FACULTY OF LAW AND CRIMINOLOGY

The extension of fundamental rights to animals

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FOREWORD

This master thesis was written in the context of obtaining the title of Master of Laws at the University of Ghent.

Both during my studies and while writing this work, I could count on the help and support of several people. According to tradition, the foreword of a thesis seems to be an opportunity to thank all these people.

First of all, I would like to thank my supervisor professor dr. Geert VAN HOORICK for giving me the opportunity to write this thesis and especially about this specific topic. He gave me the possibility to combine two big passions in my life (*i.e.* the law and the love for animals) into one thesis. I admire his knowledge about animals and the law as well as his passion for teaching about it. As far as I know, he must be one of the only professors in Belgium that teaches 'animal law'. Also, the University of Ghent is the only university in Belgium that offers such a course. I sincerely hope that they will continue teaching this upcoming field of the law.

Secondly, I want to thank my mentor Ms. Lise VANDENHENDE for her continuous availability and the granted flexibility when writing this work.

Thirdly, I would like to express my gratitude towards some family members and close friends. It is doubtful whether I would have 'survived' these five years of law school without them. In particular, I would like to thank my mom and dad for giving me the possibility to study. I am aware that a lot of people like to pursue further studies but do not have the means to do so. Hence, I do not take this chance for granted. I am also thankful for the support provided by my grandparents. During these five years, the delicious meals and cups of coffee were a real treat. Also, my three best friends – that I could consider as sisters after more than ten years – deserve my 'thank you' for all the relaxing and fun moments we spent together. Lastly, I would like to thank my dog for being a source of comfort and support. He is the living proof that humans are not the only sentient beings in this world.

I would also like to thank all the other people that came across my path during these five years and that have supported me.

To finish, I want to dedicate this thesis to all people and animals suffering in the world. I am convinced that making a change in the world starts '*with the man in the mirror*'.

Jada Bruccoleri

Houthalen – Helchteren, May 2018

"But I know also that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors."

-Thomas Jefferson

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INTRODUCTION

1. No person in the world could imagine a world without animals. They have been part of our lives since the beginning. Some of us love animals, some hate them, some use them, some abuse them. This has always been the case from the moment they have been created and put on this earth, just like us. We ought to share mother earth with them. Consequently, we also try to regulate our interactions with animals.

2. Since the beginning of time animals have been considered as mere things, or as a legal practitioner would call it, 'legal objects'. This goes hand in hand with our anthropocentric train of thought. This is the belief that a human being is the most significant entity of the universe. However, things are changing. An increasing percentage of our population becomes more anthropomorphic, meaning that human characteristics, emotions or intentions could be attributed to non-human entities e.g. animals and artificial intelligence. The change in mindset can be in particular assigned to our evolution to a modern society and to scientific research. As stated by DE WAAL, "*to endow animals with human emotions has long been a scientific taboo. But if we do not, we risk missing something fundamental, about both animals and us*".

3. Due to this anthropomorphic mindset, we become more critical of the use of animals in research, for economic and for pleasurable pursuits. Consequently, feelings about their rights will intensify. Hence, legal practitioners will seek to find solutions how these rights can be realized. Progressive legal thinking is a necessary condition in order to find a solution. This has also been noticed by the most prestigious universities in the world. Since a few years it is possible to specialize yourself in animal law at these universities.

MAIN ISSUE

4. Our society is evolving and so is our mindset towards animals. This is also notable in the legal world. Legislators, judges and legal scholars try to find legal solutions to reflect this change of mindset also in the legal field. The main problem is that there exists a so-called 'legal wall' between persons and things. In other words, there are two categories in our current legal system. On one hand, there are legal objects (*i.e.* things) and on the other hand, there are legal subjects (*i.e.* persons). Only the latter are able to possess legal rights.

5. Today, animals resort under the category of legal objects and are considered mere things. If we would like to grant animals fundamental rights, we are faced with a thick legal wall. Legal objects cannot be considered as legal right-holders. Hence, there are some legal scholars that try to argument why (certain) animals should be considered as (legal) persons (*i.e.* legal subjects). This would be based on the mental capacities of these animals. In other words, because some animals

would resemble to humans, they should be placed under the category of legal subjects. However, there are also authors that plead for an intermediate category.

6. The above-mentioned issue is being heavily debated in the legal world and the tremendous amounts of legal articles are a proof of it. This issue is also being handled in front of the courts, especially in the Americas. Legislators also noticed this and try to address this issue as well, especially in Europe.

RESEARCH QUESTIONS

7. The central research question is the following: "*Should fundamental rights be extended to animals?*". Different sub-questions can be distinguished, namely:

I. What is the historical and philosophical background of society's mindset towards animals?
II. What are the international trends in the legislation regarding the status of the animal?
III. What are the international trends in the jurisprudence regarding the status of the animal?
IV. What are fundamental rights?
V. What are animal rights?
VI. What is the current status of the animal under Belgian law?
VII. What are the consequences of this status?
VIII. If the central research question would be answered affirmatively; how could fundamental rights be extended?
    a. Is the eradication of the property status of the animal a *conditio sine qua non* when wanting to extend fundamental rights to animals?
    b. Is the animal's inability to bear duties really an obstacle for the extension of fundamental rights?
    c. Should the animal be granted legal personhood in order to extend fundamental rights?
    d. Should the animal be considered as a legal person or is the creation of an intermediate category a better solution?
    e. Which animals should be granted fundamental rights and based on which criterion?
    f. Which fundamental rights should be extended and would derogations be possible? If answered affirmatively, how should these derogations be determined?

METHODOLOGY

8. The central research question will be answered by using several legal techniques f.e. description, explanation, evaluation, legal comparison and the normative method. Legal concepts will be analyzed by making use of several formal legal sources, relevant case law and doctrine.

9. First of all, international movements regarding animal rights will be studied under the first chapter that is titled as "*Animal rights in a global context*". The reader will be provided with a brief historical and philosophical analysis of the animal's position throughout the years. Further, the international movements will be set out, both on the level of legislation as well as on the level of jurisprudence. In this chapter, there will also be analyzed what fundamental rights exactly are. To conclude, there will be tried to provide a definition of what animal rights are and what they are not for the purpose of this study.

10. Secondly, chapter II, named "*Current legal framework in Belgium*" concentrates on the animal's status under Belgian law. More specifically, it consists out of two major parts. The first part analyzes the animal's status under the current legal framework. The legislative proposals to change the animal's status will also be analyzed. On top, the proposed amendments for the New Civil Code are also very interesting to take into account. The second part tries to highlight a few consequences of the animal's current status under the Belgian legal framework.

11. Finally, and most importantly, the third chapter that is called "*De lege referenda*". Taking into account the research conducted in the first two chapters, there will be pointed out where the main obstacles are when wanting to extend fundamental rights to animals. Consequently, a possible solution will be found to these problems, based on legal doctrine. This chapter will end with a critical note on the current Belgian framework and will consequently formulate a brief recommendation for the Belgian legal world.

12. Concerning the language of this thesis, there should be stated that there are some typical Belgian concepts that do not have a translation. If this is the case, there will be made use of the electronic application *Interactive Terminology for Europe*[1] and *Valks Juridisch Woordenboek*[2]. For the sake of clarity, the Dutch translation will be put in the footnotes.

[1] *Interactive Terminology for Europe*, http://iate.europa.eu.
[2] Cfr. E. DIRIX, B. TILLEMAN and P. VAN ORSHOVEN, *De Valks Juridisch Woordenboek*, Antwerp, Intersentia, 2010, 621 p.

CHAPTER I: ANIMAL RIGHTS IN A GLOBAL CONTEXT

13. Historical and philosophical approach – This chapter will analyze the concept of animal rights in a global context. In order to have a broad understanding of this concept, it is crucial to have a look at the historical as well as at the philosophical background of animal rights. This will be discussed in the first section of this chapter.

14. Trends – In the second section the focus lies specifically on the 'global emergence' of animal rights. This means that the legal trends from all over the globe regarding animal rights will be discussed. Both trends in the legislation as well in the jurisprudence will be analyzed. *In concreto* this entails (i) the analysis of modifications that have been recently made to – mostly – civil codes (ii) an overview of the cases regarding the extension of fundamental rights to animals.

15. Fundamental rights – The third section will conduct a study of the concept 'fundamental rights' *in globo*. This specifically means that the reader first of all will be provided with an introduction of the so-called 'legal wall' that exists under the current legal systems. Further, the concept of 'fundamental rights' *an sich* will be analyzed. Moreover, the history of fundamental rights will be analyzed as well as the different categories and generations.

16. Animal rights – The last section aims to analyze the concept of 'animal rights' *in globo*. This would *in concreto* mean that first of all, there will be stated that this should not be linked to animal welfare. In the second paragraph of this section an attempt will be made to define the concept of 'animal rights' for the purpose this study.

Section 1: Historical and philosophical background

§1. Which historical approach?

17. Approaches - There are two ways to approach the animal's position in history. The first one is the one of the natural history, while the second one is the anthropocentric history. In the first case, the emphasis lies on the development of the animals themselves. In the second case the focus will be the role of the animals in the thinking, feeling and acting of people.

18. Elaboration - Both of the approaches can be further elaborated in different ways. When choosing for the first approach, there are several ways to study the natural history f.e. describing and classifying the animal species and studying their behavior etc. If on the other hand, the second approach will be chosen, the main activity will be the study of the changes of the image that people have about animals. It goes without saying that animals have played – and will continue playing – an important role in our lives. But they have rarely been the subject of studies that fall

under the second approach. Nevertheless, this has changed enormously the last 40 years.[3] This research about animals entails a reconstruction of our way of thinking and talking about animals or a reconstruction of our representation about the animal world.

19. Scholars - The connection between animals and the society can be approached in two ways. According to one group of scholars the research about animals can be used to get an insight in the culture of certain groups, communities or societies.[4] The fundamental idea of this strategy has been developed by GEERTZ in his 'thick description' of Balinese cockfights. He states the following about cockfights: "… *much of Bali surfaces in a cock ring. For it is only apparently cocks that are fighting. Actually, it is men*"[5]. Hence, according to GEERTZ, animal fights play a key role in understanding the society. So, here you start analyzing animals – and their behavior – in order to understand society. According to another group of scholars, the opposite way of thinking is also possible. They try to study the animal's position from the perspective of society. In other words, here you will analyze the society's point of view towards animals. This approach will for example study the acceptability of testing on animals or will analyze the beginnings of animal law as a legal discipline.[6] It is important to realize that both fall under the above mentioned 'anthropocentric history'.

20. Relevance – Having a look at the history can obviously be relevant because most of the arguments in today's discussions are not new. The supporters and the opponents of a certain position have already been established centuries ago. Knowledge of certain ideas in the past can therefore be relevant for all the involved parties. Moreover, the belief that the attitudes of the Western world towards animals are not natural enhances the interest in the history of the animal's image in society. According to some, it is not self-evident that people make a radical distinction between themselves and the animal world and that the first drastically predominate and exploit the latter. Attitudes towards animals are contrarily considered as variable, depending on culture. In order to prove this, not only sociology or anthropology is being used but also history. The latter should show us that this attitude in the Western world was not always the norm in the past. In other words, it was different. Some participants to the discussion of the extension of fundamental rights to animals find it crucial to analyze the past before acting now in the present.[7] As stated by P. SINGER: "*To end tyranny we must first understand it*".[8]

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[3] C.A. DAVIDS, *Dieren en geschiedenis: Benaderingen, bronnen en problemen*, Groningen, *Groniek Historisch Tijdschrift,* 1994, 10.
[4] C.A. DAVIDS, *Dieren en geschiedenis: Benaderingen, bronnen en problemen*, Groningen, *Groniek Historisch Tijdschrift,* 1994, 10.
[5] C. GEERTZ, *Deep play. Notes on the Balinese cockfight', in The interpretation of cultures,* New York, Unknown, 1973, 417.
[6] C.A. DAVIDS, "Dieren en geschiedenis: Benaderingen, bronnen en problemen", Groningen, *Groniek Historisch Tijdschrift* 1994, 11.
[7] C.A. DAVIDS, "Dieren en geschiedenis: Benaderingen, bronnen en problemen", Groningen, *Groniek Historisch Tijdschrift* 1994, 13.
[8] P. SINGER, *Animal Liberation: A New Ethics for our Treatment of Animals*, New York, Random House, 1975, 185.

§2. Mindset towards animals from an historical perspective

21. General – As stated above, the second approach will be followed. In other words, the society's point of view – and its changes – towards animals will be analyzed. This will help us to get an insight in the way we treat and view animals.

2.1. Pre-Christian era

22. Old Testament – Already before the birth of Christ, the Old Testament created a gap between mankind and animals.[9] This can be illustrated by the following extract out of Genesis:

"*Then God said, "Let us make man[a] in our image, after our likeness. And let them have dominion over the fish of the sea and over the birds of the heavens and over the livestock and over all the earth and over every creeping thing that creeps on the earth*."[10]

According to the Bible, mankind has a special position in the universe towards animals. Mankind has been created to rule over other species.[11]

23. PYTHAGORAS – Later, two specific tendencies emerged. On one hand, the school of PYTHAGORAS was convinced that animals should be treated with respect. Moreover, the philosopher himself was vegetarian. He was of the opinion that the souls of dead people would return in animals.[12]

24. ARISTOTLE – On the other hand, there was the school of PLATO and ARISTOTLE. Both were convinced that the animal existed only to serve mankind. However, ARISTOTLE was also of the opinion that a human is an animal itself but a 'rational animal'.[13] Today, most of the societies are based upon this mindset.[14]

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[9] V. DE MEUTER, *Dieren in het strafrecht: Van bijzondere rechtsobjecten naar beperkte rechtssubjecten?,* Master Thesis, KU Leuven, 2015, 3.
[10] Genesis 1: 26.
[11] Genesis 1: 26-28.
[12] P. SINGER, *Animal Liberation*, New York, HarperCollins Publishers, 1975, 188; P. CLITEUR, "De filosofie van dierenrechten", in J. BRAECKMAN, B. DE REUVER en T. VERVISCH (eds.), *Ethiek van DNA tot 9/11*, Amsterdam, Amsterdam University Press, 2005, 139.
[13] *Ibid.*
[14] V. DE MEUTER, *Dieren in het strafrecht: Van bijzondere rechtsobjecten naar beperkte rechtssubjecten?,* Master Thesis, KU Leuven, 2015, 4.

2.2. Christian era

25. Roman Empire – During this era the religion of Christianity started to expand. However, this era can be characterized with a constant need for conquests in order to expand the Roman Empire. Hence, there was not much space left for an empathetic approach towards weaker members of the society (including animals).[15] Moreover, the Romans are known for the organization of their plays in, for example, the coliseum. During these plays animals and even people were being slaughtered in front of thousands of spectators.[16]

26. Christianity – The human race was considered as being holy.[17] Christianity brought resistance against the plays where people were slaughtered. At the end of the fourth century, they were prohibited. However, animals were being excluded from this prohibition. Hence, torture and cruelty towards animals was still considered as acceptable.[18]

27. Other religions – This cruel mindset towards animals during the Christian era was not shared by all other religions. Hinduism and Buddhism for example considered every living creature as holy. Hence, not only mankind but also animals should be respected. In countries that have these religions as main religions, it is notable that the society recognizes the intrinsic value of the animal.[19]

2.3. Middle Ages

28. THOMAS AQUINAS– According to AQUINAS, there was a clear division between mankind and the animal in the 13th century. According to him, this division could be justified because animals cannot be considered as autonomous creatures due to their lack of rationality. Animals should be seen as instruments that can serve mankind.[20]

29. Humanism – During the era of the Renaissance, humanism played an important role. The key idea of the latter was that mankind is the center of the universe. Moreover, mankind has several capacities and possesses a free will. Hence, the role of the animal was being neglected.[21]

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[15] *Ibid.,* 5.
[16] P. SINGER, *Animal Liberation*, New York, HarperCollins Publishers, 1975, 189-190.
[17] *Ibid.*
[18] *Ibid.* and V. DE MEUTER, *Dieren in het strafrecht: Van bijzondere rechtsobjecten naar beperkte rechtssubjecten?,* Master Thesis, KU Leuven, 2015, 5.
[19] P. SINGER, *Animal Liberation*, New York, HarperCollins Publishers, 1975, 190; P. CLITEUR, "De filosofie van dierenrechten", in J. BRAECKMAN, B. DE REUVER en T. VERVISCH (eds.), *Ethiek van DNA tot 9/11*, Amsterdam, Amsterdam University Press, 2005, 139.
[20] *Ibid.* and V. DE MEUTER, *Dieren in het strafrecht: Van bijzondere rechtsobjecten naar beperkte rechtssubjecten?,* Master Thesis, KU Leuven, 2015, 6.
[21] *Ibid.* and P. SINGER, *Animal Liberation*, New York, HarperCollins Publishers, 1975, 199.

30. LEONARDO DA VINCI – DA VINCI was the first in this era to share another opinion about the role of animals in society. Apparently, he was a vegetarian because he was concerned about animal cruelty.[22] This could mark a change of mindset towards animals during this era. However, this has been subverted by DESCARTES.[23]

31. DESCARTES – During the 17th Century, DESCARTES stated that everything existed out of a certain substance and that everything was regulated by mechanical principles. This could be illustrated by the functioning of a clock. According to this mindset, people were machines and their behavior would be regulated by the laws of science. However, he made a distinction between two kinds of 'things'. Namely, there existed things with a soul and things without a soul. Mankind can be considered as a thing with a soul while animals did not have a soul, according to DESCARTES. He furthermore stated that animals should be seen as machines; they cannot suffer nor can they experience pleasure. They have no feelings and can be compared to the functioning of a clock. Based on this mindset, there were conducted a lot of vivisections on living animals without any form of anesthesia.[24] From that moment on, the mindset towards animals could not get any worse, only better.[25]

2.4. Enlightenment

32. Scientific development – The numerous amounts of vivisections have led to the conclusion that there exist several physical similarities between mankind and animals.[26] This had as result that it made DESCARTES' mindset questionable.[27] Hence, several philosophers and scientists started to question the practices of vivisections. They started to realize that animals could experience pain and that they are sentient beings. Consequently, also their interests need to be taken into account.[28]

33. BENTHAM and KANT – In the 18th and 19th century, there were two important and influential philosophers that had a whole other mindset compared to DESCARTES regarding animals.[29] BENTHAM was the first that rejected the supremacy of mankind over animals. He

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[22] P. SINGER, *Animal Liberation*, New York, HarperCollins Publishers, 1975, 199.
[23] V. DE MEUTER, *Dieren in het strafrecht: Van bijzondere rechtsobjecten naar beperkte rechtssubjecten?,* Master Thesis, KU Leuven, 2015, 6.
[24] R. DESCARTES, *Discourse on Method*, part V, 1637; G.L. FRANCIONE, "Animals – Property or Persons?", in C.R. SUNSTEIN en M.C. NUSSBAUM (eds.), Animal Rights: Current Debates and New Directions, New York, Oxford University Press, 2004, 110; L. LETOURNEAU, "De l'animal-objet à l'animal-sujet?: regard sur le droit de la protection des animaux en Occident", *Lex Elextronica* 2005, 3.
[25] V. DE MEUTER, *Dieren in het strafrecht: Van bijzondere rechtsobjecten naar beperkte rechtssubjecten?,* Master Thesis, KU Leuven, 2015, 7.
[26] P. SINGER, *Animal Liberation*, New York, HarperCollins Publishers, 1975, 202.
[27] V. DE MEUTER, *Dieren in het strafrecht: Van bijzondere rechtsobjecten naar beperkte rechtssubjecten?,* Master Thesis, KU Leuven, 2015, 7.
[28] P. SINGER, *Animal Liberation*, New York, HarperCollins Publishers, 1975, 202.
[29] V. DE MEUTER, *Dieren in het strafrecht: Van bijzondere rechtsobjecten naar beperkte rechtssubjecten?,* Master Thesis, KU Leuven, 2015, 8.

introduced the principle of humane treatment towards animals.[30] Since animals can suffer, we would have the moral duty to no commit acts of cruelty towards them. Although KANT shared the same mindset that animals could suffer, he was of the opinion that mankind had no moral duties towards them because they were not self-conscious.[31] [32]

§3. The beginnings of animal law as a legal discipline

34. General – The society's point of view can also be addressed by analyzing the existence and roots of animal law. Knowing the very first beginning of this movement is crucial when analyzing the extension of fundamental rights to animals. So, under this paragraph the reader will be provided with a brief overview of the roots of what today is categorized as 'animal law'. The purpose is not to provide an extensive overview of dates and events. On the contrary, there would be made a selection of the most noteworthy ones.

3.1. H.M. Holzer

35. First animal rights lawyer – Henry Mark HOLZER can be considered as the first animal rights lawyer. He was the first to use the legal system to protect animals' interests.[33] As a constitutional lawyer in the US, he was of the opinion that the Federal Humane Methods of Livestock Slaughter Act of 1958[34] (hereinafter: 'Humane Slaughter Act' or 'Act') violated the Establishment and Free Exercise Clauses of the First Amendment. This Act specified that in order for slaughter to be considered humane, livestock must be "*rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut…*" However, this Act provided the following exemption to the above "*slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument…*". HOLZER was convinced that the creation of this exemption cannot be justified under the law.

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[30] J. BENTHAM, *Introduction to the Principles of Morals and Legislation*, 1781; P. SINGER, *Animal Liberation*, New York, HarperCollins Publishers, 1975, 203.
[31] G.L. FRANCIONE, "Animals – Property or Persons?", in C.R. SUNSTEIN en M.C. NUSSBAUM (eds.), Animal Rights: Current Debates and New Directions, New York, Oxford University Press, 2004,111.
[32] Since these philosophers marked an important change in the mindset towards animals, their theories will be further discussed under the part dealing with the 'philosophical approach'.
[33] J. TISCHLER, "The History of Animal Law, Part I (1972 – 1987*)", Stanford Journal of Animal Law and Policy* 2008, 3 and 4.
[34] Humane Methods of Livestock Slaughter Act of 27 August 1958, Unknown publication date in official gazette.

3.2. Jones v. Butz

36. First important case – In January 1973, HOLZER filed *Jones v. Butz* in the United States District Court for the Southern District of New York. [35] The first animal rights lawsuit marked a clear division between those who sought to protect farmed animals and those who sought to protect the religious practice of ritual or "kosher" slaughter. As stated in the beginning, here we can see a good example of the "*supporters and the opponents of a certain position that already have been established centuries ago*". Among the plaintiffs were Jewish and non-Jewish people, atheists, vegetarians, meat eaters, consumers and taxpayers. [36] The plaintiffs claimed a commitment to "the principle of the humane treatment of animals" and "the principle of separation of church and state."[37] Among the defendants were Earl BUTZ, as Secretary of Agriculture, Rabbi Joseph SOLOVEITCHIK, a religious slaughter expert, a few individuals and several organizations that said to "*speak for a large number of the estimated 6 million Jews in the United States*".[38]

37. Judgment – One year later, the Court decided that while the plaintiffs had standing, the Human Slaughter Act did not violate the Establishment Clause. The Court was of the opinion that Congress had "*considered ample and persuasive evidence to the effect that the Jewish ritual method of slaughter, and the handling preparatory to such slaughter, was a humane method.*" [39] The Court found that the issue was simply a policy choice in the domain of the legislature. It further added "*The court cannot be asked to choose among methods of slaughter [or] pre-slaughter handling of livestock and to decide which is humane and which is not. We do not sit as a 'super-legislature to weigh the wisdom of legislation'.*"[40] Further, the US Supreme Court affirmed the district court without opinion.[41]

3.3. 'Animal Liberation'

38. First animal law course – In 1975, Peter SINGER, an Australian philosopher published his book called '*Animal Liberation*'.[42] The terms 'animal rights' and 'speciesism' were frequently used in his book and they were the object of several discussions. This author illustrated that animals were not mere objects that could be used by humans however they would like to. This date can be considered as the beginning of the animal rights movement. The topic would gain its popularity in the streets, in the newspapers, on the radio and on the television. Consequently, the

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[35] *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y. 1974), *aff'd*, 419 U.S. 806 (1974).
[36] J. TISCHLER, "The History of Animal Law, Part I (1972 – 1987)", *Stanford Journal of Animal Law and Policy* 2008, 6.
[37] *Ibid*.
[38] *Ibid.*, 6 and 7.
[39] *Jones v. Butz*, 374 F. Supp. at 1291.
[40] *Ibid.* at 1291-1292.
[41] *Jones v. Butz*, 419 U.S. 806 (1974).
[42] P. SINGER, *Animal Liberation: A New Ethics for our Treatment of Animals*, New York, Random House, 1975.

first animal law rights course has been introduced in a university. This course would be taught by Professor Theodore Sager METH at the Seton Hall University in New Jersey. [43] A few years later also Harvard Law School introduced its first animal law course under the name 'Animal Rights'. Because of the university's reputation, the law school establishments around the world took notice, as did worldwide media. Courses in animal law then multiplied so rapidly that the number of such courses offered around the world increased more than tenfold in the following decade.[44]

3.4. Attorneys for Animal Rights ('AFAR')

39. First organization – In 1978, the first national animal law organization in the US had been established with several lawyers. This group was called 'Attorneys for Animal Rights' and is known today as 'Animal Legal Defense Fund'. The members of the group taught themselves about a variety of animal law related issues. They would analyze US law relevant to animals or recently published books or articles on animal rights or animal abuse. [45] From this point on, the animal law movement was continuously growing.

3.5. 'Rattling the Cage'

40. WISE – After having written several articles about animal law in law reviews, WISE realized that this subject should be brought to the attention of the public. Hence, in 2000 he published the book '*Rattling the Cage*'.[46] This was a turning point in the field of animal law. It enabled the author and the animal law movement to reach a significantly larger audience. His main goal is the recognition of animals as legal persons. He and his team developed the first set of lawsuits to address this issue.[47] Today his team works under an organization called '*Nonhuman Rights Project*'. They want to change the common law status of great apes, elephants, dolphins, and whales from mere 'things', which lack the capacity to possess any legal right, to 'legal persons', who possess such fundamental rights as bodily liberty and bodily integrity. [48]

41. FAVRE – Another important legal scholar, D. FAVRE, has approached the animal rights discourse in another way. He argues that within the existing 'property paradigm' significant changes and advances are possible. This scholar is of the opinion that property in an animal can be divided between legal and equitable title. The latter would be transferrable to the animal. Moreover, he also suggests creating a new tort to protect some interests of certain animals.

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[43] *Ibid.,* 9 and 10.
[44] L. KALOF, *The Oxford Handbook of Animal Studies*, Oxford, Oxford University Press, 2017, 171-172.
[45] *Ibid.,* 10 and 11.
[46] S.M. WISE, *Rattling the Cage : Towards Legal Rights for Animals,* New York, Perseus Books Group, 2000.
[47] J. TISCHLER, "The History of Animal Law, Part II (1985 – 2011)", *Stanford Journal of Animal Law and Policy* 2012, 51.
[48] https://www.nonhumanrights.org/who-we-are/.

According to him, animals can be granted some legal rights if they are viewed as a 'living property'.[49] The latter would constitute a fourth category of property in the US.[50]

3.6. Lawsuits and legislation

42. Increased amounts of lawsuits – Since the inception of animal law there have been several lawsuits. There have been a large number of civil lawsuits dealing with problems experienced by companion animals. According to J. TISHLER the latter can be defined as "*those species who have the closest physical proximity to and emotional relationships with human beings*". [51]Moreover, there have also been several cases dealing with animals used in research and testing. The United States Department of Agriculture for example, excluded – and still excludes – rats, mice and birds from the definition of 'animal' from the American Animal Welfare Act. This has been challenged before the Court in 2000, without success.[52] On top, there have been also several cases trying to protect wildlife. The main goal of animal law defenders is that legislation and lawsuits will recognize and respect the rightful place of animals, not as resources for human exploitation but as co-equals on the planet.[53]

43. Relevance – The brief overview of some important events, dates and or persons have categorized – and/or continue categorizing – animal law as known today. This overview can show us the roots of animal law. It illustrates the changes in society's point of view towards the animal's status.

§4. Which philosophical approach?

44. General – As seen in the third part of the first section, history can be useful and relevant to get an insight about how society thinks about animals. Philosophy on the other hand is important because it can explain people's motivations and why they feel the way they do about a particular issue. Philosophical arguments are often used to either justify or condemn certain actions towards animals or certain thoughts about them. There are several philosophical theories available that could help in analyzing the extension of fundamental rights to animals. The purpose of this paragraph is not to give an extensive overview of all the available theories but to set out the most relevant ones for the extension of fundamental rights to animals.

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[49] D. FAVRE, "New Property Status for Animals: Equitable Self-Ownership"*,* in C.R. SUNSTEIN and MC. NUSSBAUM, *Animal Rights : Current debates and new directions,* Oxford, Oxford University Press, 2004, 238-45.
[50] *Ibid.,* 51 and 52.
[51] J. TISCHLER, "The History of Animal Law, Part II (1985 – 2011)", *Stanford Journal of Animal Law and Policy* 2012, 55.
[52] *Ibid.,* 60-62.
[53] *Ibid.,* 67-69.

