

The legal status of animals in the Civil Code: The long-awaited de-objectification of animals

Marita Giménez-Candela

Professor

Director of ICALP and the Animal Law Master (UAB)

ORCID: 0000-0002-0755-5928

SCOPUS ID: 57218923647



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Abstract

The legal status of animals in the Civil Code is in need of a modification that updates and modernises their treatment and ensures it meets the needs and demands of society. This work addresses the key points of the modification that, the initial proposal having been interrupted by unexpected political circumstances, is still underway, awaited since 2017 when the parliament approved the Civil Code recognition of animals as sentient beings, as opposed to things, as they appear in the current version, which ultimately allows them to be assimilated with inert objects. The topic will be addressed within the context of the current movement to de-objectify animals that has already taken off in various European and Latin-American countries.

Keywords: Legal status of animals, Spanish Civil Code, codification, continental law, the concept of animal, sentient beings, animal sentience, Art. 13 TFEU, animal welfare.

Resumen - *Estatuto jurídico de los animales en el Código civil. La esperada descosificación animal*

El estatuto jurídico de los animales en el Código civil español está necesitado de una modificación que actualice y modernice su tratamiento y lo adecúe a las necesidades y demandas de la sociedad. En este trabajo se abordan los puntos clave de dicha modificación que está actualmente en tramitación, en espera -después de haberse interrumpido la propuesta inicial por circunstancias políticas sobrevenidas-, desde el año 2017 en que el Parlamento aprobó el reconocimiento de los animales en el Código civil como seres sentientes, en lugar de cosas tal y como figura en la actual redacción, lo que en principio permite asimilarlos a los objetos inertes. Se aborda esta cuestión, dentro del contexto del actual movimiento de descosificación de los animales, que ha encontrado ya eco en varios países europeos y latinoamericanos.

Palabras clave: Estatuto jurídico animal, Código civil español, Codificación. Derecho continental, concepto de animal, seres sentientes, sentiencia animal, art. 13 TFUE, bienestar animal..

Summary

1. The history
 2. The key aspects of the Civil Code modification proposal. De-objectification
 3. The possible effects of the modification in process
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1. The History

The Spanish Civil Code, as many other contemporary civil codes,¹ is hereditary to the impulsive codification that swept Europe and Latin-America after Napoleon decided to end the most important revolutionary process in modern history - the French Revolution - taking it upon himself to endow the new man – the citizen - with new rights, free from the ties of the ancien regime.² The Napoleonic Code³ is always accepted as being a revolutionary code. Codification as a consequence of Napoleonic impulse formed the legal background that served as instrumental for leading the revolutionary process of liberating many Latin-American countries: a new right for a new town – a citizenship – free from the ties of the colony, which came to be a copy of the ancien regime.

This same mental and ideological framework – the culmination of a process of change – has curiously served repeatedly as a justification for legal codification in countries that with it have demonstrated a revolutionary process, at least in the sense in which this term is employed, which includes characterising the colonial liberation movements of the 19th century. This is the case for the civil codes of Turkey⁴ and Japan,⁵ and currently in China,⁶ both geographically and ideologically distant from the Latin-American liberation movements. In these countries the codification of the Civil Law has also been the instrument for making the will to change from the old tradition visible, and a way of declaring the citizenship's will for modernisation.

In all the civil codes to which I make reference the substratum of the compilation and ordering of subjects, with some variation, is in response to the great Roman legal tradition that, with all its avatars, was the common law (*ius commune*) par excellence of all the towns that at one point formed the territory of what is known as the Roman Empire.⁷ In other terms, civil codes, any within the ambit of what we know as Civil Law, replicate the Roman institutions, including the Roman order of the exposition of subjects as compiled (“plundered”) from ancient Roman jurisprudence under the orders of Emperor Justinian;⁸ an ordering of subjects that did nothing but replicate the ordering sequence followed by the Praetor's Edict.⁹ In this sense, the Spanish Civil Code is also of Roman tradition, and replicates the basic institutions for conflict resolution, created on the basis of the opinions of Roman jurists.

It is therefore no surprise that the legal regime of animals that appears expressed in the Spanish Civil Code (and the other civil codes that follow the Napoleonic Code) follows the Roman standards of treatment

¹ The French Civil Code, 1804 (Code civil des Français) was adopted and adjusted by, or influenced, Europe and Latin-America, even in the 19th century: Belgium (1804), Poland (1804), Louisiana (1808), The Netherlands (1810), Haiti (1826), Bolivia (1831), Chile (1855), Ecuador (1861), Romania (1864), Italy (1865), Portugal (1865), Quebec (1866), Argentina (1869), Mexico (1870), Uruguay (1871), Colombia (1887), Paraguay (1889), Spain (1889). On this topic, vid. also, GRIMALDI, M., L'exportation du code civil, in *Pouvoirs. Revue française d'études constitutionnelles et politiques* 107 (2003/4) 80-96.

² HALPÉRIN, J.L., L'Histoire de la fabrication du Code. Le Code Napoleon, in *Pouvoirs. Revue Française d'études constitutionnelles et politiques* 107 (2003/4) 11ss.

³ The French Civil Code, 1804, was officially called the Napoleonic Code (Code Napoléon) in 1807 (Décret du 3 septembre 1807).

⁴ The Turkish Civil Code, 1926, was based on the Swiss Civil Code, 1907. Vid. OGUZ, A., The Role of Comparative Law in the development of Turkish Civil Law, in *Pace Int'l L. Rev.* 17 (2005) 373-386.

⁵ The Japanese Civil Code came into force in 1898 and was the first Asian code. Vid. JALUZOT, B., Les origines du code civil japonais, in *Zeitschrift für Japanisches Recht Journal of Japanese Law* (2015) 121-146

⁶ The Chinese Civil Code came into force on 1 January 2021. It is based on text directly found in Roman law (especially in the *Corpus Juris Civilis* compiled impulsively by Emperor Justinian) without passing through the Napoleonic codification, as the civil codes of other countries did. On this news,

vid. CARDILLI, R., PORCELLI, S., *Introduzione al diritto cinese* (Torino 2020).

⁷ GIMÉNEZ-CANDELA, T., *Derecho Privado Romano* (Valencia 2020) 35, 37, 38, 42.

⁸ *Ibid.*, 106 ss.

