerischen Eigenossenschaft, Art. 120.2: “Der Bund erlässt Vorschriften über den Umgang mit Keim- und Erbgut von Tieren, Pflanzen und anderen Organismen. Er trägt dabei der Würde der Kreatur sowie der Sicherheit von Mensch, Tier und Umwelt Rechnung und schützt die genetische Vielfalt der Tier- und Pflanzenarten” <https://www.admin.ch/opc/de/classified-compilation/19995395/index.html>

<sup>23</sup>TSchG, Tierschutzgesetz (Swiss Animal Protection Act, in effect since the 1<sup>st</sup> September 2008), <https://www.admin.ch/opc/de/classified-compilation/20022103/index.html>

<sup>24</sup> TSchG, art. 1 and art. 3 (unofficial translation). Also, vid. Tierschutzverordnung (Swiss Animal Protection Ordinance, in effect since the 1<sup>st</sup> September 2008), <https://www.admin.ch/opc/de/classified-compilation/20080796/index.html>

<sup>25</sup>GOETSCHHEL, A., Tierschutz und Grundrechte (Zürich 1989);

pass laws on the use of genetic and reproductive material of animals, plants and other organisms, and in doing this, bearing in mind the dignity of other living beings, including the dignity of animals, as we have already mentioned.<sup>26</sup>

Aside from this, a legal change came into power in 2003 that set a landmark in the history of the country, by changing the corresponding article of the Civil Code, in which it is established that animals are not things (“Nicht Sachen”), and of course this change had visible effect in the law of damages, in the law of successions and title deeds, which has involved more than few discussions on whether the term Dignity is applied equally and with the same value to human beings as it is to animals.<sup>27</sup>

Article 641a of the Civil Code (BGB),<sup>28</sup> in coherence with this, established that animals are not things. It is interesting to observe that this article is composed of two parts; in the first, the legislator refers to the contents of property and general principles (**Art. 641 A. Inhalt des Eigentums / I. Im Allgemeinen**) and in the second, refers to the contents of property and, separately, to animals (**Art. 641a A. Inhalt des Eigentums / II. Tiere**) which, in my opinion, far from being a purely material distinction, reflects a new position for animals that, already seen in the mention by the title, are separate from things.

It can be affirmed that the reference to Dignity, as an intrinsic attribute of animals,<sup>29</sup> forms part of the philosophical background and moral teleology unique to central European thought,<sup>30</sup> which, by contrast, but with help also from the discussion generated by the Kantian consideration on animals,<sup>31</sup> declines in expressions such as Dignity of creature, Dignity of creation, Fellow creature (“Mitgeschöpfte”), which form part not only of the mental horizon of Central Europe, but of the normative lexicon of constitutional orders and of the respective Codes. This is therefore the breeding ground that explains the Austrian reform of the ABGB that declares Non-things of animals and, almost as a planned concatenation, the same reform introduced in Germany,<sup>32</sup> as well as, as we have seen, in Switzerland.

We can briefly see the corresponding regulations of the Austrian Civil Code (**ABGB, Allgemeines Bürgerliches Gesetzbuch**)<sup>33</sup>. In its article § 285 this Code defines the concept of thing in a broad sense:

### **Begriff von Sachen im rechtlichen Sinne**

*(Concept of things in a legal sense)*

**§ 285.** Alles, was von der Person unterschieden ist, und zum Gebrauche der Menschen dient, wird im rechtlichen Sinne eine Sache genannt.

<sup>26</sup>The Swiss Constitution refers to animals in the following and separate articles: Art. 80 BV: competence to legislate for the protection of animals; Art. 84,1 BV: protection of animals against the disturbances of alpine transit traffic; Art. 118,2 b. BV: protection against dangerous illnesses; Art. 104,3 b. BV: protection against abusive exploitation in agriculture; Art. 120,2 BV: respect of the dignity of creature.