4.1. The moral status of animals?

45. Moral status – Before analyzing several theories, it is crucial to understand the philosophical discussion about whether animals have a moral status or not. The core idea in this discussion can be illustrated by asking the following question: "*Is there something distinctive about humanity that justifies the idea that humans have moral status while non-humans do not?*". Answering this question will enable to better understand the nature of human beings and the proper scope of our moral obligations towards animals.[54]

46. Moral claims – Stating that a being deservers moral consideration entails that there is a moral claim that this being can make on those who can recognize such claims. In other words, a being that is morally considerable is a being that can be wronged. Often there is argued that because only humans can recognize moral claims, only they are morally considerable. However, being able to recognize moral claims and being able to suffer moral wrongs are not co-extensive.[55]

47. Only persons – Some theories argue that a moral status can only be granted to 'persons' (*i.e.* beings that possess personhood).[56] While other theories argue that this personhood is not a necessary condition and that a moral status can also be granted to 'selves'.[57]

4.2. Utilitarianism

48. BENTHAM – The first theory is 'utilitarianism' and BENTHAM can be considered as the founding father. He defined his theory according to the principle of utility. This means that actions should be approved or disapproved by their possibility to augment or diminish the happiness of the stakeholder. In other words, the right choice to make is the one that maximizes the happiness of the largest group of stakeholders. Moreover, the morality of actions should be determined by their consequences.[58] BENTHAM was one of the few thinkers of his time that was convinced that the principle of equal consideration should also be applied to some non-human animals. He asked himself the following: "*The question is not, can they reason? nor can they talk? but, can they suffer?*". [59]

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[54] L. GRUEN, "The Moral Status of Animals", *Stanford Encyclopedia of Philosophy* 2017, 1 and 2.
[55] *Ibid*.
[56] This concept should not be confused with legal personhood. This will be discussed in the second chapter of this thesis.
[57] Cfr. *Infra* n° 52.
[58] G.L. FRANCIONE, "Animal Rights Theory and Utilitarianism: Relative Normative Guidance", *Between the Species* 2003, 3.
[59] J. BENTHAM, *An Introduction to the Principles of Morals and Legislation*, London, Methuen, 1982, chapter xvii, paragraph 6.

49. SINGER – Another philosopher that can be considered as a supporter of utilitarianism is P. SINGER that is famous for his book '*Animal Liberation*'.[60] He was one of the first to use the concept of 'speciesism'. He describes this as "*a prejudice or attitude of bias in favor of the interests of members of one's own species and against those of members of other species*".[61] According to him speciesism, like racism and sexism, is an act of discrimination which should be condemned and avoided.

4.3. Kantianism

50. Personhood – This theory has been developed by KANT. The main idea behind this theory is that the morality of actions should be determined by the morality of the actions themselves.[62] On top, this philosopher is of the opinion that *persons* should never be used as mere means to an end but as ends in themselves. Humans would not owe any direct duties towards non-human animals because they are not *persons*. According KANT, humans have no other duties towards animals than the duties they actually owe themselves. [63]

51. Definition – KANT stated that *persons* are rational beings.[64] A more elaborated definition of a person has been developed by SAPONTZIS. According to him, persons are "*beings that are (i) embodied (ii) animate (iii) emotive (iv) initiators of actions rather than reflexive, instinctual, or mechanical respondents to their environment and (v) capable of forming ideas about the world rather than being merely things in the world*".[65]

4.4. Animal Rights Theories

52. Selfhood – As seen above, according to Kantianism, personhood is a necessary condition for granting a moral status. According to DONALDSON and KYMLICKA, granting a moral status to persons only "*would defeat the purpose of human rights: namely to provide security to all selves, especially to those who are vulnerable*".[66] Another theory that proposes a more inclusive condition for moral consideration is the 'Animal Rights Theory'. [67] According to several Animal Rights Theorists, 'selfhood' is a sufficient condition for moral consideration.[68]

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[60] P. SINGER, *Animal Liberation: A New Ethics for our Treatment of Animals*, New York, Random House, 1975, 185.
[61] *Ibid*., 7.
[62] I. KANT, *Kant: The Metaphysics of Morals*, Oxford, Oxford University Press, 2017, 166.
[63] *Ibid.,* 165.
[64] *Ibid.,* xiii.
[65] S.F. SAPONTZIS, "A Critique of Personhood", *Chicago Journals* 1981, 607 and 608.
[66] S. DONALDSON and W. KYMLICKA, *Zoopolis. A Political Theory of Animal Rights,* Oxford, Oxford University Press, 2011, 25-32.
[67] A. HOUWAARD, *Human Rights for Monkeys and Pigs: Why selves deserve a moral status,* Master Thesis, University of Leiden, 2018, 13.
[68] FRANCIONE, 2008; CAVALIERI, 2001; REGAN, 2004; DONALDSON and KYMLICKA, 2011; KORSGAARD, 2009.

53. Definition – Philosopher T. REGAN has conceptualized 'selfhood' through his 'subject-of-a-life' criterion. This would entail the following: "*…individuals are subjects-of-a-life if they have beliefs and desires; perception, memory, and a sense of the future, including their own future; and emotional life together with feelings of pleasure and pain; preference-and welfare-interests; the ability to initiate action in pursuit of their desires and goals; a psychological identity over time; and an individual welfare in the sense that their experiential life fares well or ill for them…*".[69] REGAN is of the opinion that as soon as a being is subject-of-a-life, it holds an inherent value and should not be viewed as mere means-to-ends. The concept of selfhood can be considered adequate since (i) it relies on characteristics that go beyond species (ii) it includes more than merely being alive. [70]

54. Selves? – Consequently, the question can be asked which beings could be considered selves. In other words, if this would be known, then a line could be drawn between persons and selves. According to multiple scientific studies normally functioning mammals, once having attained a certain age, possess the cognitive prerequisites for having "*…beliefs and desires….*" and could be considered as subjects-of-a-life.[71]

4.5. Conclusion

55. Which criterion? – When talking about philosophy and animal rights, there is a discussion whether animals should have a moral status. This is relevant in order to determine the moral obligations of humans towards animals. When analyzing Kantianism, it became clear that this theory does take into consideration the intrinsic value of beings. However, according to KANT only persons (*i.e.* rational beings that possess personhood) should be morally considerable. Therefore, a theory that provides a more inclusive condition for moral consideration are the Animal Rights Theories. The latter does not take into account personhood but selfhood. The latter can be illustrated through the subject-of-a-life criterion by developed REGAN.

Section 2: Global emergence of 'animal rights'

56. Limitations to the research – There should be highlighted that the analysis of the trends in the legislation and jurisprudence are subject to some limitations. This means that the analysis has been conducted in countries that have made their sources available online. Moreover, there is also

[69] T. REGAN, *The Case for Animal Rights*, Los Angeles, University of California Press, 2004, 243.
[70] A. HOUWAARD, *Human Rights for Monkeys and Pigs: Why selves deserve a moral status,* Master Thesis, University of Leiden, 2018, 15.
[71] A. SETH, B. BAARS and D. EDELMAN, "Criteria for consciousness in humans and other mammals", *Consciousness and Cognition* 2005, 119-139; J. PANKSEPP, "Affective consciousness: Core emotional feelings in animals and humans", *Consciousness and Cognition* 2005, 30–80; N. CLAYTON, T. BUSSEY and A. DICKENSON, "Can Animals Recall the Past and Plan for the Future? " *Nature Reviews: Neuroscience* 2003, 685-691.

the language barrier that prevented analyzing other potentially interesting countries regarding the extension of fundamental rights to animals.

§1. Trends in the legislation

57. General – There are several countries that are amending their civil codes. Some countries recognize that animals are not things (*i.e.* the dereification of animals), while other countries recognize them as 'sentient beings'. However, these modifications do not entail that animals would not resort anymore under the property laws. According to some legal scholars these modifications are mere symbolic ones. They are of the opinion that a real change of the legal status of animals has to be followed by a reinterpretation of their position within particular legal institutions such as ownership. Nevertheless, other legal scholars are convinced that this is a first step in the direction of granting fundamental rights to animals.[72] [73] Moreover, these modifications are an illustration that the society's point of view towards animals is changing. It should be noted that these trends are especially notable in civil law countries.

1.1. The (symbolic) dereification in civil law: Animals as non-things

58. Austria – The dereification of the animal entails the recognition that animals are not mere things.[74] Austria has initiated this 'movement' of dereification of the animal by modifying their Civil Code. In 1988, they modified their Code and now article 285 states the following: "*Animals are not things; they are protected by special laws. The provisions in force for the things apply to animals only if no contrary regulation exists.*" [75] (Free translation)

59. Germany – Germany followed in 1990 and the relevant provision in their Civil Code reads as follows: "*Animals are not things. They are protected through special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided.* "[76] (Free translation)

60. Switzerland – In 2003, also Switzerland modified their Civil Code by stating that "*animals are not objects*". But this article also adds that "*where no special provisions exist for animals, they are subject to the provisions governing objects*".[77] (Free translation)

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[72] J.P. MARGENAUD, "L'entrée en vigueur de «l'amendement Glavany»: un grand pas de plus vers la personnalité juridique des animaux", *RSDA* 2014, 15-44.
[73] This will be further analyzed under the third chapter.
[74] O. LE BOT, "Grandes Evolutions du Régime Juridique de l'Animal en Europe: Constitionalisation et Dereification", *Revue québecoise de droit international* 2011, 254.
[75] Article 285 Austrian Civil Code from 1 June 1811, Published in the *Austrian Official Gazette* on 1 January 1812.
[76] Article 90.1 German Civil Code from 18 August 1896, Published in the *German Official Gazette* on 24 August 1886.
[77] Article 641 Swiss Civil Code from 10 December 1907, Published in the *Swiss Official Gazette* on 1 January 1912.

61. Catalonia – Catalonia stated in their Civil Code in 2006 the following: "*The animals, which are not considered as things, are under the special protection of the laws. Only apply to them the rules of goods in accordance with their nature*".[78] (Free translation)

62. Netherlands – The Netherlands followed in 2011 and their Civil Code now provides the following: "*Provisions regarding things are applicable to animals, taking into account the legal requirements and rules of common law, reasonable restrictions, obligations and principles of law, as well as public order and morality*".[79] (Free translation)

63. Czech Republic – Since 2012 article 494 of the Czech Civil Code states the following: "*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*".[80] (Official translation)

64. Conclusion – There can be concluded that even though animals are no longer considered things in the Civil Codes of these countries, they continue resorting under the category of 'things' (*i.e.* under property law). Therefore, the dereification is just a mere symbolic one and not genuine.[81]

1.2. Sentience recognized in civil law: Animals as sentient beings

65. The European Union – The European Union stated in 2008, in one of its most important treaties, that animals are sentient beings.[82] A few years later several countries have also recognized in their Civil Codes that animals are sentient beings.

66. France – Article 515-14 of the French Civil Code reads as follows since 2015[83]: "*Animals are sentient beings who can benefit from laws regarding animal welfare*".[84] (Free translation)

67. Québec – Québec followed in 2015 and they modified their Civil Code by introducing the following article: "*Animals are not things. They are sentient beings and have biological needs. In*

[78] Article 511-1 of the Catalonian Civil Code from 10 May 2006, Published in the *Catalonian Official Gazette* on 24 May 2006.
[79] Article 3 :2A Dutch New Civil Code from 1 January 1992, Published in the *Dutch Official Gazette* on 1 January 1992,
[80] Article 494 Czech Civil Code from 3 February 2012, Unknown publication date in Official Gazette.
[81] O. LE BOT, "Grandes Evolutions du Régime Juridique de l'Animal en Europe: Constitionalisation et Dereification", *Revue québecoise de droit international* 2011, 256.
[82] Article 13 of the Treaty on the Functioning of the European Union of 13 December 2007, *Pb.L.* 26 October 2012.
[83] Cfr. J.M. NEUMANN, "The Legal Status of Animals in the French Civil Code The recognition by the French Civil Code that animals are living and sentient beings: symbolic move, evolution or revolution?", *Global Journal of Animal Law* 2015, 1-13.
[84] Article 515-14 French Civil Code from 21 March 1804, Published in the *French Official Gazette* on 21 March 1804.

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."[85] (Official translation)

68. Colombia – A new Law (n° 1774 of 2016) was approved in Colombia in 2016 and article 2 of that bill states the following: "*Animals as sentient beings are not things, they will receive special protection against suffering and pain, in particular, suffering and pain caused directly or indirectly by humans; this Law classifies some behaviors related with animal abuse as punishable and establishes a police and legal enforcement procedure*."[86] (Free translation) Following this law, the Civil Code also got modified but it does not explicitly state that animals are sentient beings. Article 655 of the Colombian Civil Code reads as follows: "*Movable goods are those which can be transported from one place to another, either when they are capable of moving themselves, such as animals (which are known as self-moving), or whether they are only moved by an external force, such as inanimate things. Excepting those which are movable goods by nature but are deemed immovable goods due to their use, according to article 658*."[87] (Free translation) As can be noted, Colombia decided to maintain the original drafting of the Civil Code but article 2 of the new Law (1774 of 2016) adds a paragraph mentioning that animals shall be recognized as having the quality of sentient beings. This is not considered as coherent according to Colombian legal scholars.[88]

1.3. Did India grant legal personhood to dolphins?

69. Statement –There has been a lot of confusion whether India has granted legal personhood to dolphins.[89] This confusion arose from the statement of the Minister of the Environment and Forests in India. The Minister stated the following: "*Whereas cetaceans in general are highly intelligent and sensitive, and various scientists who have researched dolphin behavior have suggested that the unusually high intelligence; as compared to other animals means that* ***dolphins should be seen as 'non-human persons' and as such should have their own specific rights*** *and is morally unacceptable to keep them captive for entertainment purpose."*[90]

70. No legal personhood – Stating that dolphins should be seen as 'non-human persons' does not mean that legal personhood has been extended to these animals. The Indian government only

[85] Article 898.1 Quebec Civil Code from 18 December 1991, Published in the Quebec, Unknown Publication Date in Official Gazette.
[86] Law 1774 of January 6, 2016 which modifies the Civil Code, Law 84 of 1989, the Criminal Code, the Criminal Procedure Code and dictates other provisions, Unknown publication date in Official Gazette.
[87] Article 655 Colombian Civil Code from 26 May 1873, Published in *Colombian Official Gazette* on 31 May 1873.
[88] C. CONTRERAS, "Sentient Beings Protected by Law : Analysis of Recent Changes in Colombian Animal Welfare Legislation", *Global Journal of Animal Law* 2016, 5.
[89] According to ethics professor WHITE "*Science has shown that individuality - consciousness, self-awareness - is no longer a unique human property. That poses all kinds of challenges*.", http://www.bbc.com/news/world-17116882.
[90] Government of India, Ministry of Environment and Forests, "Policy on Establishing Dolphinariums ", F. No. 20-1/2010 – CZA (W), 17 Mary 2013 in C.S.G. JEFFERIES, *Marine Mammal Conservation and the Law of the Sea,* Oxford, Oxford University Press, 2016, 110.

claimed that dolphins 'should' be recognized as legal persons with the capacity for holding certain legal rights, but they never granted them a status in order to hold such rights. However, they did abolish the use of dolphins in aquatic theme parks.

§2. Trends in the jurisprudence

71. Legal personhood – The trends in the jurisprudence do not concern the (symbolic) dereification of the animal nor do they concern the recognition of the status of the animal as sentient being. Organizations as for example the *Nonhuman Rights Project*, founded by animal rights lawyer WISE, are fighting for recognizing some animals as legal persons. It can be useful to set out the approach used by the organization before analyzing the cases that have been brought before the courts.

72. Approach – WISE and his legal team are of the opinion that "*The few animal protection laws that exist are weak, apply only to certain species in certain circumstances, and grant the animals themselves no rights whatsoever. Animal welfare statutes don't provide recourse against the inherent cruelty of depriving self-aware, autonomous beings of their freedom, the company of others of their kind, and their natural habitats*".[91]They are convinced that the first and best way to achieve fundamental rights for animals is through litigation before the Court. They state that "*For a millennium, English-speaking judges have used the common law to decide cases that turn on general legal principles—such as liberty and equality—as opposed to those that require interpretation of statutes, constitutions, or treaties. Historically, the common law has been uniquely responsive to evolving standards of morality, scientific discovery, and human experience, especially in matters where the legislature hasn't definitively spoken. These evolving standards have already significantly changed how we view and treat nonhuman animals outside the courtroom. It's time for our legal systems to catch up*."[92]

73. *Habeas Corpus* – The *Nonhuman Rights Project* and other organizations that strive for fundamental rights for animals do this by filing "*Petitions for Writs of Habeas Corpus*". According to the first mentioned organization the *Habeas Corpus* is "*... a centuries-old means of testing the lawfulness of one's imprisonment before a court. It was used extensively in the 18th and 19thcenturies to fight human slavery, and abolitionists often petitioned for common law writs of habeas corpus on behalf of enslaved individuals. The most well-known such case is Somerset v. Steuart (1772) in which the Lord Chief Justice of England and Wales granted the writ to a human slave, freeing him unequivocally and essentially transforming him from a legal thing to a legal person. We argue common law courts should do the same for our nonhuman clients.*".[93]

[91] https://www.nonhumanrights.org/litigation/.
[92] *Ibid.*
[93] *Ibid.*

74. Not for all animals – It should be highlighted that the organizations demand recognition of the legal personhood and fundamental rights to bodily liberty of individual great apes, elephants, dolphins, bears and whales that are held in captivity. Other animals are not (yet) subject of any litigation. These trends in jurisprudence are more notable in common law countries. This is contrary to the changes made in the legislation. The latter are more visible in civil law countries.

2.1. Suiça

75. Who? – A petition for writ of *Habeas Corpus* in favor of the chimpanzee Suiça was filed before the 9th Criminal Court of the State of Bahia. The chimpanzee lived in a cage in the Zoological Garden of the City of Salvador (Brazil). Judge E.L. DA CRUZ opened an historical precedent for the legal world and admitted a chimpanzee as a subject of rights in a court.[94]

76. Denied writ – Unfortunately, before the Court could judge the merits of the case, Suiça died and the legal proceedings needed to be interrupted. Nevertheless, it needs to be emphasized that the judge made clear that the writ fulfilled all the conditions of action. In other words, (i) the judicial protection claim was susceptible to assessment (ii) the parties were legitimate (iii) and the *Habeas Corpus* was a necessary and appropriate instrument for the petition and therefore could occasion a satisfactory result.[95] The judge cited an ancient precedent of the Supreme Federal Court of Law: "*I am sure that, with the acceptance of the discussion, I could arouse the attention of lawyers across the country, making the subject matter of extensive discussion, because it is known that the Criminal Process of Law is not static, but subject to constant change, where new decisions have to adapt to the modern times.*"

2.2. Tommy, Kiko, Hercules and Leo

2.2.1. Tommy and Kiko

77. Who? –The chimpanzee called Tommy was the first 'non-human animal' client of the *Nonhuman Rights Project* in the United States. The other chimpanzee is called 'Kiko'. Both have been used for a role in a movie. Today they are being held captive alone in a cage. The proceedings for both of the chimpanzees started in a very similar way. Therefore, only the proceeding for Tommy will be shortly discussed. Moreover, currently both proceedings are being handled together before the New York Court of Appeals.[96]In December 2013, WISE filed a petition for writ of *Habeas Corpus* before the New York State Supreme Court to demand

[94] *Suiça V. Zoological Garden of the City of Salvador*, 28 September 2005, Index. No. 833085-3/2005 (The 9th Criminal Court of the State of Bahia). (Known as *Suiça v. Gavazza*)
[95] H. GORDILHO, "Animal Standing and the Habeas Corpus Theory for the Great Apes", *RJLB* 2017, 730 ff.
[96] https://www.nonhumanrights.org/client-tommy/.

recognition of Tommy's legal personhood and right to bodily liberty and his immediate transfer to an appropriate sanctuary.[97]

78. Denied writ – At the end of the hearing Justice J.M. SISE offers his support for Tommy but denies the *habeas* petition. He adds the following: *"Your impassioned representations to the Court are quite impressive ... I will be available as the judge for any other lawsuit to right any wrongs that are done to this chimpanzee because I understand what you're saying. You make a very strong argument.* ***However, I do not agree with the argument only insofar as Article 70 applies to chimpanzees.*** *Good luck with your venture. I'm sorry I can't sign the order, but I hope you continue. As an animal lover, I appreciate your work."*[98] After having filed a Notice of Appeal with the New York State Supreme Court, Appellate Division, Third Judicial Department, the Court states the following in December 2014: "*Tommy is not a 'person' entitled to rights and protections afforded by the writ of habeas corpus because unlike human beings,* ***chimpanzees can't bear any legal duties****, submit to societal responsibilities, or be held legally accountable for their actions.*" [99]

79. ***Amicus curiae*** **–** In May 2015, legal scholar L.H. TRIBE, University Professor and Professional of Constitutional Law at Harvard University, submits *an amicus curiae* brief[100] in support of the *Nonhuman Rights Project*'s motion. He is of the opinion that "*the lower court fundamentally misunderstood the purpose of the common law writ of habeas corpus*" and "*reached its conclusion on the basis of a fundamentally flawed definition of legal personhood*".[101] Furthermore, also the Center for Constitutional Rights – a legal advocacy organization focusing on civil liberties and human rights – submits an *amicus curiae* brief. It urges the Court of Appeals to hear this case because it agrees that the *Nonhuman Rights Project* "*presents a novel question of significant importance, both in terms of the legal precedent it will set and as a matter of social justice and public policy*".[102]

80. Denied writ in appeal – In June 2017, the First Judicial Department rules that the *Nonhuman Rights Project* cannot seek writs of *habeas corpus* on behalf of Tommy and Kiko. The Court reaffirms the argument made by the New York State Supreme Court, Appellate Division, Third Judicial Department and states the following: "*Petitioner argues that the ability to acknowledge a*

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[97] *Ibid.*
[98] *The Nonhuman Rights Project v. P.C. Lavery*, New York State Supreme Court, Index No. 02051, 3 December 2013, 27.
[99] *The Nonhuman Rights Project v. P.C. Lavery*, State of New York Supreme Court, Appellate Division Third Judicial Department, Index No. 518336, 4 December 2014, 6.
[100] This literally means 'friend of the Court'. It is filed by a non-party who has an interest in the outcome of the case. Cfr. P.E. NOLLKAMPER, *Legal Secretary Federal Litigation*, Costa Mesa, James Publishing, 2017, paragraph 422.2.
[101] *The Nonhuman Rights Project v. P.C. Lavery*, Court of Appeals of the State of New York, Index No. 518336, 8 May 2015 (Letter Brief of Amicus Curiae L.H. TRIBE), 1 ff.
[102] *The Nonhuman Rights Project v. P.C. Lavery*, Court of Appeals of the State of New York, Index No. 518336, 28 May 2015 (Letter Brief of Amicus Curiae Center for Constitutional Rights), 4 ff.

legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. ***This argument ignores the fact that these are still human beings, members of the human community***."[103]

81. Legislative process – It is also worth mentioning that the Court is of the opinion that the extension of fundamental rights to animals is more likely to be achieved through a change of legislation instead of proceedings before the courts: "*While petitioner's avowed mission is certainly laudable, the according of any fundamental legal rights to animals, including entitlement to habeas relief,* ***is an issue better suited to the legislative process***".[104]

2.2.2. Hercules and Leo

82. Who? –Hercules and Leo are two chimpanzees that are held in captivity at the New Iberia Research Center (NIRC) at the University of Louisiana, Lafayette. In 2009, when Hercules and Leo were each only a year old, NIRC 'leased' them to Stony Brook University's Department of Anatomical Sciences.[105]

83. Denied writ – In December 2013, the *Nonhuman Rights Project* files a petition for a common law writ of *habeas corpus* lawsuit in front of the New York State Supreme Court to demand recognition of Hercules' and Leo's legal personhood and right to bodily liberty and their immediate transfer to an appropriate sanctuary. This has been denied without holding a hearing.[106]

84. Denied writ in appeal – In appeal, Justice B. JAFFE rules that, despite the merits of the case that she is bound to follow the previous determination of the New York State Supreme Court, Appellate Division, Third Judicial Department in Tommy's case. Consequently, she denies the *habeas* petition. Nonetheless, she concludes: *"****Efforts to extend legal rights to chimpanzees are … understandable; some day they may even succeed****. Courts, however, are slow to embrace change, and occasionally seem reluctant to engage in broader, more inclusive interpretations of the law … As Justice Kennedy observed in Lawrence v Texas*[107]*, 'times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.' For now, however, given the precedent to which I am bound, it is hereby ordered that the petition for a writ of habeas corpus is denied."*[108]Justice B. JAFFE is also of the opinion that the idea that recognizing legal rights of individual chimpanzees will open the door to

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[103] *The Nonhuman Rights Project v. P.C. Lavery*, State of New York Supreme Court, Appellate Division Third Judicial Department No. 518336, 8 June 2017.
[104] *Ibid.*
[105] https://www.nonhumanrights.org/hercules-leo/.
[106] *Ibid.*
[107] *Lawrence e.a. v. Texas*, Court of Appeal of Texas, Index. No. 02-102, 26 June 2003.
[108] *The Nonhuman Rights Project* v. S.L. Stanley, New York Supreme Court, Index. No. 152736/15, 29 July 2015, 33.

rights for all animals is "*not a cogent reason for denying relief*". On top, she states that who is a "person" is not a question of biology, but of public policy and principle. [109]

85. Release – Following the highly publicized hearing, Stony Brook announced in July 2015 that it will no longer use Hercules and Leo in research. Currently, at the moment of writing, they are still held in captivity in the Research Center in Louisiana. In May 2016, the NIRC announced that it will send Leo and Hercules – and 218 other chimpanzees that remain in captivity at the facility – to a sanctuary. In spite of this positive announcement, according to the NIRC this process would take three to five years. [110]

2.3. Cecilia

86. Who? – Cecilia is a chimpanzee that was held captive at the Mendoza Zoo in Argentina. The Association of Professional Lawyers for Animal Rights (Hereinafter 'AFADA') filed a habeas corpus lawsuit with the Third Court of Guarantees in Mendoza. [111]

87. Granted writ – Judge M.A. MAURICIO ruled in November 2016 that Cecilia is a "*non-human legal person*" with "*inherent rights*". She also ordered that the chimpanzee needed to be transferred to a sanctuary within the six months of the date of the judgment.[112]

88. Judge's arguments – This case is extremely interesting since Cecilia is the first non-human animal to be freed from captivity using a writ of *habeas corpus*. It is worth to quote some of the statements that the Court made regarding the extension of fundamental rights to animals:[113]

"*At present, we can see an awareness of situations and realities that although are have been happening since unmemorable times, they were not recognized by social figures. That is the case of gender violence, marriage equality, equal voting rights, etc. There is an identical situation with the awareness of animal rights*."[114] (Free translation)

"*I am aware that for more than one decade our society has started a slow process of awareness and learning about the impact of the excessive and illegitimate use of property that is part of the patrimony of private or public legal persons, so that there has been a strong enforcement of the idea of the protection and preservation of the environment.*

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[109] *Ibid.,* 30 ff.
[110] https://www.nonhumanrights.org/hercules-leo/.
[111] https://www.nonhumanrights.org/media-center/12-5-16-media-release-nhrp-praises-argentine-court-on-legal-personhood-for-chimpanzee/.
[112] *A.F.A.DA. v. Zoo of Mendoza*, Third Court of Guarantees in Mendoza, Index N.P-72.254/15, 3 November 2016, 24.
[113] The quotations origin from the judgment that has been officially translated from Spanish to English.
[114] *A.F.A.DA. v. Zoo of Mendoza*, Third Court of Guarantees in Mendoza, Index No. P-72.254/15, 3 November 2016, 20.

In spite of this advancement, ***men have not questioned enough what happens with animals within the natural scope of society****. Even less have judicial authorities asked about the present topic: are animals legal persons?*

For Llambías it is not necessary the definition of what a human person is since if "there is something that does not require definition… is the human itself". (RIVERA, Julio César, MEDINA, Graciela, Op. Citada, p. 114). Nonetheless, I differ from the prestigious author since the category of a person must be necessarily defined because within the legal scope the concept of a person is identified with the concept of a legal person. This premise is followed by: ***is the human being the only one that can be considered as a legal person? Is man the only one that can have legal capacity?****"*[115]

"***To classify animals as things is not a correct standard****. The essential nature of things is to be inanimate objects in contrast with a living being. Civil legislation sub classifies animals as semi moving giving them the "unique" and "enhanced" characteristic of a "thing" that can move by itself*."[116](Free translation)

"*Therefore, in the present case we are not stating that sentient beings-animals- are the same as human beings, and we are not raising to a human category all existent animals or flora and fauna, we are recognizing and confirming that primates are non-human legal persons and they possess fundamental rights that should be studied and listed by state authorities,* ***a task that exceeds the jurisdictional scope***."[117](Free translation)

"***Animals must have fundamental right****s and the applicable legislation in accordance with such fundamental rights to protect the particular situation they encounter, following the evolutionary degree that science has determined they can reach. This is not about granting them the same rights humans have, it is about accepting and understanding once and for all that they are living sentient beings, with legal personhood and that among other rights; they are assisted by the fundamental right to be born, to live, grow and die in the proper environment for their species.* ***Animals and great apes are not objects to be exposed like a work of art created by humans****.*

We cannot evade that that a great sector of the doctrine is against the recognition of animals as legal persons, so that some do not understand how is it possible for animals to exercise their rights, while understand that is human genes are the ones that determine legal personhood (excluding speciesism)." [118] (Free translation)

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[115] *Ibid*., 23
[116] *Ibid.*
[117] *Ibid.,* 26.
[118] *Ibid.,* 27.

