

The De-Objectification of Animals in the Spanish Civil Code *

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Abstract

The legal status of animals in the Spanish Civil Code is currently the subject to a process undertaken by the competent legislative bodies, aimed at changing their consideration to “living beings endowed with sensibility”, instead of as things, which is more common. This reform also includes corresponding changes in the Mortgage Law and in the Civil Procedure Rules. This piece analyses the antecedents, context and reasoning behind this reform within the general context of the de-objectification of animals, as well as some of the principles that will facilitate an understanding of the outcomes of this reform.

Key words: Spanish Civil Code, Codification, legal status of animals, de-objectification, French Civil Code, Portuguese Civil Code, ABGB Austria, Swiss BGB, German BGB.

Resumen. *Descosificación de los animales en el Cc español*

El estatuto jurídico de los animales en el Cc español, está sometido actualmente a una tramitación en los órganos legislativos competentes, dirigida a considerarlos “seres vivos dotados de sensibilidad”, en lugar de cosas, tal y como venía siendo tradicional. Esta reforma incluye también los correspondientes cambios en la Ley Hipotecaria y en la Ley de Enjuiciamiento civil. En este trabajo se analizan los antecedentes, contexto y justificación de esta reforma, que se integra dentro de un contexto general de descosificación de los animales, así como algunos de los principios que permiten entender qué resultados cabe esperar de dicha reforma.

Palabras clave: Código civil español, codificación, estatuto jurídico de los animales, descosificación, Cc Francia, Cc Portugal, ABGB Austria, BGB Suiza, BGB Alemania

SUMMARY

- I. Introduction
- II. The de-objectification of animals in the European Civil Codes
- III. Justifications for the de-objectification proposal
- IV. Conclusion

I.- INTRODUCTION

As I have already covered on previous occasions¹, the movement to de-objectify animals is a reality that has begun with the Civil Code in most countries. As part of this movement, a modification to the legal status of animals in the Spanish Civil Code has been proposed, and has since been unanimously approved by the Congress of Deputies on 14th February 2017.²

This proposal (a transactional amendment to the non-legal proposal on the modification of the companion animal legal framework in the Civil Code of the ‘Grupo Parlamentario Ciudadanos’, Expedient no. 162/000200) urged the Government to:

- 1.- “Promote the legal reforms necessary for creating a special category in the Civil Code referring to animals, different from those planned, where they are defined as sentient beings endowed with sensibility”
- 2.- “Plan the necessary legal reforms to ensure that companion animals cannot be considered as seizable objects in any legal procedure”.³

In this sense the first and foremost reflection that it offers – as a question that frames the corresponding adaptation of the Civil Code article that has been proposed – deals with the need not only to modify the relevant aspects of the Civil Codes relating to the property and possession of animals, but also of considering, in its totality, the proposal approved in Parliament that refers to “the creation of a special category in the Civil Code different from those planned, where they are defined as living beings endowed with sensibility”,⁴ which is

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¹GIMÉNEZ-CANDELA, T., The De-objectification of animals (I), in *dA* 8/2 (2017) (<https://doi.org/10.5565/rev/da.318>); The De-objectification of animals (II), in *dA* 8/3 (2017) (<https://doi.org/10.5565/rev/da.250>); Dignity, Sentience, Personality: the human-animal legal relationship I, in *dA* 9/2 (2018) <https://doi.org/10.5565/rev/da.346>; LE BOT, O., El Derecho Animal: ayer, hoy y mañana, in *dA*. 8/2 (2017) <https://doi.org/10.5565/rev/da.16>

²See GIMÉNEZ-CANDELA, T., Es alguien, no algo, in *dA* 9/1 (2018) 5ss. <https://doi.org/10.5565/rev/da.251>

³Official Bulletin of the General Courts. Congress of Deputies, Series D, Number 108), 22nd February 2017, Pages. 6 and 7; http://www.congreso.es/public_oficiales/L12/CONG/BOCG/D/BOCG-12-D-108.PDF#page=6

⁴Cfr. Meeting minutes of the Congress of Deputies, plenary session and permanent council, 2017, N° 29, XII Legislature, plenary session N° 27, Tuesday, 14th February 2017, pages 43-50. http://www.congreso.es/public_oficiales/L12/CONG/DS/PL/DSCD-12-PL-29.PDF; Vid. The chronicle of CODINA, J.I., Unanimidad en el Congreso de los Diputados para instar la reforma del Código civil español y reconocer a los animales como seres dotados de sensibilidad, in *dA*. 2/2017

a linguistic phrase used in the recent Civil Code reforms of France and Portugal⁵ to translate the expression “seres sensibles”; it does not properly reflect the expression “sentient beings”, whose equivalent in Castilian would be “seres sintientes” or “sentientes” - an expression that is neither, however, accepted by the Royal Spanish Academy Dictionary, despite its use is becoming more and more widespread, nor accepted when applied to animals, although it has been used in Castilian when referring to the capacity of humans to feel.⁶

It is shocking that the key terms “sentience” or “sentient beings” - instruments for understanding the movement of renovating the European Civil Codes in recent years -⁷ have still not been integrated in our technical legal language when speaking about animals. For animal welfare science – the place from where the term is derived - the term “sentience”, as in the term “sentient beings”, refers to the capacity of animals to feel not only pain, but also suffering and positive emotions. This scientific claim, which has inexorably continued to open the way, includes all vertebrate animals, as well as cephalopods.⁸

It should not come as a surprise that in 2010 the Directive 2010/63/EU of the European Parliament and Council, of 22nd September 2010, on the protection of animals used for scientific purposes, did not expressly include cetaceans, as it is only recently that not only scientific, but also legal and jurisprudential support has begun to include them within the concept of sentient beings, as has been the case in recent Swiss legislation⁹ and Italian jurisprudence.¹⁰

The scientific advance on the topic of animal sentience is a primary motivator for the changes that the Law has experienced in the last decades, no matter how much the resistance to officially accepting the terms sentience / sentient beings excludes them from the proposal of changing the legal status of animals in the Spanish Civil Code and uses, instead, the phrase “living beings endowed with sensibility”. Overall, this circumlocution – showing affirmative character – is preferable to the negative expression (“not things”, “nicht Sachen”), with which the De-objectification of animals movement began in Europe in the 80s, particularly in the

<https://derechoanimal.info/es/actividades/2017/unanimidad-en-el-congreso-de-los-diputados-para-instar-la-reforma-del-codigo-civil>

⁵See, infra sub II,1 and II,2.

⁶Cf. ZUBIRI, X., *Inteligencia sentiente: Inteligencia y realidad* (Madrid 1980), that the trilogy uses the term “sentient” to refer to the theory of knowledge applied to the human being, as a theory of intelligence that is not just rational – according to the traditional understanding – but as knowledge that requires the senses to be able to complete the act of knowing; see the reference of GÜELL, F. y MURILLO, J.I., Leonardo Polo and Xavier Zubiri, *Fenomenología, realismo y filosofía trascendental*, in *Studia Poliana* 17 (2015) 5ss.