<sup>27</sup>MICHEL, M. & SCHNEIDER KASSAYEH, E., The Legal Situation of Animals in Switzerland: Two Steps forward, One Step back-many Steps to go, en *Journal of Animal Law* 7 (2011)

<sup>28</sup>BGB Art. 641a <https://www.admin.ch/opc/de/classified-compilation/19070042/index.html>

<sup>29</sup>BURGAT, F., La “dignité de l’animal”: Une intrusion dans la métaphysique du propre de l’homme, in *l’Homme. Revue Française d’Anthropologie*, 161 (2002) 197ss.; RICHTER, D., Die Würde der Kreatur. Rechtsvergleichende Betrachtungen, in *ZaöRV* 67 (2007) 317ss.

<sup>30</sup>BRENNER, A., Die Würde des Lebens. Vom Selbstsein der Tiere, en MICHEL, M., KÜHNE, D., HÄNNI, J. (Ed.), *Tier und Recht. Entwicklungen und Perspektiven im 21. Jahrhundert* (Zürich 2012) 55s.; SITTER-LIVER, B., Recht und Gerechtigkeit auch für Tiere. Eine Konkrete Utopie, in *Tier und Recht* (cit.) 31ss.

<sup>31</sup>KORSGAARD, C., A Kantian Case for Animal Rights, in *Tier und Recht* (cit.) 6ss.

<sup>32</sup>AMMANN, C., CHRISTENSEN, B., ENGI, L., MICHEL, M. (Ed.) *Würde der Kreatur – Ethische und rechtliche Beiträge zu einem unbestimmten Konzept* (Zürich/Basel/Genf 2015); rec. de BINDER, R., Die Würde des Tieres ist antastbar, en *Rechtswissenschaft. Zeitschrift für rechtswissenschaftliche Forschung* 3 (2016) 497SS.

<sup>33</sup>Cfr. GIMÉNEZ-CANDELA, T., *El estatuto jurídico de los animales: aspectos comparados*, in BALTASAR, B. (Coord.) *El Derecho de los Animales* (Madrid 2015) 167ss.

*All that differs from the person and serves for the use of man is considered a thing in the legal sense.*

In this way the concept encompasses both corporal as well as non-corporal things. To this § was added § 285°, which excludes *expressis verbis* to the animal of the concept of the thing:

**§ 285a. Tiere sind keine Sachen;** sie werden durch besondere Gesetze geschützt. Die für Sachen geltenden Vorschriften sind auf Tiere nur insoweit anzuwenden, als keine abweichenden Regelungen bestehen.

*Animals are not things; they are protected by special laws. The orders referred to things are applied to animals if there is no alternate provision.*

To complement this rule, in the field of regulating compensation a new § about the costs of recovery of an injured animal was simultaneously added, § 1332 ABGB. Here it says:

**§ 1332 a.** Wird ein Tier verletzt, so gebühren die tatsächlich aufgewendeten Kosten der Heilung oder der versuchten Heilung auch dann, wenn sie den Wert des Tieres übersteigen, soweit auch ein verständiger Tierhalter in der Lage des Geschädigten die Kosten aufgewendet hätte.

*If an animal is injured, they are owed the actual costs of recovery or of intent to recover, even when this exceeds the value of the animal, so long as the legal owner of the animal has covered the costs in place of the injured party.*

Afterwards, the Austrian legislator changed the Enforcement Regulation in the sense of the exemption from seizure of animals (EO, Exekutionsordnung), but it was done – by consequence of the change introduced in the BGB – within the frame of a broad modification in the year 1996. Effectively, in paragraph § 250 (4) it determined the exemption from seizure of domestic animals that are not to be sold. In contrast to the German regulation, which will be examined a little later, and contains a clause of harshness in favour of the creditor, is limited to the exemption of seizure up to a value of 750 euros.

#### **§ 250 EO (4): Unpfändbare Sachen *Non-seizable things***

(1) Unpfändbar sind: *They are non-seizable*

1.....