89. Release – To conclude, the Judge also requests that *"... the members of the Honorable Legislatura de la Provincia de Mendoza to provide to the competent authorities the necessary legal resources to* ***cease the serious captivity situation in inappropriate conditions of the zoo animal****s like the African elephant, the Asian elephants, lions, tigers, bears, among others, and of all exotic species that do not belong in the geographical and climate area of the Province of Mendoza.*"[119] (Free translation)

90. '**Subject of rights' –** Previously, in 2015, a provincial court in Buenos Aires already ordered that the orangutan Sandra is a subject of rights.[120] More specifically, the court stated that "*... it is necessary to* ***recognize the animal as a subject of rights, because non-human beings (animals) are entitled to rights****, and therefore their protection is required by the corresponding jurisprudence*."[121] (Free translation)

2.4. Chucho

91. Who? – In July 2017, a court in Colombia had granted a writ of *habeas corpus* to a 19-year-old spectacled bear named Chucho. An attorney and law professor at the Universidad Manuela Beltrán, L.D.G. MALDONADO, filed a petition for the writ, after learning that the Corporación Autónoma Regional de Caldas (Corpocaldas) had used its authority as the entity responsible for environmental management in the region to transfer Chucho from the Rio Blanco Nature Reserve to the Barranquilla City Zoo.[122] [123]

92. Granted writ – MALDONADO argued that "*Corpocaldas had deprived Chucho of his freedom, severely compromising his physical and emotional well-being and* ***violating his fundamental rights***".[124] Judge L.A.T. VILLABONA agreed and granted the writ on 26 July 2017. Hence, he ordered Chucho to be transferred within 30 days to a habitat with "*full and dignified conditions in semi-captivity*". He furthermore added the following to his judgement: "*If fictitious legal entities [such as corporations] are subjects of rights, ..., for what reason should those who are alive or are 'sentient beings' not be so?*"[125]

[119] *Ibid.,* 32.
[120] Subject of rights should be distinguished from 'legal person'. This will be analyzed in the second section of the third chapter.
[121] *A.F.A.D.A. v. Government of the City of Buenos Aires and the Zoo of the City of Buenos Aires*, Provincial Court in Buenos Aires, Index No. A2174-2015/0, 21 October 2015, 5 ff.
[122] https://www.nonhumanrights.org/blog/nonhuman-rights-colombia-interview/.
[123] The quotations origin from the judgment that has been officially translated from Spanish to English.
[124] *L.D.G Maldonado v. Barranquilla City Zoo*, The Supreme Court of Justice, Index No. AHC4806-2017, 26 July 2017, 15 ff.
[125] *Ibid.,* 6.

93. Judge's argumentation – On top, where US courts have essentially dismissed the idea of animal legal personhood on the grounds of the contractarian notion of reciprocity between rights and duties, the judge developed an interesting reasoning regarding this. He analyzed this reciprocity paradigm and called for a "flexibilization" of the traditional *view* of right-holders as concurrent duty-bearers. According to this modified view of the legal subject, animals are right-holders but not duty-bearers. In other words, animals should be considered as "legal subjects without duties" (in Spanish: "*sujetos de derechos sin deberes*").[126] In the wordings of the Court it would read as follows: "*All we have said demonstrates that, regarding nature,* ***we must reconsider what a holder of rights is;*** *we must relax the principle that holds that such a thing is reciprocally bound to comply with a set of duties; and we must accept from now on that* ***nonhuman sentient subjects are subjects of rights despite not being reciprocally constrained by duties.*** *Animals are right-holders that are free of duties, entities that cannot be burdened by obligations because they are sentient subjects of rights of whom we, precisely, are guardians, representatives and informal agents in charge of their care.* ***To deem that animals cannot be subjects of rights because they are not encumbered with reciprocal duties is tantamount to instantiating a completely selfish and reductionist individualistic or collectivistic form of self-anthropocentrism*** *that forces us to consider as equals beings that are totally different from us, but that constitute an essential and unique part of the biotic chain.*"[127]

94. Denied writ by Supreme Court – In spite of the above-mentioned judgment, a panel of the Colombian Supreme Court reversed the ruling in August 2017, stating that "*the writ of habeas corpus is inappropriate in the present case, because it was designed for persons, rational animals, not for nonhuman or irrational animals, and the foundations of such a decision [i.e. granting a writ of habeas corpus to Chucho] are incompatible with the purpose for which the writ was created*."[128]

95. Status of proceedings – Currently, MALDONADO is appealing Chucho's case to the Colombian Constitutional Court, which could decide to revise the Supreme Court's ruling.[129]

2.5. Beulah, Karen and Minnie

96. Who? – Beulah, Karen and Minnie are three elephants that were born in the wild and that were imported in the US. They were sold to the Commerford Zoo.[130]

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[126] S. STUCKY and J.C. HERRERA, "Habea(r)s Corpus: Some Thoughts on the Role of Habeas Corpus in the Evolution of Animal Rights ", *Int'l J. Const. L. Blog* 2017.
[127] *L.D.G Maldonado v. Barranquilla City Zoo*, The Supreme Court of Justice, Index No. AHC4806-2017, 26 July 2017, 8.
[128] *L.D.G Maldonado v. Barranquilla City Zoo*, The Supreme Court of Justice, Index No. STL12651-2017, 16 August 2017, 16 ff.
[129] https://www.nonhumanrights.org/blog/nonhuman-rights-colombia-interview/.
[130] https://www.nonhumanrights.org/clients-beulah-karen-minnie/.

97. Denied writ – In November 2017, the *Nonhuman Rights Project* filed a petition for a common law writ of *habeas corpus* in Connecticut Superior Court, to demand recognition of the three elephants' legal personhood and fundamental right to bodily liberty and their release to a natural habitat sanctuary. Judge BENTIVEGNA dismissed the petition and denied the motion to reargue. The judge was of the opinion that the basis of the petition was not constitutionally protected liberty, *i.e.* a liberty interest protected by the due process clause of the Fourteenth Amendment. [131] He furthermore stated that "*the petitioner's proposed amendments do not resolve this court's conclusion that – under the law as it stands today – the petition lacks the possibility or probability of victory, meaning it is wholly frivolous on its face in legal terms.*"[132]

98. Status of proceedings – Currently the *Nonhuman Rights Project* is preparing appeal after Connecticut Superior Court denied motion to reargue. [133]

2.6. Naruto

99. Who? – A last case worth mentioning in order to illustrate the trends in the jurisprudence regarding the extension of fundamental rights to animals is the Naruto case. A photographer, Mr. SLATER, was working in a Nature Reserve and left his equipment unsupervised. A male black macaque named Naruto proceeded to take several selfies which Mr. SLATER published in a book. PETA (*People for the Ethical Treatment of Animals*) brought an action before the Federal Courts in California. They claimed that Naruto, as the author of the work in question, owned the copyright to the images and that all proceeds gained from their use therefore belonged to him. PETA furthermore states that the profits should be used for the preservation of species and their habitat. [134]PETA claims that: "*Naruto has the right to own and benefit from the copyright in the Monkey Selfies in the same manner and to the same extent as any other author. Had the Monkey Selfies been made by a human using Slater's unattended camera, that human would be declared the photographs' author and copyright owner."*[135]

100. Relevance – The core of this discussion is whether Naruto can benefit protection offered by the US Copyright Act.[136] An analysis of this would fall outside the scope of this thesis. Nevertheless, this case illustrates that this is "*yet another test case which is actively seeking to expand upon the accepted limits of the legislation under review*", as put forward by J. JOWITT.[137]

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[131] *The Nonhuman Rights Project v. Commerford & Sons*, Superior Court Judicial District of Litchfield, Index No. LLI-CV-17-5009822-S, 27 February 2018.
[132] *Ibid.,* 1 ff.
[133] https://www.nonhumanrights.org/blog/nonhuman-rights-colombia-interview/.
[134] *Naruto e.a. v. Slater e.a.*, District Court Northern California, Index No. 3:15-cv-04324 6 January 2016, 5.
[135] *Ibid.,* 2.
[136] Article §102 of the Copyright Act of 19 October 1976, Published in the *US Official Gazette* on 1 December 1990.
[137] J.J. JOWITT, "Monkey See, Monkey Sue? Gewirth's Principle of Generic Consistency and Rights for Non-Human Agents", *Trinity C.L. Rev.* 2017, 75.

101. Settlement – Both parties agreed in a joint statement that "***this case raises important, cutting-edge issues about expanding legal rights for non-human animals****, a goal that they both support, and they will continue their respective work to achieve this goal*". [138]

102. Court's opinion – Nevertheless, according to judge W.H. ORRICK Naruto is not an "*author*" within the meaning of the Copyright Act. When argued that this is "*antithetical*" to the "*tremendous [public] interest in animal art*", the judge replies that "***this is an argument that should be made to the Congress and the President, not to me***".[139] Furthermore, the Court then quotes the *Cetacean* case[140] and states that "*if Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly*".[141]The Court then concludes that the Copyright Act does not "*plainly*" extend the concept of authorship or statutory standing to animals. To the contrary, there is no mention of animals anywhere in the Act.[142]

103. Criticism – The outcome of this case has been analyzed – and criticized – by several authors[143] and has received a lot of media attention from all over the world.

2.7. Conclusion

104. Legal persons – There can briefly be concluded that the trends in the jurisprudence deal with the issue about extending fundamental rights to animals. Moreover, the petitioners for writs of *habeas corpus* try to recognize animals as legal persons instead of objects before the courts. This is a trend that is visible especially in the Americas and it does not only concern primates but also bears and elephants for example.

105. Rights without duties – The most invoked argument against extending fundamental rights to animals is the fact that the latter cannot bear any legal duties. Moreover, they cannot be submitted to social responsibilities or be held legally accountable. This argument is always linked to the argument that legal personhood is something that is reserved for humans only. In spite of this, a chimpanzee, called Cecilia, has been recognized in Argentina in 2016 as a "*non – human legal person*" with "*inherent rights*".

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[138] https://www.peta.org/blog/settlement-reached-monkey-selfie-case-broke-new-ground-animal-rights/.
[139] *Naruto e.a. v. Slater e.a.*, District Court Northern California, Index No. 3:15-cv-04324 6 January 2016, 6.
[140] *Japan Whaling Association v. American Cetacean Society*, US Supreme Court, Index No. 85-954, 30 June 1986.
[141] *Ibid.,* 1179.
[142] *Naruto e.a. v. Slater e.a.*, District Court Northern California, Index No. 3:15-cv-04324 6 January 2016, 5.
[143] H.C. LYNCH, "What Do-an Orangutan and a Corporation Have in Common?: Whether the Copyright Protection Afforded to Corporations Should Extend to Works Created by Animals", *Ohio N.U. L. Rev.* 2015, 267-287; J.J. JOWITT, "Monkey See, Monkey Sue? Gewirth's Principle of Generic Consistency and Rights for Non-Human Agents", *Trinity C.L. Rev.* 2017, 71-96.

106. Legislative process – It should be noted that almost all of the judges that did not grant the *habeas corpus* – and did not recognize animals as legal persons – are of the opinion that the extension of fundamental rights to animals is best achieved through the legislative process.

Section 3: An analysis of the concept 'fundamental rights' *in globo*

§1. Introduction: 'The legal wall'

107. Legal wall – Currently, our legal system has a thick legal wall between humans and non-human animals. On one side of the wall, there are the humans that enjoy the status of legal persons and can benefit from so-called 'fundamental rights'. These rights are for example incorporated in the Universal Declaration of Human Rights, the European Convention for Human Rights, the national constitutions etc. While on the other side of the wall, there are legal things, which, by definition, enjoy no legal rights. An adult gorilla together with a kitchen chair resort behind this legal wall.

108. Indian Court – When confronted with a case regarding the welfare of circus animals, the Kerala High Court stated in 2000 that it was time to dismantle this wall: "*If humans are entitled to fundamental rights, why not animals? In our considered opinion,* ***legal rights shall not be the exclusive preserve of the humans*** *which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-humans on the other side*."[144]

109. Justifications? – As stated by ROOK, it should be analyzed what the justifications are for this legal wall. How can it be justified treating an adult chimpanzee as a legal thing and hence denying it the right to freedom from torture and slavery? Is it possible to identify a characteristic possessed by all humans and no animals to justify this significant differential treatment? According to ROOK there are no clear answers. Many academics, including lawyers and philosophers have struggled with these questions.[145] It cannot be denied that an adult chimpanzee is more rational than some severely mentally disabled human adults. Moreover, it has been proved that dolphins have a greater understanding of language than a one-day old newborn. Both the mentally disabled adult and the newborn can benefit from fundamental legal rights. As stated by ROOK, it is obvious that both are entitled to that protection. But how can the denial of this protection to animals be justified? If drawing a line between us and for example chimpanzees cannot be justified then we are arbitrarily drawing lines to permit differential treatment. In this regard, the definition of 'speciesism' should be reminded. This is the practice of discriminating on the grounds of species membership alone.[146]

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[144] *N. R. Nair v. UOI*, Kerala High Court, 6 June 2000.
[145] D. ROOK, "Should great apes have 'human rights'?", *Web Journal of Current Legal Issues* 2009, x.
[146] *Ibid.*

110. Rights and duties – As also seen in the recent jurisprudence, opponents to granting fundamental rights to animals justify this wall by highlighting the link between rights and responsibilities. They are of the opinion that it is not possible to enjoy the benefits of rights without being able to be held accountable or to have any duties. According to f.e. geneticist professor S. JONES, "*Rights and responsibilities go together and I've yet to see a chimp imprisoned for stealing a banana because they don't have a moral sense of what's right and wrong. To give them rights is to give them something without asking for anything in return.*"[147] It is strongly debatable if this statement can still be justified taking into account the recent scientific researches. Recent studies have namely showed that chimpanzees are able to distinguish right and wrong.[148]

111. Dependent legal subjects – Leaving aside the argument whether some animals can distinguish right from wrong, the following should be highlighted. Many humans lack the capacity for moral responsibility but nevertheless they enjoy rights to freedom from torture and slavery. As put forward by ROOK, very young children, senile adults and severely mentally disabled people may all be unable to appreciate the difference between right and wrong but nevertheless they benefit from the protection of legal rights. Moreover, if their human rights are violated, representatives or guardians will act on their behalf to assert those rights. Their own inability to assert or claim their rights does not preclude them from having those rights in the first place.[149]

§2. Conceptualization of 'fundamental rights'

112. Definition? – It is not easy finding a proper definition of 'fundamental rights'. Some authors try to – whether intentionally or not – avoid formulating a definition of this concept. Moreover, the concept of 'human rights' is also closely linked to it. Traditionally, the term 'a fundamental right' is used in a constitutional setting whereas the term 'human rights' is used in international law. According to the *European Union Agency for Fundamental Rights*[150] and several others,[151] the two terms refer to a similar substance as can be seen when comparing the content in the Charter of Fundamental Rights of the European Union with that of the European Convention on Human Rights and the European Social Charter (and the Universal Declaration of Human Rights).

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[147] T. GEOGHEGAN, "Should apes have human rights?", http://news.bbc.co.uk/1/hi/magazine/6505691.stm.
[148] The team of researchers, led by Dr Claudia Rudolf von Rohr from the University of Zurich, wrote in the journal of Human Nature: "*We found that chimpanzees discriminated between a video clip depicting severe aggression against an infant and video clips depicting other forms of social aggression or neutral behaviour*.", http://www.independent.co.uk/environment/nature/chimpanzees-may-have-a-similar-sense-of-right-and-wrong-to-humans-new-study-finds-10351333.html.
[149] D. ROOK, "Should great apes have 'human rights'?", *Web Journal of Current Legal Issues* 2009, x.
[150] http://fra.europa.eu/en/about-fundamental-rights/frequently-asked-questions#difference-human-fundamental-rights.
[151] J. VANDE LANOTTE and Y. HAECK, *Handboek EVRM I*, Antwerp, Intersentia, 2005; B.H. WESTON, "Human Rights", *Britannica Academic, Encyclopædia Britannica* 2016; X., "International Recognition and Protection of Fundamental Human Rights", *Duke L.J.* 1964; R.A. SAMEK, "Untrenching Fundamental Rights", *McGill L. J.* 1982.

Nevertheless, it is crucial to have a good understanding of this concept in to order analyze whether it is possible to extend these 'fundamental rights' to animals.

113. VANDE LANOTTE and HAECK –According to VANDE LANOTTE and HAECK "*human rights, fundamental rights and freedoms or constitutional rights*" are "*universal rights that have as purpose to create and to continue guaranteeing conditions in order that persons can live a dignified or decent life, regardless of their gender, nationality, ethnic origin, economic background*". (Free translation) These authors are of the opinion that human rights – and also fundamental rights – are universal (*i.e.* rights that all people should have everywhere in the world and at every moment in time). These rights have a double purpose. Namely, to let persons live freely and in a decent or dignified way. Moreover, they clearly state that the concept of human rights – and also fundamental rights – reflect the process of historic continuity and changes that have helped in shaping the current content of this concept. [152]

114. SAMEK – SAMEK on the other hand is of the opinion that we should view the notion of fundamental rights as a "*dynamic response to man's condition in the world and not as a bundle of claims with a static ideological content*".[153] He is convinced that as the term itself indicates, fundamental rights should take us back to fundamentals, to the very bedrock of human existence. They are 'natural' inasmuch as they are based on the nature of human beings in the world, and not on special rights conferred by a political or legal system. While the latter are contingent, the former are primordial. The author provides us with the following illustration: "*John Smith does not have fundamental rights because he has a unique set of personal attributes; it is the human being hidden behind John Smith who claims such rights*".[154] He furthermore adds that fundamental rights have their source in man's response to the human condition and that they necessarily transcend all ideological values. Consequently, fundamental rights can never be exhaustively listed. As stated by the author: "*There is a dynamism in the notion that it at odds with any static mold*".[155] According to him, we are not dealing here with "*a definable class of sacred rights, but with a dialectical process. It should help us to transcend the ideological horizon of the present and re-authenticate our values, instead of accepting it as the limit of truth*".[156]

115. WESTON – Another legal scholar, called WESTON, is of the opinion that these rights belong to an individual or group of individuals "*simply for being human, or as a consequence of inherent human vulnerability, or because they are requisite to the possibility of a just society*". Regardless of the theoretical justification of this concept, these rights refer to a whole of values or capabilities that would enhance human agency or would protect human interests. He is also

[152] J. VANDE LANOTTE and Y. HAECK, *Handboek EVRM I*, Antwerp, Intersentia, 2005, 3-14.
[153] R.A. SAMEK, "Untrenching Fundamental Rights", *McGill L. J.* 1982, 786-787.
[154] *Ibid.,* 774 and 775.
[155] *Ibid.,* 775.
[156] *Ibid.*

convinced that these rights are universal in character and hence can be claimed for all human beings in the present and future.[157]

116. Constitutive elements –There are some elements that are present in all the analyzed definitions and descriptions of 'fundamental rights'. Since there is no one unique and universal accepted definition of these rights, the solution is to sum these crucial elements up. Fundamental rights are:

- Dynamic;[158]
- universal rights;[159]
- that a person possesses just because of the mere fact that he or she is 'human' and;
- that enable that person to live a dignified/decent life.

§3. History of fundamental rights

117. History – After having analyzed some key elements of fundamental rights, it can be interesting to study the roots of these rights or in other words, the historical development of fundamental rights. The expression of 'fundamental rights' or 'human rights' is relatively new. However, this does not mean that no person tried to claim any rights in the past. Since the beginning of ages, manhood intents to acquire – more – rights. The concept of human rights finds its roots in the aftermath of the Second World War. This war claimed more than 40 million victims, including 6 million Jews. This encouraged people to put a definitive end to conflict by establishing sustainable peace and guaranteeing human rights. When the war was not finished yet, Allies began to think about creating a –new[160]– international organization to secure peace between countries. In 1945, the United Nations has been established. Its main concerns were mainly centered on the recognition of the fundamental rights and freedoms to which everyone was entitled. In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. [161] This declaration replaced the concept of 'natural rights'. The latter was a term that was linked to the concept of 'natural law'. With the rise of 'legal positivism' the concept of 'natural law' became controversial. The core idea behind legal 'positivism' is the rejection of the theory that law must be moral to be law, as defended by the Roman Catholic Church.

[157] B.H. WESTON, "Human Rights"*, Britannica Academic, Encyclopædia Britannica* 2016, X.
[158] Needs to be understood as the contrary of 'static'. These rights reflect the process of historic continuity and changes that have helped in shaping the current content of this concept. The fundamental rights tradition is a product of its time.
[159] The discussion whether fundamental rights – and human rights – are universal or not falls outside of the scope of this thesis. Since there is no consensus in the world, I will follow my own personal opinion and presume that these fundamental rights are indeed universal. Hence, the so-called 'cultural limitation' of fundamental rights will not be further discussed in this thesis.
[160] The League of Nations, established in 1920 was a failure and did not prevent the Second World War. Nevertheless, it served as a lesson to the future founders of the United Nations from 1945.
[161] A. IRIYE, P. GOEDDE, W.I. HITCHCOCK, *The Human Rights Revolution: An International History,* Oxford, Oxford University Press, 2012, 27 ff.

Moreover, the Declaration of 1948 – and the concept of human rights – also replaced the later phrase of the 'Rights of Man'.[162] It should be highlighted that this concept did not include for example the rights of women.[163]

§4. Different categories and generations of fundamental rights

118. General – While the origin of 'human rights' lies in the nature of the human being itself, 'human rights law' is a more recent phenomenon that is closely associated with the rise of the liberal democratic state.[164] The concept of 'human rights law' entails among other things the study regarding the categories and generations of fundamental rights.

4.1. Categories of fundamental rights

119. Categories – Civil rights are intended to protect the legal subjects against unlawful and unjustified interference of the government f.e. the right to life, the prohibition against torture and the right to personal freedom and security. Political rights are the rights that are meant to let legal subjects have a say in the state authority. Economic, social and cultural rights are rights that oblige the government to create some conditions in order to let its citizens live a dignified life. Lastly, group rights are intended to guarantee a specific global status to a whole group of persons. [165]

4.2. Generations of fundamental rights

120. History – The traditional categorization of three generations of human rights, used in both national and international human rights discourses, finds its roots in the French revolution. The French tripartite motto (*i.e. Liberté, Egalité* and *Fraternité*) reflects the three generations of rights. The 'first generation' rights can be linked to '*Liberté*' (*i.e.* freedoms and civil – political rights). In the 18th and 19th centuries, the struggle for rights focused on the liberation from authoritarian oppression and the corresponding rights of free speech, association and religion and the right to vote. The 'second generation' rights on its turn are linked to '*Egalité*' (*i.e.* equality and socio-economic rights). With the changed view of the state role in an industrializing world, and against the background of growing inequalities, the importance of socio-economic rights became more clearly articulated. The last and 'third generation' rights are linked to '*Fraternité*' (*i.e.* solidarity and collective rights). With growing globalization and an increased awareness of several global

[162] For example the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration on the Rights of Man and Citizen (1789), and the US Constitution and Bill of Rights (1791).
[163] B.H. WESTON, "Human Rights"*, Britannica Academic, Encyclopædia Britannica,* 2016, X; L. HUNT, "The Long and the Short of the History of Human Rights**"**, *Past & Present* 2016, 323–331.
[164] X., "International Human Rights Law: A Short History", *UNChronicle* 2009, x.
[165] J. VANDE LANOTTE and Y. HAECK, *Handboek EVRM I*, Antwerp, Intersentia, 2005, 8-10.

concerns as for example extreme poverty, 'third generation' rights have been adopted. Some examples include rights to a healthy environment, to self-determination and to development. [166]

121. Characteristics – Today, all generations of rights are considered as interdependent and indivisible. All the three categories impose obligations upon the states, *i.e.* the duty to respect, protect, promote and fulfil these rights. The statement that fundamental rights are considered interdependent and indivisible was not always the case. During the period of the Cold War, first generation rights were prioritized in Western democracies, while second generation rights were resisted as socialist notions. In the developing world, economic growth and development were often regarded as goals able to defeat 'civil and political' rights. Moreover, this distinction between these rights was increased by stating that first generation rights have an immediate application, while second generation rights only need to be implemented progressively. To conclude, also the notion that first generation rights place negative obligations on the states while second generation rights place positive obligation on the states, is fading away.[167]

Section 4: An analysis of the concept 'animal rights' *in globo*

§1. 'Animal rights' linked to animal welfare

122. Animals already have 'rights' – Trying to formulate a definition of 'animal rights' is like opening the box of Pandora. If we understand 'rights' to be the legal protection against harm, then many animals already do have rights. Hence, the idea of animal rights would not be controversial neither. Also, if we consider 'rights' to mean moral claims to such protection, there is general agreement that animals have rights of certain kinds. [168] Today almost everyone agrees that people should not be allowed to torture animals or to engage in acts of cruelty against them. This is the core idea behind the protection against cruelty and neglect, the so-called 'Animal Welfare Acts'. From this point of view animal rights could entail "*the law that should prevent acts of cruelty to animals*".[169]

§2. Conceptualization 'animal rights'

2.1. Animal

123. Sensorimotor abilities – According to legal scholar SHERRY the definition of 'animal', in its broadest sense, refers to an organism that "*possesses sensorimotor abilities and that can sense changes in its environment and respond to them*".[170] Hence, by this definition, 'animal' includes humans and other primates, as well as mammals, birds, reptiles, amphibians, fish, and many

[166] *Ibid.*
[167] *Ibid.*
[168] C.R. SUNSTEIN, "The Rights of Animals: A very Short Primer", *The Chicago Working Paper Series* 2002, 4.
[169] *Ibid.*
[170] C.J. SHERRY, *Animal Rights : A Reference Handbook,* Oxford, ABC-CLIO, 2009, 244.

invertebrates. Animals, humans and non-humans, are sentient (*i.e.* have the capacity to enjoy and suffer, to experience pleasure and pain), and their lives have significant value. [171]

124. Contested matter – Legal scholar WALDAU on contrary argues that there is not such as one non-contested and universally accepted definition of an 'animal'. He points out that there are two definitions of 'animal'. He refers to two definitions that are mentioned in the *Oxford English Dictionary.* On one hand, the first definition describes 'animal' as "*A living organism that feeds on organic matter, typically having specialized sense organs and nervous system and able to respond rapidly to stimuli*".[172] Under this definition, humans clearly fall into the animal category.[173] This definition is considered to be the 'scientific' definition.[174] On the other hand, the second definition describes 'animal' as "*an animal as opposed to a human being*".[175] According to the Oxford English Dictionary the second definition is the more common use. Consequently, WALDAU states that the fact that there are two different uses of this key word our languages is a first clue that talking about 'animals' is a contested matter. He furthermore states that another relevant clue is related to our commitment to science. According to him it is revealing when a common word such as 'animal' is not only used in a non-scientific manner but in a manner that actually amounts an anti-scientific statement. He is also of the opinion that humans are by consensus members of the animal kingdom, and few would contend that humans are not primates or mammals.[176] Hence, there could be assumed that the science-based approach would prevail when we talk about ourselves in the modern world. However, the more frequent use of the term 'animal' is the second, non-scientific one. It excludes humans.[177]

125. Two approaches – Since there is some tension between these two different uses of the term 'animal' in today's society, the choice one makes between the two can be a sensitive matter. Choosing one definition or the other can reveal which approach we prefer. If someone chooses the scientific approach, this means that he or she links humans to other living beings. If on the other hand someone chooses, the more common use of the definition of 'animal' (*i.e.* an animal as opposed to a human being), then he or she is (i) ignoring the tradition of science (ii) separating humans from other living beings on earth.[178]

126. Conclusion – As analyzed above, today, there is no neutral definition yet. Hence, for the purpose of this study I will follow the scientific approach. This choice is not only based on the merits of science but it also a personal choice since this feels intuitively as the best choice. For the purpose of this study, an 'animal' can be defined as "*A living organism that feeds on organic*

[171] *Ibid.*
[172] https://en.oxforddictionaries.com/definition/animal.
[173] P. WALDAU, *Animal Rights : What everyone needs to know,* Oxford, Oxford University Press, 2011, 5.
[174] *Ibid.,* 6.
[175] https://en.oxforddictionaries.com/definition/animal.
[176] P. WALDAU, *Animal Rights : What everyone needs to know,* Oxford, Oxford University Press, 2011, 6.
[177] *Ibid.*
[178] *Ibid.,* 7.

matter, typically having specialized sense organs and nervous system and able to respond rapidly to stimuli". [179]

2.2. Moral and legal rights

127. Concept – The concept of 'rights' *an sich* is also associated with its own ambiguities. The roots of this concept can be found in philosophy. There are several definitions and theories available that try to define the concept of a 'right'. The major distinction that should be made is the one between 'moral rights' and 'legal rights'.

128. Two types of rights – On one hand, the concept of a 'moral right' can be defined as "*a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion*".[180] On the other hand, the concept of a 'legal right' can be described as *"… the fruits of the law, and the law alone. There are no rights without law – no rights contrary to the law – no rights anterior to the law …. There are no other than legal rights; - no natural rights – no rights of man, anterior or superior to those created by the laws. The assertion of such rights, absurd in logic, is pernicious in morals.*"[181] In other words, legal rights are normative claims providing reasons for action.[182]

129. Criteria – However, it is more interesting for this thesis to mention the criteria that are necessary in order to be considered as a (legal) 'right-holder'. Legal scholar GALVIN proposes the following criteria.[183]

(i) A legal right is recognized as such by the law and thereby protected from destruction or infringement;

(ii) The entity holding the right can seek legal protection on its own behalf;

(iii) The assertion of the right should protect the entity from injury;

(iv) The relief the law provides should directly compensate or benefit the holder of the right;

(v) Incapacity on the part of the holder of the right does not preclude a representative from protecting the best interest of the holder of the right.

The above-mentioned definition is also shared by DICHTER. She states that an animal can only possess legal rights if the following criteria are taken into consideration:[184]

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[179] Cfr. *Supra* n° 124.
[180] J.S. MILL (1861) in T. REGAN, *The Case for Animal Rights,* Los Angeles, University of California Press, 2004, 269 ; X.,"Legal Rights", *Stanford Encyclopedia of Philosophy* 2017.
[181] J. BENTHAM (1843) in *Ibid*.
[182] H. STEWART, "The Definition of a Right", *Jurisprudence* 2012, 321.
[183] R.W. GALVIN, "What Rights for Animals ? A Modest Proposal", *Pace Environmental Law Review* 1985, 248.