⁹ *Ibid.*, 8, 78, 108, 117.

afforded to animals in classical Rome. Expressed here in synthesised form,¹⁰ this treatment fundamentally entailed the inclusion of animals within the juridical category of things of property. Specialised literature has given little importance to this fundamental and distinguishing fact relating to the Roman juridical treatment of animals, by which they, along with slaves, are “objectified”: they form part of the juridical category defined as the institution of property. The inclusion of animals as a juridical reality for the first time, positioned within the uncontroversial institution of property,¹¹ was a discovery of the Roman juridical genius, as there are no other signs of such juridical categorisation of animals in other juridical regimes of other peoples of antiquity. This inclusion of animals and slaves in the framework of things of property was perfectly appropriate for an eminently rural society such as Rome.¹²

Precisely, when we speak of modifying the juridical status of animals nowadays, it is the need for its modernisation that is argued for,¹³ related with the inadequacy of their status in a society like ours, which is not exactly rural. However, this consideration should not be oversimplified; animals, aside from finding a comfortable spot (or not) in the regime of property, cannot be treated as inert objects, because, as science has more than demonstrated, they simply are not.¹⁴ On the contrary, animals are beings with capacities, conscience and sentience very similar to our own;¹⁵ this has been affirmed by animal welfare science, and accepted by Article 13 of the TFEU since 2009.¹⁶

The juridical treatment of animals has repeatedly stumbled over a fundamental difficulty, which is none other than that the legislature has never clearly and precisely defined what is to be understood by animal in law. In fact, there is no reference made to the concept of animals in relevant literature,¹⁷ except observations that I made¹⁸ at the time regarding the need to create a juridical reference that covers animal diversity without being exclusive.

To certain excess, some recognised animal welfare sciences specialists refuse to use the distinction “human animals” and “nonhuman animals”.¹⁹ While it is well known that human beings are animals, perhaps the simplicity of the denomination – that which allows it to serve as a reference to man and animal, as in the classic texts of antiquity - is preferable, and to say *animal* is enough for it to be known that reference is being made to the immense diversity of the animal kingdom, from elephants to mosquitos.²⁰

The definition of animal is, in this sense, multifaceted and changeable. It is also so semantically vast as to make it practically immeasurable. However, it is useful to focus on the sense, or senses, in which we use

¹⁰ In-depth, vid. GIMÉNEZ-CANDELA, M., *Transición animal en España* (Valencia 2019) 148, 174, 182, 231; GIMÉNEZ-CANDELA, T., *Derecho Privado Romano* (cit.) 19, 20, 165, 166, 168, 169, 170, 171

¹¹ Of the broad literature on property, here I will point out only two studies with a critical perspective and a theoretical range that go beyond the typical normative works: HALPERIN, J.L., *Histoire du Droit des Biens* (Paris 2008), which highlights how the systematisation of property law, the basis of which is in the well-known Gaian classification of things, owed to Rome; and SCHERMAIER, M., *Dominus actuum suorum*. Die willenstheoretische Begründung des Eigentums und das römische Recht, in SZ 134 (2017) 50ss.

¹² CAPOGROSSI COLOGNESI, L., *Das Eigentum in Rom vom Ende der patriarchalischen Ordnung bis zur Blütezeit der Sklavereiordnung*, in *Scritti scelti* (Roma 2010) 299-323; RATHBONE, D., *Rural Economy and Society in Roman Italy* (Cambridge University Press 2004); REMESAL RODRÍGUEZ, J., *Heeresversorgung im frühen Prinzipat. Eine Art, die antike Wirtschaft zu verstehen*. (Münster 2002); SCHEIDEL, W., von REDEN, S. (ed.) *The Ancient Economy* (Princeton 2002); FINLEY, M.I., *Ancient Economy* (California University Press 1999); DUNCAN-JONES, R., *Structure & Scale in the Roman Economy* (Cambridge University Press 1990); WEBER, M., *Wirtschaft und Gesellschaft: Grundriß der verstehende Soziologie/Max Weber; besorgt von Johannes Winckelmann* (Tübingen 1985)

¹³ The Glavany Amendment, so named after one of the members of parliament that presented the reform proposal, made use of a general project to “modernise” French legislation in order to introduce the change in the legal status of animals from things to “êtres vivants doués de sensibilité”: Modernisation and simplification of law and procedures in the domains of justice and internal affairs (No. 1808) <https://www.assemblee-nationale.fr/14/amendements/1808/AN/59.asp> Vid. with a pioneering vision since 2009, MARGUÉNAUD, J.P. *Avant-Propos*, in RSDA 1 (2009) 7ss.; ANTOINE, S., *Le projet de réforme du droit des biens*, in RSDA 1 (2009) 11ss; MARGUÉNAUD, 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.

¹⁴ Vid, *infra* n. 28

¹⁵ I deal with animal sentience as a key element for making improvements to the legal treatment of animals in GIMÉNEZ-CANDELA, M., *Dignidad, Sentiencia, Personalidad: relación jurídica humano-animal*, in *dA, Derecho Animal*, (Forum of Animal Law Studies) 9/2 (2018) 5-16. <https://doi.org/10.5565/rev/da.346>

¹⁶ Article 13 of the Treaty on the Functioning of the European Union : “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”

¹⁷ Calls for attention regarding the absence of a legal definition of animals appears in the works of two authors: LE BOT, O., *La protection de l’animal en droit constitutionnel. Etude de droit comparé*, in RRJ 2007/4, 1823ss.; and FRASCH, P. (*et al.*), *Animal Law in a Nutshell* (Ann Arbor, Michigan 2011) 4ss.

¹⁸ GIMÉNEZ-CANDELA, M., *Transición animal en España* (Valencia 2019) 159ss.

¹⁹ CHAPOUTHIER, G., KAPLAN, F., *L’homme, l’animal et la machine* (Paris 2011) 7s.; 203ss.

²⁰ CHAPOUTHIER, G., *Qu’est-ce que l’animal?* (Paris 2004)

the term animal, as it is a central aspect of what is being discussed here. Irrespective of philosophical and social connotations of the term animal,²¹ when we refer to animals we are referring to a reality that fills our lives, but also to art, science, gastronomy, religion, and to collective imagination and political activity on a global scale.²²

Even though direct and natural, biological perception that it is an animal appears obvious, in legal texts it is not so obvious.²³ For centuries animals have been identified as things in legal texts, due to their juridical status as systematised by man, since the Romans included them in their legal system as *res* (=thing) in property,²⁴ the same way it did slaves. Nowadays, however, this is juridical category a clearly decaying and changing. The transition of animal objectification, active and indisputable for centuries, has in recent decades become a de-objectification process in juridical texts, seemingly unstoppable and of a global nature.²⁵

The etymological connotation of the term animal with *anima* (soul) –²⁶ as obvious as it is essential – is important for understanding that the animated being (with soul), insufflated with the breath of life, also corresponds to human beings, but it is typically used to make reference to all living beings other than plants, which are sessile beings (like certain animals such as coral and molluscs). Meanwhile, animals move and cross the planet just as we do.

