Moving Away from Thinghood in Law: Animals as a New Legal Category? DOI: 10.58590/leoh.2023.003

Margot Michel *

Abstract
The question of what legal status animals have has preoccupied the law for centuries. Most legal systems classify animals among objects and as “things”. This has far-reaching implications on how they can be treated. In particular, the question of commercialisation, i.e. (almost) unlimited use, is closely linked to the status of being a thing and thus, also property. In recent years, many European legal systems have taken the first, albeit still rather tentative, steps towards de-reification of animals. What they look like and what they mean in concrete terms, but also what they might mean in the future, is the subject of this article.

Keywords
Animals, legal status of animals, de-reification, animals as things, trends in animal law, legal category, property, person, animal bodies

Suggested Citation Style

* Prof. Dr. iur., Chair of Private and Comparative Law, Animal Welfare Law and Philosophy of Law, Faculty of Law, University of Zurich, Switzerland

The Journal of Animal Law, Ethics and One Health (LEOH) is an open access journal which means that all articles published in the LEOH are freely available online and for download upon publication and may be cited provided the original source is acknowledged. Each article is licensed under a Creative Commons Attribution-NonDerivative Works 4.0 International License (CC BY-ND 4.0) https://creativecommons.org/licenses/by-nd/4.0/

---

1 This text draws on my habilitation thesis: Margot Michel, Rechtsgemeinschaft mit Tieren. Eine Spurensuche, forthcoming.
Moving Away from Thinghood in Law: Animals as a New Legal Category?

I. Introduction: Animals and the Law

The question of whether animals are legally treated as things, persons or something of their own relates to their legal status. In a legal context, a person or subject is someone who can hold rights, an object is something that cannot hold rights.² In between, modern legal systems contain various constructs to protect certain interests of an entity without recognising it as a person and giving it legal rights.³ Like moral status, legal status says something about how an entity may or should be treated in principle, although the details are regulated by law. However, unlike moral status, which is predominantly determined according to the theoretical framework of moral individualism,⁴ legal status is no longer linked to individual characteristics or abilities.⁵ Essentially, in contemporary legal sys-


⁵ Kant, formative for the discussion in Continental Europe, referring to the rational nature of human beings, had already abandoned the idea of linking the status of a person to individual characteristics; cf. in more detail and with references, Christensen, ‘Person oder Würde’ (n 2) 93, 95-96. In earlier times, legal capacity — and thus the legal status as a person — was tied to certain cognitive or physical abilities or capacities such as reason, resulting in different grades of legal capacity; against this background, general legal capacity of all human beings regard-
tems, humans are legal persons because they are humans, regardless of the abilities and characteristics that they have as individuals, which can vary greatly from one human being to the next. Thus, the legal status of humans and animals alike is a construct and not based on scientific or biological fact, even if the opposite is often assumed. Rather, the legal status of animals represents how humans categorise and incorporate animals into a profoundly human concept – the law. As law is a form of human action – a human way of ordering and categorising the world, its inhabitants and objects – it is traditionally fundamentally anthropocentric, ordering everything in relation to and around the human being.

Therefore, following a traditional understanding of law, only human beings have the status of legal subjects: only they and the organisational units determined by their will (the so-called legal persons) are bearers of rights and obligations. Consequently, like other entities that are not categorised as human, animals fall into the realm of legal objects and, at least until recently, the legal sub-category of things.

However, these outdated certainties are fading. Especially in European legal systems, a trend can be identified whereby animals are being removed from the category of things (res), sometimes referred to as the process of de-reification. The movement does not seem to have reached its finale just yet, even if such changes are taking place very slowly. Despite these modifications to the legal status of animals already being in effect for several years now in various countries, it has not yet been definitively clarified what status animals now have in law or should have in the future. Certainly, they are no longer qualified as ‘things’, but the revisions have not made them bearers of legal rights either. Thus, they have not (yet?) become legal subjects or persons, but remain in the broader category of legal objects, although perhaps, as the doctrine seems to now imply, best described as a sub-category of their own. This paper traces these changes with a special focus on European legal systems, and discusses the significance of such developments vis-à-vis their potential for improving the legal status and protection of animals. This analysis is carried out through the lens of the European civil law tradition.
II. Legal Status of Animals

The dichotomous distinction between legal subjects (personae, persons) and legal objects (res, things), long perceived as almost insurmountable, goes back to the European interpretation of Roman law in the Middle Ages and the Age of Enlightenment. According to this view, all animals belonged to the category of legal objects. Human beings belonged to the category of persons in principle, albeit this category is still debated today, as slaves were considered ‘unfree’ people and ownership of them was possible. Roman law itself was heavily influenced by the Stoic doctrine; the Stokies had devoted themselves extensively to the human-animal distinction. For them, physical similarities between humans and animals (e.g. the capacity to suffer) were of no normative significance, since only reason had independent value. They further deemed rational beings alone as capable of having rights, given that they were unique in their capability to bear obligations in return. As only humans were believed to be rational beings, humans and animals were fundamentally unequal and there could be no community of law between them. The reception of Stoic doctrine together with Roman law in the Enlightenment led to a further cementing of the human-animal barrier and the reciprocity paradigm also shaped the doctrines of natural law and law of reason. Kant thus created the Kingdom of Ends consisting only of rational beings (humans and, maybe, angels) who could be bound by each other. In his view, all humans belonged to the category of persons, as did children, as the ability of rationality was something inherent to ‘humankind’, something humans were born into.