(i) The animal must have standing to institute legal action;
(ii) Substantive laws must be based on injury to the animal itself;
(iii) The remedy or the relief must benefit the animal.

2.3. Legal and moral animal rights

130. General – Taking into account the two analyzed concepts (*i.e.* 'animals' and 'rights'), a conceptualization of 'animal rights' could be made.

131. Dictionary – *Oxford English Dictionary* defines 'animal rights' as "*the rights of animals to live free from human exploitation and abuse*".[185]

132. PETA – PETA ('People for the Ethical Treatment of Animals') is of the opinion that animal rights mean that "*animals deserve certain kinds of consideration—consideration of what is in their best interests, regardless of whether they are 'cute', useful to humans, or an endangered species and regardless of whether any human cares about them at all. It means recognizing that animals are not ours to use—for food, clothing, entertainment, or experimentation*".[186]

133. Ethical concept– These two definitions are linked to the above-mentioned concept of 'moral rights'. Legal scholar, SHERRY is of the opinion that animal rights activists argue that 'animal rights' is an ethical concept and that the issues of animal rights are philosophical issues.[187]

134. Proposed definitions – Today the definition of 'animal rights' is indeed more of a 'moral' one. This confronts us with the fact that if fundamental rights would be extended to animals, then the 'legal' definition of rights should not be forgotten. In other words, if we want to extend fundamental rights to animals, then these animals need to be considered as 'legal right holders'. For the sake of clarity, 'moral animal rights' and 'legal animal rights' could be described as follows:

i. Moral animal rights are valid claims on society that aim in protecting any living organism - that feeds on organic matter, typically having specialized sense organs and nervous system and able to respond rapidly to stimuli – against any human exploitation or abuse.

ii. Legal animal rights are valid claims on society that can be enforced by the law and that aim in protecting any living organism - that feeds on organic matter, typically having specialized

[184] A. DICHTER, "Legal Definitions of Cruelty and Animal Rights", *Boston College Environmental Affairs Law Review* 1978, 148 ff.
[185] https://en.oxforddictionaries.com/definition/animal_rights.
[186] https://www.peta.org/about-peta/learn-about-peta/.
[187] C.J. SHERRY, *Animal Rights : A Reference Handbook,* Oxford, ABC-CLIO, 2009, 244.

sense organs and nervous system and able to respond rapidly to stimuli – against any human exploitation or abuse and that provide a guarantee for a dignified life.

135. Remark – It should be noted that both definitions do not make any distinction between the different animal species. The analysis whether all animals or just a few animals – and based on which criteria – should possess any fundamental rights will be analyzed in the third chapter. Moreover, the question which fundamental rights could be extended to animals will also be analyzed under this third chapter.

136. Conclusion – However, the 'legal' definition of animal rights illustrates a possible issue that needs to be addressed before it would be possible to extend fundamental rights to animals. This issue is the fact that animals need to be considered as 'legal right holders'.

CHAPTER II: LEGAL FRAMEWORK OF THE ANIMAL'S STATUS IN BELGIUM

137. Current status – Under this chapter an analysis will follow of the Belgian legal framework regarding the animal's status. The first section will study this from the point of view of property law. When digging in this field of the law, it became clear that there are three crucial concepts (*i.e.* legal object, legal subject and legal personhood). These concepts will be exposed in detail in the first part of this first section. The second part will give an overview of the current position of the animal. In the third part the reader will be provided with an overview of the legislative proposals that have been submitted by deputies to change the current status of the animal. This section will be concluded with an overview of the proposed modifications of the animal's status in the Belgian Civil Code. Also, the statement of reasons for these modifications will be analyzed.

138. Consequences of the status – The current status of the animal in the Civil Code has several consequences and complications under the Belgian legal system. These will be analyzed in the second section of this chapter. There will be discussed what the role of property rights is upon animals and if there are any limitations to it. Further, the civil action and its own complications will be studied. Also, the liability for animals will be shortly analyzed. Two other consequences of the current status are that animals can be the subject of sales agreements, renting agreements and *usufruct* agreements. To conclude, the unseizability of animals will be set out as well as the problemacy regarding legitimate self-defense.

Section 1: The animal's status under Belgian law

§1. Legal object, legal subject and legal personality

139. General – Before analyzing the current status of the animal under Belgian law, it is crucial to discuss three important concepts. The meaning of the concepts of 'legal object', 'legal subject' and 'legal personhood' will be set out. It is indispensable to have a clear insight of the content of these terms in order to understand the current status of the animal under the Belgian law.

1.1. Legal object

140. History – The concept of a 'legal object' originates from Roman law. The Latin term '*res*' was a general concept for all that could form the object of a legal act[188].[189] These objects could be sold and the property of it could be transferred or disposed of.[190]The majority of the objects[191]

[188] In Dutch: '*rechtshandeling*'.
[189] D. HEIRBAUT, *Privaatrechtsgeschiedenis, van de Romeinen tot heden,* Gent, Academia Press, 2013, 251.
[190] In Dutch: '*vervreemd*'.
[191] This term can also be understood as property or goods or assets.

resorted under two categories: *res mancipi* and *res nec mancipi*.[192] Children, draught animals, certain intangible goods, servitudes[193] and land located in Italy resorted under the category of *res mancipi*.[194] Later on, the scope of the term '*res*' changed into the term 'legal object'.

141. Developments – Through developments in the legal system, the meaning and the extent of the term 'legal object' changed. As already mentioned, during the Roman times certain people as for example children and slaves were considered as legal objects. Under the influence of the Enlightenment and the French Revolution, there were several social developments that had as consequence that all the people were recognized as legal subjects.[195] The possibility to provide people with the position of a legal object belonged to the past.

142. Current meaning – In the current Belgian legal system, legal objects are things upon which rights and duties can exist. The legal object itself cannot bear any rights or duties. Legal objects can form the subject of a subjective right, such as a property right.[196] In other words, a legal object is that thing related to a specific right. Legal objects can on one hand, be physically tangible, such as for example a product, a plant or a car. [197] On the other hand, they can also refer to intangible things as for example intellectual property rights and services. The term legal object is used to indicate the objects of subjective property rights.[198]

143. Three concepts – In order to have a good understanding of this concept, there must be made a distinction between (i) goods (ii) products and (iii) services. Goods and products are legal objects. Services are not because they are acts carried out by persons.[199]

i. Good

A good is a thing that can be the subject of an acquirement[200] and that is used for satisfying a specific need or demand. In the extent that a thing has a specific interest in the legal order, it will be considered as a good. This is the case with every 'thing' that exists in nature, with the only exception of mankind. Goods can be processed or non-processed and they can be suitable for consumption, production, destruction etc.[201]

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[192] D. HEIRBAUT, *Privaatrechtsgeschiedenis, van de Romeinen tot heden,* Gent, Academia Press, 2013, 254.
[193] In Dutch: '*erfdienstbaarheden*'.
[194] D. HEIRBAUT, *Privaatrechtsgeschiedenis, van de Romeinen tot heden,* Gent, Academia Press, 2013, 254.
[195] D. HEIRBAUT, *Privaatrechtsgeschiedenis, van de Romeinen tot heden,* Gent, Academia Press, 2013, 184.
[196] G. VAN HOORICK, "Dieren in het recht in historisch perspectief" in G. CAZAUX (ed.), *Mensen en andere dieren: hun onderlinge relaties meervoudig bekeken*, Leuven, Garant, 2001, 95-96.
[197] In Dutch: '*fysiek tastbaar*'.
[198] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 203.
[199] *Ibid.*
[200] In Dutch: '*voor verkrijging vatbaar*'.
[201] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 203.

ii. Product

A product can be described as a physically tangible good that has been made suitable for consumption. A product is a species from a good that has undergone an operation or process. Moreover, the product needs to have a physical nature.[202] For example, wild berries that grow in the wood are goods; berries that have been picked and wrapped for consumption are products.

iii. Service

Services are acts or performances[203] carried out by people with an economic purpose. The main difference between a good and a service is that a good refers to a certain object while a service entails a certain kind of act.[204]

1.2. Legal subject

144. History – Just as the legal object, the concept of a 'legal subject' originates from Roman law. Certain people could not possess any rights, while others had fewer rights and some had privileges.[205] However, the most important aspect was the status of a person. The only persons with complete legal capacity[206] were the *pater familias*[207] and the Romans that were free and not under the control of the *pater familias*. Hence, the Roman times can be characterized with having several big differences regarding (legal) equality. In spite of this, all people are considered legal subjects since the French Revolution, as mentioned above.

145. Current meaning – In the current Belgian legal system, the concept of 'legal subject' is the legal qualification for entities that carry out legal transactions. In other words, a legal subject is any entity that is entitled to subjective rights.[208] According to some authors, it is necessary for a legal subject to be able to bear rights as well as duties or responsibilities.[209] According to other authors a legal subject can be described as "*the individual that has been recognized as legally*

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[202] *Ibid.*
[203] In Dutch: '*prestaties*'.
[204] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 203.
[205] *Ibid.,* 185.
[206] In Dutch: '*volledige rechtsbekwaamheid'*.
[207] This is a Roman citizen and it was often the oldest in the family. The other members of the family were under the control and power of the pater *familias.*
[208] G. VAN HOORICK, "Dieren in het recht in historisch perspectief" in G. CAZAUX (ed.), *Mensen en andere dieren: hun onderlinge relaties meervoudig bekeken*, Leuven, Garant, 2001, 95-96; G. MARTYN and R. DEVLOO, *Een kennismaking met recht en rechtspraktijk,* Brugge, Die Keure, 2012, 57.
[209] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 194; F. SWENNEN, *Personenrecht in kort bestek*, Antwerp, Intersentia, 2008, 9.

capable[210] *by the law*".[211] Every natural person is being recognized as a legal subject, from the moment of birth until the moment he or she dies.[212] In addition, the Belgian legal system also considers the 'juridical person'[213] as a legal subject. In principle, this juridical person is a created fiction. It is not physically tangible and it only exists on paper. The juridical person is a mechanism in the Belgian legal system allowing entities such as municipalities and private limited companies to carry out legal transactions, just as natural persons. The positive law determines whether an entity is a legal subject or not.[214] For example, the Belgian Company Code grants specific companies, legal personality.[215]

1.3. Legal personhood[216]

146. Definition – The capacity of a person to bear rights and duties, is called legal personality or legal subjectivity or legal personhood.[217] In the Belgian legal system, every human being necessarily possesses legal personality since the Belgian Constitution has abolished the civil death.[218] Due to this legal personhood, people can participate in the legal order and hence they can acquire property, get married, litigate etc.

1.3.1. Content of legal personhood

147. General – Granting legal personhood entails recognizing a person or an organization as an autonomous entity in the legal order; it implies granting a *status*[219], an own *equity*[220], *capability*[221].[222]

148. State – In first instance, legal subjects possess *a status*. This would entail the whole of elements and legal characteristics, which determine their identity. Every legal subject has a status:

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[210] Cfr. *Infra* n° 150.
[211] In Dutch: '*individu dat door het recht als rechtsbekwaam wordt erkend*', cfr. E. DIRIX, B. TILLEMAN and P. VAN ORSHOVEN, *De Valks Juridisch Woordenboek,* Antwerpen, Intersentia, 2010, 344.
[212] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Overzicht van het privaatrecht,* Antwerp, Intersentia, 2017, 7.
[213] In Dutch: *'rechtspersoon'.*
[214] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 194
[215] Article 2 of the Belgian Company Code of 7 May 1999, published in the *Belgian Official Gazette* on 6 August 1999.
[216] In Dutch: '*rechtspersoonlijkheid*'.
[217] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 194.
[218] Article 18 of the Belgian Constitution of 17 February 1994, published in the *Belgian Official Gazette* on 17 February 1994.
[219] In Dutch: '*staat*'.
[220] In Dutch: '*vermogen*'.
[221] In Dutch: '*bekwaamheid*'.
[222] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 194.

a name, a residence and a nationality. Only mankind has a 'family status'[223]: gender, marital status, ancestry…[224]

149. Equity – The equity of a legal subject means its capacity to participate to the economic order. The equity includes the totality of all the goods and rights that are measurable in money, as well as the liabilities.[225]This equity belongs to the legal subject. It is an essential characteristic of legal personhood. Both concepts are indissolubly connected with each other. The possessing of equity is only reserved to legal subjects. The equity is indivisible and each legal subject possesses necessarily only one equity.[226] [227]Not only the physical person is able to possess equity. As legal subject, also the juridical person can possess equity. The juridical person shall have all the rights related to the equity that are necessary in pursuing its social purpose. Hence there are some limitations to its rights related to the equity.[228]

150. Capacity – Every legal subject possesses 'legal capacity' and 'capacity' in general to enforce its rights. The legal capacity refers to the legal subject to be able to 'enjoy' a right. While the capacity refers to the legal subject to be able to enforce this right itself.

i. Legal capacity[229]

This legal capacity entails that a legal subject can bear rights, duties and responsibilities. Hence, this concept does not relate to whether the legal subject *has* any rights, duties or responsibility. On the contrary, it relates to the fact whether the legal subject *can have* any rights, duties or responsibilities. Even in the hypothesis that the legal subject would not have any rights or duties, he or she will still possess the legal capacity to bear them. Every single legal subject is equally 'legally capable'. However, the legal position in the legal system can differ. This has as important consequence that not every existing right, duty or responsibility can be exercised.[230]

[223] In Dutch: '*familiale staat*'.
[224] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 194.
[225] E. DIRIX and R. DE CORTE, *Zekerheidsrechten*, Antwerp, Kluwer, 1996, nr 8.
[226] V. SAGAERT, B. TILLEMAN and A.L. VERBEKE, *Vermogensrecht in kort bestek: Goederen- en bijzondere overeenkomstenrecht*, Antwerp, Intersentia, 2013, 20-21; A. KLUYSKENS, *Beginselen van Burgerlijk Recht*, V, *Zakenrecht*, Antwerp, Standaard, 1953, 12-13.
[227] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 195.
[228] *Ibid*.
[229] In Dutch: '*rechtsbekwaamheid*'.
[230] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 195.

ii. Capacity[231]

According to article 1123 of the Belgian Civil Code[232], every natural person should be considered as capable, to the extent that the law does not state the contrary. This capacity will be determined based on certain characteristics that the person possesses, for example the age, the physical and mental condition. Hence, there are several grounds upon which someone can be considered as incapable. A minor for example is automatically considered as incapable under the law, while an adult can be declared as incapable through a judgment by a court. The latter will be the case when a trustee has been appointed. Juridical persons are capable to carry out legal transactions.[233] Moreover, there should be noted that the question who can be considered as capable, is subject to changes. Until recently, even women were considered as incapable.[234]

1.3.2. Rights and duties

151. Juridical and natural persons – The legal system creates rights, duties and responsibilities that enable legal subjects to defend their own interests. The underlying reason behind conferring rights, duties and responsibilities are the (legal) interests of the legal subject. Moreover, the legal system often tries to protect the party that is in a weaker position. Also, it takes into account the differences and the extent of the interests of the legal subjects. For example, a natural person as a legal subject has the right to bodily integrity. A juridical person does not have any body hence it does not need this right.[235] The law equates juridical persons with natural persons regarding property law. For the juridical person, it is important to be able to carry out legal transactions. However, in principle, the juridical person cannot enforce any rights regarding family law since this will not be relevant.[236]

152. Correlation rights and duties – In the legal system, also duties can be imposed on legal subjects.[237] For example, natural persons and juridical persons have the duty to pay taxes. The idea is often that every right goes hand in hand with a duty. This duty for the legal subject to pay taxes goes hand in hand with the right of the tax authorities to collect these taxes. Rights and duties can arise through several ways. In the first place, they can arise automatically. There can be thought of

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[231] In Dutch: '*handelingsbekwaamheid*'.
[232] Article 1123 of the Belgian Civil Code of 21 March 1804, published in the Belgian Official Gazette on 3 September 1807.
[233] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 195.
[234] Only in 1958, when the law of 30 April 1958 regulating the 'incapibiliy' has been abolished, the woman was allowed to participate in the legal order and hence carry out legal transactions autonomously.
[235] A.W. MACHEN, "Corporate Personality", *Harvard Law Review* 1911, 253.
[236] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 195.
[237] F. SWENNEN, *Personenrecht in kort bestek*, Antwerp, Intersentia, 2008, 9.

article 8 of the Belgian Civil Code that states that every Belgian can enjoy civil rights.[238] Secondly, the legal subject itself can acquire them by for example concluding an employment contract. Finally, legal subjects can enforce them between themselves. An example of the latter would be when person X claims damages of person Y as consequence of a tort.

1.3.3. Subjective and objective law

153. Objective law – Objective law means the whole of legal rules and legal principles. The objective law has a general nature and entails for example a prohibition or a commandment for all the legal subjects. Moreover, this law aims at aligning everyone's interests in an equitable way. According to the objective law, legal subjects will whether be allowed or not allowed to carry out certain legal transactions. The decisive factors are the specific characteristics of the legal subject itself.[239]

154. Subjective law – In case a legal subject relies on a rule of the objective law in a specific situation, this will be a subjective right. Thus, subjective rights are not legal rights but concrete claims or competences that a legal subject possesses and that derive from objective law. Hence, subjective law is, contrary to objective law, individual and has a more practical nature. This subjective law grants the legal subject a certain right that belongs to no other legal subject and this claim or competence is usually enforceable. The subjective law has four specific characteristics (i) the presence of a legal subject is necessary (ii) certain claims or competences will be granted (iii) it operates against one or more legal subjects different from the one possessing this claim or competence (iv) it aims at protecting the interests of the legal subject or the right holder.[240]

1.3.4. Dependent legal subjects

155. General – In certain specific situations, legal subjects are not always able to exercise their rights. In case a legal subject is incapable and hence limited in exercising his rights, it will be considered as a dependent legal subject. The incapable legal subject will be dependent on the capable legal subject. The Belgian legal system knows several dependent legal subjects. As already mentioned above, minors are automatically considered as being incapable and hence dependent legal subjects. Thus, a capable legal subject can act in favor of the dependent legal subject in order to protect the latter its interests. [241]

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[238] Article 8 of the Belgian Civil Code of 21 March 1804, published in the Belgian Official Gazette on 3 September 1807.
[239] R. DE CORTE and B. DE GROOTE, *Handboek Civiel Recht,* Brussels, Larcier, 2011, Chapter 5.
[240] *Ibid.*
[241] R. DE CORTE, B. DE GROOTE and D. BRULOOT, *Privaatrecht in hoofdlijnen: Inleiding tot het recht,* Antwerp, Intersentia, 2017, 196.

1.3.5. Conclusion

156. Conclusion – The Belgian legal system does not know a legal definition of the term 'legal subject'. Nor does it know any specific conditions in order to be considered as a legal subject. This will depend on the current law. However, legal subjects, such as the natural person and the juridical person, possess some characteristics. On the basis of these specific characteristics, there could be analyzed whether another entity, such as an animal can possess these as well. A legal subject derives subjective rights from the objective law on the basis of the legal capacity possessed by this legal subject. However, it is not necessary that this legal subject is also 'capable'.[242] It is obvious that legal rules are created in order to protect the interests of legal subjects. These interests, or also called subjective rights, can significantly differ from each other. This acknowledgement makes it possible to recognize several types of legal subjectivity.[243] To conclude, there can be stated that the legal subject is an entity that can possess rights, duties and responsibilities that arise from its legal interests. This can be called the legal personality or legal personhood or legal subjectivity.

§2. Current status of the animal

157. Status – Under the current Belgian legal system, animals are considered as assets, so part of an equity. Hence, they could be the subject of personal rights and property rights (*i.e.* rights *in rem*). In other words, they are considered as mere legal objects and they can be the subject of certain legal transactions. This could for example entail that animals could be the subject of property in the sense of article 544 of the Belgian Civil Code[244] or subject to *usufruct*[245] (*i.e.* beneficial ownership) in the sense of article 581 of the Belgian Civil Code.[246]Also, animals could be rented on the basis of article 1711 of the Belgian Civil Code.[247] These consequences will be further discussed in the second section of this chapter.

2.1. Movable tangible goods

158. Different categories – Essentially, animals are considered as being movable tangible property by their nature. But in practice, animals can also become immovable by destination.[248] The notion of tangibility and intangibility is also derived from Roman law. GAIUS stated that

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[242] Cfr. *Infra* n° 210. In Dutch: '*handelingsbekwaam*'.
[243] In Dutch: '*rechtssubjectiviteit*'.
[244] Article 544 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[245] In Dutch: '*vruchtgebruik*'.
[246] Article 581 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[247] *Ibid.,* Article 1711.
[248] V. SAGAERT, *Beginselen van Belgisch privaatrecht*, V, *Goederenrecht*, Mechelen, Kluwer, 2014, 156.

goods that can be touched, *quae tangi possunt,* are tangible goods.[249] As already mentioned above, there is not much discussion about the fact that animals are considered tangible goods under the Belgian legal system. However, the question whether animals fall under the category of movable or immovable goods is not that easy to answer.

159. DE PAGE – According to DE PAGE, there is nothing as easy as determining whether tangible goods are movable or immovable since this results from nature itself. Movable are all the goods that are portable, either because they can move themselves e.g. animals, either because they can be moved through a certain dynamic e.g. cars and vessels or through an external force e.g. all other lifeless things.[250] It is not that easy to determine this for intangible goods since this does not result from nature itself. This category will not be further discussed since it is not relevant for the purpose of this thesis.

160. Value of goods – Roman law did not make a big distinction between movable and immovable goods. It was only during the Carolingian times that the distinction between these two goods was notable. From that time on, people started seeing immovable goods as very valuable and precious, while immovable goods were considered as being not that important or less valuable. The term 'movable' almost started being a synonym for despicable (*res mobilis, res vilis*).[251] Immovable goods were not only considered as being more honorable but they also had a more stable value, were easier to protect against loss and could easier generate revenues.[252] Later, when trading economies started to emerge, people realized the true value of some movable goods. For example, silver and gold could have a higher value than land or orchards.[253]

161. Exhaustive list – In the Belgian Civil Code, immovable goods are identified in an exhaustive way. All the goods that are not defined as being immovable should be considered as being movable.[254]

2.2. Immovable goods by destination

162. What? – Goods immovable by destination are goods that are in their nature movable but they should be considered as being immovable because their owner uses them with goods that are

[249] H. DE PAGE and R. DEKKERS, *Traité élémentaire de droit civil Belge*, V, *Les principaux contract les biens*, Brussels, Bruylant, 1975, 544-545.
[250] *Ibid.,* 591.
[251] H. DE PAGE and R. DEKKERS, *Traité élémentaire de droit civil Belge*, V, *Les principaux contract les biens*, Brussel, Bruylant, 1975, 592-594.
[252] H. DE PAGE and R. DEKKERS, *Traité élémentaire de droit civil Belge*, V, *Les principaux contract les biens*, Brussel, Bruylant, 1975, 594-595.
[253] *Ibid.*
[254] H. DE PAGE and R. DEKKERS, *Traité élémentaire de droit civil Belge*, V, *Les principaux contract les biens*, Brussels, Bruylant, 1975, 641; A. KLUYSKENS, *Beginselen van Burgerlijk Recht*, V, *Zakenrecht*, Antwerp, Standaard, 1953, 35-36.

immovable in their nature. These rules are laid down in the articles 522 until 524 of the Belgian Civil Code.[255]

163. Conditions – Two main conditions should be fulfilled in order for a good to become immovable by destination. First of all, the owner of the movable good also needs to be the owner of the immovable good. Hence, both of the goods need to belong to the same equity.[256] Secondly, there must be a fictional or a material link between the movable and the immovable good. This link can be derived from the fact that the owner uses the goods to work on the farmyard with it. In other words, there must be an economic connection since the movable goods are useful for the exploitation of a farmyard (*i.e.* the immovable good). Hence, the animals (*i.e.* movable goods *an sich)* could be used to work on the farmyard (*i.e.* immovable good). Further, these animals will be considered immovable by destination. According to DE PAGE this concept of making animals immovable goods by destination, should be objective and in public. This is important because third parties need to be aware of this.[257] Consequently, a horse and a cart transporting milk will entail that the horse becomes immovable property by destination.[258]

164. Which animals? – This process of making goods immovable by destination is especially the case for farm animals that are used in the agriculture and recreational sectors.[259] Article 524, second paragraph sums up a few animals that will become immovable by destination.[260] First of all, it concerns animals that are related to farms. According to LAURENT, these are animals that are mainly used for fertilizing land, working the land and to transport certain products.[261] These days there can be concluded that also animals that are used for the production of foods with an animal origin e.g. milk, honey, fat, eggs, oil or wool etc. are considered as being immovable by destination. This is also the case for livestock that are being bred and forced-feed for the mere purpose of sale.[262] This would also be the case for animals that are being sold for the reproduction of other animals. However, there should be noted that the latter two examples are only the case if the animals are being fed with products generated from the exploitation of the farm. On the contrary, this would mean that if the owner feeds the animals with food not generated from the exploitation of the farm, the animals would still be considered as being movable. The latter has

[255] F. LAURENT, *Principes de droit civil*, VI, *De la distinction des biens*, Brussels, Bruylant, 1878, 538-539; A. KLUYSKENS, *Beginselen van Burgerlijk Recht*, V, *Zakenrecht*, Antwerp, Standaard, 1953, 20-31.
[256] F. LAURENT, *Principes de droit civil*, VI, *De la distinction des biens*, Brussels, Bruylant, 1878, 543.
[257] H. DE PAGE and R. DEKKERS, *Traité élémentaire de droit civil Belge*, V, *Les principaux contract les biens*, Brussels, Bruylant, 1975, 621.
[258] H. DE PAGE and R. DEKKERS, *Traité élémentaire de droit civil Belge*, V, *Les principaux contract les biens*, Brussels, Bruylant, 1975, 625-626.
[259] V. SAGAERT, *Beginselen van Belgisch privaatrecht*, V, *Goederenrecht*, Mechelen, Kluwer, 2014, 156.
[260] Article 524 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[261] F. LAURENT, *Principes de droit civil*, VI, *De la distinction des biens*, Brussels, Bruylant, 1878, 549-551.
[262] F. VAN NESTE, *Beginselen van het Belgisch privaatrecht*, V/1, *Zakenrecht goederen, bezit en eigendom*, Brussels, Story-Scientia, 1990, 116.

been confirmed by the Court of Appeals of Antwerp.[263] Also, animals are not considered as being immovable when they are only used for personal use of the owner e.g. '*des animaux d'agrément*', or show horses that are present on the farm.[264] Secondly, the second paragraph of article 524 of the Belgian Civil Code[265] also makes an archaic reference to bees and beehives, pigeons in pigeon lofts, fish in pond and rabbits in rabbit parks. LAURENT states that these animals become immovable by destination because they are used for purposes related to the exploitation of the farm.[266]

165. No exhaustive list – VAN NESTE clearly states that article 524 of the Belgian Civil Code[267] should not be interpreted exhaustively. In other words, it does not mean that if animals are not listed in this article that they cannot become immovable by destination. Consequently, there could be argued that horses that are being used in a riding school solely are being used for giving classes to children and hence they can be considered as being essential production factors. Through this destination, horses became 'accessories' of the riding school (*accessorium sequitur principale*). Hence, they are not only useful for exploitation but they also show characteristics of sustainability since they won't be sold and that they will exclusively be used during the riding courses. The immovable character of these horses will change when they won't be the property anymore of the same owner.[268]

166. Consequences – This qualification as immovable by destination also has several consequences for the animals under Belgian property law. First of all, animals that received the immovable 'status' cannot be the subject of an execution procedure on the basis of article 1408, 1° and 2° of the Belgian Judicial Code.[269] [270] Secondly, according to article 45, 4th paragraph of the Belgian Mortgages Act[271], a mortgage that is registered upon the immovable good, will also be extended to the animals as 'accessories' of the immovable good (*accessorium sequitur principale*). Hence, the privilege of the seller, lying on the movable goods, will get lost when these goods become immovable by destination on the basis of article 20, 5° second paragraph of the Belgian Mortgages Act.[272] Thirdly, when this immovable good will be sold, it will entail that the seller will

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[263] Antwerpen, 28 February 2000, *AJT* 2000, 389.
[264] P. LECOCQ, B. TILLEMAN and A. VERBEKE, *Zakenrecht/Droit des Biens*, Brugges, Die Keure, 2005, 11-12.
[265] Article 524 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[266] F. LAURENT, *Principes de droit civil*, VI, *De la distinction des biens*, Brussels, Bruylant, 1878, 555-557.
[267] Article 524 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[268] F. VAN NESTE, *Beginselen van het Belgisch privaatrecht*, V/1, *Zakenrecht goederen, bezit en eigendom*, Brussels, Story-Scientia, 1990, 100.
[269] Article 1408 of the Belgian Judicial Code of 10 October 1967, published in the *Belgian Official Gazette* on 31 October 1967.
[270] V. SAGAERT, "Onroerende goederen door bestemming en beslag", *RW* 2007-08, 906-909.
[271] Article 45 of the Belgian Mortgages Act of 16 December 1851, published in the *Belgian Official Gazette* on 22 December 1851.
[272] *Ibid.,* Article 20.

need to deliver all the accessories as well, residing on this immovable good on the basis of article 1615 of the Belgian Civil Code.[273] Fourthly, when an immovable good will be the subject of an *usufruct*, all animals that became immovable by destination, will be part of this *usufruct* on the basis of article 600 of the Belgian Civil Code.[274]

2.3. Animals as res nullius and untradeable animals

167. *Res nullius* – As stated by DE PAGE, goods could only fulfill the needs of people when they have been reserved or claimed. If this did not take place, the goods will be considered being *res communes* or *res nullius.*[275] Wild animals, including living natural resources in the sea are considered being *res nullius*. Also, animals that have been abandoned by their owner, *res derelictae,* fall under that category. This means that they belong to no one and that they are without an owner until they are taken into possession, contrary to the *res communes.* From the moment the animals are taken into possession, they lose their status as *res nullius* and they will belong to one owner as it is the case with domesticated animals.[276] According to article 714 of the Belgian Civil Code[277], there are certain goods that belong to no one (*i.e. res communes*) and the use of these goods is common for everyone. Hence, goods falling under the category of *res communes* cannot be possessed.[278]

168. Untradeable goods – Goods that cannot be traded stand against goods that are allowed to be traded. According to DE PAGE, the term 'traded' should be interpreted much broader than today's meaning of this word. Trade in this case would mean the entire legal 'circulation' of goods and rights. In other words, goods that can be traded are goods that can be subject to a legal transaction. According to LAURENT, this would entail goods that can be the subject of an acquisitive prescription or an exclusive property right.[279] Based on these definitions, all animals that are considered being movable goods can be traded. Goods that cannot be traded are goods upon which it is not possible to have a property right due to a legal constraint. It should be noted that this is not the same for *res communes*. The goods that fall under the category of *res communes* cannot be owned due to a factual limitation (*i.e.* not a legal one). Consequently, goods that cannot be traded, cannot be the subject of an acquisitive prescription in the sense of article 2226 of the Belgian Civil

[273] Article 1615 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[274] Article 600 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[275] H. DE PAGE and R. DEKKERS, *Traité élémentaire de droit civil Belge*, V, *Les principaux contract les biens*, Brussels, Bruylant, 1975, 537.
[276] F. LAURENT, *Principes de droit civil*, VI, *De la distinction des biens*, Brussels, Bruylant, 1878, 6
[277] Article 714 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[278] G. VAN HOORICK, "Dieren in het recht in historisch perspectief*"* in G. CAZAUX (ed.), *Mensen en andere dieren: hun onderlinge relaties meervoudig bekeken*, Leuven, Garant, 2001, 95-96.
[279] F. LAURENT, *Principes de droit civil*, VI, *De la distinction des biens*, Brussels, Bruylant, 1878, 7.

