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The de-objectification of animals (II)

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The majority of European Civil Codes agree with the legal qualification of animals as things of property (*res*), due to the Roman legal tradition that permeates European Private Law as its historical basis, to which we have already referred.[1] Throughout the member States of the European Union (EU), many European Directives have been integrated and ratified, as well as Conventions made by the European Council, which, in a more explicit way, have pushed for, in all the countries within the Union, decidedly protectionist legislation regarding animals,[2] inspired by the ever increasing idea – brought together by the Treaty of Lisbon, the so-called European Constitution[3] - of animals as sentient beings, meaning that, as a result of this, their treatment and regulation by the Law is in compliance.

The result is a legal regime whose supremacy continually, through the national Civil codes, boasts a status awarded to animals; a phenomenon that, as it is well known, depends on the particular origins of the European and Latin-American Codification, but that, due to the European Animal Welfare legislation and the progressive transformation of attitudes of society regarding animals, has led to the Civil Codes of many European countries (and those outside the ambit of the Union, such as New Zealand, Canada, and Colombia) changing the legal status of animals to "sentient beings".

The question that must be asked is that of the opportunity to introduce, now, a change regarding the legal status of animals in our Civil Code – the "de-objectification of animals - just as society, through its representation by the Congress of the Deputies, has unanimously endorsed.[4] It is clear that the de-objectification of animals is a movement that seems to have come to stay. It is not merely a style or a trend, [5] but an awakening of legal consciousness when dealingwith the treatment that should be enjoyed by animals in society in the CXXI.[6] The first steps toward this were taken by the United Kingdom.[7]
Animal sentience, however, is not as obvious for the legislator, and therefore perhaps it may be worth taking the time to consider:

- The possible implications
- Its introduction into legal texts up until now
- What could be hoped for from an adequate collaboration between scientists and jurists

1 GIMÉNEZ-CANDELA, T., The De-objectification of Animals (I) (http://www.derechoanimal.info/eng/page/5108/the-de-objectification-of-animals-(i))
2 N. Pedersen, European Animal Welfare Laws: Past, Present and Future, in Animal Law, 2009 (https://www.animallaw.info/intro/eu-us-comparative-cruelty-laws-2003-present)
3 TFUE, in http://noticias.juridicas.com/base_datos/Anterior/r3-ttce.html
4 Codina, JI., Unanimity in the Congress of Deputies to urge for the reform of the Spanish Civil Code to recognize animals as sentient beings (http://www.derechoanimal.info/eng/page/5093/unanimity-in-the-congress-of-deputies-to-urge-for-the-reform-of-the-spanish-civil-code-to-recognize-animals-as-sentient-beings)

Put another way:

- when we speak of legally recognising animals as sentient, what are we trying to say? What possible results applicable to legal texts must we jurists consider?
- how must we reflect, in the legal texts, the capacity human response regarding animals, if we recognise them as beings that 'feel' in the same way that we feel?
- what specific results must we consider and demand, in terms of both public and private responsibility, for the affirmation of animal sentience by the legal texts?

Reviewing briefly how the notion of animal sentience was introduced as a standard of treatment toward animals, reveals the idea that animals feel to be very old and to have had an influence on the spreading of respectful treatment toward animals,[8] however it does not explain how a concept accepted by science to be in duality with the development of a Science of Animal Welfare did not appear as a veterinary speciality until the CXX.[9]

In the legal arena, the EU owes to the United Kingdom the important creation of the term "Animal Welfare," the form of its application through the so-called Five Freedoms, which govern the regulation of the basic elements in the life of an animal, and, in recent decades, the inclusion of the term "sentient beings" as a standard of animal treatment, which entails the recognition of their capacity not only to feel physical pain, but also suffering, pleasure, and enjoyment. Essentially, the EU legislation on animals (production, experimentation, transport, and shows)[10] over the last 40 years could not be understood without the decisive intervention and creativity of the United Kingdom.[11]

The next step (clear, although not final), has brought with it the fixing of the term "sentient beings", as an term expressly accepted by the Law to indicate the fundamental elements of wellbeing whose regulation, application, respect for and sanctioning of – in case of default – must involve, primarily, the member States. Ultimately, the concept of Animal Welfare would result from the application of animal sentience as a regulatory parameter of a dignified life (and death) of an animal, understood to be a public responsibility.

Since the term began to be used, this has been drawn together succinctly by the legal texts by the programmatical rules of Treaties and Protocols, as well as through the application of public policy on Animal Welfare in areas in which the EU has performed a decisive role.[12] By 1974, in fact, a Directive by the Council of Europe recommended avoiding the unnecessary suffering of animals at the moment of slaughter.[13] For this reason, the first legal transposition

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5 Hall, B.-Arellano, S.-Ramírez Barreto, C., En memoria de Tom Regan (http://www.derechoanimal.info/esp/page/5109/en-memoria-de-tom-regan)

6 Vid. GIMÉNEZ-CANDELA, T., An Overview of Spanish Animal Law, in FAVRE, D. & GIMÉNEZ-CANDELA, T. (Ed.), Animales y Derecho (Valencia 2015) 211ss.

7 GIMÉNEZ-CANDELA, T., Brexit y los animales. El legado del Reino Unido al Derecho Animal (http://www.derechoanimal.info/esp/page/4752/brexit-y-los-animales-el-legado-del-reino-unido-al-derecho-animal)

8 DUNCAN, I.J.H., The Changing Concept of Animal Sentience, in Applied Animal Behaviour Science 100 (2006) 11ss.

9 FRASER, D., Understanding Animal Welfare. The Science in its cultural context (Oxford 2008).

10 VILLALBA, T., 40 años de Bienestar Animal. Guía de la legislación comunitaria sobre Bienestar Animal (Madrid 2016).

11 Cfr. n.7.

12 Gavinelli, A.-Lakestani, N., Animal Welfare in Europe (http://www.derechoanimal.info/esp/page/1588/animal-welfare-in-europe)

13 Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter, Official Journal L 316, 26 November.1974, p. 10–11 (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31974L0577)

involving animal sentience consisted not in a rule creating an obligation (that animals don't suffer during slaughter), but in the admission that they do, in fact, suffer and that, for this reason, any unnecessary suffering should be avoided.