12 Cf. Toni Selkäla and Mikko Rajavuori, ‘Traditions, Myths, and Utopias of Personhood: An Introduction’ (2017) 18/5 German Law Journal 2020, 1020 ‘rightly point out that the present meaning given to the distinction between persons and things cannot be found in Roman law but has emerged much later’ (Peters, Animals in International Law (n 2) 430, footnote 1380); Visa A.J. Kurki, A Theory of Legal Personhood (Oxford University Press 2019) 3-35.
13 Johanna Filip-Fröschl, ‘Rechtshistorische Wurzeln der Behandlung des Tieres durch das geltende Privatrecht’ in Friedrich Harrer and Georg Graf (eds), Tierschutz und Recht (Orac 1994) 21, 29. Marita Giménez-Candela points out that Roman law considered animals to be res sui generis, as living beings; cf. Giménez-Candela, ‘What is Left to be Said’ (n 9) 363, 367.
14 Richard Gamauf, ‘§ 3 Mirakel’ in Urs Dierauer, Tier und Mensch im Denken der Antike. Studien zur Tierpsychologie, Anthropologie und Ethik (B. R. Grüner B.V. 1977) 244; Marguénaud, Burgat and Leroy (n 8) 92.
15 On the origins of the idea, that ‘rationality’ is ‘both a necessary and a sufficient condition of our standing in a relation of justice to another’, cf. Richard Sorabji, Animal Minds & Human Morals. The Origins of the Western Debate (Cornell University Press 1993) 123-24. In consequence: ‘The lack of any relation of justice means that whatever we do to animals, it will not be a wrong, or an injustice.’
16 Urs Dierauer, Tier und Mensch im Denken der Antike. Studien zur Tierpsychologie, Anthropologie und Ethik (B. R. Grüner B.V. 1977) 244; Marguénaud, Burgat and Leroy (n 8) 92.
17 Cf. Immanuel Kant, Grundlegung zur Metaphysik der Sitten (Meiner 1999) 433-34. Christine M. Korsgaard has shown that Kant failed to take into account that we are obliged to include animals in the Kingdom of Ends by our own normative assumptions; cf. Christine M. Korsgaard, Fellow Creatures. Our Obligations to the Other Animals (Oxford University Press 2018) 131-55; the reciprocity paradigm or similar concepts are still discussed today, as some scholars adhere to the opinion that only those who can also bear obligations can be part of the legal community. However, in modern legal systems, this opinion must actually be regarded as outdated; cf. also Olivier Le Bot, Introduction au droit de l’animal (Independent 2018) 29; Marguénaud, Burgat, Leroy (n 8) 62-64.
18 Cf. on children as persons and beings endowed with freedom: Immanuel Kant, Die Metaphysik der Sitten (Reclam 1990/2007) 280-81 and, talking about the ‘idea’ of mankind as an end in itself in: Kant, Grundlegung (n 17) 429; on this, Christensen, ‘Person oder Würde’ (n 2) 93, 96; Johannes Caspar, ‘Tierschutz unter rechtspolitischem Aspekt’ Archiv für Rechts- und Sozialphilosophie 1995, 378, 401. Interestingly enough, especially when thinking about ‘mixed legal status’ as some legal scholars do today (cf. David Favre, ‘Animals as Living Property’ in Linda Kalof (ed), The Oxford Handbook of Animal Studies (Oxford University Press 2017) 65-
This dichotomous thinking between legal subjects and legal objects, traditionally equated with persons and things, was deeply rooted and is still evident to this day. For a long time, it seemed impossible that the rights of a legal subject and person would be restricted in the interest of a legal object like an animal. As animals were not part of the legal community, duties towards them belonged to the realm of ethics and were not the subject of law. In this way, animals remained without legal protection. This fact was often criticised and the dichotomous thinking finally softened considerably with the entry into force of animal protection legislation. It protected certain individual interests of animals – e.g. the interest in not being overworked or tortured – without recognising animals as legal persons. Nevertheless, as animal protection legislation also protected the interests of animals vis-à-vis their owner, from that point on animals were in fact treated differently in law from mere things, which the owner can dispose of at will. Their legal protection was originally based on the fact that animals are able to suffer – a characteristic that distinguished them from mere things and not only justified, but also required, a degree of interference with the rights of the owner. The concept that certain interests are protected absent the ability of the interest-bearer to enforce this protection in court, instead relying on state authorities to enforce the law, is nowadays also recognised in other areas of law, such as environmental protection and nature conservation.