Code.[280] Moreover, these goods cannot form the subject of a sales agreement on the basis of the articles 1128 *j.o.* 1598 of the Belgian Civil Code.[281] [282] According to the Belgian Court of Cassation, animals that are affected with infectious diseases cannot be traded.[283] Also, illegal animal species should be seen as animals that cannot be traded.[284] Animal species that are considered being illegal are mostly exotic. They are protected under international treaties and hence cannot be traded. The most important example of such a treaty is the '*Convention on International Trade in Endangered Species of Wild Fauna and Flora*' (*i.e.* CITES treaty).[285] This treaty makes a distinction between three species of animals. The most important category is the one with the animals (and plants) in danger of extinction. These include for example whales, dolphins, elephants, rhinoceroses, tigers, and certain species of apes, certain species of parrots and certain species of turtles that are not born in captivity. Following this treaty, the European Union also enacted a regulation similar to the CITES in order to regulate cross-border trade of endangered species.[286] Belgium has ratified the CITES treaty by adopting the Act of 28 July 1981.[287] Article 4 of this Act states that it is prohibited to sell certain easy identifiable species of animals, regardless whether they are alive or dead. In the first annex of this Act, the Belgian legislator determines which species fall under this provision.

§3. Legislative proposals

169. Proposals – In Belgium, recently, there have been several legislative initiatives to change the status of animals. Several deputies have proposed to recognize animals as 'sentient beings' and to take them out of the category of mere 'goods' in the Belgian Civil Code. These proposals will briefly be discussed hereunder.

170. First one – The first legislative proposal was introduced in May 2012 by Ms. DEFRAIGNE. This depute is convinced that animals are playing an increased role in our daily lives and in society in general. She then refers to the example that animals help with the education and development of children, that they provide moral and social assistance to lonely, sick and disabled people. Animals should no longer be considered as objects of consumption but rather as sentient

[280] Article 2226 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[281] *Ibid.,* Articles 1128 and 1598.
[282] H. DE PAGE and R. DEKKERS, *Traité élémentaire de droit civil Belge*, V, *Les principaux contract les biens*, Brussels, Bruylant, 1975, 539.
[283] Cass. 26 October 1899, *Pas*. 1900, 18.
[284] Corr. Gent, 27 June 2014, *TMR* 2014/3 and 4, 330-368.
[285] Convention on International Trade in Endangered Species of wild fauna and flora of 3 March 1973 signed in Washington DC.
[286] Regulation 338/97 regulating trade so as to protect species of wild fauna and flora of 9 December 1996, *Pb.L*. 3 March 1997.
[287] Belgian Act of 28 July 1981 regarding the approval of the Convention on International Trade in Endangered Species of wild fauna and flora and its annexes of 3 March 1973 and regarding the amendment of the Agreement made in Bonn on 22 June 1979, published in the *Belgian Official Gazette* on 30 December 1983.

beings. This mindset is not enough reflected in today's animal welfare acts. She then refers to countries such as France that have recognized animals as sentient beings.[288] Ms. DEFRAIGNE moreover hopes that this proposal will be the initial impetus for a change in attitude in the Belgian legal system. She hopes that animals will receive the status that they deserve and that their worth is being recognized. Her conviction is based upon the ability of the animal to feel pain and emotions. This is only possible to be felt by animals with a 'higher rate of central nervous system'. Hence, she finds it first of all necessary to state in the Belgian Civil Code that animals are 'sentient beings'. She is of the opinion that this change would imply a right for animals to preserve their well-being. Secondly, the author of the proposal also finds it necessary to remove animals from the categories of 'goods' in the Belgian Civil Code.[289] To conclude, she also states that the recognition of the fact that animals are able to feel pain and emotions should be defined. The author of the proposal then refers to a definition provided by the *'Fondation Ligue française des Droits de l'Animal'.*[290] Consequently, the articles dealing with property rights of the animals in the Belgian Civil Code should be amended. This would entail that article 522 will be abolished, the articles 524, 528, 544 and 564 will be amended and that new articles 515/1, 515/2 and 515/3 will be introduced in the Belgian Civil Code.

171. Second one – In April 2015, Ms. DEFRAIGNE proposed a motion for resolution[291] since the legislative proposal of 2012 has not been addressed by the Federal Parliament due to its dissolution. Contentwise, there can be referred to the legislative proposal of 2012, which is almost the same.

172. Third one – In July 2016, Ms. CAPRESSE also introduced a legislative proposal for recognizing animals as sentient beings and hence amending the Belgian Civil Code.[292] The depute is convinced that there exists a discrepancy between the Belgian Civil Code, that considers animals as objects, and European law, that recognizes that animals are sentient beings. Hence, she proclaims that an amendment of the Belgian Civil Code will entail an increase in the protection of animals. She furthermore states that there is a consensus in Europe about the fact that animals can suffer, experience pain and can express their feelings. The Cartesian idea that animals are as machines, belongs forever to the past and cruelty against animals is unacceptable. Just like Ms. DEFRAIGNE, she states that animals evolved from being considered as mere objects of consumption to sentient beings. Several scientific researches show us that animals are endowed

[288] Legislative proposal of Ms. DEFRAIGNE, *Parliamentary Documents,* Senate 2011-12, nr. 5-1631.
[289] *Ibid.*
[290] This organization stated in 2011 in '*Droit animal, éthique et sciences*' that the 'feeling' or ability to experience pain and emotions should be defined as follows: "*For every animal that belongs to a zoological or superior class from which there exists at least one species and that it is scientifically proved that they can feel pain and/or other emotions, there should be enacted legislative and regulatory instruments that take into consideration this special ability/feeling*". (Free translation).
[291] Motion for a resolution of Ms. DEFRAIGNE, *Parliamentary Documents,* Senate 2014-15, nr. 6-196/1.
[292] Legislative proposal of Ms. CAPRESSE, *Parliamentary Documents,* Chamber of Representatives 2015-16, nr. 1954/001.

with a certain autonomy and self-awareness. The author of the legislative proposal also highlights that the concerns that exist about the living circumstances of animal have led to several strong debates and pleas, inspired by ethics and social progress. In Belgium, the animal's status has not been subject to any change since the '*Code Napoléon*' from 1804, upon which our Belgian Civil Code is directly derived from. However, she states that the foundations of the thinking behind the *Code Napoléon* have been laid during the Roman times.[293] Ms. CAPRESSE then concludes by stating that Belgium should not become one of the most outdated legal systems regarding animals. The latter should not anymore be considered as movable or immovable goods but as 'sentient beings'.

173. Constitutional protection? – Besides these changes put forward by deputies to recognize animals as sentient beings, there has recently been another noteworthy evolution in the Belgian legal system. In April 2017, the deputies DEFRAIGNE and DE BETHUNE, proposed to amend the Belgian Constitution.[294] In their proposal, they state that animals should be protected because of their own interests.[295] According to them, the whole Belgian society is concerned about the interests of animals and their own existence. This could be seen as an evolution in our society. They propose that these animals' interests and their self-worth should be recognized in the Belgian Constitution. This could be achieved by imposing certain protection mechanisms and by recognizing that the animal is a sentient being. The latter would entail that the animal is a special 'thing' with feelings and own interests that should be recognized by the Belgian governments. However, they clearly state that they do not want to consider animals as legal subjects and hence do no want to grant them any legal personality. The deputies are convinced that this amendment to the constitution will have as result that animals will be more protected within our society. *In concreto,* they want to impose the Belgian governments to respect animal protection. In other words, animal welfare protection will have a constitutional value and governments could not simply ignore this provision. They propose that article 7*bis* of the Belgian Constitution should be amended and it would read as follows: "*When exercising their respective competences, the Federal State, the Communities and the Regions should strive to take care of animals and consider them as sentient beings"*. (Free translation).

174. Changed mindset – The above-mentioned proposals illustrate that Belgium is considering some changes in their legislation in order to remove animals from the category of 'goods'. These proposals furthermore want to recognize animals as sentient beings.

[293] This has also been mentioned in the first section of this chapter.
[294] The Belgian Constitution of 17 February 1994, published in the *Belgian Official Gazette* on 17 February 1994.
[295] Legislative proposal of Ms. DEFRAIGNE and DE BETHUNE, *Parliamentary Documents,* Chamber of Representatives 2016-17, nr. 6-339/1.

§4. Proposed modifications to the Belgian Civil Code

175. General – The Belgian Minister of Justice and its cabinet are preparing a reform of the Belgian Civil Code. This reform would also affect property law and hence the above discussed articles about animals. Under this section the relevant proposed modifications to the Belgian Civil Code will be briefly set out. Under the third chapter, there will be referred to this reform and some points of criticism will be put forward when analyzing it. Before analyzing the reform, it should be highlighted that at the moment of writing, these modifications still need to be approved by the Council of State and the Chamber of Representatives.

4.1. The modifications

176. Proposed modifications – The reform will not only change the content of the current Belgian Civil Code but it will also modify the structure of it. The second book of the New Civil Code will deal with property law. The second title of it will be called 'goods' (*i.e.* 'property'). The first chapter of the second title of the second book will read as 'general categories'. The future articles 53 and 54 will read as follows[296]:

"*Article 52. – General provision: Goods should be distinguished from persons and animals.*

Article 53. – Animals: Animals have a certain sensibility and comply with biological laws of nature. The provisions applicable to goods will also be applicable to animals. However, the legal and regulatory provisions dealing with animal protection should be taken into account as well as the general provisions of public order and common decency." (Free translation)

4.2. Statement of reasons

177. Wait-and-see approach – The Minister of Justice and its cabinet start by stating that during the past few years, all the modern legal systems have paid attention to the legal position of the animal. They are strongly convinced that Belgian law needs to evolve, especially taking into account the citizens' opinion. However, they mention that the society's opinion is divided. Some legal authors are convinced that animals should be qualified as 'a special good', while others opt for a *sui generis* category between persons and goods.[297] There are also authors who are convinced

[296] Preliminary Draft of the Act regarding the introduction of book II 'Property Law' in the New Civil Code of 7 December 2017, unpublished.
[297] J. VAN DE VOORDE, "Dieren als quasi-goederen. Beschouwingen over de juridisch- technische wenselijkheid van een bijzonder statuut voor dieren tussen goederen en rechtssubjecten", *R.W.* 2016-17, 903-916.

that the animal should be granted legal personhood.[298] Because of these disparities within the legal doctrine, the Minister of Justice states that this issue should not be addressed hurriedly but all the recent evolutions need to be taken into account.[299]

178. Symbolic distinction – While awaiting the outcome of the above-mentioned debate, the authors of this preliminary draft have chosen to make a symbolic distinction between goods, persons and animals. However, they also chose to grant living animals certain characteristics. The authors of this preliminary draft furthermore state that they have opted for a general wording instead of specific rules, 'for the sake of clarity'. They propose to apply the rules regarding property law on animals, 'for the sake of transparency and simplicity', taking into account all the relevant legislation and regulations protecting the animal welfare, the public order and common decency.

179. Consequences – Since the category of goods becoming immovable by destination will disappear, also all the references made to bees and beehives, pigeons in pigeon lofts, fish in pond and rabbits in rabbit parks in the current article 524 of the Belgian Civil Code will disappear. [300]Moreover, the drafters are of the opinion that the legal principle of *accessorium sequitur principale* should not be applied anymore taking into account the current view of animals. However, they only refer to the specific case that the buyer of a piece of land would also receive the animals residing on it.

Section 2: Implications of the current status of the animal

180. General – As analyzed above, the animal is still considered as a mere object under Belgian property law. Depending on the circumstances the animal can be seen as a movable tangible good or as a good that becomes immovable by destination. This position has several consequences under the legal systems that are mention worthy.

§1. Property rights upon animals and its limitations

181. Absolute right – Having a property right upon a thing, entails being able to enjoy a good and dispose over it in the most absolute way. The owner of the animal will also become the owner of the litter based upon article 547 of the Belgian Civil Code. Namely, the litter should be considered as the fruit of the animal.[301] Also, if the animals falling under the category *res nullius* are being

[298] E. LANGENAKEN, "L'animal en droit civil: les amorces d'un nouveau statut", *JT* 2016, 698 ff.
[299] Preliminary Draft of the Act regarding the introduction of book II 'Property Law' in the New Civil Code of 7 December 2017, unpublished. (a different document with the statement of reasons)
[300] Article 524 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[301] M.E. STORME, *Handboek vermogensrecht,* II, 2010, 248, consulted on: https://www.law.kuleuven.be/personal/mstorme/vermogensrecht2010II.pdf.

kept captive, they will be considered as being domesticated animals and hence be subject to property rights. Based on article 544 of the Belgian Civil Code, it is possible to over-exploit a thing since property rights are the most absolute rights.[302]

182. Limitations – The only limitation to this property right is the law.[303]Articles 544 and 714 of the Belgian Civil Code give the governments the possibility to impose limitations upon this property rights.[304] Hence, governments can impose how goods falling under the categories of *res nullius* and *res communes* shall be regulated.[305] During the course of the past two centuries, the government used its competence to issue legislation in order to protect animals in their relationship with people. There can be find two types of regulation. In the first type of regulation, animals are seen as a specimen of wild species that should be preserved. The main goal is trying to not let the population level decrease. In general, this is called regulation that protects certain species. This would also include the act of destroying certain specimen that are considered as being harmful. In the second type of regulation, the focus will lay on the individual animal itself. This is often the case with domesticated animals. The relationship between mankind and the animal plays a more important role. Originally, this type of regulation aimed at protecting the individual animal against cruelty committed by people. However, today there is a switch to guaranteeing animal welfare in general. We could state that these animals in some way have the right not to suffer or not to be killed for unnecessary reasons.[306] In general, this type of regulation is called 'animal welfare' or 'animal protection'.[307]

183. Enforcement of limitations – The Belgian Criminal Code divides crimes against animals in two different categories.[308] The first category consists out of felonies and misdemeanors against property and the second consists out of contraventions. The first category only criminalizes the damaging and killing of someone else's animals. In other words, the focus lies on the protection of the property and not on the animal. Only the second category also provided protection for the owner and its animals. These cruelty acts were further elaborated in the Animal Welfare Act.[309]

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[302] Article 544 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[303] *Ibid.,* article 544.
[304] Articles 544 and 714 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[305] G. VAN HOORICK, "Dieren in het recht in historisch perspectief", in G. CAZAUX (ed.), *Mensen en andere dieren: hun onderlinge relaties meervoudig bekeken*, Leuven, Garant, 2001, 96.
[306] Cfr. Article 1 of the Belgian Animal Welfare Act of 14 August 1986, Published in the *Belgian Official Gazette* on 3 December 1986 and Belgian Draft Act of regarding the protection and welfare of animals, *Parliamentary Documents,* Senate 1982-83, nr. 469, 3.
[307] G. VAN HOORICK, "Dieren in het recht in historisch perspectief", in G. CAZAUX (ed.), *Mensen en andere dieren: hun onderlinge relaties meervoudig bekeken*, Leuven, Garant, 2001, 96.
[308] The Belgian Criminal Code of 8 June 1867, published in the *Belgian Official Gazette* on 9 June 1867.
[309] The Belgian Animal Welfare Act of 14 August 1986, published in the *Belgian Official Gazette* on 3 December 1986.

§2. Civil action [310]

184. General – Another consequence deriving from the current status of the animal is related to judicial law. As mentioned above, the animal – as a legal object – does not possess any subjective rights. However, an animal is entitled to more protection than a mere movable tangible good. More specific, the Belgian Animal Welfare Act offers protection to animals.[311] This Act imposes obligations upon persons towards animals. Therefore, the animal could be seen as a 'special' legal object. Yet animals cannot stand up for their own interests. In case persons become victims of a certain crime, they can introduce a complaint or intervene in a proceeding as civil party (*i.e.* '*partie civile*'). In this way, a criminal procedure can be introduced. However, only natural persons can be victims of a crime.[312]

185. 'Victimless crimes' – Since the Belgian Animal Welfare Act[313] got introduced to protect the intrinsic value of the animal, but animals cannot be victims themselves, the crimes should be considered as being 'victimless crimes'.[314] It is typical that for these kind of crimes, a legal procedure will only be introduced from the moment that the whole society would be adversely affected.[315] Consequently, animals are dependent upon people for protecting their welfare. In Belgium, there are several animal rights associations that actively search for severe acts of animal cruelty and try to expose these to the public eye. However, they try to go further then only exposing these animal cruelty acts. They try to introduce '*partie civile*' proceedings. In this way, they hope to start a criminal procedure. Hereunder there will be set out why this is not as easy as it may seem. It should be stated that an analysis of this civil action (and its complications), related to animal protection or welfare, is also interesting when analyzing who will defend the fundamental rights for animals. Hence, there will also be build upon the outcome of this analysis under the third chapter.

2.1. Conceptualization and conditions

186. Conceptualization - Legal scholar VERSTRAETEN defines this civil action in criminal proceedings as a legal act upon which a victim of a crime can introduce a damage claim before the criminal courts in order to receive compensation.[316] This civil action aims at receiving damages

[310] In Dutch: '*burgerlijke partijstelling*'.
[311] The Belgian Animal Welfare Act of 14 August 1986, published in the *Belgian Official Gazette* on 3 December 1986.
[312] S. VERHELST, *De rol van het slachtoffer in het straf(proces)recht*, Antwerp/Cambridge, Intersentia, 2013, 9-10.
[313] The Belgian Animal Welfare Act of 14 August 1986, published in the *Belgian Official Gazette* on 3 December 1986.
[314] In Dutch: 'slachtofferloos delict'. Cfr. V. DE MEUTER, *Dieren in het strafrecht: Van bijzondere rechtsobjecten naar beperkte rechtssubjecten?,* Master Thesis, KU Leuven, 2015, 46.
[315] S. VERHELST, *De rol van het slachtoffer in het straf(proces)recht*, Antwerp/Cambridge, Intersentia, 2013, 12.
[316] R. VERSTRAETEN, *De burgerlijke partij en het gerechtelijk onderzoek. Het slachtoffer in het strafproces*, Antwerp/Apeldoorn, Maklu, 1990, 37.

when also private interests are injured due to the crime.[317] The possibility to introduce such a civil action is important because it marks the start of a criminal procedure and makes the mistrial by the public prosecutor impossible. Moreover, a civil party can request the investigating judge to provide him or her access to the file according to article 61*ter* of the Belgian Code of Criminal Procedure.[318] Also, the civil party can request for additional investigating acts based on article 61*quinquies* of the Belgian Code of Criminal Procedure.[319] If this action will be declared well-founded, then the judge can provide the civil party with compensation.[320]

187. Conditions – There are several conditions that need to be fulfilled in order for the civil action to be declared admissible.[321] According to article 17 of the Belgian Judicial Code, the civil party needs to have a specific interest and the necessary capacity.[322] [323] Article 18 of the Belgian Judicial Code states that this interest needs to exist in the present (and not only exist in the future).[324] These conditions, stated in the Belgian Civil Code, are similar to the condition under criminal procedural law. Namely, the party introducing a civil action is required to have suffered a damage that results from the crime.[325] Article 63 of the Belgian Code of Criminal Procedure furthermore adds that only victims of a felony or misdemeanor can introduce a claim (and not victims of a contravention).[326] Moreover, the damage suffered by the victim needs to be genuine and a subjective right or a legitimate interest needs to be violated.[327] To conclude, the civil party itself needs to have experienced this damage and it can only be introduced to receive a compensation for his or her own damage.[328]

2.2. Civil action and animal rights organizations

188. Problem setting – The problem with an animal rights organization trying to introduce a civil action relates to the condition that the damage needs to be 'personal' and that the organization

[317] A. DE NAUW, "Groepsbelangen en strafproces", in X, *Liber Amicorum Frédéric Dumon*, Antwerp, Kluwer, 1983, 421.
[318] Article 61ter of the Belgian Code of Criminal Procedure of 17 November 1808, published in the *Belgian Official Gazette* on 27 November 1808.
[319] *Ibid.,* Article 61 quinquies.
[320] I. WOUTERS, *Je rechten als slachtoffer*, Berchem, Uitgeverij EPO, 2008, 140 ff.
[321] S. VERHELST, *De rol van het slachtoffer in het straf(proces)recht*, Antwerp/Cambridge, Intersentia, 2013, 196.
[322] Article 17 of the Belgian Judicial Code of 10 October 1967, published in the *Belgian Official Gazette* on 31 October 1967.
[323] R. VERSTRAETEN, *Handboek Strafvordering*, Antwerp/Apeldoorn, Maklu, 2012, 194-197.
[324] Article 18 of the Belgian Judicial Code of 10 October 1967, published in the *Belgian Official Gazette* on 31 October 1967.
[325] Article 3 of the Preliminary Title of the Belgian Code of Criminal Procedure of 17 April 1878, published in the *Belgian Official Gazette* on 25 April 1878.
[326] Article 63 of the Belgian Code of Criminal Procedure of 17 November 1808, published in the *Belgian Official Gazette* on 27 November 1808.
[327] R. VERSTRAETEN, *Handboek Strafvordering*, Antwerp/Apeldoorn, Maklu, 2012, 201; S. VERHELST, *De rol van het slachtoffer in het straf(proces)recht*, Antwerp/Cambridge, Intersentia, 2013, 205-06.
[328] R. VERSTRAETEN*, Handboek Strafvordering*, Antwerp/Apeldoorn, Maklu, 1994, 94.

needs to have an own interest.[329] When an animal rights organization introduces a civil action, it is with the purpose to defend her social purpose. The latter is the improvement of animal welfare and the prevention of animal cruelty. Hence, these non-profit associations do not act in their own interests but in the interest of the animals. This is considered as a 'collective interest'.[330]

189. Belgian Court of Cassation – If the damage relates to a collective interest, the civil action will not be declared admissible according to the Belgian Court of Cassation. In other words, the interest of the animal rights organization needs to be 'personal'.[331] The protection of the collective interest is a task assigned to the public prosecutor.[332] Hence, the own and personal interest needs to be interpreted restrictively according to the Belgian Court of Cassation. There always needs to exist a personal and direct damage that is a result of the infringement of personal interests. This would not be the case with organizations that defend collective, indirect and non-personal interests. Moreover, the Belgian Court of Cassation is also of the opinion that pursuing a social purpose should not be considered as an own or personal interest.[333] Several civil actions of animal rights organizations have therefore been declared inadmissible.[334]

190. Legal derogations – Only a legal provision could provide an exemption to the required condition of 'personal interest'. The Belgian law foresees some exceptions in the context of denialism, domestic violence, trafficking in human beings, antidiscrimination, protection and nature conservation (including the protection of certain species).[335] In that way, there will be provided extra protection for victims that find themselves in an extreme vulnerable position. Moreover, another goal was also to stimulate the public prosecutor to prosecute these criminal offences. However, these legal derogations should be interpreted in a restrictive way. The law itself provides additional conditions for these organizations to introduce such a civil action.[336]

191. Lower courts – There should be stated that not every court shares the opinion of the Belgian Court of Cassation. There exist several cases that are contrary to the Court of Cassation's judgments. These 'lower' courts have declared the civil actions of these animal rights

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[329] K. WAGNER, "Collectieve acties in het Belgisch recht", *P.&B./R.D.J.P*. 2001, 153.
[330] R. VERSTRAETEN, *De burgerlijke partij en het gerechtelijk onderzoek. Het slachtoffer in het strafproces*, Antwerp/Apeldoorn, Maklu, 1990, 83.
[331] Cass. 19 November 1982, *Arr.Cass.* 1982-83, 372, concl. KRINGS, E.; *Bull.* 1983, 338; *Jura Falc.* 1982-83, 423, note D. DE GREEF; *Pas.* 1983, I, 338; *RW* 1983-84, 2029, note J. LAENENS.; *Rev.prat.soc*. 1984, 18.
[332] P. LEMMENS en J. VERLINDEN, "Toegang tot de rechter in milieuzaken" in C.B.R. (ed.) *Rechtspraktijk en Milieubescherming*, Eerste Antwerps Juristencongres, Antwerp, Kluwer, 1991, 226; R. VERSTRAETEN, *Handboek Strafvordering*, Antwerp/Apeldoorn, Maklu, 2012, 202-03.
[333] R. VERSTRAETEN, *De burgerlijke partij en het gerechtelijk onderzoek. Het slachtoffer in het strafproces*, Antwerp/Apeldoorn, Maklu, 1990, 83.
[334] Corr. Aarlen 18 March 1968*, Jur.Liege* 1968-69, 11; Pol.Rochefort, 27 May 1983, unpublished; Pol. Turnhout 10 April 1989, *T. Vred*. 1989, 219.
[335] Cass. 11 June 2013, *APT* 2013 (summary), 372; *Juristenkrant* 2013, 274; http://www.cass.be (4 July 2013); *TMR* 2013, 392, notet P. LEFRANC.
[336] R. VERSTRAETEN, *Handboek Strafvordering*, Antwerp/Apeldoorn, Maklu, 1994, 151; S. VERHELST, *De rol van het slachtoffer in het straf(proces)recht*, Antwerp/Cambridge, Intersentia, 2013, 211-13.

organizations admissible. The cases relate for example to animal cruelty acts, the unjustified killing of animals, water pollution, etc.[337] The compensations granted by the court did not relate to the animal cruelty but to the damages that the organizations needed to bear because they were hindered in pursuing their activities.[338]

192. Press – Also the Belgian press got involved with the discussion regarding the condition of having a 'personal' interest for introducing a civil action. Newspapers reported the success of several animal rights organizations (e.g. *GAIA, Blid, Vogelbescherming* …). The civil actions of these organizations were declared admissible in cases of animal cruelty.[339] The lawyer of the animal rights organization '*GAIA*', GODFROID, is of the opinion that it is a legal technical discussion whether these organizations possess a 'personal' interest. The counterparty argues that such civil actions should not be declared admissible because the conditions of article 17 of the Belgian Judicial Code are not fulfilled.[340] They are of the opinion that such organizations do not have a 'personal' interest.[341]

§3. Liability for animals

193. Content – As mentioned above, there can be made a distinction between the capacity[342] and the legal capacity.[343] If a person is legally capable but not capable, it entails that this person would need a representative to enforce his or her rights. There can example be thought about a minor and/or a mentally ill person. Animals today are not even considered as legally capable since they possess no rights (or duties). For this reason, the owners or supervisors of the animals will be held liable for the acts committed by these animals. This liability for the acts committed by animals is regulated in article 1385 of the Belgian Civil Code.[344] This liability is considered a so-called 'strict

[337] Brussel 21 February 1989, *Amén.,* 1989, 75; Corr. Antwerpen 12 December 2009, unpublished; Corr. Leuven 12 January 2009, unpublished; Corr. Leuven 20 November 2000, *T.R.V.* 2001, 118, note M. DENEF; Corr. Gent 4 December 2007, *TMR.* 2008, 405; Pol. St. Niklaas-Waas 23 May 1990, *Amén.* 1990, 175; Corr. Aarlen 16 March 1989, *Amén.* 1989, 113.
[338] Brussel 12 March 2003, *TMR* 2008, 127, note P. LEFRANC.
[339] X., "Hanenvechters in Sint-Truiden opgepakt na tip GAIA", http://www.hbvl.be/limburg/sint-truiden/hanenvechters-in-sint-truiden-opgepakt-na-tip-gaia-2.aspx; Global Action in the Interest of Animals (GAIA), Belgische Landelijke Inspectiedienst (BLID), Anti Broodfok Actie (ABA), Vlaamse Vereniging voor Dierenbescherming (VVDB); X., "Hondenfokkers krijgen drie jaar beroepsverbod", http://www.nieuwsblad.be/article/detail.aspx?articleid=N82O24B6; X.,"Koppel dat honden verwaarloosde, mag toch dieren houden", http://www.nieuwsblad.be/article/detail.aspx?articleid=9A336BVV.
[340] Article 17 of the Belgian Judicial Code of 10 October 1967, published in the *Belgian Official Gazette* on 31 October 1967.
[341] X., "Tweede zittingsdag roofvogelzwendel", http://www.vogelbescherming.be/site/index.php?option=com_content&view=article&id=737:tweedezittingsdag-roofvogelzwendel&catid=14:persberichten&Itemid=105.
[342] In Dutch: '*handelingsbekwaamheid*'.
[343] In Dutch: '*rechtsbekwaamheid*'.
[344] Article 1385 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.

liability'.[345] This means that it makes a person legally responsible for damage and loss caused by his or her acts and omissions regardless of culpability. Hence, there is no requirement to prove fault, negligence or intention.[346] The person that relies on this article does not need to prove the wrongful or abnormal behavior of the animal.[347] He or she only needs to prove that there exists a causal link between the behavior of the animal and the caused damage. The owner or the supervisor can only be released from this liability if he or she proves that the damage has been caused by a strange cause e.g. *force majeure*, coincidence, an act from a third party or due to a mistake by the victim itself. [348] This would namely break – partially or entirely – the link between the damage and the animal's behavior.[349] According to legal scholar, VAN GERVEN, all animals would fall under this provision, including wild animals if they have an owner or supervisor. Both of them could be held alternatively liable.[350]

§4. Sales agreement regarding animals

194. Content – In commercial relationships, the animal has the same value as any other movable tangible good according to the Belgian Civil Code. Hence, it is possible to transfer the property upon an animal to someone else by means of an agreement.[351] According to article 1128 of the Belgian Civil Code, persons considered as legal subjects cannot be the subject of a sales agreement.[352] [353] Animals affected by an infectious disease cannot be traded neither because the agreement would fall without object.[354] The legal rules applying to sales agreements are entirely applicable to the sale of an animal. This would also include, amongst other things, the applicability of the Product Liability Act.[355] The buyers of a dog would for example also have a two-year guarantee when they buy an animal.[356]

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[345] In Dutch: '*risicoaansprakelijkheid*' or '*kwalitatieve aansprakelijkheid*'.
[346] X., *Strict liability*, Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/strict_liability.
[347] J. DARCHAMBEAU, "Schade veroorzaakt door een dier – vermoede aansprakelijkheid van de eigenaar", *Verzekeringsnieuws* 2012, part 1: edition 21, 1-4, part 2: edition 23, 1-4.
[348] P. GRAULUS, "Aansprakelijkheid voor dieren en de fout van het slachtoffer", *T.Verz.* 2010, 98.
[349] S. GUILIAMS, "Verdeling of uitsluiting van aansprakelijkheid ex artikel 1385 BW ingeval van een fout van het slachtoffer?", *NJW* 2014, 412-413.
[350] W. VAN GERVEN, *Verbintenissenrecht*, Leuven, Acco, 2006, 405.
[351] Article 1583 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[352] Article 1128 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[353] R. GIELEN, *Dier en Recht: mensenrechten ook voor dieren*, Antwerpen, Maklu, 2000, 86.
[354] Vred. Louveigné, 8 February1977, *J.L.* 1976-1977, 255; Vred. Wolvertem, 5 October 1978, *T. Vred.* 1979, 16; Vred. Brasschaat, 10 May 1978, *T. Vred.* 1979, 115.
[355] The Belgian Act related to the product liability of 25 February 1991, published in the *Belgian Official Gazette* on 22 March 1991.
[356] M. REDON, "Animal", *Répertoire de droit civil* 2015, n° 12.