⁷Cf. GIMÉNEZ-CANDELA, T., *El estatuto jurídico de los animales: aspectos comparados*, in BALTASAR, B. (Coord.) *El Derecho de los Animales* (Madrid 2015) 167ss.

⁸ Vid. Point (8) of Directive 2010/63/UE of the European Parliament and of the Council of 22nd September 2010 on the protection of animals used for scientific purposes: “In addition to vertebrate animals including cyclostomes, cephalopods should also be included in the scope of this Directive, as there is scientific evidence of their ability to experience pain, suffering, distress and lasting harm” <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0063&from=EN>

⁹ Switzerland has recognised crustaceans as sentient beings in the Ordinance that prohibits the boiling alive of lobsters and exhibiting them alive in buckets of ice in fisheries or catering establishments. In its reunion on 10th January 2018, the Swiss Federal Council decided to adapt the veterinary ordinances in this sense. In particular, it tries to improve the way in which it treats animals. The primary texts are the Ordinance on animal protection (OPAn) and the Ordinance on the slaughter of animals and the control of meat (OabCV). The modifications came into power on 1st March 2018. Order on the protection of animals (OPAn) amendment of the 10th January 2018, Swiss Confederation, RO 2018, pp. 573-626, accessible at: <https://www.admin.ch/opc/fr/official-compilation/2018/573.pdf> (link accessed 13/07/2018).

¹⁰ In the same sense, it concurs to the 2017 pioneering sentence in Italy, see. CAMPANARO, C., *Los crustáceos como seres sintientes*. Sentence n° 30177/2017 of the third criminal section of the Italian Supreme Court, dA 8/3 (2017) (<https://doi.org/10.5565/rev/da.56>)

Civil Codes of Austria, Switzerland and Germany.¹¹

However, these expressions have been used already in Latin-American legislative texts relating to animal protection. I am referring particularly to the Constitution of Mexico City (art. 13,B.1)¹² and to the Law of Rights and Protection of Animals in the State of Michoacan of Ocampo (art. 2),¹³ also in Mexico, and approved recently in April 2018.

It is not only a question of linguistics, as, in my opinion, it goes further. Regarding this proposal, it is interesting to observe that Consideration (9) of the cited Directive includes foetuses of mammals,¹⁴ since there exists “scientific evidence that these forms, in the last third of their development period, have a greater risk of experiencing pain, suffering and distress, which can negatively affect later development...”. The observation regarding the negative impact of the suffering (the regulations repeat the triad: “pain, suffering and distress”), that the foetuses of mammals can have in later development, is offered as an undeniable scientific outcome, in which the foetus is considered a being separate from the mother (revealing the inconsistency that persists when animal offspring are treated as an indelible extension of the property of the “productive thing” (that is to say, the mother)), in those Civil Code articles referring to the products,¹⁵ whose modification and adaptation to the principle that animals are sentient beings and not mere things, denominated by the doctrine “anticipated moveable things”,¹⁶ is absolutely essential and, of course, figures in the modification proposal.

One of the traditional obstacles to considering animals as sentient beings and not mere things in property, resulting from the anthropocentric conception of the Law,¹⁷ comes from a reluctance to attribute to them not only the capacity for a physical reaction toward stimuli (which appears to have been widely demonstrated by the scientific community), but intellectual and cognitive capabilities also. Thus the use of the term intelligence referring when to animals is only used figuratively, and there are few authors that refer to animal intelligence in the typical sense. In 1882, a contemporary (as well as co-worker and friend) of Darwin published a book that in both title and content made reference to the intelligence of animals;¹⁸ this reference, although having no significant impact at the time, was later

¹¹Cfr. GIMÉNEZ-CANDELA, T., An Overview of Spanish Animal Law, in FAVRE, D. & GIMÉNEZ-CANDELA, Animals & the Law (Valencia 2015) esp. 221ss.; also, n.1, 2 and 7.

¹² The Constitution of Mexico City, in article 13, which refers to the Habitable City, part B, suggests the following: B. Protection of animals 1. “This Constitution recognises animals as sentient beings and, for this reason, they must receive the respective treatment” (<http://www.cdmx.gob.mx/constitucion>).

¹³ Law of rights and protection for non-human animals in the State of Michoacán, passed on 2nd April 2018, art. 2: “With this law, the State recognises that non-human animals are sentient beings that feel different physical and emotional sensations, for which reason the present law recognises them as objects of guardianship, imposing the obligation on physical or legal entities to ensure their protection, respect and wellbeing, according to the ethical principles contained in this Law, their Regulation and other applicable provisions”; the legislative text of art. 3.1 defines what is to be a non-human animal by the following: “non-human Animal: sentient being, endowed with a central nervous system that enables it to feel various physical and emotional sensations”.

(<http://congresomich.gob.mx/file/nueva-ley-de-derechos-y-protecci%C3%93n-para-los-animales-2-de-abril-de-2018.pdf>).

¹⁴ Directive 2010/63/EU of the European Parliament and of the Council of 22nd September 2010 on the protection of animals used for scientific purposes <https://www.boe.es/boe/2010/276/L00033-00079.pdf>

¹⁵ Civil Code. art. 355 ss. <https://www.boe.es/buscar/act.php?id=BOE-A-1889-4763>

¹⁶ The explanation provided on this topic is debatable, ROGEL VIDE, C., Los animales en el Código civil (Madrid 2017) 37-39; Vid. On the methodology that the author uses, the recourse to the book by ROGEL VIDE, Personas, animales y derechos (Madrid 2018) of HUI M., La modificación de los Códigos Civiles clásicos para elevar el status de los animales: el caso de España, in JAL & IAWS 1 (2018) 6ss.

¹⁷Cf. above all, FAVRE, D., Respecting Animals. A balanced Approach to our Relationship with Pets, Food and Wildlife (New York 2018) 21ss.

¹⁸ROMANES, G.J., Animal Intelligence (London 1882).

brought up and affirmed by other authors¹⁹ and has ultimately been the main outcome of the Cambridge Declaration of 2012²⁰ on the cognitive capacities of animals, which has had a great scientific impact and is gradually being incorporated in legal texts.

Consequently the object of the proposal sent to the Government by the Parliament, which was conducted in the Legal Proposal for the Modification of the Civil Code, the Mortgage Law and the Civil Procedure Rules,²¹ is the creation of a legal regime unique to animals that clearly separates and distinguishes them from the consideration of things, and establishes a differentiated category between inert things and human beings, as holders of subjective rights, integrally protected by the legal system.