4. nicht zur Veräußerung bestimmte Haustiere, zu denen eine gefühlsmäßige Bindung besteht, bis zum Wert von 750,-€(10 000 S) sowie eine Milchkuh oder nach Wahl des Verpflichteten zwei Schweine, Ziegen oder Schafe, wenn diese Tiere für die Ernährung des Verpflichteten oder der mit ihm im gemeinsamen Haushalt lebenden Familienmitglieder erforderlich sind, ferner die Futter- und Streuvorräte auf vier Wochen;

*Domestic animals that are not to be sold, and in respect of those where an emotional attachment exists, up to a value of 750 euros (10.000 chelines), just like a dairy cow or, at the choice of the liable party, two pigs, goats or sheep, if these animals are necessary for the feeding of the liable party or the members of family that live in their house, along with the estimate for feeding and maintaining them for four weeks.*

At the time of the Austrian reform, the German legislator also began a reform relating to the legal status of animals in the BGB. The fact that Germany had itself taken on this theme was to be expected, as in Germany broad changes had already been made in the field of animal protection. In 1986 a new version of the Animal Protection Act came into power. Through the “Law to improve the legal situation of animals in Civil Law”, it also modified

in Germany the Civil Code (BGB), for which reason, the regulations of the BGB are very similar to the Austrian ones.

The title of the chapter two of the first book broadens to include animals, which that which remains of the following form: Things. Animals. At § 90, in which things are defined, and to which § 90a is added.<sup>34</sup>

The result is as follows:

**§ 90. [Begriff]** Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände.

*(Concept) Things, in the legal sense, only constitute corporal things.*

**§ 90 a. [Tiere]** Tiere sind keine Sachen. Sie werden durch besondere Gesetze geschützt. Auf sie sind die für Sachen geltenden Vorschriften entsprechend anzuwenden, soweit nicht etwas anderes bestimmt ist.

*Animals are not things. They are protected by special laws. The following orders, valid for things, must be applied to them, as long as another thing is not planned.*

It is interesting to observe that, in a different way to how this reform was addressed in Austrian Law, the BGB signals special treatment for animals, making reference to the rights and duties of the owner, such as in the third chapter, assigned to the property:

Dritter Abschnitt. 1) Eigentum

Erster Titel. Inhalt des Eigentums

**First Title: Contents of property**

**§ 903. [Befugnisse des Eigentümers]** Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen. Der Eigentümer eines Tieres hat bei der Ausübung seiner Befugnisse die besonderen Vorschriften zum Schutz der Tiere zu beachten.

*(Powers of the owner) The owner of a thing can make use of it as they like, so long as this does not contravene the law or the rights of a third party, and can exclude all others from intervention. The owner of an animal must observe the special provisions for the protection of animals when exercising their power.*

It agrees to mark an important reform operated in the area of compensation, so completes itself in paragraph § 251 BGB – which regulates the compensation in cash and that, in part two, limits the obligation of restitution to adequate costs through a similar regulation to that of Austria, but with greater scope and weight.

**§ 251(1) Soweit die Herstellung nicht möglich oder zur Entschädigung des Gläubigers nicht genügend ist, hat der Ersatzpflichtige den Gläubiger in Geld zu entschädigen.**

(2) Der Ersatzpflichtige kann den Gläubiger in Geld entschädigen, wenn die Herstellung nur mit unverhältnismäßigen Aufwendungen möglich ist. Die aus der Heilbehandlung eines Tieres entstandenen Aufwendungen sind nicht bereits dann unverhältnismäßig, wenn sie dessen Wert erheblich übersteigen.

*(1) If restitution is not possible, or is insufficient for the compensation of the creditor, the liable party must compensate the creditor with money*

*(2) The liable party may compensate the creditor with money when restitution is only possible with a disproportionate amount. The expenses arising for the recovery of an animal are not disproportionate even when they considerably exceed its value.*

<sup>34</sup> BGB § 90a [http://www.gesetze-im-internet.de/bgb/\\_90a.html](http://www.gesetze-im-internet.de/bgb/_90a.html)

With its meticulous recognition, the German legislator introduced, at the same time, rules adapted to the new condition of animals in the rules governing forced execution and changed the order of civil procedure to the following:

The § 765 of the ZPO (Zivilprozessordnung), which regulates the suppression of measures of forced execution in extreme cases, broadens through the following precision instruments, which are a call to the exercise of responsibility that human beings have in respect to animals, in coherence with the spirit that impregnates German animal protection legislation that, as it is well known, began with National-Socialism:<sup>35</sup>

**§ 765a ZPO.** Betrifft die Maßnahme ein Tier, so hat das Vollstreckungsgericht bei der von ihm vorzunehmenden Abwägung die Verantwortung des Menschen für das Tier zu berücksichtigen.