The Directive to which we refer does not create sanctions for causing the suffering of animals (as, technically, this would not be possible), but it extends the limit of suffering (although the extent of the limit is not mentioned) at the moment of slaughter. Even though it is certain that a Directive can not impose sanctions for the breach of its terms, it is interesting to see how the legal language has been extremely cautious at the time of effectively protecting the animals facing suffering. In essence, the Law employs the term "mistreatment" toward certain animals, and this is sanctioned appropriately, while for other animals, the term "unnecessary suffering" is used. Therefore, there appear to be great lacunas in animal protection that cannot be covered only by the affirmation in the texts that the animals are "sentient beings", as has been the case with the latest modifications of the French and Portuguese Civil Codes when changing the status of animals from things of property.

From a normative perspective, one could hope, from the application of animal sentience, for a significant improvement in constitutional, civil, administrative and criminal legislation. There are various programmatical texts of the EU that have, over the last 40 years, recognised animal sentience as a guide for Animal Welfare legislation,[14] but it was not until 2009, in art. 13 of the TFEU, the Treaty of the Lisbon, when an obligation to treat animals as "sentient beings" in domestic legislation was imposed on the Member States. This article also applies to Spain, and is binding on the State.

In said article 13, it is stated that, in a limited sense, animals are "sentient beings", which differentiates them from being considered things of property.[15]

Article 13 expressly states:

> "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."[16]

The clarity of art. 13 regarding this new condition of animals within the European ambit[17] has not gone unnoticed by doctrine across the rest of the world. In this sense, it is important to note that the EU has decidedly wagered for the consideration of animals as sentient beings in its legislation on Animal Welfare since 1997 in the Treaty of Amsterdam,[18] which is the first legal text in which the term "sentient beings" appears explicitly in relation to animals.

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14 BROOM, D.M., Sentience and Animal Welfare (Boston 2014)136ss.

15 ALONSO, E., El art.13 del Tratado de Funcionamiento de la Unión Europea, in FAVRE, D.& GIMÉNEZ-CANDELA, T. (Ed.), Animales y Derecho (Valencia 2015) 18ss.

16 Vid. BOE art. 13 TFUE. (https://www.boe.es/buscar/doc.php?id=DOUE-Z-2010-70006)

17WARTEMBERG, M., Art. 13 Lisbon Treaty/TFUE – Historical, Constitutional and Legal Aspects, in FAVRE, D. & GIMÉNEZ-CANDELA, T. (Ed.), Animales y Derecho (Valencia 2015) 353ss.

18Treaty of Amsterdam (http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf).

A clear example of Union policy, established under the animal sentience paradigm, is the Directive 2003/15/CE,[19] concerning animal experimentation, that was reflected in Directive 76/768/CEE,[20] a "testing ban" prohibiting animal experimentation for domestic products. This European regulation that, since 2009, has comprised a prohibition of the sale of cosmetic products that have been tested on animals, was applied in Spain 10 years later through the Royal Decree 53/2013 of the 1st of February.[21] It is interesting to point out that, as much in the programmatical part of the cited regulations as in the regulatory text, animals are referred to as sentient beings, with the prick of an injection marking the pain threshold for experiments.

Although dated, this text is a valuable example of the modifications that could be hoped for from the adaptation of our domestic regulations, and particularly for the contents of the Civil Code, relating to animals and their condition as "sentient beings".

However, if the affirmation of animal sentience remains in the form of a negative declaration stating animals not to be things, we will not have advanced much, as demonstrated by the examples of such countries as Austria, Germany, and Switzerland, where the 'negative affirmation' -worth the paradox!- that animals "are not things" (="nicht sachen") has let to inefficient methods for bringing it into effect, and to the declaration of judges that the denial that animals are things results inapplicable, for example, at the time of impeding a seizure of company animals. In other terms, the affirmation of animal sentience in legal texts must go further than just a statement on make-up, to the reality of the consequence-free abuse committed against animals, and must be consistent with the responsibility that, as much for citizens as for the States involve them in the fight for a fundamental respect for animal interests. By sayings interests, I refer to those so basic and obvious as life and dignity, without having to die for the amusement of others.
In summary,

To de-objectifying is not to theorise on the nature of animal suffering, or cautiously establish the boundaries of "unnecessary suffering", but to effectively protect.

To de-objectify is to give equal treatment to all animals; this doesn't mean attributing them the basic subjective rights that are afforded to human beings, but means recognising their interests with the same level of urgency afforded when protecting the interests of human beings.

To de-objectify is to educate about all animals, including those deemed to be "pests" and those that, at the moment, remain outside the realm of protection in lieu of being considered wild Fauna (or savage).

19Directiva 2003/15/CE (http://www.derechoanimal.info/bbdd/Documentos/84.pdf).
20Directiva 76/768/CEE (http://eur-lex.europa.eu/legal-content/ES/TXT/?uri=URISERV%3Al21191)
21RD 53/2013 de 1 de febrero (http://www.derechoanimal.info/bbdd/Documentos/1029.pdf)

For these reasons, the task of de-objectifying animals is neither trivial nor circumstantial; it is a task that appeals to the responsibility of the State, to the responsibility of citizens, to the responsibility of Public Administration, and to the responsibility of the Security Forces.

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