§5. *Usufruct* and renting agreement

195. *Usufruct* - Articles 578 and following of the Belgian Civil Code[357] regulate the right of *usufruct.* This right unites the two property interests of *usus* and *fructus*. The first entails the right to use and enjoy a thing in possession without altering it, while the second entails the right to derive profit from it.[358]According to article 581 the right of *usufruct* can relate to all sorts of movable and immovable goods. Hence, it can also be used for animals.[359]

196. Renting agreement - All goods that can be traded can also be the object of a renting agreement on the basis of article 1128 of the Belgian Civil Code.[360] Since animals today are legal objects, it is possible to conclude a renting agreement with the animal as object.

§6. Unseizability

197. Content – Since animals are considered being movable tangible goods, they find themselves in the equity of the legal subject (*i.e.* the owner of the equity). According to article 7 and 8 of the Belgian Mortgages Act, the creditor can claim the whole equity.[361] However, there are some exceptions to this principle.[362] Article 1408, §1 of the Belgian Judicial Code provides a list with certain animals that are unseizable.[363] This list also includes companion animals.[364] These animals (*i.e.* legal objects) cannot be seized because they can have affective ties with their owner and/or their family. This could be an indication that animals or companion animals in this case, can be considered as being more than mere objects.

§7. Self-defense

198. Content – Legitimate self-defense is not accepted when wanting to protect goods. The law presumes that the loss of goods is recoverable. Since animals situate under the category of goods,

[357] Article 579 ff. of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[358] A. DE BRABANDERE, "Usufruit, Usage, Habitation" in *Répertoire Notarial*, II, *Les Biens*, Brussels, Larcier, 1977, nr. 35, 46.
[359] *Ibid.,* 60.
[360] Article 1128 of the Belgian Civil Code of 21 March 1804, published in the *Belgian Official Gazette* on 3 September 1807.
[361] Articles 7 and 8 of the Belgian Mortgages Act of 16 December 1851, published in the *Belgian Official Gazette* on 22 December 1851.
[362] A. KLUYSKENS, *Beginselen van Burgerlijk Recht*, V, *Zakenrecht*, Antwerp, Standaard, 1953, 13; V. SAGAERT, B. TILLEMAN en A.L. VERBEKE, *Vermogensrecht in kort bestek: Goederen- en bijzondere overeenkomstenrecht*, Antwerp, Intersentia, 2013, 20-21.
[363] Article 1408 of the Belgian Judicial Code of 10 October 1967, published in the *Belgian Official Gazette* on 31 October 1967.
[364] M.E. STORME, *Handboek vermogensrecht*, I, 2010, 86, http://storme.be/zakenrecht.html.

legitimate self-defense will not be accepted by the courts when wanting to protect an animal.[365] Taking into account the 'special' position of the animal on the basis of the Belgian Animal Welfare act[366], the interpretation of article 416 of the Belgian Criminal Code[367] is outdated. The recognition of the intrinsic value of the animal does not correspond the idea of the 'recoverability' when losing an animal.

[365] Cass. 28 juni 1938, *Arr. Cass.* 1938, 144, *Pas.* 1938, I, 232 ; Luik 17 april 1905, *Pas.* 1907, II, 31.
[366] The Belgian Animal Welfare Act of 14 August 1986, Published in the *Belgian Official Gazette* on 3 December 1986.
[367] The Belgian Criminal Code of 8 June 1867, published in the *Belgian Official Gazette* on 9 June 1867.

CHAPTER III: *DE LEGE REFERENDA*

199. Breaking the 'legal wall' – The first section of this chapter will analyze how fundamental rights could be extended to animals. A necessary step is to break the so-called 'legal wall'. From this point of view the eradication of the property status of the animal will be analyzed as well as the problematic with the current account of legal personhood. An alternative account of legal personhood will be set out.

200. Fundamental rights in practical terms – The second section of this chapter will study the extension of fundamental rights 'in practical terms'. This means that there will be analyzed which animals would benefit from fundamental rights and based on which criterion. Further, there will be determined which fundamental rights should be extended. To conclude, three specific criteria will be developed in order to be able to limit these rights in some specific cases.

201. Critical note and recommendations – The last section will provide a critical note on the Belgian legal framework based on the conducted research. Both the current legislation as well as the proposed amendments to the Civil Code will be subjected to a critical note. At the end of this section some recommendations will be put forward.

Section 1: Breaking the 'legal wall'

§1. General situation

202. Legal wall – As mentioned in the second section of the first chapter, there currently exists a thick legal wall between humans and non-humans. On one side of the wall, there are the humans that enjoy the status of legal persons and can benefit from so-called 'fundamental rights'. While on the other side of the wall there are legal things which, by definition, enjoy no legal rights. In my opinion, this legal wall is not defendable anymore. The foundations of this way of thinking (and also of our legal system) have been laid in a period where there was not a small amount of attention to the legal protection of animals.[368] Today there is enough evidence that mankind starts to rethink the position of the animal in the legal system.[369] The evidence can be found in philosophical, ethical, scientific corners but also in the legal world. A tremendous amount of legal doctrine dealing with this issue is popping out. Also, courts are involved in this issue that lead to jurisprudence. On top, several countries are rethinking this status and are consequently changing their legislation.

[368] G. CAZAUX (ed.), *Mensen en andere dieren: hun onderlinge relaties meervoudig bekeken*, Leuven, Garant, 2001, 95.
[369] O. LE BOT, "La qualification juridique de l'animal: d'une conception classique dépassée à la recherche d'une nouvelle catégorie juridique" in P. JOUVENTIN, D. CHAUVET et E. UTRIA (eds.), *La Raison des plus forts. La conscience déniée aux animaux*, Paris éditions I.M.H.O., 2010, 236.

203. Breaking the legal wall – Legal scholar SWENNEN stated that this legal wall is fading a bit.[370] Also, Belgian legal scholar, DIRIX, stated that animals are not goods.[371] But he does not state what they are then if they are not goods. Also, some countries are recognizing animals as sentient beings.[372] However, these countries do apply the rules regulating goods upon animals. In my opinion, recognizing animals as sentient beings but applying property law upon them is a mere symbolic recognition. This legal wall needs to be broken if we want to extend fundamental rights to animals.

§2. Eradication of the property status of animals

"*It is difficult, to handle simply as property, a creature possessing human passions and human feelings ... while on the other hand, the absolute necessity of dealing with property as a thing, greatly embarrasses a man in any attempt to treat it as a person.*"
-Frederick Law Olmsted

204. General – As seen above, property rights are the most absolute rights. They can only be limited by law, as for example by the Belgian Animal Welfare Act. However, we should ask ourselves which interest is protected by such animal welfare acts? Is this the general interest and hence the interest of mankind, so by preventing immoral acts of cruelty against animals or is this the interest of the animal himself? The majority of the authors refuse to admit that the animal already has some 'rights'.[373] As stated by J.P. MARGUENAUD, "*admettre une limitation du droit de propriété dans l'intérêt de la chose appropriée constitueterais 'une incongruité sinon une monstruosité juridique*'".[374] The legal scholar correctly states that admitting that the limitation of property rights in favor of the subject, upon which this property right resides, would constitute a legal incoherence. Today there exists a legal incoherence and paradox because we could say that on one hand animals already have the 'right' to not be committed to cruelty acts and to not die for unnecessary reasons according to animal welfare acts.[375] While on the other hand civil law still considers the animal as a mere legal object. Hence, the animal cannot be sufficiently protected as long as it is considered as a subject of property.

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[370] F. SWENNEN, *Personenrecht in kort bestek*, Antwerpen/Oxford, Intersentia, 2005, 10; V. DE MEUTER, *Dieren in het strafrecht: Van bijzondere rechtsobjecten naar beperkte rechtssubjecten?,* Master Thesis, KU Leuven, 2015, 64.
[371] E. DIRIX, "Dieren zijn geen zaken", *RW* 2014-15, 1122.
[372] Cfr. *Supra* n° 65 ff.
[373] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 76.
[374] J.-P. MARGUENAUD, *L'animal en droit privé*, Limoges, Presses universitaires de Limoges, 1993, 357.
[375] Cfr. Article 1 of the Belgian Animal Welfare Act of 14 August 1986, Published in the *Belgian Official Gazette* on 3 December 1986 and Belgian Draft Act of regarding the protection and welfare of animals, *Parliamentary Documents,* Senate 1982-83, nr. 469, 3.

205. Broad concept – The property concept is far more than a mere legal concept, it is also a central psychological, social, economic, religious, intellectual, cultural, political and environmental reality for humans. This concept of property is one of the main reasons why societies have failed to notice animals or take them seriously.[376]

2.1. Property rights deny the sensibility of an animal

206. Problem setting – Under the current legal system, the animal is only being taken under consideration when discussing possible limits to property rights. The fact that an animal is a subject of property rights has two negative consequences. On one hand, appropriated animals can only be protected as limitations upon property law (e.g. animal welfare acts). This entails that property rights are superior to animals' protection. On the other hand, animals that are not appropriated by a private party cannot fall under these limitations to property rights. In other words, there is an assumption that these animals won't be subjected to any cruelty acts.

2.1.1. Failure in protecting domesticated animals

207. General – As stated by BOISSEAU-SOWINSKI, considering animals as things promotes the devaluation of the legal protection of animals and it consequently diminishes the effectiveness of animal protection.[377] For the sake of clarity, a short analysis will follow of the term 'domesticated' animals.

2.1.1.1. Conceptualization of a domesticated animal

208. Conceptualization – According to HOROWITZ, the term 'domesticated' means '*belonging to the house*', which clearly indicates a strong link between domesticated animals and humans. HOROWITZ also stated that this link is a process of evolution that has been driven by human selection and breeding of animals rather than natural evolution.[378] This statement has been supported by EDDY. According to him, a domesticated animal is "*a species of animal which has been artificially selected by humans over a number of generations to possess specific traits and over which humans have reproductive contro*".[379] Furthermore, MIKLOSI points out that these traits have been targeted to enable the development of an animal that fills a specific human created – anthropogenic –[380] niche.[381] While such niches may have traditionally been seen to relate to

[376] L. KALOF, *The Oxford Handbook of Animal Studies*, Oxford, Oxford University Press, 2017, 168.
[377] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 126.
[378] A. HOROWITZ, *Inside of a dog : What dogs see, smell and know,* New York, Scribner, 2009, 39.
[379] T. EDDY, "What is a pet?" *Anthrozoos* 2003, 100.
[380] This means '*caused by humans or their activities*', consulted on https://dictionary.cambridge.org/dictionary/english/anthropogenic.
[381] A. MIKLOSI, *Dog behaviour, evoluation and cognition,* Oxford, Oxford University Press, 2015, 124.

work or food production, more recently they incorporated human companionship and fashion as well. As CARR points out, it is important to recognize that while an animal may have been domesticated for one purpose or to fill one niche it does not mean that it has remained in that place. Author CARR provides an illustration with the dog.[382] This animal was initially domesticated for one set/set of purposes and had been utilized in many more as human needs and desired have altered.

2.1.1.2. Promoting the devaluation of animals' legal protection

209. No general principle – Animal protection is in almost no legal system being recognized as a 'superior principle' that can exclude the application of other legal norms. It remains a subordinated principle to the constitutionally protected right of ownership and the free movement of goods by the European Union.[383] The animal protection is not being considered as a general principle of law.[384] This is probably due to reasons of economic utility, as stated by BOISSEAU-SOWINSKI.[385] Considering animal protection as a general principle of law would entail to give precedence to the sensibility of the animal above other values, or at least to place them on the same rank. Thus, some difficulties need to be addressed: should we give precedence to the protection of the animals above the fundamental protection of property or above the freedom of trade? However, if the animal would not be submitted to property law anymore, the question would not have the same relevance or scope.

210. Relevance – The eradication of the property status of animals would enable to give more weight to the principle of animal protection, however without touching the fundamental principles of property. Since the concerns about animal protection are exponentially growing, this should be recognized as a principle, residing at least at the same level of property. According to BOISSEAU-SOWINSKY, animal protection as a general principle could be written down in the constitution next to the principle guaranteeing property.[386] There are already some countries that have included animal protection in their constitutions.[387] Also, two Belgian deputies have

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[382] N. CARR, *Domesticated Animals and Leisure,* London, Springer, 2016, 5.
[383] *Ibid.,* 129-130.
[384] "*General principle of law or general legal principle refers to a principle that is recognized in all kinds of legal relations, regardless of the legal system to which it belongs. It can also be a principle that is widely recognized by people whose legal order has attained a certain level of sophistication.*", https://definitions.uslegal.com/g/general-principle-of-law/. These principles are in general used to fill in gaps in the law. MAILLOT states the following about these general principles of law : "*Un principe général du droit est une plante vive dont les racines plongent dans des textes multiples qui en sont le terreau. Elle grandit à la mesure de l'intérêt que lui porte le juge et de la taille qu'il lui donne.*" in J.-M. MAILLOT, *La théorie administrative des principes généraux du droit, Continuité et modernité*, Paris, Dalloz, 2003, 12.
[385] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 130.
[386] *Ibid.*
[387] F.e. Germany and Switzerland. Cfr. E. EVANS, "Constitutional Inclusion of Animal Rights: How Did Animal Protection Become an Issue of National Importance?", *Society and Animals* 2010, 231-250.

proposed this and the Senate is currently revising it.[388]The constitutional protection of the animal would offer a solid basis to the limitations applied when exercising fundamental rights. It will also be more difficult to 'use' animals.[389] Animal protection should become more than just a mere limitation to property rights. The reluctance to consider animal protection as a genuine fundamental principle is a factor that attributes to the inefficiency of animal protection rules.

2.1.1.3. Ineffectiveness of animal protection

211. Why? – The ineffectiveness of animal protection rules has several causes. First of all, the prosecution can only take place through public prosecution. As illustrated by SUNSTEIN, if horses and cows are being beaten at a local farm, or if greyhounds are forced to live in small cages, protection will come only if the prosecutor decides to provide it.[390] Since the animal protection is rarely a high-priority item, violations of these laws occur on a daily basis. Moreover, as already has been mentioned, in Belgium there is no legal basis for animal rights organizations to introduce a civil action.[391] Secondly, it is generally known that these animal welfare acts entail large exceptions.[392] In Belgium for example article 1 of the Animal Welfare Act states that "*No one is allowed to commit acts that are not foreseen by this Act and that would cause any harm to an animal or would kill the animal without any reason, excluding the cases of force majeure*".[393] (Free translation) This means that the protection offered by this Act does not apply to cruelty acts or the killing of animals with a 'reason'[394] etc. A third cause is the devaluation of the legal protection of animals. By refusing to recognize animal protection as a serious issue, the legislator makes it also difficult for legal practitioners to give the necessary importance to animal protection. Judges see themselves necessary to conduct a strict interpretation of the legal instruments without being able to interpret in favor of animal protection. However, if animal protection would be recognized as a general principle of law, the jurisprudential interpretation would be more favorable for animals as well.[395]

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[388] Cfr. *Supra* n° 173.
[389] O. LE BOT, "La protection de l'animal dans le droit constitutionnel. Etude de droit comparé", *RRJ* 2007, 34 ff.
[390] C.R. SUNSTEIN, "The Rights of Animals: A very Short Primer", *The Chicago Working Paper Series* 2002, 4.
[391] Cfr. *Supra* n° 184 ff.
[392] C.R. SUNSTEIN, "The Rights of Animals: A very Short Primer", *The Chicago Working Paper Serie,* 2002, 4.
[393] Article 1 of the Belgian Animal Welfare Act of 14 August 1986, Published in the *Belgian Official Gazette* on 3 December 1986.
[394] The Belgian Court of Cassation decided in 2002 that drinking common roach fish that is alive – and put into a glass of wine – does not constitute an act of cruelty since it can be justified on the basis of cultural historical reasons. Cfr. Cass. 5 November 2002, *NJW* 2003, 1260, note CAZOUX, G; *Pas.* 2002 , 2095; *Pas.* 2002, 2357; *T.Strafr.* 2003, ,116.
[395] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 131-132.

2.1.2. Not (enough) protection for wild animals

212. General – As mentioned above, wild animals are protected from a point of view of preserving their species. The core idea behind the protection of species is safeguarding that their population level does not decrease. Hence, wild animals are not protected individually. The individual protection of domesticated animals is the core idea behind animal protection (and animal welfare acts).[396] This distinction between these two 'categories' of animals has several reasons that will be set out hereunder.

2.1.2.1. Conceptualization wild animals

213. Conceptualization – For the sake of clarity, wild animals can be described as '*animals that, as a matter of common knowledge, are naturally ferocious, unpredictable, dangerous, mischievous, or not by custom devoted to the service of mankind at the time and in the place in which it is kept*'.[397] These animals are not domesticated.

2.1.2.2. Historical reasons

214. General – Historically, the animal is only protected as limitation to property rights. The link between private appropriation and animal protection shows us that a wild animal is not protected as an individual living and sentient being. Only in case the wild animal is appropriated and hence considered as a legal 'thing' (*res*). [398]

215. Link between appropriation and animal protection – The current system of animal protection is marked by an evolution of several objectives. It started from protecting the property of someone against infringements by third parties to protecting the public morality by prohibiting cruelty acts towards animals to protecting the animal itself. The evolution of these several objectives shows us that the legislator never granted any autonomy to animals themselves. Animals have always been considered as being property of someone and animal protection rules were seen as limits to these property rights. This undoubtedly explains us why wild animals never have been protected the same way as domesticated animals since they cannot be appropriated by their very own nature.[399] As a matter of fact, the law was in first instance only interested in the domesticated animals. Wild animals did not really exist under the law since it was considered that they did not have any economic or symbolic value.[400] Before the growing awareness of protecting

[396] G. VAN HOORICK, "Dieren in het recht in historisch perspectief" in G. CAZAUX (ed.), *Mensen en andere dieren: hun onderlinge relaties meervoudig bekeken*, Leuven, Garant, 2001, 96.
[397] http://www.duhaime.org/LegalDictionary/W/WildAnimal.aspx.
[398] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 146.
[399] *Ibid.,* 147.
[400] B. EDELMAN et M.-A. HERMITTE, *L'homme, la nature et le droit*, Paris Ed. Christian Bourgeois, 1988, 203.

the environment, the protection of wild animals did not have any legal value.[401] There exists thus a close link between the appropriation of the animal and its protection. The wild animal on the contrary, which cannot be appropriated by its nature, has almost no ties with an individual and hence it is considered that it is not necessary to protect its sensibility. We can therefore ask ourselves whether the legislator does not implicitly presume that the well-being of wild animals is guaranteed by their nature since they live 'in freedom'. Furthermore, this would entail that there exists a – wrongful – presumption that a wild animal can only be the victim of a cruel act if it is being held in captivity by an individual.[402]

216. Appropriation of a wild animal – Positive law only considers a wild animal as an individual if it can be subject to appropriation. Private law sees wild animals as *res nullius*. This means that the animal is not protected under private law as long as it is not appropriated. If such an animal is being appropriated, the level of protection will depend on (i) the specific legal category under which it falls (ii) the regulation regarding the acquisition of wild animals (*i.e*. hunting and trapping legislation).[403]

217. Hunting legislation – In order to determine this legal category to which the wild animal belongs, it is necessary to first analyze which animals can be hunted or not. In Flanders[404] (Belgium), the activity of hunting has been regulated in several decrees and implementing orders.[405] The Flemish legislator has also determined which animals can be hunted.[406] Consequently, three categories of animals can be distinguished: (a) prey[407] that cannot be hunted and thus are a protected species (b) prey that can be hunted (c) unappropriated animals that cannot be considered as prey. The legal status of the wild animal will depend on which category it falls under. Prey belonging to a protected specimen cannot be subject to appropriation which has as consequence that it is not individually legally protected as a living and sentient being.[408] This prey belongs to the category *res communes*.[409] This type of animals is only protected by environmental law because they belong to a certain species. Unappropriated animals that cannot be considered as prey and belonging to the category of domesticated animals can be qualified as *res nullius* but they

[401] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 147,
[402] *Ibid.,* 148.
[403] *Ibid.,* 150.
[404] This comptence has been transferred to the regions.
[405] Official coordination of the Flemish hunting legislation of 1 July 2017, published on the website of *the Flemish Agency for Nature and Forests*, unknown publication date, https://www.natuurenbos.be/sites/default/files/inserted-files/20170701_officieuze_coordinatie_van_de_vlaamse_jachtwetgeving.pdf.
[406] Article 3 of the Flemish decree regulating the activity of hunting of 24 July 1991, published in *the Belgian Official Gazette* on 7 July 1991.
[407] In Dutch : '*wild*'.
[408] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 151.
[409] Cfr. *Supra* n° 167 ff.

don't benefit from any specific legal protection.[410] Finally, prey that can be hunted can be qualified as *res nullius* and they will be protected under the hunting legislation. Hunting legislation has as aim the conservation and the sustainable management of wildlife or as stated by the Flemish Hunting Decree[411]: "*the prudent use of wild species and their habitats*".[412] (Free translation) The Flemish hunting legislation for example regulates the timeframes within it is allowed to hunt, in which locations it is allowed, which type of gun needs to be used, from how far or how close the hunter needs to shoot, the type of authorization he needs to acquire etc.[413] Hence, the acquisition of an animal that can be hunted is more regulated than the acquisition of an animal without any owner. Through the hunting legislation, the wild animal benefits from an indirect protection. Namely, the animal can only be hunted in certain locations, within certain timeframes etc. However, it is important to note that hunting legislation does not aim to protect the animal but rather the maintenance of ecosystems.[414] Only legislation regulating the trapping of animals, would take into consideration the individual sensibility of the animal.

218. Trapping legislation – The regulation regarding the trapping of animals is regulated on the level of the European Union.[415] Although the main objective of this regulation is the conservation of wildlife, the European legislator also pointed out the necessity to protect wild animals and their sensibility. This regulation has been implemented by the Flemish Government through a decree regarding the protection of certain species.[416] There can be noted that the regulation regarding the trapping of animals is the only one protecting wild animals while taking into account their sensibility. If this type of protection would be extended, regardless of the way of acquiring an animal, it could apply to all wild animals.[417]

219. Conclusion – The protection of the sensibility of the wild animal will only apply if it can be the subject of appropriation (*i.e. res nullius*).[418] On the contrary, animals that cannot be appropriated are not entitled to any protection as long as this protection is linked to appropriation

[410] However, they could be appropriated. They won't fall under the scope of application of hunting legislation.
[411] Article 2 of the Flemish decree regulating the activity of hunting of 24 July 1991, published in *the Belgian Official Gazette* on 7 July 1991.
[412] In Dutch: *'het verstandig gebruik van wildsoorten en hun leefgebieden'.*
[413] Cfr. The official coordination of the Flemish hunting legislation of 1 July 2017, published on the website of *the Flemish Agency for Nature and Forests*, unknown publication date, https://www.natuurenbos.be/sites/default/files/inserted-files/20170701_officieuze_coordinatie_van_de_vlaamse_jachtwetgeving.pdf.
[414] In my opinion, even this should be reconsidered.
[415] Council Regulation No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, *Pb.L.* 9 November 1991.
[416] Decree of the Flemish Government regarding the protection of certain specimen of 15 May 2009, published in the *Belgian Official Gazette* on 13 August 2009.
[417] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 154.
[418] *Ibid.*

instead to the very own being of the animal. Therefore, private appropriation should not be a condition for safeguarding the protection of wild animals.

2.1.2.3. Contemporary reasons

220. General – Today, the wild animal is still not individually protected under positive law against any form of attacks on its life or sensibility. The reluctance to recognize the wild animal as an individual living being knows two reasons. On one hand, environmental law, that protects wildlife, creates the illusion that it also protects wild animals for their very own being. On the other hand, the efficiency of the hunting lobby, combined with the power of tradition, plays a big role behind the reluctance of politicians to recognize the sensibility of wild animals.[419]

221. The illusion that environmental law provides animal protection – Environmental law does not protect wild animals because of the fact that they could be the subject of appropriation (r*es nullius*), as private law does, but rather to preserve biodiversity. The environmental protection of wild animals can be find in international, European and national legislation[420] and aims at safeguarding the existence of species that are near extinction. As already mentioned above, the CITES is one of the most famous examples.[421] When reading the Convention and the national implementation, we could think that the provided protection is quite extended. However, it does not provide efficient protection for the wild animal. On one hand, the convention only refers to animals that are near extinction or that are living in protected areas such as parcs or sanctuaries. Wild animals that do not belong under these categories do not benefit from this protection. On the other hand, the legislator - international or European or national – protects animals collectively (*i.e.* belonging to a certain species that is near extinction) and not individually (*i.e.* taking into account their sensibility). As stated by BOISSEAU-SOWINSKI, the legislator may be hiding himself behind the 'protection' provided by environmental law.[422]

222. The power of tradition and the hunting lobby[423] – For the sake of clarity, lobbying can be described as "*the activity of trying to persuade someone in authority, usually an elected member of*

[419] https://lobbyfacts.eu/representative/84bea1df5686438eb8321592dbc90764; A. CRUISE, "US hunters auction SA big five hunts for funds to lobby Trump for pro-hunting stance", https://conservationaction.co.za/media-articles/us-hunters-auction-sa-big-five-hunts-funds-lobby-trump-pro-hunting-stance/.

[420] Belgian Act of 28 July 1981 regarding the approval of the Convention on International Trade in Endangered Species of wild fauna and flora and its annexes of 3 March 1973 and regarding the amendment of the Agreement made in Bonn on 22 June 1979, published in the *Belgian Official Gazette* on 30 December 1983.

[421] Convention on International Trade in Endangered Species of wild fauna and flora of 3 March 1973 signed in Washington DC.

[422] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 160.