III. Things, Property and the Consequences

1. The Legal Category of Things

Different legal systems define the category of legal things slightly differently or dispense entirely with an abstract definition. For the European context, the concept of a thing developed by the influential legal scholar Friedrich Carl von Savigny (1779–1861) has proven to be highly significant to this day. Savigny believed that man does not dominate ‘unfree nature’ as a whole, but only in parts or, more
precisely, only in spatially limited units. He called such a spatially limited unit, over which rights can exist, a ‘thing’. In his eyes, the purest and most complete right over a thing was ‘property’. Thus, two essential elements of the concept of a thing were its physical limitation and its human controllability, and therefore the possibility of establishing ownership over it.

While the question of whether a thing must always and necessarily be a physical object is answered differently nowadays, human controllability and ownership are still closely linked to the concept of a thing. Consequently, the decisive factor of a ‘thing’ (Sache, chose, res) is that it must be possible for humans to exercise actual and legal dominion over it. For example, in the Dutch Civil Code, ‘things’ are defined as ‘tangible objects that can be controlled by humans’.

It is telling that the reference to human dominion is usually not substantiated or justified further, neither in law nor doctrine: as an anthropocentric system, law simply presupposes its legitimacy. Accordingly, what humans cannot (or cannot yet) control is not classified as a ‘thing’ in the eyes of the law. Examples of entities that are beyond the realm of human dominion traditionally include other planets, the open sea or the air. The mere possibility of human dominion, however, is not enough to make an object a ‘thing’, it must also be legally permissible. This is the case if a thing could be marketable in the eyes of the law: if it has a market value that can and should be realised in legal transactions. This is why, for example, the human body is not considered a thing, even though it would fulfil the criteria for a thing in an abstract view; this will be explored in more detail later on. Nonetheless, it can be stated that the concept of a ‘thing’ also includes a strong normative criterion. The question of which entities can and should be subject to legal dominion is determined by ethical considerations as much as economic reasons and the prevailing opinion of society.

Therefore, the category of things is not formed according to abstract and objective criteria but is instead based on teleological considerations at its core. An entity is considered a thing if humans want it to be legally tradeable – that is, if it is to be a commodity, to serve human interests, to be commercialised, or an object of property. The category of things therefore does not so much reflect an empirical fact, but is rather an expression of the values of a society: the legal categorisation as a thing is more of a normative statement about the value or weighting of this good within the legal order than the properties of the thing itself.

2. Human and Animal Bodies in Law

Today, the dichotomy between (unavailable) persons and (available) things, which is based on Kant’s philosophy that everything has either a price (things) or dignity (persons), is constitutive for conti-
ntental European thinking. It still serves to legitimise the different treatment of human and animal bodies by law, an area in which the importance of teleological and ethical considerations for the categorisation of an entity as a thing becomes obvious. Despite the fact that human bodies and those of other mammals function in a very similar manner and are both vulnerable, only the (living) human body and its parts are excluded from property law. Following Kant, the spiritual part of human beings (their minds) cannot be divided from their physical constitution (their bodies). Human beings and their bodies are therefore subject to the law of persons as a whole – persons are fully ‘embodied’ in the eyes of the law. A person, however, cannot be a thing at the same time; the two categories are mutually exclusive because they simultaneously mark the boundary between legal subjects and legal objects. Consequently, the human body as well as its parts and substances (e.g. organs, germ cells) are not things in the eyes of the law: they should not be legally controllable and therefore not tradeable. It follows that the relationship of persons to their bodies cannot be described via the category of property either: ownership of one’s own body is not possible because it is not a thing. If the human body were subject to property law, it would become an asset, it would have a market value, and it would be capitalisable and commercialisable. So far, this is not the case, and the market value of the human body and its functions cannot be realised. Contracts concerning the human body itself or bodily functions are, in most cases, considered unlawful and certainly cannot be enforced against the will of the affected person. For example, an obligation to have blood drawn regularly in return for payment or to ‘donate’ a kidney is considered legally invalid.

The bodies of animals, however, are qualified quite differently. Until recently, they were, in principle, considered as ordinary things by law – important exceptions to this were based primarily on animal protection legislation, which aims to prevent unnecessary suffering. The legal qualification of being a thing encompassed the whole animal just as much as the legal qualification of being a person encompasses the human being. We will discuss whether the de-reification process has changed anything at all in this respect, and if so, in which areas. But even if animals are no longer things in many European legal systems today, they have nevertheless remained legal objects. Thus, they are still commodities and objects of property law and human dominion. Animals can therefore be bought and sold, their bodies and bodily functions subject to contracts, and they can be extensively commercialised.