*If the measure affects an animal, the Enforcement Court must bear in mind, in its evaluation, the responsibility of man in relation to animals.*

The new § 811c ZPO refers to the exemption of animals from seizure in the following terms:

*Abs. 1:* Tiere, die im häuslichen Bereich und nicht zu Erwerbszwecken gehalten werden, sind der Pfändung nicht unterworfen.

*Abs. 2:* Auf Antrag des Gläubigers läßt das Vollstreckungsgericht eine Pfändung wegen des hohen Wertes des Tiers zu, wenn die Unpfändbarkeit für den Gläubiger eine Härte bedeuten würde, die auch unter Würdigung der Belange des Tierschutzes und des berechtigten Interesses des Schuldners nicht zu rechtfertigen ist.

*(1) Animals kept in the domestic environment and not for profit are not subjects of the pledge*

*(2) At the request of the creditor, the Enforcement Court will permit the pledge due to the high value of the animal, if the exemption from seizure will for the creditor be of excessive harshness, not justifiable in the appreciation of the interest of the defence of animals nor the legitimate interest of the debtor*

At the same time it suppresses the rule of § 811 No. 14 ZPO, which prohibits the seizure of animals with a value of less than 500 marks (~ 250 € or £220).

Other European states<sup>36</sup> have followed the same way as Austria, with a substantial amount of critics<sup>37</sup> due to the difficulty involved in the practical application of this negative category. However, in these countries there is development of literature, discussions, the birth of animal protection groups, but a very moderate scientific and academic reflection up until now.<sup>38</sup>

Outside of Europe, two main lines of interpretation have concurrently opened up; of property, on the one hand, and of procedural action on the other. I am referring to the

<sup>35</sup>A recent revision of this little known aspect of German legal history, owed to PLUDA, M., *Animal Law in the Third Reich* (in print).

<sup>36</sup>Moldova in 2002, Art. 287 Cc. <http://lex.justice.md/md/325085/>; Catalonia, in 2006, Art. 511, 1-3 CcCat. <https://www.boe.es/buscar/act.php?id=BOE-A-2006-11130>; The Czech Republic §494 CCC (in 2012, but it came into power in 2014), cfr. MÜLEROVA, H., *Animals finally above Objects and stricter Criminalization of Cruelty: some Insights in Czech Animal Legislation*, in dA. 3/1 (2012) <http://revistes.uab.cat/da/article/view/v3-n1-mulerova>; Holand in 2016, Art. 2a BW <http://maxius.nl/burgerlijk-wetboek-boek-3/artikel2a>

<sup>37</sup>OBERGFELL, I., *Tiere als Mitgeschöpfe im Zivilrecht. Zwischen Rechtsobjektivität und Schadensregulierung*, en *Rechtswissenschaft* 3 (2016) 394 y 396ss.

<sup>38</sup>PETERS, A., *Tierwohl als Globales Gut: Regulierungsbedarf und –Chancen*, in *Rechtswissenschaft* 3 (2016) 382ss.

announcement of the David Favre's theory of Living Property,<sup>39</sup> and the Non-Human Rights Project of Steven Wise<sup>40</sup> and concession of *Habeas Corpus* to certain chimpanzees in Argentinian Courts. But this is a topic to be dealt with at another time.

## b. Sentience

Animal Welfare Science, driven by the increasingly stronger verification of the sentience of animals,<sup>41</sup> opens a front of discussion that has put into question, ever more intensively, that animals can only be objects of Law, and has began to consolidate that animals, as sentient beings, are destined to be subjects of the law, through the recognition that they are living beings endowed with sensibility.<sup>42</sup> It is in this area that we must identify the changes introduced by certain European Civil Codes through the affirmation of their capacity to feel. The support in this realm of European Animal Welfare legislation has been decisive. In no other way could one judge the influence that art. 13 TFEU has had, in spite of the limitations that the same article imposes in the second part of its composition<sup>43</sup>. However, it has been the buttress for arguing the change of legal status of animals, beginning with the French Civil Code.