This differentiated category can be none other than that of animals - a category *a se* or a category *sui generis*.²² In other terms, these reflections, along the lines of the legal proposal approved by Parliament, stand first and foremost for the creation of a category proper to animals whereby the traditional, roman, bipartite classification of persons and things, with which I have dealt on many occasions,²³ would become a tri-partition, much more coherent with societal changes, the law and European legislation, in relation to the consideration of animals as beings that cannot continue to be entrenched by the legal status of things that these days does not correspond adequately. This tri-partition would therefore be persons, things, and animals.

The historic Law,²⁴ particularly Roman Law, that constitutes the foundation and roots of the legal conception of animals as things in property, offers a surprise for any convinced of the decisive (and erroneous) affirmation that the slaves and things included animals as things of the same standing, instead finding evidence that the relevant legal sources did not, in fact, treat slaves and animals the same²⁵ (except in the procedure relating to the assumption of noxal responsibility).²⁶

¹⁹CHAPOUTHIER, G., From Animal Intelligence to Animal Rights, in FAVRE, D. & GIMÉNEZ-CANDELA, T. (EDS.), *Animals and the Law* (Valencia 2015) 150ss. From another perspective, VAUCLAIR, J., *L'intelligence de l'animal* (Paris 1995, reimp 2017); POUDEYBAT, E., *L'intelligence animale* (Paris 2017).

²⁰The Cambridge Declaration on Consciousness, published 7th July 2012, signed by a group of eminent neuroscientists (Philip Low, Jaak Panksepp, Diana Reiss, David Edelman, Bruno Van Swinderen, Christof Koch), proposes, in its final paragraph: "The absence of a neocortex does not appear to preclude an organism from experiencing affective states. Convergent evidence indicates that non-human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviours. Consequently, the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness. Nonhuman animals, including all mammals and birds, and many other creatures, including octopuses, also possess these neurological substrates." *CambridgeDeclarationOnConsciousness.pdf* (<http://fcmconference.org/>)

²¹The proposal by law for the modification of the Civil Code, the Mortgage Law and the Rules of Civil Procedure was presented by the Popular Parliamentary Group, with the date of 13th October 2017, and was unanimously approved, http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-167-1.PDF#page=1

²²The origin of this proposal can be found in the study of Roman sources (legal and literary documents about animals with which I have often dealt in other works (see n. 1, 2, 7) and is conducted in an article for review.

²³In comprehensive form, GIMÉNEZ-CANDELA, T., *Le statut de l'animal de compagnie: législation espagnole comparée*, in *La personnalité juridique de l'animal (I): L'animal de compagnie* (LexisNexis 2018), in print (2018).

²⁴Cfr. KELCH, T., *A Short History of (Mostly) Western Animal Law: Part I*, in *Animal Law* (2012) 24ss.; KELCH, T., *A Short History Of (Mostly) Western Animal Law: Part II*, in *Animal Law* (2013) 348ss.; ALONSO GARCIA, E. y RECARTE VICENTE-ARCHE, *La diversidad de fundamentos de las distintas normas que constituyen el Derecho Animal (I)*, in *JAL&IAWS 0* (2017) 17ss.

²⁵Complete reference to the related sources is given in GIMÉNEZ-CANDELA, T., *Derecho Privado Romano* (Valencia reprint. 2011) and also in previously cited works, Vid. supra: n. 1, 2, 7, 22.

²⁶GIMÉNEZ-CANDELA, T., *El régimen pretorio subsidiario de la acción noxal* (Pamplona 1981).

II. THE DE-OBJECTIFICATION OF ANIMALS IN THE EUROPEAN CIVIL CODES

However, the recent modifying experiences of the legal status of animals in the Civil Codes of France and Portugal produce various answers in relation to the structural question considered here. We will consider them separately:

II.1. France²⁷

On 10th May 2015, Mme. Suzanne Antoine, *Présidente de Chambre honoraire à la Cour d'Appel de Paris et trésorière de la Ligue Française des Droits de l'Animal*, broadcasted a report requesting M. le Garde des Sceaux to consult the web of the *Ministère de la Justice de Francia* (the French Ministry of Justice).²⁸

In this report, Mme. Antoine suggested to the legislator the creation of a third category of goods that would be animals, positioned between those of moveable and immoveable. The justification made by the “Antoine Report” (which, from being based on reliable data on current concerns for animals that had been removed from enquiry by legal operators, distinguished members of animal protection associations, and comparative Law, had an impressive receipt) was based on the following reasoning: animals are living beings endowed with sensibility, which (as Phillippe Reigné observed in his time)²⁹ could also be claimed for human beings, but the difference with human beings being that, although animals are protected from acts of cruelty and mistreatment through the dispositions of Criminal Code, they continue to be considered as with things of unlimited use, ownable, and whose value is measured by the material value of the market.

This idea – rigorously demonstrated by the “Antoine Report” – directly and openly conflicts with the affective value that French society attributes animals (and especially companion animals) and in terms of the respect afforded to animals as part of nature, which constitutes a character unique to French culture; refined, without any doubt for the writings of the representatives of the Enlightenment in the CXVIII, who have so greatly contributed to the change in man’s perception, as a citizen, central to decisions made about our world, a post-revolutionary world. It is well known that animals have not been exempt from this profound transformation; it is, however, advisable that the philosophical consideration do not transcend the entire legal realm. Evidence for this, without further remission, is the Napoleonic Code, which loyally follows the criteria of the Roman inclusion of animals (and of slaves) under the legal status of things in property.

However, the author of the report affirms with clarity that these premises, this legal situation with animals, is not sustainable in contemporary society, and therefore derives from this the proposal of changing said statute, as well as the creation of a category of animals separate from that of things. Although the creation of this separate category relating to animals has not been achieved, immediately after the publication of the report of reference, France, with the distinct academic impulse demonstrated by the distinguished jurist Jean Pierre Marguénaud,³⁰ has already set off on a path of progressive admission, within academic

²⁷Cfr. In this dossier a detailed revision by, LELANCHON, L., La reforma del estatuto jurídico civil de los animales en el Derecho francés, in dA. 9/3 (2018) <https://doi.org/10.5565/rev/da.344>

²⁸ANTOINE, S., Rapport sur le régime juridique de l’animal, <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/054000297.pdf>

²⁹REIGNÉ, Ph., Les animaux et le Code civil, La semaine juridique édition générale 2015, n°9, 2.3.2015, 402ss.

³⁰The work of Professor J.P. MARGUÉNAUD must be counted; his doctoral thesis published in 1992, *L’animal en droit privé* (Limoges-Paris 1992) and in 2009, the creation of the *Revue Semestrielle de Droit Animalier* (<http://www.unilim.fr/omij/publications-2/revue-semestrielle-de-droit-animalier/>), which has approached the academic reflection on the need to change the legal status of animals, already by the first number, see: MARGUÉNAUD, J.P. Avant-Propos, RSDA 1 (2009) 7ss.; ANTOINE, S., Le

and political circles, that the Civil Code must be modernised in terms of animals; “The Glavany Amendment”³¹ consecrates the insertion of animal in art. 2 of the 2015-177 Law of 16th February 2015 (“relating to the modernisation and simplification of the right and procedures in the domains of justice and domestic affairs”)³² which would be crystallised by the modification of arts. 515-14 that declares: “Les animaux sont d’êtres vivants doués de sensibilité. Sous réserve des lois qui les protègent, les animaux sont soumis au régime des biens”, just as in the consequent reforms of articles 522, 524, 528, 533, 564, and 2051, that result in the eradication of both direct and indirect references to animals as moveable or immoveable things in the Civil Code.