The consequences of this distinctive qualification are sobering. The human body, falling within the realm of the law of persons, is almost completely protected from being instrumentalised for extrinsic purposes by others. Animal bodies, however, being legal objects and falling within the realm of property law, can be fully instrumentalised by humans.

IV. Moving away from Thinghood

1. General Principle: Animals Are Not Things – but Remain Property

Legal animal studies have identified the de-reification of animals as one of the main trends in the development of animal law in Europe and, recently, also in Latin America. However, it is only in the

---

36 Kant, Metaphysik (n 18) 269-70; in contrast, in the Anglo-American legal sphere, the normative status of the human body is sometimes renegotiated under the keyword of ‘self-ownership’.
37 Cf. on the connection between ‘thing’ and ‘property’, also Peters, Animals in International Law (n 2) 425.
last 35 years that the legal denomination of animals as things has begun to change in some countries. The development first started in Austria and Germany: as early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. The development first started in Austria and Germany: as early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law. As early as 1988 (Austria) and 1990 (Germany), both countries removed animals from the status of ‘things’ under private law.

In terms of their normative content, the various European provisions on the de-reification of animals are often quite similar, yet two main strands can be identified. The older norms primarily contain a negative definition: animals are defined as what they are not, namely not things. As a rule, no further definition of the term ‘animal’ is given, so that it must be assumed that the provisions largely refer to all animals – both sentient and insentient, including wild, domestic, farm and laboratory animals alike. However, as these provisions are regularly located in the systematic context of property law, they naturally have more of an effect on those animals over which ownership is regularly established. More recent provisions though, influenced by the terminology used by the European Union, refer to animals positively as what they are, namely ‘sentient living beings’, as opposed to what they

---

39 See for Austria, § 285a Civil Code (ABGB: Allgemeines Bürgerliches Gesetzbuch), amendment of 1 July 1988 (BGBI 179/188, JGS Nr. 946/1811); cf. for Germany, § 90a Civil Code (BGB: Bürgerliches Gesetzbuch), amendment of 20 August 1990.
40 However, the Polish provision that animals are not considered things is not found in civil law but in the Animal Protection Act. Cf. arts 1 and 2 Polish Animal Protection Act (Ustawa o ochronie zwierząt, Pz. 857). Cf. for Azerbaijan, Art 135 (3) of the Civil Code, No. 779-IG of 28 December 1999; for Moldova, Art 458 Civil Code (Codul Civil Al Republicii Moldova), CODUL Nr. 1107, published on 22 June 2002; for Switzerland, Art 641a Civil Code (ZGB: Schweizerisches Zivilgesetzbuch), amendment of 4 October 2002, entered into force 1 April 2003, AS 2003 463, BBl 2002 4164 5806); for Liechtenstein, Art 20a Property Law (Sachenrecht, LGBl Nr. 1923.004); for Catalonia, Art 511-1(3) Ley 32/2007 para el cuidado de los animales, en su explotación, transporte, experimentación y sacrificio.
43 New Zealand law has incorporated a statement to this effect in the title of its Animal Welfare Act: Amendments to principal Act, Long Title amended, Animal Welfare Amendment Act (No. 2) 2015 (2015 No. 49) of 9 May 2015; for the Province of Québec Art 898.1 Civil Code of Québec; for Colombia, Art 655(3) Civil Code (Código Civil), amendment by law no. 1774 of 6 January 2016.
44 Cf. Peters, Animals in International Law (n 2) 425-28.
46 Rey (n 31) 41.
are not. However, in doing so, they simultaneously limit the scope of application to sentient animals.

An example of a relatively dated provision on the de-reification of animals can be found in the Swiss Civil Code. The wording is practically identical to that contained in the German and Austrian Civil Codes:

Article 641a Swiss Civil Code:
(1) Animals are not things.
(2) Where no special provisions exist for animals, they are subject to the provisions governing things.

French law formulates the same assertions positively, but without making a different statement altogether as a result:

Article 515-14 Code Civil:
Animals are sentient living beings. Unless they are protected by special laws, animals are subject to the scope of property law.

An interesting approach is used by the Province of Québec, Canada, which combines a negative and a positive statement:

Article 891.1 Civil Code of Québec:
Animals are not things. They are sentient beings and have biological needs.

In addition to the provisions of special Acts which protect animals, the provisions of this Code and of any other Act concerning property nonetheless apply to animals.