In France, The Glavany Amendment<sup>44</sup> of 2015 recognised the condition of animals as "living beings endowed with sensibility"; a necessary linguistic turn, given that in the French language an equivalent term to "sentient beings" cannot be found, not have the expressions sentient beings or sentience<sup>45</sup> been popularised, as has occurred, on the contrary, in Castilian. This new classification of animals, without separating them from the realm of property, introduces a conceptual change of great magnitude by removing them from the condition of things (understood to be assimilated with inert things). In effect, the Napoleonic Code has been a wakeup call for other continental Codes, which have continued linking together the pertinent reforms in their respective Codes; a movement that appears to know no break, for now.<sup>46</sup> In Spain, for example, we have been immersed in this since February 2017 in a reform of the legal status of animals, that is itself considered to be both near and

<sup>39</sup>FAVRE, D., Animals as Living Property, in Tier und Recht (cit.) 418ss., article based on the publication in 2010 in Marquette Law Review 93 (2010) 1021ss.

<sup>40</sup>WISE, S. <https://www.nonhumanrights.org/>

<sup>41</sup>BRAMBELL, F.R.S. [Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems](#) (1965), p. 13,14,15, 84 (Appendix III), 86 (Appendix IV), respectively

<sup>42</sup>PETERS, A., Liberté, Egalité, Animalité. Human-Animal Comparisons in Law, in Transnational Environmental Law 25 (2016) 3ss.

<sup>43</sup>For the maximal approximation of this transformation of European origin, the constitutive treaties (which always prevails over the Spanish), ALONSO GARCÍA, E., El bienestar de los animales como seres sensibles-sentientes: su valor como principio general, de rango constitucional, en el derecho español, en el libro colectivo Los Principios Generales del Derecho y el Derecho Administrativo, Ed Kluwer 2010; WARTEMBERG, M., Art. 13 Lisbon Treaty/TFUE – Historical, Constitutional and Legal Aspects, en FAVRE, D. y GIMÉNEZ-CANDELA, T. (Ed.), Animales y Derecho (Valencia 2015) 353ss

<sup>44</sup>"The Glavany Amendment", which consecrates the insertion of animal in such that is, in art. 2 of the law 2015-177 of 16 February 2015; MARGUÉNAUD, J.P., L'entrée en vigueur de "The Glavany Amendment": un grand pas de plus vers la personnalité juridique des animaux, RSDA 2/2014 15ss.

<sup>45</sup>BURGAT, F., Prologue of Code de l'Animal (Paris 2018) VI: "Puisse ce travail contribuer à faire de la qualité d'être sensible le véritable cœur du Droit Animalier".

<sup>46</sup>On the 22 December 2016 the Portuguese Parliament unanimously approved that animals would no longer be things in property, just as they had been until this date, under the regulation of the Civil Code in the respective articles, among others: 1302, 1318 y 1323, of libro III, referred to as "Direito das Coisas" [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=775&tabela=leis;](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=775&tabela=leis;) GIMÉNEZ-CANDELA, T. Reforma del Cc. De Portugal, los animales como seres sintientes, in dA. 7/4 (2016) 2ss.; CORREIA MENDONÇA, H., Recognising Sentience in the Portuguese Civil Code, in dA. 8/2 (2017) 9ss.

positive. The de-objectification of animals<sup>47</sup> seems to be a movement destined to remain, and in this way is not a temporary tendency.

It cannot be a shock that the legal reflection was not grateful, given the condition of animals, far from being a local question, without doubt has global dimensions, as has aptly been shown.<sup>48</sup> Between the arguments that support this globalisation figures the affirmation that the animal question is only part of the protection of nature, an area in which legal reflection has not met any obstacle in personifying and empowering the Environment, or, as in some Latin-American legal orders, Mother Earth or Pacha Mama<sup>49</sup>.