The biological attribution of indivisible affiliation between man and animal, which has been an undeniable fact since Darwin,²⁷ has not prevented reluctance from the law to recognise the intelligence of animals and their doubtless capacity for knowledge and awareness.²⁸ Moreover, the refusal to attribute animals anything beyond the physical body capacity to perceive sensorial stimuli, consequently framing them within the category of things (equivalent to inert things), has made this the key point of difference between man (endowed with reason and the ability to speak) and animal. This has, since antiquity, been the dominant perspective in culture and philosophical thought.²⁹ As Pollo recently and wisely observed,³⁰ in the eighteenth century this distinguishing point between man and animal began to fracture; once firmly anchored as the affirmation of certain human abilities such as speech and rationality, this was progressively substituted with what the author calls an “enlightenment of sentiment”, the first representatives of which were Bentham³¹ and Darwin.³²

In legal texts there is no generally valid delimitation of what is to be understood as animal. When in

²¹ Above all, POLLO, S., *Umani e Animali. Questioni di Etica* (Roma 2016); MANNUCCI, E.J., *La cena di Pitagora. Storia del vegetarianismo dall'antica Grecia a Internet* (Roma 2008); ATTERTON P., CALARCO, M., *Animal Philosophy. Ethics and Identity* (London-New York 2004).

²² Vid. the collection of interdisciplinary studies sharing this perspective, AAVV, *Les animaux, in Pouvoirs. Revue Française d'études constitutionnelles et politiques* 131 (2009/4) 1-209

²³ Vid. A recent approach, STAMP DAWKINS, M., *The Science of Animal Welfare. Understanding what animals want* (Oxford 2021).

²⁴ GIMÉNEZ-CANDELA, T., *Derecho Privado Romano* (cit.) 48, 165, 166, 225ss.; GIMÉNEZ-CANDELA, M., *La Descosificación de los animales (I)*, in dA. *Derecho Animal* (Forum of Animal Law Studies) 8/2 (2017) 1ss. <https://doi.org/10.5565/rev/da.318>

²⁵ GIMÉNEZ-CANDELA, M., *La Descosificación de los animales (I)*, in dA. *Derecho Animal* (Forum of Animal Law Studies) 8/2 (2017) <https://doi.org/10.5565/rev/da.318>; *La Descosificación de los animales (II)*, in dA. *Derecho Animal* (Forum of Animal Law Studies) 8/3 (2017) <https://doi.org/10.5565/rev/da.250> ; *Descosificación de los animales en el Código civil español*, in dA. *Derecho Animal* (Forum of Animal Law Studies) 9/3 (2018) <https://doi.org/10.5565/rev/da.361> ;

²⁶ HEUMANN, H., SECKEL, E., *Handlexikon zu den Quellen des römischen Rechts* (11^a ed. Graz 1971) s.v. *anima y animal*

²⁷ BECK, A., *The Biology of the Human Animal Bond*, in *Animal Frontiers* 4/3 (2014) DOI:10.2527/af.2014-0019

²⁸ The Cambridge Declaration on Consciousness, published 7 July 2012, and signed by a group of eminent neuroscientists (Philip Low, Jaak Panksepp, Diana Deiss, David Edelman, Bruno Van Swinderen, Christof Koch), signifies a step forward in the affirmation of animal consciousness. The final paragraph proposes that “The absence of a neocortex does not appear to preclude an organism from experiencing affective states. Convergent evidence indicates that non-human animals have then euroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors. 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/>

²⁹ Vid. summarily, 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).

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

³⁰ POLLO, *Manifiesto per un animalismo democrático* (Roma 2021) 15ss.

³¹ BENTHAM, J., (London, 1748-1832), considered to be the first defender of animal welfare (“Animal Welfare”), in his work, *An Introduction to the Principles of Moral and Legislation*, published in London in 1789 (the year in which the French Revolution broke out) and whose final English edition dates to 2005 (Adamant Media Corporation), reasoned in the following way: “What else is it that should trace the insuperable line? Is it the faculty of reason or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as more conversable animal, than an infant of a day or a week or even a month old. But suppose they were otherwise, what would it avail? The question is not, Can they reason?, nor Can they talk? but, Can they suffer? Why should the law refuse its protection to any sensitive being? The time will come when humanity will extend its mantle over everything which breathes”.

³² DARWIN, C., *On the Origin of Species* (1^a ed. London 1859)

relation to animal welfare or protection, the law does not concern itself with defining what exactly the animal is to which regulations refer. In recent decades, it has been most commonly understood that in a legal sense, animals are “living beings endowed with sensibility” (differentiating them from other living beings) and that each regulation sets out what an animal is in reference to said regulation,³³ coherent with a classification based on the use of or treatment afforded to the animal in said regulation.³⁴

The most general denomination of animals within the administrative, civil and criminal spheres is found in the Pan-Hispanic Dictionary of Legal Spanish,³⁵ which seems ignorant of the most recent scientific knowledge as it emphasises animal irrationality as a distinctive feature, and understands animals in a very unique way:

“Irrational living being that feels and moves by itself”

Just how behind the times this definition is can be seen from the fact that rationality as a prerequisite of the “humanity” of human beings, and so as to differentiate them from the “animality” of animals due to their irrationality,³⁶ is at the core of the Aristotelian distinction between humans and animal, fundamental for affirming man’s superiority over animals.³⁷

Over time, there have therefore been two concurrent arguments, or trains of thought, that the legislature has had in mind when regulating the treatment of animals:

- a) On the one hand, there is the aforementioned traditional focus that bases the difference between man and animal on the affirmation of the animal’s lack of capacities that are declared to be exclusively human (rationality, speech). It is this focus that has enabled the objectification of animals; their treatment as mere things that has quite possibly been able to justify their extreme legal marginalisation and silencing that, while not inevitably assimilating animals with inert things, has however made the way for legal treatment that is exempt of thoughts on specific protection regarding animals and, ultimately, a lax attitude towards animal mistreatment.
- b) On the other hand, there is the focus that is dominant nowadays and is based in the scientific development of biology and animal welfare, which emphasises sentience³⁸ as a meeting point between man and animal. Through the assertion of the importance of sentience, animals cannot be treated as mere things, but must be treated in accordance with their natural requirements as sentient beings.

It can be asserted that sentience is the key argument nowadays, and is the key for understanding the animal de-objectification phenomenon across contemporary legislation.³⁹ In short, sentience has become establish as an anchor that has enabled, and enables, legislatures to introduce changes that endow animals with an improved legal condition, the need for which is argued for as “modernisation”,⁴⁰ “modification”,⁴¹ or “adaptation”.⁴² In reality, considering animals as “sentient beings” in positive law is the definitive argument

³³ A sample can be seen, for example, in Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations, which establishes that, for the purposes of this regulation, “animals” is to be understood as “living vertebrate animals” (Article 2). Another example: according to the European Convention for the Protection of Animals kept for Farming Purposes (10th March 1976), “animals” is understood as those that are raised or kept for the production of food, wool, leathers, fur and other agricultural purposes (...) (Article 1)

³⁴ This occurs, for example, in Law 32/2007, which adds a glossary of animals covered by the regulation: Ley 32/2007, de 7 de noviembre para el cuidado de los animales, en su explotación, transporte, experimentación y sacrificio.

