

## The De-objectification of Animals (I)

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Throughout history, animals have played a very important role in society, in the law and in the economy. Despite the fact that we often overlook the universal respect for animals - a characteristic of the Ancient World that was advocated by the jurist Ulpian in the famous text of the Digest D.1,1,1,3,<sup>1</sup> in which he refers to the existence and application of a natural law common to all living beings (within distinction between human and animal) - all our culture is impregnated by a profound knowledge and collective persuasion that animals are **creatures that share our destiny**, a notion that is concisely and effectively embodied by the German expression “Mitgeschöpfte” when referring to animals.<sup>2</sup> This position adheres fundamentally to the respect and veneration of man for nature that, in the occident,<sup>3</sup> has been blurred over the centuries, but has provided us with the entire classic Greco-Roman literature.<sup>4</sup>

Animals are considered by our continental legal system to be things of property. The attribution of this status of things (*res*),<sup>5</sup> when referring to animals, is a creation of roman law, which, at the time, integrated the two greatest workforces of an eminently agricultural society (the slaves and the animals, and above all those of draft animals) within the most important elements of patrimony (*mancipium*) of the chief of a family clan (*paterfamilias*), that is, of the owner and only title holder of the collection of goods with which a family develops its life and economic activity.

At the time, the inclusion of animals within the roman legal system, as a specific category within the integrating elements of property, signified a very important change; as in other societies of the Antiquity, animals and slaves existed (of course!), but they existed outside the reach of the law, that is to say, not included within the Legal system.

Hence, as it is well known, the slaves and animals were awarded the same legal status, which, for as much as this may seem regrettable and paradoxical today, essentially made way the gradual improvement in the conditions of slaves with manumission, and ultimately, the definite abolishment of slavery. The abolition of slavery would not have been possible had the slaves not been legally categorised. By applying the same logic, today we strive for a change of the legal status of animals from things of property, because this would mean identification as a legal category and would permit changes, improvements and abolishment.

In a society structured in such a way that I have described, animals (ultimately, those that serve for transport, sustenance and work) spent centuries an unspoken place within property, justified

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1 Ulpian D. 1,1,1,3: Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censer.

2 OBERGFELL, E.I., Tiere als Mitgeschöpfte im Zivilrecht, en Rechtswissenschaft 3 (2016) 388ss.

3 KELCH, T., A Short History of (mostly) Western Animal Law: Part I, Animal Law Review (2012) 1ss.; Part II, Animal Law Review (2013) 1ss.

4 Vid. Entre otros, DIERAUER, U., Tier und Mensch im Denken der Antike (Amsterdam 1977); INGILD GILHUS, A., Animals, Gods and Humans (London-New York 2006); ALEXANDRIDIS, WILD, WINKLER-HORACEK (ed.), Mensch und Tier in der Antike (Wiesbaden 2008).

5 GIMÉNEZ-CANDELA, T., Derecho Privado Romano (Valencia 1999)

principally because society did not change substantially in form or structure until recent times, namely from the Industrial Revolution onwards. For this reason, the law, conforming to a social and economic panorama very similar to that of Classical history, does not concern itself with introducing changes – not even in suggesting them – regarding the legal relations with animals. The question of proprietorship over animals has remained passive and unspoken of until recent times.<sup>6</sup>

The entire legacy of Roman Law has flowed, in a practically unaltered form, to the modern age through Napoleon's codification. It is no surprise that Napoleon himself ("... a new Law for a new citizen") would insist with lucidity – even when suffering his last years of exile on a wind-battered island –, that his name did not appear associates, for posterity, with the big battles through which he took control of Europe, but with the unified summary of the Law that he entrusted to enlightened jurists and that today is known as the Civil Code or the Napoleonic Code.<sup>7</sup>

The law has dealt with animals through codification – within the logic of the ownership of things-, in the way that it has covered the most fundamental necessities of their lives: as products, the methods of their transport and investigation, their companionship, and their part in shows for human entertainment. As well as this, the law has concerned itself with animals in their means as a source of responsibility, in conflicts of interest; consideration for the animal has been measured or included.

Another matter, in my opinion, is the response that the law has given, through the Criminal Law, to animal abuse; it is the mission of a constitutional and democratic State to provide sanctions when faced with behaviours that question the efficacy of the punitive faculty that concern it.<sup>8</sup> This is a mandate in which, naturally, the question of proprietorship over animals also plays a role;<sup>9</sup> but the punishment for animal abuse is tied to the behaviours that the law deems to be illicit and in which the State assumes a particular mission of vigilance in favour of the most vulnerable.<sup>10</sup>

However, critical thought has, many times over the centuries, revisited the initial consideration of a universal respect for animals and the desire to protect them in the face of abuse and aggression, in order to provoke the question of attributing them a legal position better than that of property. To put it in other terms, Philosophy,<sup>11</sup> Ethics,<sup>12</sup> Anthropology, History, and, recently, Animal Welfare Science, have questioned whether animals should remain tied to the status of things of property and, also, whether this status justifies not just their use, but also the limitless abuse toward their lives and physical integrity.<sup>13</sup>

This being said, it remains obvious that, these days, the question of legal status of animals and its eventual change, specifically in the Civil Code, has gone from a question that only interested and mobilised the defence movements for animals, to become a question that:

- Concerns Science and legal language regarding animals as sentient beings
- Concerns society as a whole, resulting in the development of a new awareness

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6 MUÑOZ MACHADO, S., *Los animales y el Derecho* (Madrid 1999) 70s.

7 Llamado "Le Code civil des Français", se promulgó el 21 de marzo de 1804 y empezó a conocerse como Code Napoleon desde 1807.