As it has already been observed,³³ from a strictly Civil Law point of view, the new provisions relating to animals continue to be found in Book II, relating to things and the different forms of property; this does not close the debate on the legal status of animals, but has instead facilitated a process of discussion and reforms that strongly indicate that animals, defined now in the Civil Code as living beings endowed with sensibility, do not figure in the category of things, of which there are abundant examples not only in academic literature, but in recent French jurisprudence also.

To show just one example, following the reform of arts. 515-14 of the Code, art. 528, which affirms (including after the modifying reform of the Law of 6th January 1999) that “sont meubles par leur nature les animaux et les corps qui peuvent se transporter d’un lieu à un autre, soit qu’ils se meuvent par eux-mêmes, soit qu’ils ne puissent changer de place que par l’effet d’une force étrangère” has been modified. In effect, following the 2015 reform, animals no longer figure as “meubles par destination”, as France has eliminated the risk of the assimilation of animals with things through a consequent reform of articles related to these categories.

An even more significant example is the elimination of animals from article 524, in which, with all the historic Roman weight and agricultural nature, that remained unaltered during the C XIX, mentions - among “immeubles par destination” - animals linked to cultivation and rural life such as “les pigeons de colombiers, les lapins de garennes, les poissons de certaines eaux..., mais aussi les ustensiles aratoires, les semences, les ruches à miel...”. Currently, the agricultural tools and the facilities in which they are kept are still in the cited article, but the mentions of animals have disappeared – it no longer speaks of “des pigeons, des lapins, des poissons”, and therefore it would be inconsistent to say that these animals, even though kept by the landowner (in hutches, in birdhouses, in hives) are immovable things “par destination”.

Therefore in France the legislator has not managed to change the “*summa divisio*” persons-things - this remains a calculated ambiguity that will possibly not cause a fracture between economic operators linked to agricultural and farming operatives. This highly-criticised solution of compromise has begun to reveal its weaknesses, as much through the critique of theories of Law as by the application of new criteria for animals consecrated by the Civil Code through the most recent rulings of the French courts. It is possible that it has only been a transitory compromise.

II.2. Portugal³⁴

projet de réforme du droit des biens, in RSDA 1 (2009) 11ss.

³¹Amendment n.59, named the Amendment Glavany after the name of one of the congressmen that presented the reform proposal: Legal Project to modernise and simplify the Law in the area of Justice and Domestic Affairs (No. 1808) <http://www.assembleenationale.fr/14/amendements/1808/AN/59.asp>

³² Decision 2015-710 DC on 12th February 2015

³³MARGUÉNAUD, J.P., L’entrée en vigueur de “l’amendement Glavany”: un grand pas de plus vers la personnalité juridique des animaux, RSDA 2/2014 15ss.

³⁴Cf. In this dossier a detailed revisión by, REIS MOREIRA, A., La reforma del Código civil portugués respecto al estatuto del animal, en dA 9/3 (2018) (<https://doi.org/10.5565/rev/da.345>)

On 22nd December 2016 the Portuguese Parliament unanimously approved that animals would no longer be things in property, such as they had come to be regulated up until this point by the Civil Code in their respective articles, among others: 1302,³⁵ 1318 and 1323,³⁶ of book III, referred to as “direito das Coisas”, in accordance with the Roman tradition that has been expressed in the vast majority of the European and Latin-American continental Codes and has been recognised by the Civil Law treaties.³⁷ In this sense, Portugal was up until this date no exception to the rules of ownership over animals, considered as moveable things - the dominant legal status in occidental legal systems.

The process of this important reform of the legal condition of animals has been a long journey,³⁸ culminating with the success of a proposal that, as we see, displays original characteristics in comparison to other reforms of the legal status of animals undertaken by other countries in the 90s, the CXX and in the first decade of the CXXI. With this reform, Portugal finds itself in a significant place regarding the transposition of the latest advances in Animal Welfare Science into a legal text that solidly affirms that animals are sentient beings.³⁹

The initial proposal to modify the Civil Code was presented on 13th May 2016 by the following parties: PAN (Persons, Animals, Nature), Socialist Party (PS), the Left Block (BE) and the Social Democrat Party (PSD). The final draft received an absolute majority of votes following the debate in the Commission of Constitutional Affairs, Rights, Liberties and Guarantees (Comissão de Assuntos Constitucionais, Direitos, Liberdades e Garantias). The proposal was approved by all the parties, without exception (PAN, PSD, PS, BE, CDE and CDS-PP), in favour of the recognition of animals as sentient beings, which was to be included in a separate section of the Civil Code, distinguished from the Book on the rules of property; this amounts to the establishment of a special legal regime for animals.

So therefore the modification of the legal status of animals is reflected by article 1 in the Law 8/2017 of 3rd March⁴⁰, which reads: “*A presente lei estabelece um estatuto jurídico dos animais, reconhecendo a sua natureza de seres vivos dotados de sensibilidade.*”

Such a modification does not immediately imply the attribution of legal personality to animals, but – and it is here that lies one of the most important aspects of the reform – entails a new classification and the creation of a new legal concept that places animals in a legal category “*a se*”, which is none other than that of “Animals”.⁴¹

Essentially, the Portuguese Civil Code recognises that animals do not fit as things in the classification of things in property and, for this reason, it has created a third legal figure – that of animals – that is not to be confused with things or human beings that, legally, we

³⁵Portuguese Civil Code, art 1302: “Só as coisas corpóreas, móveis ou imóveis, podem ser objecto do direito de propriedade regulado neste código”.

³⁶Portuguese Civil Code, art. 1323.1: “Aquele que encontrar animal ou outra coisa móvel perdida e souber a quem pertence deve restituir o animal ou a coisa a seu dono, ou avisar este do achado; se não souber a quem pertence, deve anunciar o achado pelo modo mais conveniente, atendendo ao valor da coisa e às possibilidades locais, ou avisar as autoridades, observando os usos da terra, sempre que os haja.

³⁷ Cfr. For Portugal, MENEZES CORDEIRO, A., *Tratado de Direito Civil III. Parte Geral III. Coisas* (Lisboa 2016), dedicates chapter V of his treaty on the Ownership of (“Os Animais”), with an interesting reflection of the legal protection of animals in the realm of property and the justification of legal title over them.