³⁵ Vid. the Pan-Hispanic Dictionary Legal Spanish, published by the Royal Spanish Academy, the Ibero-American Judicial Summit and the Association of Academies of the Spanish Language (ed. 2020 <https://dpej.rae.es/lema/animal>). As well as this definition of animal, this dictionary makes a list of the following 15 types of animal: tame, feral, untamed, animals whose meat is destined for human consumption, working animals, companion animals, for fur, for production, domesticated, domestic, wild, docile, dangerous, wild or indigenous, and live animals.

³⁶ Vid. on the animality-humanity binomial in the legal framework, PETERS, A., Liberté, Egalité, Animalité, in *Transnational Environmental Law* 5/1 (2016) 25ss.

DOI: <https://doi.org/10.1017/S204710251500031X>; BURGAT, F., (dir.), *L’animal dans nos sociétés*, La documentation Française, coll. Problèmes économiques et sociaux (2004) 11ss.

³⁷ Vid. from a biologist’s viewpoint, CHAPOUTHIER, G., KAPLAN, F., *op.cit.* (Paris 2011) 203-212.

³⁸ PROCTOR, H., S., CARDER, G., CORNISH, A. R., Searching for Animal Sentience: A Systematic Review of the Scientific Literature, in *Animals*, 3/3 (2013) 882-906. DOI: <https://doi.org/10.3390/ani3030882>; JONES, R. C., Science, sentience, and animal welfare. *Biology and Philosophy* (2013), 1-30 DOI 10.1007/s10539-012-9351-1; PROCTOR, H., Animal Sentience: Where Are We and Where Are We Heading?, in *Animals* 2/4 (2012) 628-639 DOI: <https://doi.org/10.3390/ani2040628>

³⁹ Vid. supra n. 15

⁴⁰ France: <https://www.assemblee-nationale.fr/14/amendements/1808/AN/59.asp>

⁴¹ Spain: https://www.congreso.es/public_oficiales/L14/CONG/BOCG/B/BOCG-14-B-157-1.PDF#page=1

⁴² Austria: https://rdb.manz.at/document/ris.c.BGBL_OS_19880331_0_0179++; Germany:

for enabling legislatures to protect them.

The animal sentience-protection binomial that has constantly appeared in recent years is justifying the review of the regulations in our codes, and of sectorial animal welfare legislation.⁴³ Moreover, while it has not delved into the meaning of sentience, it has, by invoking it, enabled legislatures to make a novel extension that overcomes the animal-thing impediments. This is the case with the constitutions of the Mexico City,⁴⁴ Ecuador,⁴⁵ and Brazil,⁴⁶ where sentient animals are integrated as part of Mother Nature that provides life and must be preserved and protected. Essentially, sentience is used as a reason for the constitutional protection of biodiversity. Moreover, the invocation of animal sentience is behind certain court decisions that use it to support going beyond the material value of animals as things and rule in their favour,⁴⁷ or, in the criminal ambit, for establishing the application of punishments of the highest magnitude.⁴⁸

Sentience has come to be a universal resource, invoked to improve animal protection, as well as for justifying it. Otherwise, it is an easy element to recognise at a social level, and has worked, and continues to work, as an argument for making society more aware that animals “are like us” and that “we must treat them, at least, like we treat each other”.⁴⁹ Moreover, this simplification of sentience seems to be behind the resounding assertions that “animals are not things”. At its heart, the link between man and animals, while not giving much information on the implications it has, is accepted and spread with great ease: the fortune of democratic animalism⁵⁰ is that these days it flows easily and joyfully stimulates social movements in support of legal changes in favour of animals.

However, despite the popularity of the argument of animal protection based on sentience, the difficulty remains that ‘sentient beings’ is only understood in reference to mammals, birds, reptiles, amphibians, and including recently, at the demand of scientists, fish, cephalopods and molluscs.⁵¹

It is clear that legally speaking there are many animal species that do not fall under the protective umbrella of sentience, and if they do, there appears to be a division established between some animals more sentient than others. I am specifically referring to insects, whose individuality is protected only with great difficulty, considering, for example, the indiscriminate use of herbicides and poisons that cause the mass devastation of butterflies, bees,⁵² and snails,⁵³ and many species that play a significant role in biodiversity conservation. The regulations applicable to these small yet important living and sentient beings is scarce in comparison with those aimed at companion and production animals, even though their economic importance is as great as, or at least comparable with, that of cows, sheep and pigs, if it is indeed the classification of these animals by economic value that makes them more deserving of protection. Without risk of exaggeration, it can be said that, at least up until now, the attention given to them by legislation has been scarce and of a secondary nature.

It is thus worth drawing attention to the fact that, when our civil code refers to animals as things of property, it is only referring to domestic animals. It does not include all animals, but only those to which the

https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl190s1762.pdf#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl190s1762.pdf%27%5D__1624985557468;

Switzerland: <https://www.fedlex.admin.ch/eli/fga/2002/895/de>

⁴³ GIMÉNEZ-CANDELA, M., *Transición animal en España* (cit.) 168-171, 186-191, 201-203, 213-222.

⁴⁴ Article 13, part B, of the Constitution of Mexico City refers to a ‘habitable city’, set out as follows:

B. Protección a los animales 1. “Esta Constitución reconoce a los animales como seres sentientes y, por lo tanto, deben recibir trato digno”: <http://www.cdmx.gob.mx/constitucion> ;

⁴⁵ Art. 71 Constitución de la República del Ecuador:

https://www.defensa.gob.ec/wp-content/uploads/downloads/2021/02/Constitucion-de-la-Republica-del-Ecuador_act_ene-2021.pdf

⁴⁶ Art. 225 Constituição da República Federativa do Brasil: <https://legis.senado.leg.br/norma/579494/publicacao/16434817>

⁴⁷ The recognition of moral damages for the death or injury to an animal during veterinary action or due to an attack by another animal, as opposed to determining damages according to the market value of the animal.

⁴⁸ CUERDA ARNAU, ML (dir.), PERIAGO MORANT, JJ (coord.), *De animales y normas. Protección animal y derecho sancionador* (Valencia 2021); OLMEDO DE LA CALLE, E., *Los delitos de maltrato animal en España* (Valencia 2021).

⁴⁹ BERTUZZI, N., *I movimenti animalisti in Italia. Strategie, politiche e pratiche di attivismo* (Milano 2018); 54ss.; 123ss.; GUAZZALOCA, G., *Primo: non maltrattare. Storia della protezione degli animali in Italia* (Bari-Roma 2018) 34ss.; 54ss.; 165ss.

⁵⁰ POLLO, S. *Manifesto* (cit.) 49ss.