The differences, however, are evident mostly at a linguistic level, as all the provisions hasten to declare that animals will nevertheless still be legally treated as objects of property and that exceptions apply only when the law determines otherwise. Yet, in many jurisdictions, property law is to be applied to animals by analogy only. This was already addressed in the German reform process in 1989, with the legislator emphasising that alt-

---

47 Art 13 Treaty on the Functioning of the European Union (TFEU); cf. to this provision in detail Peters, Animals in International Law (n 2) 427; Spain, for example, has specifically opted for a positive terminology in line with the European Union and more recent regulations seen in France and Portugal, BOE núm. 300 2021, 154134.
48 See, for example, § 903 German Civil Code, which expressly states that ‘the owner of an animal must, when exercising his powers, take into account the special provisions for the protection of animals’; see also the explicit mention of the ‘limits of the law’ in Art 641 para 1 Swiss Civil Code.
49 Cf. § 90a German Civil Code; Sec 494 Czech Civil Code: ‘A living animal has a special significance and value as a living creature endowed with senses. A living animal is not a thing, and the provisions on things apply, by analogy, to a living animal only to the extent in which they are not contrary to its nature.’ On this, cf. Petr (n 32) 202. This is also true for Art 641a Swiss Civil Code Switzerland, although the text of the law is not as clear as the German or Czech equivalents; cf. Wolf and Wiegand (n 11) Art 641a para 8; for Spain, Art 333bis para 1 Civil Code (Código Civil): ‘Animals are living beings endowed with sentience. The legal regime of goods and things is applicable to them only in so far as it is compatible with their nature or with the provisions intended for their protection’; for Slovakia, § 119 para 3 Civil Code (Občiansky zákoník): ‘A living animal has a special significance and value as a living creature capable of perception through its own senses and has a special status in civil law relations. The provisions on movable things shall apply to a living animal; this shall not apply if this is contrary to the nature of the animal as a living creature’; for France, Art. 515-14 Civil Code (Code Civil): ‘Animals are living beings endowed with sentience. Subject to the laws that protect them, animals are subject to the regime of property.’
50 Stephanie Hrubesch-Millauer, Barbara Graham-Siegenthaler and Vito Roberto, Sachenrecht (5th edn, Stämpfli Verlag 2017) 6; Christina Stresemann, ‘Kommentierung von § 90a BGB’ in Franz Jürgen Säcker, Roland
hough animals are included ‘in all cases in which the term “thing” is used by law’, nevertheless, ‘in each individual case, the meaning and purpose of the norm must be taken into account’. Accordingly, it must be examined whether the ‘scope of protection of a norm also extends to animals’.

Hence, it is permissible that property law be applied to animals, but not in an unqualified manner – a restriction that has thus far been implemented far too seldom. Taking the normative content (albeit limited) of the de-reification norms seriously, it would at least be necessary to examine on a case-by-case basis and with a view to the meaning and purpose of the individual property norm in question vis-à-vis the de-reification of animals, as to whether and how it can be meaningfully applied to animals. Adjustments have to be made if necessary by those who apply the laws, in particular by state authorities and courts. Anne Peters gives an example referring to the sale of a mother animal and young child: when the animals are treated as mere things, the separation of mother and child would be legal; however, in any case, animal welfare laws would have to be taken into account, which sometimes (albeit very seldomly) prohibit the separation of mother and child at a very young age.

But even if this is not the case, Anne Peters rightly argues that ‘under consideration of their status as sentient beings, provided that “sentience” is properly understood to encompass also mental well-being, such a transaction would have to be prohibited because a separation of mother and young infant would cause severe emotional distress and mental anguish in these individuals’. This would implement what the de-reification norms require – that the provisions of property law may only be applied to animals by analogy, i.e. with the necessary modifications. However, this potential of the de-reification process has hardly been explored in its entirety thus far. Traditional doctrine has been quite hesitant in making any adaptations to property law, even if the effects would probably still be limited.

However, this hesitancy is unjustified because the removal of animals from the category of mere ‘things’ was intended to make allowances for their special status as living beings in the first place. Particularly in terms of property law, where these provisions are systematically located, it is absolutely crucial to treat animals differently from inanimate objects if the reform is to have any normative significance at all. Therefore, due to the necessary legislative assessment in individual cases, it may well follow that the civil law provisions tailored to inanimate objects can only be applied to animals with qualifications – or even not at all.

In sum, several countries have removed animals from the category of things, and it is reasonable to expect similar changes in the future. However, animals have clearly not become persons or legal subjects as a result of these changes; they still remain in the broader category of legal objects, meaning that the exercise of property rights over them is still possible and the rules governing things gen-

Rixecker, Hartmut Oetker and Bettina Limperg (eds), Münchener Kommentar zum Bürgerlichen Gesetzbuch (9th edn, C.H. Beck 2021) para 8; Malte Stieper, “§ 90a BGB” in Malte Stieper, Steffen Klumpp, Reinhard Singer and Sebastian Herrler (eds), J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Buch 1 Allgemeiner Teil, §§ 90-124, §§ 130-133 (De Gruyter 2021) para 9.