³⁸ All the opinions and the various stages of the legislative initiative can be found on the Parliament website: <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheIniciativa.aspx?BID=40225>

³⁹GIMÉNEZ-CANDELA, T., *Reforma del Cc. de Portugal: los animales como seres sintientes*, in *DA* 7/4 (2016) <https://doi.org/10.5565/rev/da.255>

⁴⁰Diário da República 1ª Serie, N°45, de 3 de Março de 2017, <https://dre.pt/web/guest/home/-/dre/106549655/details/maximized>.

⁴¹The consequences of a such a change have begun to reveal themselves in the reflection applied to certain aspects of ethics in the collective work, PATRAO NEVES, M.D.C y ARAUJO, F. (Coord.) *Ética Aplicada. Animais* (Lisboa 2018).

tend to call “persons”;⁴² in itself it is nothing more than an abstraction categorised by the representation with which something (a society, an entity, a collective desire, a human being) acts in Law,⁴³ and hence the great expansion of the concept of “person” in the legal realm.⁴⁴

Therefore, from now on animals appear in the Portuguese Civil Code as beings endowed with sensibility; this entails, among other things, their recognition as part of an independent legal category that additionally means the possibility of compensation in case of death or injuries to the animal, the establishment of the role of a carer for animals in the case of divorce, and the inability to seize companion animals.

The aforementioned amendment has entailed a systematic reorganisation of the Civil Code that takes the following form: Subtitle I-A has been added to Book I of Title II, under the denomination of “Animals”, which integrates articles 201-B and 201-D.⁴⁵

Overall, the reform of the Portuguese Civil Code opens an important door for legal reflection, going further than other reforms on animals undertaken by other European and Latin-American Civil Codes⁴⁶ (especially that undertaken by Colombia in 2015) by not limiting itself to the “negative” expression of the concept “they are not things”, but configuring the category in a positive way (“*living beings endowed with sensibility*”) and modifying the legal condition of animals by separating them from the condition of things in property.⁴⁷

III. JUSTIFICATIONS FOR THE DE-OBJECTIFICATION PROPOSAL⁴⁸

On the whole, the European Civil Codes agree upon the legal classification of animals as things in property, due to the Roman tradition to which I have already referred that permeates European Private Law as its historic foundation.

III.1. Coherence with European legislation

It was in the United Kingdom’s Common Law that the first animal protection law was passed in 1822 (Richard Martin’s Act to Prevent the Cruel and Improper Treatment of Cattle),⁴⁹ which broadened its reach until the Animal Protection Act was established in 1911,

⁴²GIMÉNEZ-CANDELA, M., Dignidad, Sentencia, Personalidad. Relación jurídica humano-animal in dA 9/2 (2018) <https://doi.org/10.5565/rev/da.346>

⁴³BROZEK, B., The troublesome ‘Person’, en KURKI & PIETRZYKOWSKI (Ed.), Legal Personhood: Animals, Artificial Intelligence and the Unborn (Springer International Publishing 2017) 8ss. <https://doi.org/10.1007/978-3-319-53462-6>; vid. rec. de WOOKEY, O., en dA 9/3 (2018) <https://doi.org/10.5565/rev/da.350>

⁴⁴ With an abundance of literature, the most recent will be referred to, AUGSBERG, S., Der Anthropozentrismus des juristischen Personenbegriffs – Ausdruck überkommener (religiöser) Traditionen, spezieistischer Engführung oder funktionaler Notwendigkeit?, in Rechtswissenschaft 3 (2016) 338ss.

⁴⁵ Book II, Title III, Chapter II, Section II is named “occupancy of things and animals”.

⁴⁶ The chronology of the status change for animals from things to not things, as a first step toward the “de-objectification” of animals in the Civil Law system is as follows: Austria (ABGB, §285a) 1st July 1988; Germany (BGB §90a) 20th August 1990; Switzerland (ZGB §641^a) 4th October 2002; Lichtenstein (Sachenrecht art.20^a) 14th May 2003. Also Catalonia (Cc. art. 511-1,3) 10th May 2006.

⁴⁷CORREIA MENDONÇA, H., Reconocimiento de la sentiencia en el Código civil portugués, in dA. 8/2 (2018) <https://doi.org/10.5565/rev/da.12>

⁴⁸Cf. in this dossier, ALÁEZ CORRAL, B., Algunas claves de la reforma del estatuto jurídico civil del animal en España, in dA 9/3 (2018) <https://doi.org/10.5565/rev/da.342>

⁴⁹Cf. *Cruel Treatment of Cattle Act 1822*, also known as Martin’s Act:

“...if any person or persons shall wantonly and cruelly beat, abuse, or ill-treat any Horse, Mare, Gelding, Mule, Ass, Ox, Cow, Heifer, Steer, Sheep, or other Cattle...and if the party or parties accused shall be convicted of any such Offence...he, she, or they so convicted shall forfeit and pay any Sum not exceeding Five Pounds, not less than Ten Shillings, to His Majesty...and if the person or persons so convicted shall

which for decades remained in force, and relatively intact, until finally being substituted in 2006 for the Animal Welfare Act⁵⁰ that, for the first time, imposed a duty of care on the owners of companion animals.

The novelty of this legal formula lies in the fact that the owners of companion animals are not only obliged by law to satisfy the basic needs of their companion animals, such as the needs for water and food, but that the law imposes the requirement of veterinary attention, and that the animal lives in a suitable environment for its needs – something that the 1911 Act stipulated only for farmed animals.

Legally speaking, it is to the United Kingdom that EU owes; the creation of the term Animal Welfare, its manner of application through the so-called Five Freedoms and, in recent decades, the use of the term “sentient beings” as a standard of treating animals, recognising their capability for not only experiencing physical pain, but for suffering, as well as for pleasure and joy.

On the Government website of the United Kingdom one can find the standards of treatment that must be met by those responsible (it does not use the term *owners!*) for farming operations, clearly set out on the basis that “if you’re responsible for a farm animal you must make sure that you care for it properly”.⁵¹ It is not just a polite statement, but the result of years of animal welfare culture, of rigorous study and of revelation. It is not in vain that the two main political parties of the United Kingdom undertake and publish in their campaigns the regulations they consider to be necessary for Animal Welfare; the Conservatives under the slogan “Animals have Friends”,⁵² and the Labour Party with “Six things you need to know about Labour’s plans to protect animals”.⁵³

Essentially, the United Kingdom has played a crucial role the creation of the current standards that govern Animal Welfare in Europe. In the 60s, the publication of Ruth Harrison’s book *Animal Machines*⁵⁴ had an immediate impact on society by warning of the precarious living conditions of farmed animal in intensive systems.