⁵¹ As advocated by the Cambridge Declaration (vid. supra n. 28). Vid. otherwise, in reference to fish, GIMÉNEZ-CANDELA, M., SARAIVA, J.L., BAUER, H., *The legal protection of farmed fish in Europe – analysing the range of EU legislation and the impact of international animal welfare standards for the fishes in European aquaculture*, dA. *Derecho Animal* (Forum of Animal Law Studies) 11/1 (2020); GIMÉNEZ-CANDELA, M., *Tratamiento jurídico de los peces en la UE y en España*, dA. *Derecho Animal* (Forum of Animal Law Studies) 10/4 (2019).

⁵² GIMÉNEZ-CANDELA, M., *Abejas y Covid-19: una regulación jurídica necesaria*, dA. *Derecho Animal* (Forum of Animal Law Studies) 11/4 (2020); GÓMEZ MALDONADO, L.D., *Abejas y otros insectos polinizadores frente al uso indiscriminado de Neonicotinoides y Fipronil en Colombia. Comentarios a la sentencia del 12 de diciembre de 2019 del Tribunal Administrativo de Cundinamarca*, dA. *Derecho Animal* (Forum of Animal Law Studies) 12/2 (2021).

⁵³ GIMÉNEZ-CANDELA, M., *Transición animal en España* (cit.) 39-42.

Roman foundations of the Napoleonic Code refer;⁵⁴ animals that contribute to the support of the family and rural economy, such as beasts of burden, those that provide food or sustenance for the family, and those for protection or for small commerce. ‘Domestic’ means that it lives in and for the house (*domus*), the reason for which the distinguishing point of the category is as flexible as it is difficult to determine. The distinction between domestic and wild animals stems from the affirmation that domestic animals maintain the instinct to return to the place they had left (corral, enclosure, house), going by the name of *animus revertendi*.⁵⁵ These days, as distant as the invocation of this day-to-day occurrence, formed on the basis of the most direct observation of animal behaviour, seems to us, it is still used to determine whether or not an animal is included in the category of animal considered to be a thing in the Civil Code.

No matter how vague, imprecise and obsolete it may be, the truth is that the category of domestic animals is that which the Civil Code regulates with all its sections and articles. This much is clear. It is also clear that, if the animals of which the Civil Code speaks are domestic animals, the regulation of other animals (which are numerous) remain at the expense of other regulations that have progressively been incorporated in the *corpus* of our legislation. In short, the main legal focus on animals in Spain has come from the abundance of European animal welfare legislation, at both state and community level.⁵⁶ This could be no other way, given the condition of Spain as a member of the EU.

2. The key aspects of the Civil Code modification proposal. De-objectification

The proposal to modify the Civil Code is currently in a transition phase,⁵⁷ following an abrupt interruption by well-known political circumstances. I thoroughly addressed this in an article published by this very journal in 2019.⁵⁸ I will allow myself to transcribe a personal reflection I made back then that has come to be premonitory:

“That the reform of the legal status of animals in the Civil Code has not resulted in its passing is, in my opinion, one more step on a journey that it will be hard not to resume with the new Parliament emerging following the vote on 28th April 2018. The propitiating elements remain in force. Society has changed its attitude towards animals, science is increasingly offering consolidating evidence in favour of animal sentience, the de-objectification movement is a global reality perceptible in many countries and, lastly, animal welfare legislation remains active and binds Spain as a Member State that cannot disregard its obligations.”

In brief, the key aspects that sustained the 2017 reform proposal⁵⁹ have again been a driving force for this proposal, virtually unaltered and persistent regarding the will to endow animals with a new legal status as sentient, or sensitive, beings, as also indicated.⁶⁰ The four topical axes to which I will refer are the following:

- a) The change in social awareness towards animals
- b) Increasingly widespread scientific advances that affirm animal sentience
- c) The global de-objectification movement
- d) Animal welfare legislation that binds Spain as a member of the EU

⁵⁴ GIMÉNEZ-CANDELA, T., Derecho privado romano (cit.) 168.

⁵⁵ On *animus revertendi*, which Roman chickens seemed to lack, or, at least, Roman jurists laboriously argued whether they could be domestic, as they didn’t seem to return after leaving the corral, vid. GIMÉNEZ-CANDELA, T., Derecho privado romano (cit.) 169, 189.

⁵⁶ VILLALBA, T., Código de Protección y Bienestar Animal (BOE 2021):

https://www.boe.es/biblioteca_juridica/codigos/codigo.php?id=204_Codigo_de_Proteccion_y_Bienestar_Animal&modo=2

⁵⁷ In its session on 20 April 2021, the Plenary Session of the Congress of Deputies approved the consideration of the legal proposition to modify the Civil Code, the Mortgage Law and the Civil Procedure Rules, on the legal regime of animals, presented by the Socialist Parliamentary Group, published in the «BOCG. Congreso de los Diputados», series B, no. 157-1, of 26 March 2021. https://www.congreso.es/public_oficiales/L14/CONG/BOCG/B/BOCG-14-B-157-1.PDF#page=1

⁵⁸ GIMÉNEZ-CANDELA, M., Animales en el Código civil español: una reforma interrumpida, dA. Derecho Animal (Forum of Animal Law Studies) 10/2 (2019) - DOI <https://doi.org/10.5565/rev/da.438>

⁵⁹ Diario de Sesiones del Congreso de los Diputados, pleno y diputación permanente, Año 2017, N° 29, XII Legislatura, sesión plenaria N° 27, martes, 14 de febrero de 2017, págs. 43-50. http://www.congreso.es/public_oficiales/L12/CONG/DS/PL/DSCD-12-PL-29.PDF; BOGC de 13 de Octubre de 2017 (122/00034) Proposición de Ley de modificación del Código Civil, la Ley Hipotecaria y la Ley de Enjuiciamiento Civil sobre el régimen jurídico de los animales.

http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-167-1.PDF#page=1

⁶⁰ DE TORRES PEREA, JM., El nuevo estatuto jurídico de los animales en el Derecho civil: de su cosificación a su reconocimiento como seres sensibles (Madrid 2020); rec. de CERDEIRA BRAVO DE MANSILLA, Entre personas y cosas: los animales, ¿como *tertium genus*?, in Revista de Derecho Privado, 3 (2020) 113-128.

The legal proposal to modify the Civil Code, the Mortgage Law and the Civil Procedure Rules precisely echoes these aspects to create what could perhaps be called a new civil regime aimed at animals.⁶¹ The text that has now been approved brings together the failed proposal – unanimously voted twice in Parliament –⁶² with a few differences. This time has been different, as it has been supported by a majority of parliament members with certain severe discrepancies.⁶³ However, the aforementioned project to modify the legal status of animals in the Civil Code, different than the former proposal, remains underway. It remains to be seen how the final text turns out, if, indeed, it ultimately gets passed. All that can be said here is that, as is the way, the amendment process could formally and substantially alter the text.

In accordance with the aforementioned core themes, I will detail some of keys for understanding the new proposal. I will once again refer to the on-going Civil Code modification (which I proposed in 2009, but it was against the current for the juristic mentality of the time) as the supporting axis of the change in treatment towards animals that should have been recognised.⁶⁴

As we are still awaiting the final text, the reference will in this case be deliberately brief. However in previous works I've published,⁶⁵ far more detailed, broad and complete reflections on the general frame of reference are made, which is the central focus right now: the change in the legal status of animals in the Civil Code.