[423] This refers to every lobbying organization all over the world cfr. for example: http://www.face.eu/about-us; M. EASTON, "How big game hunting is dividing southern Africa", http://www.bbc.com/news/world-africa-41163520.

a government, to support laws or rules that give your organization or industry an advantage".[424] The hunting lobby tries to preserve the rights of hunters by preventing the adoption of legal instruments that protect wild animals and restrict the hunting right. The influences of the hunting lobby know two complications according tot BOISSEAU-SOWINSKI. On one hand, as every lobbying activity, it influences the decisions of civil society in a specific matter without taking into consideration the bigger picture. On the other hand, the hunting activity excludes every form of recognition of the sensibility of a wild animal and hence every form of individual protection. Consequently, BOISSEAU-SOWINSKY asks herself how the difference in protection between domesticated animals and wild animals can be justified if both their sensibility has been scientifically proven. How can it be explained that cruelty against a wild animal kept in captivity is being suppressed while cruelty against an animal living in freedom is not?[425] Also, there exists a certain contradiction between wanting to protect wildlife and ignoring the sensibility of the individual animal.

223. Conclusion – The illusion that environmental law protects wild animals on an individual basis, combined with the power of the hunting lobby explains the absence of individual protection of wild animals.[426] Hence, it is necessary to efficiently protect the wild animals. Not the fact whether they can be subject to appropriation needs to be taken into consideration but rather their sensibility. Consequently, every animal – wild or domesticated, being held in captivity or living in freedom – should be recognized as a living being and should benefit from protection against every act of cruelty.

2.2. Property rights fail to protect the tie of affection between the human and the animal

224. General – It cannot be denied that animals play an important role in our daily lives. It is also difficult to deny that we can get attached to our companion animals and that there could exist a tie of affection.[427] This tie of affection requires taking into consideration the intrinsic value of the animal for its owner. This value should take a higher place than its status under property law (*i.e.* a mere thing). The – real and not just symbolic – dereification of the animal and the eradication of the property status will be able to protect this tie of affection. In other words, the animal won't be considered as a 'thing' anymore if it will be excluded from the category of 'property'. The application of the law of property has as consequence that the animal's status as a 'good' or

[424] https://dictionary.cambridge.org/dictionary/english/lobbying.
[425] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 162.
[426] *Ibid.,* 163.
[427] Legislative proposal of Ms. CAPRESSE, *Parliamentary Documents,* Chamber of Representatives 2015-16, nr. 1954/001, 3.

'thing' predominates over the animal's intrinsic value.[428] Hence, it does not *fully*[429] take into consideration the tie of affection. If property law sometimes takes into consideration this tie of affection, it is always regarded as a certain exception to something that does not properly allow to protect this tie of affection.

2.2.1. Emergence of the protection of the tie of affection

225. Illustrations – The current protection of the tie of affection between the human and the animal exists in the creation of exceptions that recognize the moral interest of the human towards his animal, without losing its property status. There are several examples that can illustrate the recognition of this tie of affection between the human and the animal. First of all, there can be discussed whether article 8[430] of the European Convention of Human Rights[431] also covers the right to keep a pet. Although some countries have clearly stated that humans have a right to keep a pet[432], Belgium did not. Regardless of this, there can be concluded that the European legislator clearly recognized the right of the owner to freely travel with his pets within the territory of the European Union. The European Directive wants to guarantee a certain level of protection to the health of both the owner and the animal by facilitating their free movement.[433] This has been implemented by the Belgian legislator through the Royal Decree of 13 December 2014.[434] Secondly, there is an implicit recognition of the tie of affection when the animal dies. This also finds its roots in the protection offered by a European legislative instrument. The European Regulation gives the possibility to all owners to be able to choose how to say farewell to their animals. More specific, it gives the owners – under certain conditions – the possibility to bury the animal themselves.[435] This Regulation has also been implemented by the Flemish legislator.[436]

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[428] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 165-166.

[429] Cfr. The section analyzing the consequences of the current position of the animal under Belgian property law.

[430] "*Right to respect for private and family life : 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*"

[431] Europen Convention on Human Rights of 4 November 1950, published in the *Belgian Official Gazette* on 19 August 1955.

[432] In France this has been recognized in article 10 of the Law n° 70-598 of 9 July 1970: "*non écrite, toute stipulation tendant à interdire la détention d'un animal dans un local d'habitation dans la mesure où elle concerne un animal familier*".

[433] Directive 2013/31/EU of the European Parliament and of the Council of 12 June 2013 amending Council Directive 92/65/EEC as regards the animal health requirements governing intra-Union trade in and imports into the Union of dogs, cats and ferrets, *Pb.L.* 28 June 2013.

[434] Royal Decree of 13 December 2014 regarding the animal health requirements governing the traffic of dogs, cats and ferrets, published in the *Belgian Official Gazette* on 29 December 2014.

[435] Regulation No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation), *Pb.L.* 14 Novembr 2009.

This recognition of the right to pay tribute to its animal goes in the direction of a dereification of the animal.[437] This also shows us that the animal is a living being worthy of respect. There is also an increase in the number of centers in Belgium where the animal can be cremated.[438] This can be compared to a kind of 'animal funeral' that is an illustration of the tie of affection that can exist and that the legislator also recognizes. Thirdly, there exist several cases in which courts grant moral damages to the owner when his or her animal dies.[439] This is also a clear illustration of the tie of affection that can exist between a human and his or her animal. Hence, the animal in these cases is not treated as a mere thing.[440] Fourthly, as already mentioned above, the unseizability of companion animals is also an illustration that the legislator recognizes the tie of affection.[441]

2.2.2. Incomplete protection of this tie of affection

226. Illustrations – There exist some examples where the legislator fails to protect tis tie of affection. There can for example be thought of the situation of a divorce between couples. If the animal falls under the property of one of the spouses, he or she will possess the exclusive property rights. If both spouses share the property of the dog, each of the spouses has the right to ask the exclusive property right.[442] Regardless of the chosen matrimonial property regime, the animal cannot be the subject of any custody or right to visit. Hence, the tie of affection in such a situation is being neglected by the legislator.[443] Another example is that the qualification of the animal as legal object makes it impossible for the owner to properly regulate the well-being of his or her dog after his or her death. The owner cannot grant any form of donation to his animal since the latter cannot bear any property rights. Hence, the animal cannot benefit from any financial resources if the owner wants to guarantee a good life for the animal after his or her death. There can be stated that this qualification as a legal object denies the tie of affection between the human and the animal.[444] A last example has already been mentioned in the second chapter when setting out the consequences of the current animal's status under Belgian law. Namely, that legal defense is not accepted when wanting to defend property and hence animals.[445]

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[436] Decree of the Flemish Government of 21 June 2013 regarding animal by-prducts and derived products, published in the *Belgian Official Gazette* on 6 August 2013.
[437] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 173.
[438] https://www.vlaanderen.be/nl/natuur-en-milieu/dieren/gestorven-huisdier.
[439] Pol. Brussel 24 November 1954, *JT* 1955, 113. Rb. Brugge 7 February 2005, *NJW* 2005, 316 ; Vred. Brugge 14 January 2011, not published; Brussel 6 November 2012, *RGAR* 2013, nr. 14952.
[440] VRG Alumni, *Recht in Beweging,* Antwerp, Maklu, 2017, 146.
[441] Cfr. *Supra* n° 197.
[442] D. MICHIELS, "Actuele ontwikkelingen inzake mede-eigendom", http://notarissen-msp.be/docs/Actuele%20ontwikkelingen%20inzake%20mede-eigendom%20(2014).pdf.
[443] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 179.
[444] *Ibid.*
[445] Cfr. *Supra* n° 198.

2.3. Conclusion

227. Conclusion – There can be concluded that in order to break the legal wall, one of the necessary steps is the eradication of the property status of the animal. As set out above, the qualification of the animal as property fails to protect its sensibility. We have also seen that domesticated animals are consequently not enough protected and the sensibility of wild animals is often being neglected. The property status of the animal also fails to recognize the tie of affection between the human and the animal. To conclude, the eradication of the property status will mean that animals finally will be protected because of their own being. They simply should be protected because they are animals and not things.

§3. An alternative account for legal personhood?

3.1. General overview

228. General – Under the second part of the first section, there has been concluded that the eradication of the property status of the animal will result in a better protection for the animals. This eradication is also a necessary step for granting animals fundamental rights. If animals indeed would not be considered as 'property' anymore, it does not mean that they can immediately benefit from fundamental rights. Another major obstacle that needs to be overcome when wanting to break the legal wall, is the current concept of legal personhood. Under the first section of the second chapter there has been made an analysis of the meaning of the concept of 'legal personhood'.[446] In short, this concept refers to the capacity of a person to hold rights and bear duties. This special conception of personhood is also the reason why corporations are persons, whereas slaves have traditionally been considered property rather than persons. As stated by KURKI, this odd state of affairs has not garnered the interest of legal theorists for a while. He stated that the theory of legal personhood has been a relatively peripheral topic in jurisprudence for at least 50 years.[447] However, many recent developments call for a theoretical investigation of this topic. The concept should not only be revisited in the context of granting animals fundamental rights but also in other contexts. For example, developments in robotics have made arise questions as to whether driverless cars should be granted a limited legal personality, so that it itself would be responsible for such damages.[448]

3.2. Problem setting

229. No rights without duties? – According to the current account of legal personhood, an entity would need to be able to hold rights and bear duties. Some judges – that have been confronted

[446] Cfr. *Supra* n° 146 ff.
[447] V.A.J. KURKI, "Revisiting legal personhood", Paper, University of Cambridge, unpublished paper, 2016, 1; V. A. J. KURKI, "Animals, Slaves, and Corporations: Analyzing Legal Thinghood", *German L.J.* 2017, 1070.
[448] *Ibid*.

with extending legal personhood to animals – are of the opinion that this is also the problem why animals cannot have fundamental rights. In order to illustrate this, a case from the '*Nonhuman Rights Project*' should be recalled.[449] The Court stated: "*Tommy is not a 'person' entitled to rights and protections afforded by the writ of habeas corpus because unlike human beings, chimpanzees can't bear any legal duties, submit to societal responsibilities, or be held legally accountable for their actions.*"[450] The court also noted that: "*Further, although the dispositive inquiry is whether chimpanzees are entitled to the right to be free from bodily restraint such that they may be deemed "persons" subject to the benefits of habeas corpus, legal personhood has consistently been defined in terms of both rights and duties*[451]*.*"[452]

230. Rights are only for humans? – The Court furthermore mentioned GRAY's similar assertion.[453] As chimpanzees are currently not legal persons and as supposedly only persons can hold legal rights, chimpanzees do not hold legal rights. If the court would accept the *habeas corpus* writ this would entail that it would grant their first legal right to the chimpanzee and hence recognize them as persons. This idea lies behind the court's argumentation. The Court also added that animals could not, according to the court, fulfil any 'social responsibilities' in exchange for rights, which is why it would have been "*inappropriate to confer upon chimpanzees the legal rights – such as the fundamental right to personal freedom, protected by the writ of habeas corpus – **that have been afforded to human beings***".[454] This is the reason why the court rejected the *habeas corpus* and hence why it has rejected granting rights to animals.

231. KURKI – As stated by KURKI, the traditional theory of legal personality is not 'wrong'. He stated that it is not wrong because it cannot be wrong since it makes no predictive claims that could be empirically refuted. However, I agree with KURKI by stating that the problem of the theory is that it cannot properly explain and structure the various ongoing debates that are linked to legal personality. There can for example be thought of the legal status of animals, foetuses, corporations and artificial intelligence. He also states that the mainstream theory of legal personality has implications that obscure the need for legal reasoning and normative argumentation. An example of such implications is that animals do not, or could not, currently hold legal rights because they are not legal persons.[455]

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[449] Cfr. *Supra* n° 77 ff.
[450] *The Nonhuman Rights Project v. P.C. Lavery*, State of New York Supreme Court, Appellate Division Third Judicial Department, Index No. 518336, 4 December 2014, 6.
[451] Emphasis in original.
[452] *Ibid*.
[453] J.C. GRAY, R. GRAY, D. CAMPBELL, *The Nature and Sources of the Law (Classical Jurisprudence),* Farnham, Ashgate, 1997, 6.
[454] *Ibid*.
[455] V. A. J. KURKI, "Revisiting legal personhood", Paper, University of Cambridge, unpublished paper, 2016, 11.

3.3. Is the main obstacle not being able to bear duties?

"All duty-bearers are right-holders, but not all right-holders are duty-bearers"[456]

232. General – A main point of criticism in granting an animal legal personhood and fundamental rights, is that they could not bear any duties. But it should be analyzed whether this is indeed the main obstacle. In my opinion, it is not right to state that if creatures are unable to bear legal responsibilities they are *ipso facto* unable to possess legal rights.

233. KRAMER – According to KRAMER, there are two grave weaknesses that undermine this sceptical position.[457] The first – less important – weakness relates to the meaning of being able to bear legal duties. On one hand, it may be that all animals are incapable of understanding legal duties and are therefore unable to adjust their behavior in accordance with the law. If this is the case, their compliance with legal duties will probably only be intermittent instead of deliberately adapt to the law's requirements. On the other hand, we shall have no reason to presume that animals cannot bear legal duties. To bear a legal obligation or duty simply means to be placed under it. As illustrated by KRAMER, if X bears a legal duty to do, then a legal norm or decision requires him to do; whether he can comprehend the legal norm or decision (and can adjust his behavior to it) is a separate matter.[458] If legal norms require animals to behave in certain ways, animals are legally duty-bound to behave in those ways. This requirement is regardless of their (in) ability to understand the requirements that have been laid down. The addressing of legal demands to animals that are incapable of understanding and following them is not desirable nor reasonable[459] or as stated by KRAMER it is "*cruel and perhaps silly*".[460] In the past, some animals have been treated as having legal duties and as being prosecutable when they have breached them.[461] These medieval trials for animals for crimes seem strange to us. The placing of animals under legal requirements is far from infeasible, thus the bearing of legal duties by animals is far from infeasible.[462] Hence, even if an animal's status as a holder of legal rights would entail its status as a bearer of legal duties, it does not entail that animals cannot hold such rights since they could bear such duties.[463] The second – more significant – weakness lies in the the fact that claims about the relationship between rights and duties is "*straightforwardly false*".[464] If X possesses a legal right it does not entail that X bears a legal duty. It rather means that someone else bears that

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[456] M. KRAMER, *Rights, wrongs and responsibilities,* New York City, Springer, 2001, 45.
[457] *Ibid.,* 42.
[458] *Ibid*.
[459] S. TUDOR, "Some Implications for Legal Personhood of Extending Legal-Rights to Non-Human Animals", *Austl. J. Leg. Phil.* 2010, 136.
[460] M. KRAMER, *Rights, wrongs and responsibilities,* New York City, Springer, 2001, 42.
[461] S. TUDOR, "Some Implications for Legal Personhood of Extending Legal-Rights to Non-Human Animals", *Austl. J. Leg. Phil.* 2010, 136 ; M. KRAMER, *Rights, wrongs and responsibilities,* New York City, Springer, 2001, 43.
[462] M. KRAMER, *Rights, wrongs and responsibilities,* New York City, Springer, 2001, 43.
[463] *Ibid*.
[464] *Ibid*.

duty.[465] However, it should be highlighted that rights and duties are indeed correlative. This means that the existence of a right entails the existence of a duty and *vice versa*. This idea can be clearly illustrated by the example provided by KRAMER. He stated that when X holds a legal right, he is thereby entitled to someone else's performance of an act or a set of acts, or to someone else's abstention from an act or a set of acts.[466] In other words, this means that the other person is under a legal duty to adopt a specific behavior. It should be made clear that whether X himself bears any legal duty, is a separate matter. As put forward by KRAMER, "*His bearing of duties is entailed not by his holding of rights but by someone else's holding of rights*".[467]

234. Conclusion – There can be concluded that "*all duty-bearers are right-holders, but not all right-holders are duty-bearers*".[468] This means that the status of X as a right-holder does not entail the status of X as a duty-bearer. I hence strongly agree with KRAMER by stating that if someone wishes to deny that animals hold rights within legal systems – where they do not bear any duties – he or she will have to do more than point out that animals do not bear any duties. Moreover, arguing that animals cannot fulfill legal duties in the manner humans do and hence cannot be legal right-holders can be problematic. This would mean that infants, senile people, mentally-ill people and comatose people for example cannot have any legal rights.[469] If the (in) ability to bear duties is not the real obstacle, then there should be analyzed what is preventing us today to extend fundamental rights to animals.

3.4. The association of legal personhood with humanity

235. Rights for human (s) (interests) – Legal scholar, CUPP shared the opinion of philosopher COHEN by stating that "*Animals cannot be the bearers of rights because the concept of right is essentially human; it is rooted in the human moral world and has force and applicability within that world*".[470] He furthermore stated that it is sometimes asserted that since we give corporations personhood, justice requires that we should give personhood to intelligent animals. According to him, this ignores that corporations are created by humans as a proxy for the rights and duties of their human stakeholders. He stated that "*they are simply a vehicle for addressing human*[471] *interests and obligations*".[472] He furthermore stated that the pervasive societal view that all[473] humans have distinctive and intrinsic human dignity regardless of their capabilities may have cultural, religious or even instinctual foundations. Humans with cognitive impairments are part of

[465] For example, if I possess the right to not be tortured, it protects me from being tortured by someone else. Hence, the duty lies on the other person to not torture me.
[466] M. KRAMER, *Rights, wrongs and responsibilities,* New York City, Springer, 2001, 43.
[467] *Ibid*.
[468] *Ibid.* 45.
[469] *Ibid.*
[470] R.L. CUPP, "Cognitively Impaired Humans, Intelligent Animals and Legal Personhood", *Fla. L. Rev*. 2017, 503.
[471] Original emphasis.
[472] R.L. CUPP, "Cognitively Impaired Humans, Intelligent Animals and Legal Personhood", *Fla. L. Rev*. 2017, 503.
[473] Original emphasis.

the human community, even if their own agency is limited or nonexistent. He is of the opinion that only humans have unique natural bonds with other humans who have cognitive impairments. Denying their rights would harm the interests of society because "*we are all in community together*".[474] CUPP then concluded by stating that courts have appropriately recognized that there is 'something' distinctive in humanity.[475] In other words, legal personhood is something that has always been linked to humanity. [476]

236. The natural person as a model – As already mentioned in the second chapter of this thesis there can be made a distinction between the legal person as human (*i.e.* natural person) and the legal person as juridical person (*i.e.* artificial person). The most common and intuitive definition of a legal person is a natural person or human being. Humans are called 'natural' persons because they are persons in virtue of being born, and not by legal decree. Corporations[477] and even inanimate objects have been granted legal personhood by decree and thus are not natural.[478] Natural persons have served as a model for attributing legal personhood to persons that are not considered 'natural'.[479] We can ask ourselves why the natural person is the anchor for legal personhood. As stated above, a legal person is anyone that is able to bear rights and duties. It is not that being a human being is necessary for being a person, but that the average human is presumed to have the capacity to exercise rights and owe duties.[480] The image of the embodied human being allows us to "*draw on shared intuitions about who counts in our community of legal persons and how we should take account of them*".[481] The more like an average, adult human being, the more likely an entity is a person.[482] If we understand that legal personality has always been linked to humanity, then it is also easier to understand why judges are reluctant to grant legal personality to (certain) animals.

237. Personal opinion – I do share the opinion of CUPP and several other authors by stating that legal personality is something that has always been linked to humanity. However, I do not agree with the part that rights should be exclusively attributed to humans. So, we should try to find a way to grant non-human entities (certain) rights while taking into consideration that legal personhood is something developed for serving humans.

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[474] *Ibid.,* 506.
[475] *Ibid.,* 508.
[476] A. DYSCHKANT, "Legal personhood : How we are getting it wrong", *University of Illinois Law Review* 2015, 2077; L. KALOF, *The Oxford Handbook of Animal Studies*, Oxford, Oxford University Press, 2017, 168.
[477] A complete analysis of the corporate personhood would take us too far. However, there should be stated that corporations are useful legal fictions that serve human interests.
[478] A. DYSCHKANT, "Legal personhood: How we are getting it wrong", *University of Illinois Law Review* 2015, 2078.
[479] *Ibid*., and 2079.
[480] *Ibid.,* 2079.
[481] S.M. MATAMBANADZO, "The Body, Incorporated", *Tul. L. Rev.* 2013, 507.
[482] A. DYSCHKANT, "Legal personhood: How we are getting it wrong", *University of Illinois Law Review* 2015, 2080.

3.5. Alternative account for legal personhood

238. The law as an evolving instrument – There should be started by stating that the legal system should be viewed as a repository of knowledge. The law embodies core insights about the way the world works and how we evaluate it. Hence, transforming the abstract debate over the possibility of granting fundamental rights to animals into imagined hard case forces us to check our intuitions and arguments against the assumptions that underlie social decisions made in many other contexts.[483]

239. Personification of animals is not the answer – However, the idea of ordinary personification of animals can be considered implausible. Animals do not fit either in the category of juristic or natural persons. On one hand, placing animals under the category of juristic persons would miss the moral point of the considered reform. As mentioned above, juristic personhood is based on instrumental considerations with as main goal promoting human interests. This is exactly the opposite goal when wanting to extend fundamental rights to animals (*i.e.* recognizing their intrinsic value as a sentient being). On the other hand, although that there are many similarities between humans and animals (f.e. emotional reactions, striving to satisfy needs and desires, avoiding pain and suffering etc.), it cannot be denied that humans differ essentially from animals (based amongst other things on the cognitive abilities).[484] This capability is essential for the concept of personhood. Thus, conceptually personhood is intimately related to the capacity to act rationally and deliberately decide about someone's own action.[485]

240. What is then the answer? – As stated by KURKI and PIETRZYKOWSKI, the rejection of the straight personification of animals does not mean that there are no reasons to try to improve the protection of animals by conferring on them the status of right-holders. The long-lasting tradition regarding personhood as a necessary prerequisite for right-holding should be abandoned. From Roman law up to now, legal subjecthood has been identified with personhood. From a conceptual perspective, if being a person implies being a subject, it does not necessarily mean that being a subject implies being a person. According to KURKI and PIETRZYKOWSKI, sentient animals have their subjective mental states by virtue of which their existence may be better or worse *for them*. It makes them holders of the interests of their own related to the quality of their life. The two legal scholars then correctly draw the conclusion that sentient animals do not fit into the category of mere things. They are the subject of their lives and they possess own interests that should be protected.

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[483] L.B. SOLUM, "Legal Personhood for Artificial Intelligences", *N.C.L. REV.* 1992, 1232-1233.
[484] V.A.J., KURKI and T. PIETRZYKOWSKI, *Legal Personhood: Animals, Artificial Intelligence and the Unborn,* London, Springer, 2017, 57.
[485] *Ibid.,* 58.

241. Legal personhood as a cluster concept – I strongly agree with KURKI by stating that legal personhood should be understood as a cluster concept, incorporating distinct, but interconnected incidents and it should hence not be equated with right-holding.[486] He states that "*legal personality is not about having rights or duties in general, but rather about holding some or all of the specific types of legal entitlements and burdens that are held by some or all human beings in virtue of their status as legal persons"*.[487] Further, we should ask ourselves what these entitlements and burdens are. The legal scholar illustrates this by pointing out the legal differences between:[488]

(1) newborn children and late-stage fetuses
(2) newborn children and animals
(3) newborn children and adult human beings of sound mind[489]

242. *'Passive incidents'* – In the first two cases the relevant difference – which establishes the legal personality of newborn children – is that newborn children hold many of the entitlements and burdens that are generally associated with legal persons:

- they may own property even if they cannot dispose of it independently;
- their lives, liberty, and bodily integrity are protected, and in jurisdictions with a bill of rights, they are protected by those rights;
- they have standing in courts and can thus be parties in lawsuits (though infants need, of course, someone else to represent them);
- they are not susceptible to being owned;
- they are protected by criminal law as potential victims (killing a newborn counts as a homicide, which is not the case with foetuses in most jurisdictions);
- they can undergo legal harms (torts) which may lead to restitution or compensation.

The legal scholar calls these '*incidents of legal personality'*. Neither nonhuman animals nor human fetuses hold such incidents to a high degree. However, these two groups are different in two aspects. First of all, animals are property and thus susceptible to being owned, whereas human fetuses are not. Secondly, human fetuses benefit from the *infans conceptus* rule.[490] These above-mentioned incidents could be called '*passive incidents*' since they do not presuppose any

[486] V. A. J. KURKI, "Animals, Slaves, and Corporations: Analyzing Legal Thinghood", *German L.J.* 2017, 1080.
[487] V. A. J. KURKI, "Revisiting legal personhood", Paper, University of Cambridge, unpublished paper, 2016, 17.
[488] *Ibid.* and 18.
[489] In the meaning of "*not to be mentally ill*", https://dictionary.cambridge.org/dictionary/english/be-of-sound-unsound-mind; Or in the meaning of "*Legally, having the capacity to think, reason, and understand for oneself. Adults by nature are considered in general to be in sound mind, but through certain circumstances can be rendered as being not in sound mind, due to intensive brain damage or other major incapacities. Sound mind is considered a legal requirement before writing or signing most legal documents, including a will.*", http://www.businessdictionary.com/definition/sound-mind.html.
[490] This general principle of law entails that one who is about to be born is to be treated as if already born whenever it is to his or her advantage, *if* she or he is later born alive.

deliberative capacity that is required for acting under the law. There is assumed that adult human beings of sound mind possess this deliberative legal capacity.[491]

243. '*Active incidents*' – The difference between newborn children and adult human beings of sound mind becomes relevant in the third case since legal persons with high-level reasoning capabilities hold some additional '*active incidents*':[492]

- they can enter into contracts and perform other acts-in-the-law;
- they are regulated by law and held responsible for their actions;
- in democracies, they have political rights and powers, such as the right and power to vote.

Out of these three incidents, slaves in the Antebellum South held only one, *i.e.* they were persons in the eyes of criminal law.[493]

244. Active and passive incidents – These active and passive incidents form the elements that are distinctive about legal persons. In other words, not the right-holding or duty-bearing in general, but the holding of specific types of legal entitlements and burdens.[494] There can hence be concluded that legal personality, according to this theory, is a cluster concept. There is thus no exact border between legal personality and non-personality. It is possible that a certain entity holds only certain of the before-mentioned incidents.

245. Relevance – This theory helps us to get a better insight of the essence of the above analyzed jurisprudence.[495] These cases all dealt with the question of a certain animal should have personhood or not. For example, the *Tommy* case concerned the question of whether chimpanzees are legal persons for the purposes of *habeas corpus.* Moreover, a recent ruling in Oregon included "*animals [...] in the class of 'persons' that officers may aid without a warrant*".[496] The court improved here the protection of animals under criminal law.[497] Legal personality *tout court* can thus be distinguished from legal personality with regard to a particular incident or a set of incidents. Slaves were clearly legal persons in the limited sense described above (*i.e.* '*purely*

[491] There should be noted that KURKI is not the only legal scholar distinguishing active and passive elements of legal personhood, cfr. N. MACCORMICK, *Institutions of Law. An Essay in Legal Theory,* Oxford, Oxford University Press, 2007, 78.
[492] V. A. J. KURKI, "Revisiting legal personhood", Paper, University of Cambridge, unpublished paper, 2016, 18.
[493] D.J. FLANINGAN, "Criminal Procedure in Slave Trials in the Antebellum South", *The Journal of Southern History* 1974, 537-564.
[494] V. A. J. KURKI, "Revisiting legal personhood", Paper, University of Cambridge, unpublished paper, 2016, 18.
[495] Cfr. The second section of the first chapter.
[496] In *State v. Fessenden/Dicke* (355 Or 759 (2014)) the court affirmed a decision by a lower court, according to which "*animals were included in the class of 'persons' that officers may aid without a warrant*" (at 763). Another case, *State v. Nix* (355 Or 777 (2014)) concerned Oregon's anti-merger statute, according to which a given type of conduct that violates only one statute constitutes as many crimes as there are victims. The court ruled that animals are such victims, which is why the defendant could be convicted of 20 counts of animal neglect rather than only one.
[497] V. A. J. KURKI, "Revisiting legal personhood", Paper, University of Cambridge, unpublished paper, 2016, 18.

onerous legal personality' according to KURKI[498]). But were they legal persons *tout court*? Since the legal personality *tout court* actually has a cluster nature, there is no clear division between legal persons and non-persons. Hence, there can be concluded that slaves were clearly not legal persons *tout court* because they were only endowed with a very limited set of incidents. According to this theory legal non-persons can hold rights. Instead of applying some formalistic definitions of personhood, the sufficient condition for legal personhood consists in being the holder of certain incidents of legal personality e.g. fundamental rights, criminal law, legal standing etc. It allows us to talk about legal rights of legal non-persons. Because animals are not legal persons and only legal persons can allegedly hold rights, many jurists (including the judges in the US in the above-mentioned cases[499]) are reluctant to call the animals' legal protections rights. It would also entail that an entity can simultaneously be a legal person for some purposes and a legal nonperson for others.[500] When recalling the *Tommy* case for example, the New York State Appellate Court believed it was deciding whether to grant Tommy his first right. However, Tommy was already protected by legal safeguards that we call 'rights' in the case of people. I thus share the opinion of KURKI by stating that the Tommy case was not about whether he ought to be included in the "rights paradigm", since animals already hold rights, but about whether a particular legal personhood-related institution ought to be extended to cover the chimpanzee.[501]Also, a provincial court in Buenos Aires ordered in 2015 that "*... it is necessary to recognize the animal as* ***a subject of rights,*** *because non-human beings (animals) are entitled to rights, and therefore their protection is required by the corresponding jurisprudence*."[502] (Free translation) In other words, the court declared that the orangutan Sandra already holds rights and should be deemed a non-human subject of rights (*i.e. sujeto de derechos*). There can thus be concluded that animals are already subjects of some rights but are not legal persons.