BR-DRs. 380/89, 9.

See, for example, on the German provision BR-DRs. 380/89, 9; see, for the legislative method of referencing a set of norms by analogy, Claus-Wilhelm Canaris, ‘Die Feststellung von Lücken im Gesetz. Eine methodologische Studie über Voraussetzungen und Grenzen der richterlichen Rechtsfortbildung praeter legem’ in Jörg Neuner and Hans-Christoph Grigoleit (eds), Claus-Wilhelm Canaris, Gesammelte Schriften (De Gruyter 2012) 3, 16.

See, for example, Art 70 para 4 Swiss Animal Protection Ordinance (SR 455.1) which prohibits separating canine puppies from their mother or wet nurse before they are 56 days (8 weeks) old.

Peters, Animals in International Law (n 2) 430.

See Obergfell (n 45) 388, 395-415.
erally remain applicable, unless otherwise stated. Accordingly, animals are not things, but are largely treated as such—this is the somewhat contradictory and unsatisfactory conception of the de-reification norms. Concrete effects of these changes are hard to pinpoint so far. What follows is that the process of de-reification has softened but also complicated the traditional dichotomy between things/objects and persons/subjects by attaching a new sub-category to the larger category of legal objects: that of animals, the normative meaning of which is not yet fully clarified. This category though, which is populated by living and feeling fellow creatures, bears the potential to be further developed into a special, ‘intermediate legal category which stands between persons and things’—that of animals.

European legal systems, however, have traditionally recognised entities other than things in the broader category of legal objects prior to the recent reforms regarding animals—e.g. electricity or natural forces such as water power. Such reforms have not yet had an impact on the fundamental dichotomy between subjects and objects of law; rather, as animals were not mere things before the de-reification reforms either (as certain interests were already protected by animal welfare legislation), the change at the moment seems to take place more on a theoretical level than on a practical one by introducing a new sub-category sui generis. Tangible effects, apart from the special provisions introduced simultaneously in many countries in various areas of civil law, are most likely to be found at the level of interpretation of existing norms, thus reflecting an attitude change towards animals which allows the interests of animals to be better incorporated into existing norms as well. Perhaps that is where the potential of these provisions, albeit underdeveloped today, can be found—if their normative content were to be applied more boldly by courts in the future.

2. Special Provisions

Many countries that have introduced de-reification provisions for animals have simultaneously also revised a selective bundle of other norms, mainly in private law. They contain special rules for certain areas, i.e. providing for deviations from the otherwise applicable property law. In Switzerland,
for example, the special provisions based on the de-reification of animals concern the law on found property,\textsuperscript{65} law of succession,\textsuperscript{66} dissolution of co-ownership,\textsuperscript{67} acquisition of ownership and return,\textsuperscript{68} adverse possession,\textsuperscript{69} right of restitution of stolen or lost chattels,\textsuperscript{70} law of seizure\textsuperscript{71} and tort law.\textsuperscript{72} However, these norms – which differ from the basic rule that animals are not things – only apply to domestic animals. For the most part, they do not overcome the inherent legal anthropocentrism and primarily protect the relationship that humans have with their domestic animals – and thus, yet again, ultimately centre on human interests.\textsuperscript{73} This becomes particularly clear in tort law, where the owner of an injured or deceased domestic animal is not only granted a claim for compensation of the medical costs, which can exceed the economic ‘value’ of the animal, but the court is also authorised to take the sentimental value of the domestic animal into account when calculating the compensation amount.\textsuperscript{74} Thus, especially the latter provision primarily protects the rights of the owner, recalling the ‘immaterial harm’ provisions that can be connected with the injury or killing of a human being and which, under certain circumstances, give relatives a claim to satisfaction.

Domestic animals therefore currently enjoy a higher status than farm or laboratory animals only as regards their value to their humans, whereas those animals, whose lives and bodies are intensely instrumentalised for human benefit, fall entirely outside the scope of the special civil law provisions. As such, they do not apply to the majority of animals and have very limited significance.\textsuperscript{75}

However, there are exceptions that at least suggest the direction in which future developments could go and the following briefly turns the spotlight on a few of them. One concerns the dissolution of co-ownership of domestic animals, mainly in family settings,\textsuperscript{76} to which there are similar concepts and ideas in different European countries as well as in the US and Canada.\textsuperscript{77} The provision only applies when both human caregivers are owners of the animal, but in this case, it obliges the court to give priority consideration to the animal’s welfare and interests as well as to the relationship of the animal to the human caregiver. The sale and sharing of the proceeds as a usual solution to the co-ownership problem is explicitly excluded by law. Although it is not expressly provided for in law, doc-