- a. **The change in social awareness towards animals.** Society's change in attitude towards the treatment of animals is noticeable from the modification of certain social and cultural habits over the last ten years, such as the refusal to animal mistreatment.⁶⁶ This tendency has recently been expressed through the obligatory inclusion of “education in empathy towards animals”, which appears in the Education law approved by Parliament in December 2020, establishing among the general principles of the education system: “knowing and valuing the animals closest to human beings and adopting types of behaviour that favour empathy and caring”.⁶⁷ No further detail has been provided as to what is to be understood by “animals closest to human beings”, nor as to whether this refers to physical proximity (companion animals) or biological proximity (mammals), however, in any case, it is worth pointing out that this is the first time that “educating on the values of empathy towards animals” figures among the objectives of the Spanish education system. Beyond the climate of public opinion that favours a change in the legal status of animals, what the text currently in process offers is the establishment of certain legal changes that deserve to be highlighted, independently of whether they will remain in the final text. As mentioned, I only detail certain aspects here.
- b) **Increasingly widespread scientific advances that affirm animal sentience.** Animals appear as a separate category under the heading of property, which proves it is not just about offering certain improvements in the civil treatment of animals, but recognising their individuality separate from that of goods, which avoids any confusion between things (and nothing more) and animals. This is not so much about relating a new category referring to animals (a type of “*tertium genus*”), but expressing the natural difference between animals and things in the text, which could be considered a “*sui generis*” category, such as that which appears in many texts by authors from classic antiquity.

⁶¹ Vid. in this very volume, the editorial by CERDEIRA BRAVO DE MANSILLA, G., ¿Un nuevo Derecho civil para los animales?: Elogio (no exento de enmiendas) a la nueva Proposición de Ley sobre el régimen jurídico de los animales en España, in dA. Derecho Animal (Forum of Animal Law Studies) 12/2 (2021).

⁶² Vid. supra n. 59.

⁶³ Diario de Sesiones del Congreso de los Diputados, pleno y diputación permanente, Año 2021, N° 96, XIV Legislatura, sesión plenaria N° 92, martes, 20 de abril de 2021, págs. 17-33. https://www.congreso.es/public_oficiales/L14/CONG/DS/PL/DSCD-14-PL-96.PDF#page=26

⁶⁴ Two successive MINECO investigation projects provide a complete account of its development. Dos Proyectos de investigación sucesivos, concedidos por el MINECO, dan cumplida cuenta de esta trayectoria. I am referring to the projects entitled: “Estatuto jurídico de los animales: orígenes, dificultades y nuevas expectativas en un mundo globalizado”. Ministerio de Economía y Competitividad (MINECO DER2010-21301-1) 2011-2013 and “Estatuto jurídico de los animales: orígenes, dificultades y nuevas expectativas en un mundo globalizado”. Ministry of Economy and Competitiveness (MINECO DER2015-69314-P) 2015-2019. The following report gives an account of the published works: “El ICALP a favor de la descosificación jurídica de los animales” (Junio 2021) <https://www.derechoanimal.info/es/icalp/actividades/2021/el-icalp-favor-de-la-descosificacion-juridica-de-los-animales>

⁶⁵ GIMÉNEZ-CANDELA, T., La Descosificación de los animales (I) y II (cit.) 1ss.; La Descosificación de los animales en el Cc. Español (cit.) 7-47; Animales en el Código civil español: una reforma interrumpida, in dA. Derecho Animal (Forum of Animal Law Studies) 10/2 (2019) 7-18. <https://doi.org/10.5565/rev/da.438>

⁶⁶ GIMÉNEZ-CANDELA, M., Transición animal (cit.) 35ss.; 83ss.

⁶⁷ Modificación del apartado i) del art. 17. Ley Orgánica 3/2020 por la que se modifica la Ley Orgánica 2/2006, de 3 de mayo, de Educación, BOE n°340, de 30 de diciembre de 2020 <https://www.boe.es/eli/es/lo/2020/12/29/3>

It is interesting that there is no change between the explanation of the motives of the current proposal and the 2017 proposal, both of which consist of three paragraphs. The first (I) makes reference to the general European and community framework, the spirit of which inspires and justifies the proposal, which, briefly, expressed, is nothing more than an obligatory reference to the animal de-objectification movement that began towards the end of the 80s in Austria, Germany and Switzerland.⁶⁸ In the codes of these countries, the change in the legal status of animals was established in the negative form in which animals are not things (“Nicht Sachen”). This formulation was literally repeated in the Catalonian Civil Code,⁶⁹ which advanced through this to become the current Civil Code reform proposal, which continues to consider animals as moveable things. Later on, in 2015, the French Civil Code made an important step forward, undoubtedly influenced by advances in animal welfare science regarding sentience and the inclusion of sentience as a mandatory principle for all EU member states, reflected in Article 13 TFEU.

Effectively, the Napoleonic Code followed the revolutionary imprint that it presaged,⁷⁰ and, on the topic of animal status, it split from the negative formulation, and instead affirmed that animals are “...êtres vivants doués de sensibilité”.⁷¹ From then on, the rest of the European and Latin-American codes that modified the legal status of animals did so with the same affirmation of sentience, for example, the codes of Portugal, Lichtenstein, the Czech Republic and Colombia.

The second paragraph (II) sets forth how the reform was inspired by a “protective criterion” towards animals, according to which it must be established that animals, while subjects to the regime of property, have a different nature to things and goods; an affirmation to be fixed as “a principle that must take priority when interpreting the whole code”. This must be recognised as an ambitious proposition and a peculiarity that has caught the attention of distinguished jurists.⁷² In this sense, the Civil Code Article 333 reform is established with the following content:⁷³

- “1. Animals are living beings endowed with sensibility. The legal regime of goods and things will be applicable to them only in as much as it is compatible with their nature and with the provisions intended for their protection.
2. The owner, possessor or titleholder of any right over an animal must exercise their rights and their duty of care regarding the animal’s condition as a living being endowed with sensibility, assuring its wellbeing in accordance with the characteristics of its species and respecting the limitations established in this and other applicable regulations.
3. The expenses intended for the cure and care of an animal injured or abandoned by a third party are recoverable by the payer, proportionate to the amount awarded, even when it exceeds the value of the animal.
4. In the case that injury to a companion animal results in its death or serious harm to its physical or psychological health, the owner and those who live with the animal have the right to compensation that includes the moral damages suffered”.