8 RIOS CORBACHO, JM., *Comentario en relación al maltrato de animales. L01/2015* (<http://www.derechoanimal.info/images/pdf/Corbacho-Reforma.pdf>); REQUEJO CONDE, MC., *El delito de maltrato a los animales tras la reforma del Código Penal por la ley Orgánica 1/2015 de 30 de marzo* (<http://www.derechoanimal.info/images/pdf/Requejo.pdf>)

9 WOHLERS, W., *Tierschutz durch Strafrecht?. Zur Legitimation tierschutzstrafrechtlicher Normen*, en *Rechtswissenschaft* 3 (2016) 426ss.

10 ROXIN, K., *Sinn und Grenzen Staatlicher Strafe*, JuS (1996) 377, 383n.20: "...im Schmerzempfinden der Tiere, dem sich die Rechtsordnung aus einer Art von kreatürlicher Solidarität annimmt".

11 REGAN, T., *The Case for Animal Rights* (University California Press 1983); CAPACETE, F., *En recuerdo de Tom Regan* (<http://www.derechoanimal.info/esp/page/5091/en-recuerdo-de-tom-regan>)

12 POLLO, S., *Umani e Animali: questioni di Etica* (Roma 2016).

13 BOISSEAU-SOWINSKI, L., *La désappropriation de l'animal* (Presses Universitaires de Limoges 2013).

- Concerns the organisation of the state, which assumes responsibility for Animal Welfare, which is also a concern of EU law
- Concerns the economy and education regarding animals in all levels of teaching

The animal question is a global question, as evidenced by taking a look at the evolution of Animal Law,<sup>14</sup> an emerging legal discipline, which increasingly affirms itself as an instrument that facilitates the ‘turn’ that law requires in order to open itself to new perspectives and cross of new frontiers,<sup>15</sup> which, in my opinion, can be summarised thus:

The de-objectification of animals, the Constitutionalisation of animals and the Globalisation of animals.

I have always insisted, since first writing on the topic of animal law, and consider it to be a common thread of all the investigations and projects, that de-objectification of animals has been encouraged with the existence of the website (<http://www.derechoanimal.info/esp/page/1434/introduccion>) and the ICALP.

For the Spanish Civil Code to recognise animals as “sentient beings”, similarly to how they are recognised by the Civil Codes of France (2015)<sup>16</sup> and Portugal (2016),<sup>17</sup> it would require nothing other than an action by the Government in response to a recent petition for reform, proposed by the “Observatory of Justice and Animal Defence”, that achieved over a quarter of a million citizen signatures,<sup>18</sup> which insisted on initiating a process to “promote the legal reforms necessary to create a special category in the Civil Code different from previous ones, referring to animals, where it defines them as sentient beings”.<sup>19</sup>

Prior to the reforms undertaken by France and Portugal, the “de-objectification” of animals showed itself to be a movement that, albeit with intermittences, had not ceased to develop since it was introduced in Austria in 1988, with the classification of animals, and the affirmation, although negatively formed, that animals are not things (“nicht-Sachen”).<sup>20</sup> This same formulation (“nicht-Sachen”) that animals are not things, was then followed in Germany, Switzerland, and Liechtenstein over the following years, leading to different results in each of these countries.

It must be said, finally, that although the equating of animals to humans in terms of privileges and the attainment of “subjective rights” has not been achieved – nor tried -, it must be noted that the modification of the legal status of animals is reinforcing, in all these countries, the legal consideration of animals as what they are: sentient beings.

I will soon elaborate further, in a second part to this article on the De-objectification of animals, on

14 Por todos, FAVRE, D., *Animal Law, Welfare, Interests and Rights* (New York 2011); How Common Law Equity Concepts can help enhance Animal’s Status, en *Animals and the Law* (Valencia 2015)181ss.

15 PETERS, A., Vom Tierschutzrecht zu Legal Animal Studies: Forschungsdesiderate und –perspektiven, en 3 (2016)332s.

16 Entre sus muchos escritos sobre el tema, vid. esp.: MARGUÉNAUD, JP, L’entrée en vigueur de “l’amendement Glavany”: un grand pas de plus vers la personnalité juridique des animaux, en *RSDA* 2 (2014) 15ss.; GIMÉNEZ-CANDELA, T, Una nueva Revolución Francesa: la modernización del Code civil (<http://www.derechoanimal.info/esp/page/3718/una-nueva-revolucion-francesa-la-modernizacion-del-code-civil>)

17 ARAUJO, F, A hora dos Direitos dos Animais. O Obstaculo da Apropriação (Coimbra 2003) 303ss.; GIMÉNEZ-CANDELA, T, Reforma del Cc. de Portugal: los animales como seres sintientes (<http://www.derechoanimal.info/esp/page/4990/reforma-del-cc-de-portugal-los-animales-como-seres-sintientes>)

18 Codina, JL., 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 (<http://www.derechoanimal.info/images/pdf/SeresDotadosSensibilidad.pdf>)

19 Diario de Sesiones del Congreso de los Diputados Pleno y Diputación Permanente, 14.2.2017 (29) 43ss. ([http://www.congreso.es/public\\_oficiales/L12/CONG/DS/PL/DSCD-12-PL-29.PDF](http://www.congreso.es/public_oficiales/L12/CONG/DS/PL/DSCD-12-PL-29.PDF))

20 ABGB §285a, de 1 de Julio de 1988 (BGBl 179/188; JGS Nr.946/1811):“ § 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 statutes. Provisions applicable to things only apply to animals to the extent there are no different provisions).

the specific meanings and the extension of this expression that has resulted from Animal Welfare Science and its integration into legal framework.

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