The book was a wake-up call and the social response it generated led to the English Government ordering the establishment of a Scientific Commission that was to produce a technical report on the living conditions of farmed animals. As a result, it published a report in 1965 presented by Professor Roger Brambell,⁵⁵ known as the “Brambell Report”, which set out Animal Welfare through five requirements that ensured not only the physical integrity of animals, but the mental aspect, as well as respect for their unique characteristics, their ways of life, and behaviour according to their animal natures. From this date onwards, it can be said that the treatment of animals and the defence of their interests and respect for their behaviour (their “culture”) has permeated the academic vision and public policy to the benefit of animals – a change that has never been looked back on.⁵⁶

As a result of the “Brambell Report”, in 1965 the British Government created the Farm Animal Welfare Advisory Committee, which in 1979 became the Farm Animal

refuse or not be able forthwith to pay the Sum forfeited, every such Offender shall...be committed to the House of Correction or some other Prison...for any Time not exceeding Three Months.”

⁵⁰ www.legislation.gov.uk/ukpga/2006/45/contents

⁵¹ <https://www.gov.uk/guidance/farm-animals-looking-after-their-welfare>

⁵² <http://voteforanimals.org.uk/conservatives/>

⁵³ <http://www.labour.org.uk/blog/entry/six-things-you-need-to-know-about-labours-plans-to-protect-animals>

⁵⁴ HARRISON R., *Animal Machines: The new Factory Farming Industry*. Foreword by Rachel Carsson (London 1964).

⁵⁵ BRAMBELL, R., “Report of the Technical Committee to Enquire into the Welfare of Animals Kept under Intensive Livestock Husbandry Systems”, Her Majesty’s Stationery Office (London 1965).

⁵⁶ Vid. WOOKEY, O., Legislative Proposal to Increase Sentencing Powers for Cruelty to Nonhuman Animals: Taken with a Pinch of Salt, en dA 9/1 (2018) <https://doi.org/10.5565/rev/da.249>; WOOKEY, O., The Effect of the Brexit on Animal Welfare in the United Kingdom: A Case for Scepticism and Scrutiny, in dA 9/2 (2018) <https://doi.org/10.5565/rev/da.340>

Welfare Committee,⁵⁷ as a body responsible for the establishment and development of Animal Welfare policies, conducted through five principles that constitute Animal Welfare standards and are known as The Five Freedoms.⁵⁸ While European law does not comply with this English perseverance, this evolution of English law has its own origins, and the EU has certainly been heavily influenced by it.⁵⁹

Having said this, one should not understate the reform of the Spanish Civil Code (aimed at responding to the need to give coherency to our framework) because this tendency toward coherence evident in the French and Portuguese cases is really nothing more than an adaptation of the principle that animals are not things, but living beings endowed with sensibility, to the internal law of both countries, which was “constitutionalised” from the beginning of the 90s when the category of animals as sentient beings was introduced firstly by declarations, then in protocols, and finally in an article of the treaties of the European Community and now of the European Union.⁶⁰

Since 2009, article 13 of the Treaty on the Functioning of the European Union has essentially stipulated, without distinction between the area of law to which it applies (including in Civil Law), that:

*“In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage”.*⁶¹

The result is a legal regime applicable only to animals, in the way that they are not regulated by European law or by regulations derived from the law enforcement (which answer to the same principle), for the status awarded to animals by the national Civil Code is these days already residual and anachronistic.⁶² For this reason, it tries to apply the current text to this principal, but stumbles with the conception enrooted in the actual Codification - that the law that governs individuals is exclusively civil law (which is nothing more than an anachronism itself, as constitutional, administrative, or even general regulations are also used in such relations). This question becomes even more interesting in Spain in relation to the so-called historic rights of the ancient special law regimes, where in some cases, and as it also pertains to Catalonia, the legal status of animal was adapted in 2006 to that which was commonly dominant in Europe at the time, in the sense of considering them “Not things”,⁶³

⁵⁷ <https://www.gov.uk/government/groups/farm-animal-welfare-committee-fawc>

⁵⁸ “Freedom from Hunger and Thirst: by ready access to fresh water and a diet to maintain full health and vigor. 2 Freedom from Discomfort: by providing an appropriate environment including shelter and a comfortable resting area. 3. Freedom from Pain, Injury or Disease: by prevention or rapid diagnosis and treatment. 4. Freedom to Express Normal Behaviour: by providing sufficient space, proper facilities and company of the animal’s own kind. 5. Freedom from Fear and Distress: by ensuring conditions and treatment which avoid mental suffering”.

⁵⁹ For Spain, see VILLALBA, T., **40 años de bienestar animal: 1974-2014**: Guía de la legislación comunitaria sobre bienestar animal (Madrid 2017); VILLABA, T., Código de Protección y Bienestar Animal (Madrid 2018) <http://boe.es/legislacion/codigos/codigo.php?id=204&modo=1¬a=1>

⁶⁰ Vid. ALONSO GARCÍA, E., El bienestar de los animales como seres sensibles-sentientes: its value as a general principal, of constitutional standing, in Spanish law, in the collective book *Los Principios Generales del Derecho y el Derecho Administrativo*, Ed Kluwer 2010; WARTEMBERG, M., Art. 13 Lisbon Treaty/TFUE – Historical, Constitutional and Legal Aspects, in FAVRE, D. and GIMÉNEZ-CANDELA, T. (Ed.), *Animales y Derecho* (Valencia 2015) 353ss

⁶¹TFUE. Art. 13 <https://www.boe.es/buscar/doc.php?id=DOUE-Z-2010-70006>

⁶²Vid. MENÉNDEZ DE LLANO, N., La modernización del estatuto del animal en la legislación civil española, in *da* 9/3 (2018) <https://doi.org/10.5565/rev.da.343>

⁶³ Catalanian Civil Code, art. 511.1,3 <http://civil.udg.edu/normacivil/cat/CCC/ES/L5-2006.htm>

according to the model of the Austrian, German and Swiss Codes.⁶⁴

The changes that have taken place in the legal status of animals in the European Civil Codes to differentiate them from the regime of “things” are stimulated by different inspirational motives and principles corresponding to greatly diverging realities, especially to that of Spain. If there is anything in common, it would be the fact of being framed within what has been called the “animal turn”⁶⁵ (at a global level) and, particularly in Europe, the obliging of Member States to incorporate the principles of European Animal Welfare legislation based on the scientific proof of animal sentience, on the one hand, and, on the other, the deconstruction of the principle of property,⁶⁶ as the only element generating the relationship between humans and animals.⁶⁷ For this reason, it should not come as a surprise that other occidental countries, unaffiliated with the works of the European Union, have introduced changes in the same sense – of considering animals to be sentient beings. I am referring to countries with a codified legal system, such as in the cases of Colombia,⁶⁸ Brazil,⁶⁹ Nicaragua,⁷⁰ or, partially, Mexico,⁷¹ or Common Law countries such as New Zealand⁷² or Canada.⁷³

So in regards to the Spanish Civil Code, the question that now arises and must be considered is that of the opportunity to introduce a change regarding the legal status of animals in our Civil Code, just as society has through the Congress of Deputies that were in unanimous agreement; we see this as much from the coherency of such a change with that planned by European legislation, particularly in reference to Animal Welfare, as from the coherency of the changes undertaken by other countries.⁷⁴

III.2. Coherency with the changes made by other countries

This piece has now covered the recent changes introduced in the French and Portuguese Civil Codes regarding the legal status of animals that has come to consider them “living beings endowed with sensibility”, and has alluded to the decision of the United Kingdom to set and apply in its own legislation the concept of animals as “sentient beings” – a term that has been used by the ruling regulations of the EU on this topic (that is to say,

⁶⁴Vid. *infra* sub III.2.