\textsuperscript{65} Art 720a Swiss Civil Code.
\textsuperscript{66} Art 482 para 4 Swiss Civil Code.
\textsuperscript{67} Art 651a Swiss Civil Code.
\textsuperscript{68} Art 722 para 1\textsuperscript{bis} and para 1\textsuperscript{er} Swiss Civil Code.
\textsuperscript{69} Art 728 para 1\textsuperscript{bis} Swiss Civil Code.
\textsuperscript{70} Art 934 Swiss Civil Code.
\textsuperscript{71} Art 92 para 1 item 1a Swiss Debt Enforcement and Bankruptcy Law.
\textsuperscript{72} Art 42 para 3 and art 43 para 1\textsuperscript{bis} Swiss Code of Obligations.
\textsuperscript{74} Cf. in detail Margot Michel and Eveline Schneider Kayasseh, ‘The Legal Situation of Animals in Switzerland: Two Steps Forward, One Step Back – Many Steps to Go’ (2011) VII Journal of Animal Law 1, 21-27; there are many similar provisions: for Austria, § 1332a Civil Code (Allgemeines Bürgerliches Gesetzbuch ABGB); for Germany, § 251 para 2 Civil Code (Bürgerliches Gesetzbuch BGB); for Portugal, Art 493."A Civil Code (Código Civil); for Spain, Art 333bis para 4 Civil Code (Código Civil).
\textsuperscript{75} Cf. Stucki, Grundrechte für Tiere (n 56) 89.
\textsuperscript{76} Art 651a Swiss Civil Code; cf. Michel and Schneider Kayasseh, ‘Animals in Switzerland’ (n 74) 27-36.
\textsuperscript{77} Cf. for recent developments in Spain, Art 90 1 b\textsuperscript{bis} código civil, and on this, Manuel Ortiz Fernández, ‘Reflexiones en torno a la ley 17/2021, de 15 de diciembre: la protección de los animales como “seres sintientes”’, Actualidad Jurídica Iberoamericana N°17, 400, 408-09; Germany has no special provision on this, but doctrine argues for similar concepts; see, for example, Andreas Gängel, ‘Zum Schicksal des Hundes bei Ehescheidung und Trennung’ [2020] Neue Justiz 107, 108-12; see also Deckha, ‘Property on the Borderline’ (n 73) 332-46.
trine based on this provision also advocates for the right of the other party to maintain contact with the animal and the possibility of considering food and medical costs for the animal when determining post-marital alimony.\textsuperscript{78} Another provision concerns the placement of homeless domestic animals and also primarily rests with the interest of animals and not of their (former) owners. While lost property – as far as it concerns mere things – can be reclaimed for five years, thus extensively protecting owners’ rights, this period was reduced to two months for found domestic animals, which allows for quick rehoming.

V. Conclusions: Significance and Outlook

Without a doubt, the de-reification process reflects an important development in animal law, as it suggests moving beyond the previous purely anthropocentric frame of reference found in civil law and creates an opening for a new legal category – that of animals.\textsuperscript{79} It is certainly no coincidence that the concrete effects are primarily visible in the case of domestic animals; indeed, the scenario where animals are already considered to be family members is the most obvious place for the human-animal relationship to be put on a new foundation.\textsuperscript{80} However, at the same time, given that part of the traditional doctrine is of the opinion that dominion over animals has become fundamentally problematic,\textsuperscript{81} law reforms must not stop short at this moment in time, but rather seize the opportunity to further develop a new legal status for all animals. It is incomprehensible that law still puts animals in a much worse-off position than humans, given that they have more similarities than differences: especially their embodiment as beings with biological, psychological, and social needs and the vulnerabilities resulting from this.\textsuperscript{82}


\textsuperscript{80} See Deckha, ‘Property on the Borderline’ (n 73) 313, 316, who sees one of the reasons for this in domestic animals fulfilling relationship interests for humans.

\textsuperscript{81} See Wolf and Wiegand (n 11) ‘Vor Art. 641a ZGB’ para 13.