Just as in other European codes, paragraphs 1 and 2 of the new revision of Art. 333 of the Civil Code establish a duality of treatment towards animals: on one hand, their condition as things of property, and on the other, the restriction to the traditional principle of unlimited use and abuse (*ius abutendi*) by the owner in their use and enjoyment of their property,⁷⁴ which also grants them the possibility to destroy it (physical disposition). In the strictest sense, this sets a limit to the abilities inherent to property, imposing a limit on the

⁶⁸ GIMÉNEZ-CANDELA, M., La Descosificación de los animales en el Cc. Español (cit.) 19ss.

⁶⁹ Art. 511-1.3 CCCat: “Los animales, que no se consideran cosas, están bajo la protección especial de las leyes. Solo se les aplican las reglas de los bienes en lo que permite su naturaleza”. <https://www.boe.es/eli/es-ct/l/2006/05/10/5/con>

⁷⁰ GIMÉNEZ-CANDELA, T., Una nueva Revolución Francesa: la modernización del Code civil, dA. Derecho Animal (Forum of Animal Law Studies) 6/1 (2015) 1-2. <https://doi.org/10.5565/rev/da.270> ; LELANCHON, L., La reforma del estatuto jurídico civil de los animales en el Derecho francés, in dA. Derecho Animal (Forum of Animal Law Studies) 9/3 (2018) <https://doi.org/10.5565/rev/da.344>

⁷¹ Nor in French is the term equivalent to the English “sentience” or “sentient beings”, for which reason the legislature had to resort to a linguistic turn to the reality that animals are not inert things. However, in reality, sentience does not express the same as “sensitivity”, neither in French nor Castilian. For this reason it would be desirable for these terms to soon be accepted by their respective dictionaries in France and Spain.

⁷² ROGEL VIDE, C., Personas, animales y Derechos (Madrid-México 2018); Los animales en el Código Civil (Madrid 2017); Personas, animales y androides, in RGLJ, 4 (2017) pp. 681-693

⁷³ Vid. supra n. 57

⁷⁴ Vid. a recent application by CERDEIRA BRAVO DE MANSILLA, Clínicas veterinarias y paseos con animales de compañía ante el COVID-19: una actividad esencial para el bienestar del animal como ser sintiente, dA. Derecho Animal (Forum of Animal Law Studies) 11/2 (2020). DOI <https://doi.org/10.5565/rev/da.499>

proprietor's use of animals so that it does not go against their natural requirements as "sentient beings".

The formulation of § 903 BGB⁷⁵ reads to the same effect. I here transcribe the cited paragraph, with my own translation from German:⁷⁶

§ 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. 2. Der Eigentümer eines Tieres hat bei der Ausübung seiner Befugnisse die besonderen Vorschriften zum Schutz der Tiere zu beachten.

§ 903 Powers of the owner

The owner of a thing can, unless the law or rights of third party oppose this, treat the object as they like and exclude others from interfering. 2. When exercising their powers, the owner of an animal must respect the special animal protection regulations.

As certain respected scholars have observed,⁷⁷ since 1990 this restriction on the proprietary rights over animals has been linked with the passing of animal de-objectification in accordance with §90a BGB,⁷⁸ regarding the specific animal protection regulations. This constitutes a forwarding of all animal welfare legislation that, in Germany, as it is well-known, is characteristically its own law.⁷⁹

The reference to the animal owners' right of compensation for moral damages that appears in part 4 of the revised proposal for Art. 333 of the Civil Code is undoubtedly worth highlighting. Here, we find ourselves awaiting legislative that would guide and support many sentences that have been ruled this way for years.⁸⁰ In this sense, the compilation of and commentary on sentences ruled in Catalonia prior to the proposal to modify the legal regime of animals to which I have been referring is particularly interesting.⁸¹

a) The global de-objectification movement

The works I've dedicated to de-objectification in recent years have widely and reasonably developed the argument,⁸² hence my remittance to what I have already said. At this point, I wish only to make a few points regarding the global ambit of the animal de-objectification movement into which the proposal to modify the legal regime of animals in our Civil Code fits, as cited by the explanation of motives itself in the second part (II). The citation of the continental codes that have reached this de-objectification finally places the Spanish legislature on a path of which there is no turning back, as in 2006, on home soil, the Catalan Civil Code united with the Austrian, German and Swiss codes in declaring animals not things.⁸³

Also, the animal protection laws enacted by the autonomous communities, through the use of the powers granted by the Constitution on the subject of animal welfare,⁸⁴ constitute an advance in the legislatures will to de-objectify. On this point, it is enough to mention Law 7/2020, of 31st August, on the Welfare, Protection and Defence of the Animals of Castilla-La Mancha,

⁷⁵ § 903 BGB: http://www.gesetze-im-internet.de/bgb/_903.html

⁷⁶ Translator's Note: The translation from German to Spanish was made by the author, the result of which was then translated to English. The Spanish version reads as follows: § 903 Facultades del propietario: El propietario de una cosa puede, salvo que la ley o los derechos de terceros se opongan a ello, tratar el objeto como le plazca y excluir a los demás de cualquier interferencia. 2.El propietario de un animal deberá, en el ejercicio de sus facultades, respetar las normas especiales de protección de los animales.

⁷⁷ SCHERMAIER, M., Der zivilrechtliche Eigentumsbegriff in historischer Perspektive: Die beiden Gesichter des § 903 BGB, in BRINKMANN, M., SHIRVANI, F., *Privatrecht und Eigentumsrecht* (Baden-Baden 2016), 23-62

⁷⁸ §90^a BGB: "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 provisions applicable to property will be applied to them in the same way, unless there is a provision to the contrary" / "Los animales no son cosas. Están protegidos por leyes especiales. Las disposiciones aplicables a la propiedad se les aplicarán por igual, salvo disposición en contrario". http://www.gesetze-im-internet.de/bgb/_90a.html

⁷⁹ Art. 23 GG: https://www.gesetze-im-internet.de/gg/art_23.html; Art. 25: https://www.gesetze-im-internet.de/gg/art_25.html; Art. 31 GG: https://www.gesetze-im-internet.de/gg/art_31.html

⁸⁰ Vid. the first sentence given in Spain in favour of recognising moral damages for the death of a dog, ruled by Judge Guillermo Arias, who also wrote a commentary on the case in a type of interesting self-assessment. SJPI Barcelona 466/07 de 16 de mayo; ARIAS, G., Comentario crítico sobre la Sentencia de las actuaciones que se siguieron en el Juzgado de Primera Instancia núm. 32 de Barcelona con el número de autos 466/07 (16.5.2007) in dA. *Derecho Animal* (Forum of Animal Law Studies) 1/1 (2010) 1ss. <https://doi.org/10.5565/rev/da.236>

⁸¹ OLIVERA OLIVA, M., Crisis de pareja de hecho y animales de compañía. Sentencias en Cataluña, anteriores a la propuesta de reforma del Código Civil de 20 de abril de 2021, dA. *Derecho Animal* (Forum of Animal Law Studies) 12/2 (2021).