⁶⁵RITVO, H., On the Animal Turn, in *Daedalus. Journal of the American Academy of Arts & Sciences* 136 (2007) 118ss.

⁶⁶FAVRE, Animals as Living Property, *Tier und Recht Entwicklungen und Perspektiven im 21. Jahrhundert* (Zürich 2012) 418ss., article based in the 2010 publication in *Marquette Law Review* 93 (2010) 1021ss.; SHERMAIER, M., *Dominus actuum suorum. Die willenstheoretische Begründung des Eigentums und das römische Recht*, in *SZ* 134 (2017) 50ss.

⁶⁷GIMÉNEZ-CANDELA, T., Dignidad Sentencia, Personalidad (cit.), in *dA* 9/2 (2018) 8ss. <https://doi.org/10.5565/rev/da.346>

⁶⁸Colombian Civil Code (Law 1774 of 6th January 2016 on the modification of the Civil Code, Law 84 of 1989, the Criminal Code, the Criminal Procedure Code and other provisions. <http://es.presidencia.gov.co/normativa/normativa/LEY%201774%20DEL%206%20ENERO%20DE%202016.pdf>), in art. 655.2 affirms that animals are sentient beings.

⁶⁹A Legal Project presented to the Senate in 2015 (n° 352), to modify the status of animals in the Civil Code from things to “bens moveis” (movable things) (<http://imagem.camara.gov.br/Imagem/d/pdf/DCD0020170620001060000.PDF>)

⁷⁰ARGÜELLO, A., Los animales como seres vivos dotados de sensibilidad ante el interés común en la ganadería nicaragüense y los acuerdos de la OIE y el OIRSA, in *dA* 9/3 (2018) <https://doi.org/10.5565/rev/da.330>

⁷¹Vid. *supra* n.13 y 14.

⁷²Title Paragraph (a)(i) Animal Welfare Act of 1999, replaced by the Animal Welfare Amendment Act, 10th May 2015 (<http://www.legislation.govt.nz/act/public/1999/0142/59/0/DLM49664.html>)

⁷³The Civil Code of Quebec, art. 898.1 (Loi sur la protection sanitaire des animaux) 4th December 2015; <http://legisquebec.gouv.qc.ca/fr/ShowDoc/cs/P-42>)

⁷⁴On this aspect, vid. GIMÉNEZ-CANDELA, T., An Overview of Spanish Animal Law, in FAVRE, D. y GIMÉNEZ-CANDELA, T. (Ed.), *Animales y Derecho* (Valencia 2015) 211ss.

article 13 of the TFEU). We now move on to consider the answers to this question in other countries: Austria, Germany and Switzerland;⁷⁵ countries that, at the end of the 80s and during the 90s, undoubtedly led the movement that we have called the “De-objectification” of animals, in an approach that we began with the first MINECO project: “Animals, Law and Society: from Roman Law to Global Society” (DER 2010-2131) and that we have continued, along with other projects, and others within MINECO, and on which we have presented results⁷⁶.

III.2.a. Switzerland

A legal change came into effect in 2003 that set a landmark in the history of the country – a change in the corresponding article of the Civil Code, in which it is established that animals are not things (“Nicht Sachen”). Of course this change had a visible effect in the law of damages, in the law of successions and title deeds – something that 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.⁷⁷

In coherence with this, article 641a of the Civil Code (BGB)⁷⁸ 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.

An express reference to the Dignity of creature (“Würde der Kreatur”) as a governing principle of the treatment and consideration that is owed to animals⁷⁹ appears only in the Swiss Constitution of 18 April 1999, Art. 120.2;⁸⁰ this notion was renewed in 2008, then transformed into “dignity of animals”, in the Swiss Animal Protection Act, that had been completely revised:⁸¹

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

⁷⁵PETERS, A., Tierwohl als globales Gut: Regulierungsbedarf und –chancen, in Rechtswissenschaft 3 (2016) 363ss.

⁷⁶Vid. supra, n.1, 2 y 7.

⁷⁷MICHEL, 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)

⁷⁸BGB Art. 641a <https://www.admin.ch/opc/de/classified-compilation/19070042/index.html>

⁷⁹SITTER-LIVER, B., Recht und Gerechtigkeit auch für Tiere. Eine konkrete Utopie, en Tier und Recht (cit.) 29ss.

⁸⁰Bundesverfassung 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>

⁸¹TSchG, Tierschutzgesetz (Swiss Animal Protection Act, in effect since the 1st September 2008), <https://www.admin.ch/opc/de/classified-compilation/20022103/index.html>

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 overriding interests cannot justify the distress imposed on it. 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.*⁸²

Switzerland must be considered to be the absolute precursor and pioneering country in this area.⁸³ By 1893 the Swiss nation had already 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, by as early 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 pass laws on the use of genetic and reproductive material of animals, plants and other organisms, and in doing this, the need to bear in mind the dignity of other living beings, including the dignity of animals, as we have already mentioned.⁸⁴

III.2.b. Austria

We briefly see the corresponding regulations of the Austrian Civil Code (**ABGB**, Allgemeines Bürgerliches Gesetzbuch). This Code broadly defines the concept of *thing* in article §285:

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.

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^o, 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.

⁸² TSchG, art. 1 and art. 3 (unofficial translation). Also, vid. Tierschutzverordnung (Swiss Animal Protection Ordinance, in effect since the 1st September 2008), <https://www.admin.ch/opc/de/classified-compilation/20080796/index.html>

⁸³ GOETSCHER, A., Tierschutz und Grundrechte (Zürich 1989)

⁸⁴The 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.

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.⁸⁵ 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 *Cosas inembargables*

(1) Unpfändbar sind: *They are not 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 for sale, with respect to which there is not emotional attachment, up to the value of 750,-€ (10.000 chelines), as well as a dairy cow or, at the choice of the liable party, two cows, goats or sheep, if these animals are necessary for the liable party to feed, or to feed the members of their family that live in their house, along with the feeding provisions and maintenance of them for 4 weeks.

III.2.c. Germany

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 dealt with this topic was to be expected, as Germany had already made vast changes in the field of animal protection. A new version of the Animal Protection Law came into force in 1986. Through the “Law for the improvement of the legal condition of animals in Civil Law”, Germany also modified the Civil Code (**BGB**), and the regulations of the BGB are very similar to those in Austria.