\textsuperscript{82} See on this concept and its consequences, Christine M. Korsgaard, ‘Interacting with Animals: A Kantian Account’ in Tom L. Beauchamp and R.G. Frey (eds), The Oxford Handbook of Animal Ethics (Oxford University Press 2011) 91, 92, arguing that we share with animals the existence as embodied beings and the experiences that accompany this, especially the ‘capacity for negative and positive experiences – of hunger and thirst, and enjoyment in satisfying them; of pain and pleasure; and of fear and security’; Deckha, Animals as Legal Beings (n 60) 121-37 arguing for ‘beingness’ as a form of legal subjectivity ‘that caters to the ontologies of breathing, embodied creatures’ (121) and with a special focus on vulnerability as a concept in Maneesha Deckha, ‘Vulnerability, Equality, and Animals’ (2015) 27(1) Canadian Journal of Women and the Law 47, 60-70.
However, until now, the de-reification process has not led to animals being significantly better off in law. They are still much closer to the category of things than to that of persons, being treated not ‘as’ things, but ‘like’ things. Granted, legislators never intended the de-reification process to rule out the possibility of property rights over animals. So far, the revisions have not been accompanied by structural reform of civil law in any of the mentioned countries. It therefore remains unclear whether the consequences of the recent trend of de-reification goes beyond mere lingual cosmetics. Concrete effects are extremely limited, due to the structure of such norms as well as to the unwillingness of courts and authorities to at least explore the potential that the method of analogy actually requires, namely the adoption of the rules of property law to animals.

However, the category of animals that was created through these changes could be developed further and rendered more robust in terms of the protection of animals. As Anne Peters puts it, ‘what matters is not the status but the legal rules that apply’. It is conceivable and increasingly argued in animal law doctrine, that ownership status may not necessarily hinder the development of this new category, at least not in a first step. Several scholars have outlined what a special legal category for animals separate from or in between the traditional person/thing dichotomy could look like. Indeed, the de-reification process has created space and a vessel for this development. The role that courts and authorities play in this process cannot not be underestimated; it is within their power to exploit the potential of de-reification norms and thus to build and enlarge this vessel by consistently interpreting the existing norms in an animal-friendly way, taking their interests into account to the greatest extent possible in the current frame of reference. In this context, it must be emphasised that the de-reification reforms, and the special legal category for animals that was created by them, are not only relevant to property law. Their effects must touch on all areas of law – for example, regulations on the import and export of animals and the question of how to deal with animal diseases – as it becomes evident in these cases as well that animals are still treated as other dangerous ‘things’ that have to be eliminated.

83 See Peters, Animals in International Law (n 2) 430.
84 See Wolf and Wiegand (n 11) Art 641a para 8.
85 See Michel and Schneider Kayasseh, ‘Animals in Switzerland’ (n 74) 42.
87 Peters, Animals in International Law (n 2) 429.
89 Cf. Peters, ‘Vom Tierschutzrecht zu Legal Animal Studies’ (n 38) 325, 330; Lorz (n 80) 1057, 1061; Obergfell (n 45) 388, 394-95; Saskia Stucki, ‘Die "tierliche Person" als Tertium datur. Eine Extrapolation aus aktuellen tierschutzrechtlichen Subjektivierungsansätzen und kritische Reflexion aus feministischer Perspektive’ in Christoph Ammann, Birgit Christensen, Lorenz Engi and Margot Michel (eds), Würde der Kreatur. Ethische und rechtliche Beiträge zu einem umstrittenen Konzept (Schulthess 2015) 287, 289-90.
90 Cf. the example made by Peters, Animals in International Law (n 2) 430.
92 One example of the routine killing of animals due to the threat of epizootics is the culling of 17 million minks in Denmark in the wake of the Corona pandemic; cf. Karen K.Y. Leung and Kam Lun Hon, ‘Lessons from Animal Culling during Human Pandemics: Is Vaccination a Viable Option for Animals?’ (2023) 19 Current Pediatric Re-
Until now, the possibility of almost unlimited commercialisation and instrumentalisation of animals is essentially linked to them being property. However, it is questionable whether the link between property and instrumentalisation is really as compelling as it is traditionally seen. It would be conceivable, for example, to separate the two main functions of property in civil law: legal allocation of an entity to a person on one side, and domination over this entity on the other side, as these are not necessarily two aspects of the same problem, but rather two different functions altogether. Thus, the possibility of commercialising animals could be much more limited even within the current legal structure than it has been up to now and the development that started with the de-reification process could be further advanced. Property rights are limited by animal welfare laws today, and we have seen that a much more consistent and courageous implementation of the de-reification norms would certainly offer avenues to empowering animal interests with significantly more weight than is the case today. However, it seems that this dimension of the de-reification process has hardly been explored so far, which, apart from the still reticent doctrine, is mainly due to the fact that the authorities applying the law have not taken the necessary step towards no longer treating animals ‘like’ things, but as beings in their own right.


93 See on this, Damian Hecker, Eigentum als Sachherrschaft. Zur Genese und Kritik eines besonderen Rechtsanspruchs (Ferdinand Schöningh 1990).

94 See Hecker, Eigentum als Sachherrschaft (n 93) 259-60; also Cochrane, ‘Ownership and Justice for Animals’ (n 88) 424, arguing that ‘the concept of “ownership” does not grant owners a single right amounting to exclusive and absolute control over their property’, but refers ‘to a set of relations’ that ‘varies in different contexts’.