⁸² Vid. supra n. 25

⁸³ Vid. supra n. 15

⁸⁴ Art. 148 CE: <https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229>

which modernises Law 7/1990, of 28th December, on the Protection of Domestic Animals.⁸⁵ In Article 2 it specifies the quality of animals as sentient beings and the duty this establishes to protect and safeguard their welfare.⁸⁶ In other words, the de-objectification of animals has gone hand in hand with two key elements: the affirmation of sentience by the scientific community, and the application of this principle to animal welfare legislation, from which EU member states may not withdraw (Art. 13 TFEU).

In this sense, by applying animal welfare principles through legislation, the globalisation of animal protection, coupled with the de-objectification of animals, goes beyond the European ambit,⁸⁷ reaching countries such as China, as highlighted by the most recently published studies.⁸⁸

b) Animal welfare legislation that binds Spain as an EU member state

The explanation of motives invokes the protective ambition that leads this Civil Code modification, taking issue with the application of mandatory European animal welfare legislation. This aspect must be highlighted for the way it forms a direct relation with the change in animal legal status, which supplements the Civil Code reform proposal with a whole *corpus* of European legislation basically referring to production animals. This is something that, with a certain irony, has been named as treating animals as “products or sentient merchandise”.

The observation I’ve made on which animals the Civil Code⁸⁹ applies to and, therefore, to which animals the proposed change of legal status would apply, here finds confirmation and its principle of interpretation. The application range of the reform in process is linked to the way in which one articulates Article 13 TFEU, which restricts protection the protection of animals, as sentient beings, to certain activities specifically enumerated in the first paragraph (agriculture, fisheries, transport, interior market, technological research and development), while in the second, excludes certain activities, and thus certain animals, from this sentience-based protection (legal and administrative provisions and the customs of member states relating particularly to religious rites, cultural traditions and regional heritage). The gates opened by Art. 13 TFEU paragraph two are plagued with unknowns and difficult questions, as it establishes two categories of sentient animals: those mandatorily protected in the EU due to the fundamentally industrial and economic activities they are involved in; and those that are not, and thus receive protection subordinate to a host of activities in which respect for traditions and culture are prioritised as superior criteria.⁹⁰

In principle, the Code deals with domestic animals, which includes production and companion animals, but the legal status modification in process has caused doubts as to whether fish, molluscs and cephalopods in fish farms will become protected,⁹¹ as well as bees on bee farms,⁹² as these are activities that could fit into the first paragraph of Art. 13 TFEU.

There are other aspects to this, but I will not deal with them here and now; aspects traditionally linked with the rural character of the Civil Code in relation to animals, as with everything related to produce, immovable by destination. It is preferable to leave commentary until the reform proposal has been consolidated in an approved text.

In short, and as a summary of what has been said, the key aspects of the proposal to modify the legal regime of animals in the Civil Code can be set out by the following seven points:⁹³

1. It is not a “nominalist” modification (a mere change, or the inclusion of the word, or reference to ‘sentience’, but one the aspect and effect of a process: the Civil Procedure Rules and the Mortgage Law
2. Inability to seize

⁸⁵ Comunidad Autónoma de Castilla-La Mancha «DOCM» núm. 1, de 2 de enero de 1991 «BOE» núm. 93, de 18 de abril de 1991 Referencia: BOE-A-1991-9406: <https://www.boe.es/buscar/pdf/1991/BOE-A-1991-9406-consolidado.pdf>

⁸⁶ Vid. GISIE, L., Comentario jurídico de la Ley 7/2020, de 31 de agosto, de Bienestar, Protección y Defensa de los Animales de Castilla-La Mancha. [2020/6154] - Diario Oficial de Castilla-La Mancha de 07-09-2020, in dA. Derecho Animal (Forum of Animal Law Studies) 12/1 (2021). DOI <https://doi.org/10.5565/rev/da.556>

⁸⁷ PETERS, A., Animals in International Law. Hague Academy of International Law. Offprint from the Recueil des cours, 140 (Leiden-Boston 2020) 345ss., vid. la edición de bolsillo aparecida en 2021, Animals in International Law, *The Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye*, 45 (Leiden-Boston) 2021.

⁸⁸ LI, P., Animal Welfare in China (Sidney University Press 2021)

⁸⁹ Vid. supra sub.I.

⁹⁰ GIMÉNEZ-CANDELA, M., Transición animal en España (cit.) 35ss., 83-105.

⁹¹ GIMÉNEZ-CANDELA, M., M., SARAIVA, J.L., BAUER, H. (cit.) 65-119. <https://doi.org/10.5565/rev/da.460>

⁹² Vid supra n. 52

⁹³ ERNIQUIN, T., Les animaux vivants et la libre circulation: un statut de marchandises sensibles, in *Revue des Affaires Europeennes* 24 (2017) 49ss.

3. Shared tenancy of domestic animals
4. Animals as sentient beings, connection with Art. 13 TFEU and Spanish animal welfare legislation
5. The question of produce
6. The question of things immovable by destination
7. The criminality of animal mistreatment, included in the Civil Code

3. The possible effects of the modification in process

Two of the changes of the planned modification to the legal regime of animals that have most attracted the attention of scholars and society alike are the declaration excluding the seizure of animals,⁹⁴ and the power awarded to judges to attribute shared tenancy of companion animals in the case of marital or partnership crises.⁹⁵ Regarding both aspects, knowing how the finalized text will turn out must wait until it has been passed following any possible further revision and commentary. For now, I would just like to note that both cases, in as much the inability to seize animals, as the powers conferred upon judges to award shared tenancy of companion animals in cases of family crises, presuppose an affectionate relationship or bond between human and animal. The inclusion of this special affectionate relationship in the reform highlights its coherence with the spectrum with which this question has been regulated by other central-European codes (Austria, Switzerland and Germany), which is something that I have previously dedicated attention to and to which I remit.⁹⁶

If the modification of the legal regime of animals turns out a success, the possible extensions *de lege ferenda* that could cautiously be predicted can be set out concisely as follows:

1. 1.A new range of sentences for the judiciary
2. New regulations in the procedural realm (Civil Procedure Rules) and the for the Mortgage Law
3. Changes to family structure (bond of affection)
4. Revision of animal welfare legislation (fish, molluscs and cephalopods, for example)
5. Review of potentially dangerous dogs legislation
6. Review of public show regulations (fairs, festivals, bullfighting)
7. Protection of insects (neither considered nor protected, but “managed”)
8. A pro-animal law manifesto Un Manifiesto Pro Derecho Animal:
 - a) Animal law as an instrument for democratic **coexistence** (citizenship)
 - b) Animal welfare as a **commitment** within sustainable development (states / state / policy)
 - c) Animal law studied as a **paradigm** of social change (academia)
 - i. Law faculties
 - ii. Veterinary faculties
 - d) Veganism as a **reconsideration** of the relationship between humans and animals (new spaces for coexistence)
 - e) Information labelled in society as an **indicator** of the transfer from academia to business

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