The title of the first book, chapter 2 was broadened to include animals, with what

⁸⁵ Although I have not elaborated on this, I would like to emphasise that already by 1988 the ABGB included, in the ZPO reform, the inability to seize animals due to the “special bond of affection” that links them to the family they live with. Another is the expression, also employed by the BGB, regarding companion animals; “Familienmitglied”, which means family members.

remains of the following form: Things. Animals. A1 § 90, in which things are defined, was added § 90^a.

The result is the following:

2. Chapter. Things. Animals

§ 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 complements 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.

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:⁸⁶

§ 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).

III.3. The constitutionalisation of animals in Germany, Austria and Switzerland.

As expected, the modification of the legal status of animals was passed in both Austria and Germany in a very controversial way. On the one hand, it amounted to a great advance in the field of animal protection, as animals were not considered a thing, but on the other hand, there was harsh criticism of the lack of content for and sense in these regulations.

However, it is important to recognise that German legislation was modified with consistency and accuracy, to bring into effect the new condition of animals, declared not things, in all concomitant aspects - specifically:

- in relation to the rights and duties of owners (§903, BGB);
- in the area of compensation (§251[2] BGB);
- in cases of forced compliance (§ 765, ZPO) y
- relating to seizure (§811c, ZPO).

In fact, with all the difficulties that come with the practical application of a negative

⁸⁶ A recent revision of this little-known aspect of German legal history is attributed to PLUDA, M., *Animal Law in the Third Reich* (in print).

concept such as “not things” (nicht Sachen), up until now the German Civil Doctrine refers to animals as “Mitgeschöpfe”, which means creatures that share our fate.⁸⁷ This conception of respect for animals is that which has driven Germany to include animals in its Constitution.

This constitutionalisation of animals made in Germany has made the country a role-model on the topic of animal protection. This change came about through Art. 20 of the Constitution (Grundgesetz, GG), in the part referring to the protection of the natural heritage of life (“Schutz der natürlichen Lebensgrundlagen”) in 2002.⁸⁸

Article 20a [Protection of the natural foundations of life and animals]

Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.⁸⁹

The Constitutionalisation of animals in Austria and Switzerland came about rapidly. The chronology of the legislative changes that led to the reform of the animal-thing status by the respective Civil Codes and the Constitution in Austria, Germany and Switzerland is summarised here:⁹⁰

⁸⁷OBERGFELL, E.I., Tiere als Mitgeschöpfe im Zivilrecht, in *Rechtswissenschaft* 3 (2016) 388ss.

⁸⁸ Verfassungsgesetz, 23rd May 1949, reformed by the Law of 26th July 2002.

⁸⁹ Artikel 20^a [Schutz der natürlichen Lebensgrundlagen] Der Staat schützt auch in Verantwortung für die künftigen Generationen die natürlichen Lebensgrundlagen und die Tiere im Rahmen der verfassungsmäßigen Ordnung durch die Gesetzgebung und nach Maßgabe von Gesetz und Recht durch die Vollziehende Gewalt und die Rechtsprechung.

⁹⁰ Catalonia must be included in this chronology, as, like it has been said, in 2006 it reformed book V on the treaty of property to declare animals not things; *vid. supra*, n.63.

Country (*or Autonomous Community)	Year	Civil Code Provision
Austria	1988	« Not things » (Negative formulation)
Germany	1990	« Not things » (Negative formulation)
Switzerland	2000	« Not things » (Negative formulation)
*Catalonia	2006	« Not things » (Negative formulation)
France	2015	« Living beings endowed with sensitivity » (Positive formulation)
Colombia	2015	« Living beings endowed with sensitivity » (Positive formulation)
Portugal	2016	« Living beings endowed with sensitivity » (Positive formulation)

Simultaneously, and successively, the aforementioned countries reformed their respective Constitutions with the objective of including animal protection as a fundamental value.

Country	Modification to the Civil Code	Modification to the Constitution
Austria	1988	2004
Germany	1990	2002
Switzerland	2000	2004

The influx of these changes in the legal status of animals has been reflected in the undertaking of corresponding changes, not only in France and Portugal⁹¹, but in Liechtenstein⁹² and in 2102 in the Czech Republic also⁹³.

IV. CONCLUSION

The preceding reflections set out the “De-objectification” of animals in our Civil Code in line with the request voted for unanimously by the Parliament on the 14th February 2017 (and that they then unanimously voted in favour of) urging the Government to reform the Civil Code.⁹⁴

The formulated proposal sets out three fundamental elements:

1. The creation within the Civil Code of a “*sui generis*” category relating to animals that considers them as what they are: living beings endowed with sensibility. Consequently, a detailed adaptation of the Civil Code article is proposed, where the mention of animals is separated from that of things in property, without limits to their condition as being “sentient beings” as recognised by science and European Animal Welfare legislation, which obliges us – as a Member State of the EU – to adapt our legislation to this reality.
2. The possibility of establishing, in the case of family conflict (divorce or separation) a regime in which companion animals benefit from treatment in harmony with a respectful of their welfare and the desires of family members to share, through custody, the animals that has lived with them prior to the separation or divorce.
3. The adaptation of the article relating to the LEC, referring to the inability to seize companion animals.

At this time, the text has been subject to 117 amendments to be considered by the Commission of Justice of the Congress of Deputies.⁹⁵ At their last meeting on the 12th of June of 2018, they agreed, at the request of PSOE (the party that is currently in power), to request a new report on the presented amendments⁹⁶, although the initiative to change the legal status of animals in the Civil Code continues to come from the Popular Party (el Partido Popular), which began the reform process during their period in Government up until 1st June 2018.⁹⁷

⁹¹Vid. supra II. 1 and 2.

⁹²Vid. supra, n.46.

⁹³Civil Code of Czech Republic, n°89/2012, § 494: “Live animal has special importance and value as already senses gifted living creature. Live animal is not a thing to the provisions on the live animal only apply *mutatis mutandis* to the extent that it is contrary to his nature.” (unofficial translation). Cfr. MULEROVÁ, H., Animals finally above Objects and stricter Criminalization of Cruelty: some Insights in Czech Animal Legislation, en dA 3/1 (2012) 7ss. <https://revistes.uab.cat/da/article/view/v3-n1-mulero/179>

⁹⁴ Vid. supra, n.1 and 2.

⁹⁵http://www.congreso.es/portal/page/portal/Congreso/Congreso/Organos/Comision?_piref73_749806_3_73_1339256_1339256.next_page=/wc/composicionOrgano&idOrgano=303

⁹⁶BOCG of 27th March 2018, n°167/4, Amendments and Index of Amendments to the aforementioned, 122/000134 Legal Proposal for the modification of the Civil Code, the Mortgage Law and the Civil Procedure Laws, on the legal regime of animals, www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-167-4.PDF

⁹⁷Royal Decree 354/2018, of 1st June, naming don Pedro Sánchez Pérez-Castejón as President of the Government, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-7400