### c. Personality

It cannot therefore be striking that one attempts to attribute legal personality to animals in a third period that rides on that of sentience, even though it disgusts those who identify the term person with that of human being<sup>50</sup>. Nothing could be further than the legal reality<sup>51</sup>. The term person and the concept of the person is nothing more than an abstraction attributable to any reality that carries out a “role”, a contemplated action, regulated and protected by the law.

The origin of the term person also supports this. Person is, as is well known, the funeral mask worn by the parents of the deceased, in funeral processions, by which they represent the different roles that the deceased had played throughout their life. Person is also the theatrical mask used by actors to represent different characters or stereotypes during dramatic plays. The Law makes use of the term person precisely to attribute to an individual (*caput*) the different roles it represents in the legal realm, throughout its life and in different circumstances. It is certain, therefore, that person and human individual little in common regarding origin, but it is no less certain that the term person is used to attribute rights and duties in the legal order to entities that little resemble humans or, if one likes, physicality.

Since antiquity, and without any type of intellectual resistance, we use the term legal person to designate realities outside the individual. Person is used to designate corporations, societies, public and private entities, and endows them with legal personality, that is, the capacity to be the subject of laws and to act as such in the legal realm. It cannot be a shock to suggest the attribution of legal personality to animals can be coherent with a line of thought that is slowly but surely opening a path.

In this issue of the review, we publish a document of great interest that reflects a study conference organised by the University of Toulon<sup>52</sup>. In this document, notice is given of the initiative undertaken by a group of French scholars and other European colleagues – myself included – that will elaborate a Project of law to request from the French Parliament the recognition of companion animals as legal persons.

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<sup>47</sup>GIMENEZ-CANDELA, M., La descosificación de los animales (I), in dA. Derecho Animal (Journal of Animal Law Studies), 8/2 (2017) 1ss.; La descosificación de los animales (II), en dA.8/3 (2017) 1ss.; Es alguien no algo, in dA. 9/1 (2018) 5ss (<https://doi.org/10.5565/rev/da.251>).

<sup>48</sup>PETERS, A., Global Animal Law: What it is and Why we need it, in Transnational Environmental Law 5/1 (2016) 11ss. (doi:10.1017/S2047102516000066)

<sup>49</sup> RONCAL VATTUONE, X., La naturaleza...un sujeto con derechos. Apuntes para la reflexión, in Integra Educativa, 6/3 (2013) 122ss.

<sup>50</sup> AUGSBERG, S., Der Anthropozentrismus des juristischen Personenbegriffs – Ausdruck überkommener (religiöser) Traditionen, spezieistischer Engführung oder funktionaler Notwendigkeiten?, en Rechtswissenschaft 3 (2016) 344ss.;

<sup>51</sup> The association of person with being human is constant, e.g. in Church documents, such as that “Instruction *Dignitas personae* on Certain Bioethical Questions”, from the Congregation for the Doctrine of the Faith.

[http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20081208\\_dignitas-personae\\_sp.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_sp.html)

<sup>52</sup> RIOT, C., La personnalité juridique de l'animal - L'animal de compagnie. Synthèse d'une doctrine, en dA. 9/2 (2018) (2018) 51ss <https://doi.org/10.5565/rev/da.341>

It is no surprise that the initiative begins with companion animals. This is no doubt a good strategy and something more; it is the recognition that Jurisprudence has not confused itself when it has repetitively recognised their prominent role in our lives, when in some European codes they are considered members of the family; when bearing in mind their particular connection with human beings, to increase their protection, and to, as one of the outcomes of the project, find concrete and perceptible objectives.

Ultimately, beginning to deconstruct the term personality and the legal person<sup>53</sup> and shifting the centre of attention from anthropocentrism to ecocentrism or biocentrism will permit the inclusion of animals; if they have an animal personality and undeniable individuality, this would constitute one of the requirements for attributing them personality. This, in my opinion, is one of the possible ways that would allow us to improve the protection of animals in the future.

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<sup>53</sup> KURKI, V., PIETRZYKOWSKI, T. (Ed.), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Berlin 2017).