246. Conclusion – The disentanglement of right-holding from legal personhood is interesting for several reasons. First of all, it will be easier for jurists to analyze the topic of the extension of fundamental rights to animals. They would not need to worry that conceding fundamental rights to animals would be 'extravagant' or 'one step too far' because they would not need to grant legal personhood to animals. Secondly, lawsuits concerning animal personhood do not need to focus excessively on the question whether animals can, or ought to, hold rights at all, but rather on whether the animals in question ought to hold the particular legal entitlements that are being claimed for them.[503] Moreover, only the passive elements of 'legal personhood' should apply. Animals should not for instance be held criminally liable, as it was the case during mediaval animal trials. As stated by TUDOR: "*...it seems reasonably clear that even the highest functioning*

[498] *Ibid.*
[499] Cfr. The second section of the first chapter.
[500] V. A. J. KURKI, "Revisiting legal personhood", Paper, University of Cambridge, unpublished paper, 2016, 19.
[501] *Ibid.*
[502] *A.F.A.D.A. v. Government of the City of Buenos Aires and the Zoo of the City of Buenos Aires*, Provincial Court in Buenos Aires, Index No. A2174-2015/0, 21 October 2015, 5 ff.
[503] V. A. J. KURKI, "Revisiting legal personhood", Paper, University of Cambridge, unpublished paper, 2016, 20.

non-human animal could not and should not be made the subject of any legal or moral duty… This is because they lack the kind of communicative practical reasoning which should form the basis of the legitimate imposition of obligations."[504] In other words, animals do not possess the requisite deliberative capacities.[505] To ensure the enforcement of the legal personhood-related entitlements that animals hold would be analogous to those that are applied in case of infants for example. They would need a legal guardian to act for them.[506]

3.6. 'Non-personal subject of law'

247. Clarification – For the sake of clarity there can be highlighted that animals should not be granted legal personhood as we interpret it today. The way further is to grant animals fundamental rights without considering them as legal persons as such. As seen in the second chapter, legal subjectivity or personhood is something that the law determines whether you have it or not.[507] So, if we think of legal subjects as persons with roles attributed by the law, it becomes possible to attribute legal subjectivity to entities other than the human person.[508] However, we have seen that legal personhood has always been linked to humanity. So, if we disentangle legal right-holding from legal personhood, legal rights could be attributed by law to other non-humans as for example animals.

248. Category? – From a conceptual point of view, we can then ask ourselves in which category animals would fit. Animals do not fit in the category of things or in the category of persons. This means that animals should not be seen as non-human persons but rather as '*non-personal subjects of law*', as proposed by PIETRZYKOWSKI.[509] This concept corresponds more accurately to the similarities and dissimilarities between humans and animals. The main aim of conferring on animals the status of non-personal subject of the law is the transformation of their interests into legitimate legal considerations that have to be accounted for in each case of a practical decision.

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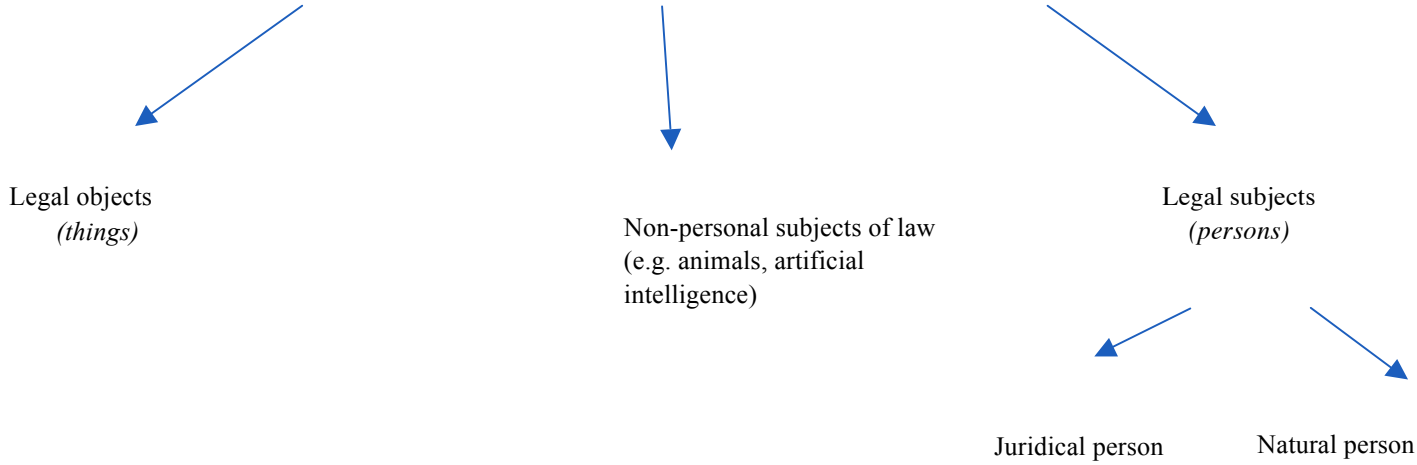
[504] S. TUDOR, "Some Implications for Legal Personhood of Extending Legal-Rights to Non-Human Animals", *Austl. J. Leg. Phil.* 2010, 136.
[505] V. A. J. KURKI, "Revisiting legal personhood", Paper, University of Cambridge, unpublished paper, 2016, 20.
[506] S. TUDOR, "Some Implications for Legal Personhood of Extending Legal-Rights to Non-Human Animals", *Austl. J. Leg. Phil.* 2010, 137.
[507] Cfr. *Supra* n° 145.
[508] K. RANNENBERG, D. ROYER and A. DEUKER, *The Future of Identity in the Information Society: Challenges and opportunities,* London, Springer, 2009, 79.
[509] V.A.J. KURKI and T. PIETRZYKOWSKI, *Legal Personhood: Animals, Artificial Intelligence and the Unborn,* London, Springer, 2017, 58.

The following schematic representation could help visualizing the before-mentioned ideas.



Section 2: The fundamental rights aspect in practical terms

Should animals have rights because they have souls? Do only the higher order species 'deserve' rights? Would it be allowed then to torture a fruit fly? If we grant animals fundamental rights, does it mean that everyone should become vegetarian?

249. Remark – The above-mentioned questions will be analyzed under this section.

§1. Should all animals have fundamental rights?

250. General – It is hard to determine which animals 'deserve' fundamental rights. Several legal scholars have a different view on this issue. We could say that all animals deserve fundamental rights or only the animals that possess certain 'selfhood' (*i.e.* taking into account that animals are sentient beings), as described under the first chapter.[510] Another possibility also exists in only granting fundamental rights to 'higher order species'.[511]

251. Two perspectives – Granting fundamental rights to animals can be approached from two different perspectives. The first approach is the one according to the current account of legal personhood. From this approach only legal persons could bear rights. However, we have seen that legal personhood has always been linked to humanity. So, WISE tries to argument why certain animal species are like humans on the grounds of their intelligence. In other words, they would possess a certain level of 'practical autonomy'. The second approach tries to disentangle legal

[510] Cfr. *Supra* n° 52 ff.
[511] These are "*animals of relatively advanced or developed characteristics, such as mammals and other vertebrates*", https://en.oxforddictionaries.com/definition/higher_animals.

right-holding from the legal institution of personhood. Not only do the few smartest animals 'deserve' some rights but all animals that are 'sentient'. These animals would then be considered as 'non-personal subjects of law'.

1.1. According to the current account of legal personhood

252. S.M. WISE – Steven M. WISE is a legal scholar and a staunch supporter of considering some animals as legal persons. As already mentioned above, he is the founder of the '*Nonhuman Rights Project*'. He has dedicated his life fighting for animal rights. He furthermore has a large amount of publications regarding animal rights on his curriculum and he initiated several lawsuits in the name of animals.[512]

253. Dignity – Courts recognize that bodily liberty and bodily integrity are fundamental human interests protected by fundamental human rights. The legal scholar asked himself what a sufficient condition would be for having fundamental rights. The constantly returning concept was 'dignity'. This was also the outcome of the analysis conducted in the third section of the second chapter of this thesis. There should be highlighted that dignity is a sufficient condition for fundamental rights but not a necessary condition. The concept of dignity has several meanings. However, dignity in the sense of being a quality imbued with intrinsic and incomparable value was something courts, legislators, and international treaties embraced.

254. 'Practical autonomy' – When trying to understand the idea of 'dignity', S.M. WISE kept encountering the idea of autonomy. We, as humans are to some important extent, autonomous and self-directed. Consequently, WISE wrestled with defining the minimum level of autonomy sufficient for legal personhood. In his book '*Drawing the Line*'[513] he sets out the concept of '*practical autonomy*'. This concept has three elements. An animal that is practically autonomous must first be cognitively complicated enough that it desires. Secondly, the animal must be able to act intentionally in achieving those desires. Lastly, the animal must have a sense of self that is complicated enough to recognize when those goals and desires are achieved.[514]

255. Consciousness – WISE emphasizes that an important component entrenched within the capacity to desire is consciousness. The legal scholar is of the opinion that an animal must be conscious in order to have practical autonomy. Whether an animal is conscious or not can be

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[512] WISE himself states that he is not litigating 'animal rights cases': "*When I litigate cases as an "animal slave lawyer" in the interests of nonhuman animals, I am not litigating "animal rights" cases; for nonhuman animals have no rights-they lack legal personhood. They are invisible to the civil law the way a human slave was once invisible in the United States before the passage of the Thirteenth Amendment and in England, before the famous Somerset v. Stewart case was decided in 1772, an event so important I wrote a book about it.* " in S. M. WISE, "Nonhuman Rights to Personhood", *Pace Envtl. L. Rev.* 2013, 1280.

[513] S.M. WISE, *Drawing the Line: Science and the Case for Animal Rights,* Boston, Merloyd Lawrence, 2003.

[514] S. M. WISE, "Nonhuman Rights to Personhood", *Pace Envtl. L. Rev.* 2013, 1283.

proven by characteristics and responses, which mirror human consciousness. A practical display of consciousness can often be demonstrated through the mirror test. In order to conduct the test, a red dot should be marked on the animal's face while it is unconscious. When the animal awakes, it is presented with a mirror. If the animal is self-aware, it will attempt to remove the red dot from itself by touching and rubbing it. Hence, a lack of attempt will demonstrate a lack of self-awareness. Although the mirror test has proved beneficial, WISE admits it is not failsafe, since it cannot be applied to animals who would not react in the same way a human would with a red dot on his face.[515]

256. Scale of practical autonomy – WISE and his team created the scale of practical autonomy. This scale consists out of four classes of animals, depending on the type of rights they ought to be given. The first class of animals falls between the range 0.9 and 1.0 and directly below 1.0 where humans – who demonstrate full autonomy – fall. According to WISE, animals ressorting under class one, should immediately be seen as legal persons. In an equal and relevant way to humans, these animals demonstrate self-consciousness. These animals encompass a so-called 'theory of mind'. This means that they understand that they have a mind and that other entities have a mind. This would entail that the four species of great apes[516] as well as bottlenose dolphins amongst others are the types of animals that should be categorized as 'class one animals'. According to WISE, they should be granted the fundamental rights of bodily liberty and integrity. Animals of the second class would fall between 0.51 and 0.89 on the practical autonomy scale. These animals have fundamental rights but it is unclear as to their sense of self. This is where the mirror test fails. Marking an African Grey Parrot with a red dot and then presenting to with a mirror, would most likely fail the mirror test. The reason why is because these animals do not demonstrate recognition of a mark in the same way as great apes and humans do, namely by touching it on themselves. Animals belonging in the third and fourth class fall below 0.50 on the practical autonomy scale. They demonstrate little to no self-consciousness.

257. Concerns – Animal rights activists will try to prove that some animals could be considered as legal persons based on their 'practical autonomy'. According to science, only an extreme limited amount of animals do have the same level of consciousness as humans. Hence, it does not sufficiently protect all the other animals. Also, despite of more than 20 years of the efforts of animal rights activists such as WISE, the practical effects remain very modest.[517]Moreover, the trends in the legislation aim at protecting more than only the 'smartest' animals. Belgium is no common law country and we do not know the writ of *habeas corpus*. Extending rights through jurisprudence would not be possible. Furthermore, judges stated that granting rights to animals should be done through a change of legislation. To conclude, in my opinion, it would also be

[515] A. RIVARD, "Steve Wise's Lecture – A resounding Success", *Animal Blawg* 2012.
[516] The bonobo, the chimpanzee, the gorilla and the orangutan.
[517] V.A.J., KURKI and T., PIETRZYKOWSKI, *Legal Personhood: Animals, Artificial Intelligence and the Unborn,* London, Springer, 2017, 56.

discriminatory to make a distinction between the species. Based on these mentioned reasons there can be defended to disentangle legal right-holding from the institution of 'legal personhood'.

1.2. According to the alternative account of legal personhood

258. General – From the point of view of the alternative account of legal personhood, we will disentangle legal right-holding from legal personhood. However, here we should also determine to which animals we will extend fundamental rights.

259. All animals? – Saying that all animals should have fundamental rights has one big problem. As analyzed above, there is not only one definition of 'animal'. The concept of 'animal' is hard to define. Several definitions exist that could describe what an 'animal' is. Legal scholar WALDAU, in my opinion, correctly argues that there is not such as one non-contested and universally accepted definition of 'animal'. There are around 9 to 10 million animal species in the animal kingdom.[518] This would entail that fundamental rights should also be extended to fruit flies. In my opinion, extending fundamental rights to a concept that is not defined enough is neither feasible nor desirable.

260. Sentience as criterion – If we would, as REGAN suggests, extend fundamental rights to animals that possess 'selfhood',[519] it would entail that as soon as a being is subject-of-a-life it deserves fundamental rights. Subject-of-a-life would entail that a being has certain "*beliefs and desires*". According to multiple scientific studies normally functioning mammals and birds, once having attained a certain age, possess the cognitive prerequisites for having "*beliefs and desires*" and could be considered as subjects-of-a-life.[520] Legal scholars KURKI and PIETRZYKOWSKI also are of the opinion that sentience should be the criterion for extending certain fundamental rights to animals.[521] It should be noted that possessing "*beliefs and desires*" entails that these animals are so-called 'sentient'. So, the trends in legislation may refer to this definition of REGAN when they state that animals are sentient beings. However, there should be noted that not all animals can be considered subject-of-a-life and hence a 'sentient being'.

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[518] X., "Which Species Make Up The Animal Kingdom?", https://www.worldatlas.com/articles/which-species-make-up-the-animal-kingdom.html.

[519] "*…individuals are subjects-of-a-life if they have beliefs and desires; perception, memory, and a sense of the future, including their own future; and emotional life together with feelings of pleasure and pain; preference-and welfare-interests; the ability to initiate action in pursuit of their desires and goals; a psychological identity over time; and an individual welfare in the sense that their experiential life fares well or ill for them…*".

[520] A. SETH, B. BAARS and D. EDELMAN, "Criteria for consciousness in humans and other mammals", *Consciousness and Cognition* 2005, 119-139; J. PANKSEPP, "Affective consciousness: Core emotional feelings in animals and humans", *Consciousness and Cognition* 2005, 30–80; N. CLAYTON, T. BUSSEY and A. DICKENSON, "Can Animals Recall the Past and Plan for the Future? " *Nature Reviews: Neuroscience* 2003, 685-691.

[521] V.A.J., KURKI and T., PIETRZYKOWSKI, *Legal Personhood: Animals, Artificial Intelligence and the Unborn,* London, Springer, 2017, 63.

§2. Which fundamental rights should be extended?

261. General – There should be highlighted that animals should not have the same fundamental rights as humans. There is no question of 'humanization' of animals or, conversely, of 'trivialis[ing]' human rights.[522] Sentient animals should be awarded the fundamental rights corresponding to their interests, needs and species such as the right to life; the right to freedom; the right to not have pain, suffering and stress inflicted on them; the right to be cared after by humans; the right to acquire ownership rights; and the right to legal protection.[523]

2.1. The right to life

262. Core idea – This right should be the norm for every sentient being.

2.2. The right not to be inflicted pain, suffering and harm

263. Core idea – This embodies the prohibition against torture and should be guaranteed for every sentient being.

2.3. The right to freedom

264. Content – This right would imply that the animal can live in its natural environment, where it can express and satisfy its physiological needs. This right must be interpreted differently depending on the category the animal belongs to. For wild animals, freedom represents the condition for survival and a 'shield' of possible suffering and stress. For the other animals (e.g. domesticated animals), freedom has another form because of the dependence on man.[524]

2.4. The right to be cared for by man

265. Content – Survival of domestic as well as wild animals is directly linked to the duty of man to care for them. This right implies a whole range of activities undertaken by man with the aim to alleviate life of animals and to enable the satisfaction of their biological needs. Taking care of domesticated animals would mean that man needs to provide appropriate food adapted to their species, necessary quantity of water, adequate shelter that meets their basic needs: to be able to move, get up, communicate with other animals of own kind or other kind, to lie down, breathe clean air, have daylight and adequate temperature, needed care, in the event of illness or very old age, and veterinary aid.[525] In principle, this should be the same for wild animals as pets as well as

[522] B. DRIESSEN, "Fundamental Animal Rights in European Law", *European Public Law* 2017, 573.
[523] N. STOJANOVIC, "Which animal rights should be recognized?", *Annals Fac. L. Belgrade Int'l Ed.* 2016, 75.
[524] *Ibid.,* 85.
[525] *Ibid.,* 87 and 88.

wild animals kept in animal shelters or wild animals breeding centers. Care for wild animals in the wild primarily refers to conservation of their natural habitats and not undertaking any actions preventing them to perform their physiological functions and when the circumstances require, (e.g. due to major natural disasters) provision of needed food and care, too.[526]

2.5. The right of animals to acquire property rights

266. Content – This right is primarily meant for companion animals since today the link of affection is not properly protected. If for example an animal was emotionally closer to the owner than with the persons who he or she was legally related to, it should be possible for animals to acquire property rights. Hence, property acquired in that way would be used by the representatives of animals for the needs of the animals themselves exclusively.[527]

2.6. The right of animals to legal protection

267. Content – This right should be guaranteed for every animal as well. It would enable animals to protect their vital interests. Since animals do not have a legally relevant will and capacity for legal communication, their interests should be protected by people who care for them. For those animals that no one cares for or only sporadically, it is acceptable, to establish special and independent state organs e.g. an animal ombudsman.[528] It should also be possible for animal rights organization to act as a party to the procedure conducted for the protection of animals' interests.[529] In this sense, they are no different from legal persons, infants or persons who are physically unable to enforce their own rights.[530]

§3. Limitations to the fundamental rights

268. Relevance of limitations – Extending fundamental rights to animals means admitting that their rights could interfere with our rights. However, the idea that animals should have the same rights as us should be rejected. Not formulating any limitations to the fundamental rights of animals, could bring us in severe problems. It would mean that we would need to change our entire way of living. Hence, the extension of fundamental rights today cannot be considered as ideal but more as a concept of lesser evil taking into consideration our current way of living.[531]

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[526] *Ibid.,* 88.
[527] *Ibid.,* 88 and 89.
[528] *Ibid.,* This is already the case in Austria. Cfr. The Austrian Federal Act on the Protection of Animals of 28 September 2004, published in the *Austrian Official Gazette* on 6 October 2004. Article 41 §4 of this Act states: "*The animal ombudsman has legal standing in all cases concerning the animal law. He or she has the right to see all legal documents of cases concerning the animal law and the right to get all relevant information. He or she must be supported by all government bodies in doing his or her duty.*"
[529] Cfr. *Infra* n° 301.
[530] B. DRIESSEN, "Fundamental Animal Rights in European Law", *European Public Law* 2017, 579.
[531] J.-B.J. VILMER, *Ethique animale*, Paris, PUF, 2008, 194.

Therefore, there should be allowed a certain, limited number of limitations to the protection of animals. As stated by SOHM BOURGEOIS "*tout l'art du législateur doit tendre (...) à réaliser un juste compromis entre les besoins légitimes de l'homme et la protection des animaux*".[532] She states that the legislator should find a balance between the legitimate interests of humans and the protection of animals. There can be agreed with BOISSEAU-SOWINSKI that it is preferable to elaborate general criteria that could limit animals' protection instead of cataloguing exceptions. Consequently, the following criteria could be used in order to determine on a case by case basis whether animals' fundamental rights need to be limited for other purposes.[533]

3.1. The proposed criteria

3.1.1. Utility and necessity

269. Utility – It is obvious that the derogation of the animal's fundamental rights should be useful. Every derogation that is not useful should not be permitted. However, this criterion does not seem to protect the animal enough. It will still allow us to limit animals' fundamental rights every time that derogation might be useful for mankind. Therefore, another criterion should be added, which is the one of the 'necessity'.

270. Necessity – The criterion of necessity can be used when facing a serious, current and imminent danger that is threatening a person's or animal's life or health. The exceptions should hence be strictly limited. Hence, the only case we could sacrifice an animal's life would be to save someone else's life. However, this would mean that the killing of animals for feeding purposes would be prohibited if mankind would not be in a state of famine. It would mean that every person on earth should become vegetarian. The amount of people that would take this proposal seriously will be reduced to a minimum. Hence, the criterion of necessity should be elaborated differently. This criterion could be interpreted as the crucial necessity in order to prevent the direct or indirect jeopardizing of the life or health of mankind or other animals. In other words, a derogation to animals' fundamental rights will only be permitted if they are useful and necessary in order to prevent the direct or indirect threat to the life or health of mankind or other animals. However, another important principle should also be taken into account.

3.1.2. Proportionality

271. Content – The principle of proportionality allows determining whether the derogation is adequate or appropriate in order to achieve the necessary goal. In other words, it tries to find a balance between two different interests. More specifically, between animals' protection and the

[532] A.M. SOHM-BOURGEOIS, "La personnification de l'animal : une tentation à repousser", *Recueil Dalloz* 1990, 33-35.
[533] L. BOISSEAU-SOWINSKI, *La désappropriation de l'animal,* Limoges, Presses universitaires de Limoges, 2013, 224.

preservation of human interests. According to the principle of proportionality, only derogations that are strictly necessary will be allowed. The courts will need to determine which derogations to animals' fundamental rights are legitimate. Such a control mechanism has the advantage that it is very dynamic and progressive that allows us to adapt legal rules to our continuously changing mindset towards animals.

272. Remarks – According to BOISSEAU-SOWINSKI, derogations to the physical and psychological integrity of the animals should be subject to a stricter appreciation than derogations to the right of life to animals. It is her opinion that derogations to the physical and psychological integrity of animals could almost always be prevented.[534] Another remark that could be added, according to the legal scholar, is that some derogations of certain animals' fundamental rights need to be judged more strictly as well. This would be the case if the fundamental rights of companion animals would be infringed. This difference in treatment could be justified by the link of affection that could exist between humans and these animals. Moreover, not only the fundamental rights of animals would be infringed in case of derogation but also the feelings of humans towards their beloved companion animal.[535] It could be considered as an aggravating circumstance.

273. Conclusion – To conclude, there can be stated that derogations to animals' fundamental rights can only be justified if they are (i) useful and (ii) necessary to preserve humans or other animals' lives (ii) and they are adequate to achieve the goal. Based on these criteria, some exceptions to animals' protection could be determined in situations where animals' interests and humans' interests would conflict.

3.2. The criteria applied

274. General – In case the protection of an animal's life could directly or indirectly jeopardize a human's life, some exceptions to animals' protection would be admissible. This would be the case when the animal represents a serious threat to human or other animals. Also, the killing of animals for feeding purposes could be allowed as well as animal testing.

3.2.1. Animals threatening humans or other animals

275. Direct threat – In case an animal represents a threat for a human, it would be admissible to make an attempt on the animal's life. In this case the animal's life will be sacrificed to the necessity to save the human's life. This is the so-called act of self-defense. Although that the utility and necessity criteria require an action, the principle of proportionality should still be respected. This will also be justified when an animal represents a threat for another animal.

[534] *Ibid.,* 231.
[535] *Ibid.,* 232 and 233.

276. Indirect threat – It is also thinkable that an animal can represent an indirect threat. This can be the case when the animal is affected by an infectious disease for example. Although every risk of being affected by such a disease should be reduced to a minimum, it cannot be excluded. In case the animal is affected by such a disease, it would only be admissible to kill the animal if the criteria of utility, necessity and proportionality are being respected. In other words, if for example isolating the animal would also offer an acceptable solution, this would be required instead of the killing of the animal.

3.2.2. Killing of animals for feeding purposes

277. Necessity? – Homo sapiens are by nature omnivores.[536] From an ethical point of view the consumption of meat it difficult to defend.[537] However, if ethics would influence the legal field, the legal reasonings should also take into consideration the practical consequences. The legal practitioner needs to strive to find a pragmatic solution taking into account political and economic considerations besides the mere ethical ones. There are several arguments in favor of becoming vegetarian but also several in favor of eating meat. For example, there can be thought of the argument that the ecological footprint increases when eating meat. An argument in favor of eating meat is that we apparently would need the vitamin B12 that no other source could provide sufficiently.[538] Although apparently 44% of the Belgian population eats less meat than previous year, only 7% of the Belgian population is vegetarian.[539] India is the country that has the highest percentage (*i.e.* 38%) of vegetarians in the world.[540] Taking into account the very small percentage of vegetarians and the fact that a complete vegetarian diet could endanger our health, the killing of animals for feeding purposes could be allowed.

278. Promoting other alternatives – However, we should promote animal welfare by improving the breeding systems and by reducing the meat overconsumption. Also, we could promote vegetarianism more by educating society. If this would be seen as a step too far, we could at least not promote meat anymore and educate people about the process of slaughtering animals for their meat.[541] A good step in the right direction is the investments and researches done in order to

[536] N.M. TANNER, *On becoming human,* Cambridge, Cambridge University Press, 1981, 139.
[537] An ethical analysis of this topic would bring us too far for the purposes of this thesis.
[538] D. GILLE and A. SCHMID, "Vitamin B12 in meat and dairy products", *Nutr. Rev.* 2015.
[539] X., "Bijna helft van de Belgen eet minder vlees dan een jaar geleden", https://www.demorgen.be/binnenland/bijna-helft-van-de-belgen-eet-minder-vlees-dan-een-jaar-geleden-b18aac06/.
[540] X., "Countries With The Highest Rates Of Vegetarianism", https://www.worldatlas.com/articles/countries-with-the-highest-rates-of-vegetarianism.html.
[541] When going to supermarkets and seeing a promotion at the section of the butchery stating '*3 sausages and one free*', we should ask ourselves some questions about our consuming patterns. Cfr. http://deredactie.be/cm/vrtnieuws/binnenland/2.49176.

develop '*meatless meat*'. For example, BILL GATES – that became the world's richest man by tackling seemingly impossible problems – is investing in companies as '*Memphis Meats*'.[542]

279. Proportionality – For now, there might exist the necessity to kill animals for feeding purposes. However, the principle of proportionality still needs to be respected. The physical and psychological integrity of the animal before the slaughter must be respected.[543] The current legislation protecting animals' interests when they are being slaughtered should be respected, without any possible derogation.[544] If for example, a judge is being faced with a case of animal abuse at a slaughterhouse, it can use the three proposed criteria. The criteria of utility and necessity might be fulfilled but the one of proportionality not. The court will be able to balance animal interests and human interests. No animal deserves to be kicked before being slaughtered.

3.2.3. Experiments on animals

280. Necessity? – Experiments on animals have always been the subject of a lot of discussion and can be considered a heavily debated topic. From an ethical point of view, there exist arguments in both directions. However, there are very strong opponents of experiments on animals.[545] There can

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[542] Their statement is the following: "*We love meat. It is core to so many of our cultures and traditions. Global demand for meat is projected to double in the coming decades, so we're working to bring meat to the plate in a sustainable, healthy way that is good for people, animals and the planet. That's why we started Memphis Meats. We are developing a way to produce real meat directly from animal cells, using far less land, water, and energy than conventional meat production. We have produced beef, chicken and duck, and we are cooking up a number of other delicious products. Our goal: Better Meat, Better World*.", cfr. http://www.memphismeats.com/about-us. Another famous project like this is '*Beyond Meat*', cfr. http://beyondmeat.com/about.

[543] Denmark is promoting their 'humane way of slaughtering', X., "Slaughtering pigs in a humane way", https://www.dti.dk/specialists/slaughtering-pigs-in-a-humane-way/37379; Belgium has been faced with several scandals in the meat industry in only one year, https://www.vrt.be/vrtnws/nl/dossiers/2017/09/mishandeling-in-slachthuizen/; Belgian expert in animal welfare, VAN THIELEN states that however slaughtering animals will never be 'animal friendly', the suffering can be reduced by for example reducing their stress, X., "Docent Dier & Welzijn: "Stress bij koeien wegnemen zou al veel helpen", https://www.vrt.be/vrtnws/nl/2017/09/12/gestresseerde-dieren-moeilijker-te-slachten/.

[544] Consideration nr. 2 of the European Regulation No. 1099/2009 of 24 September 2009 on the protection of animals at the time of killing emphasizes that: "*Business operators or any person involved in the killing of animals should take the necessary measures to avoid pain and minimise the distress and suffering of animals during the slaughtering or killing process, taking into account the best practices in the field and the methods permitted under this Regulation. Therefore, pain, distress or suffering should be considered as avoidable when business operators or any person involved in the killing of animals breach one of the requirements of this Regulation or use permitted practices without reflecting the state of the art, thereby inducing by negligence or intention, pain, distress or suffering to the animals.*"

[545] http://www.stopdierproeven.org/nl/onze-vrijwilligers-het-hart-van-de-adc-familie; https://www.gaia.be/nl/campagne/dierproeven; https://www.peta.nl/onze-missie/experimenten/839-2/; X., "Scherpe kritiek op dierproeven aan KU Leuven", http://www.standaard.be/cnt/dmf20150423_01645250; X., "The Cruelty and Waste of Vivisection", https://www.navs.org/the-issues/the-cruelty-and-waste-of-vivisection/#.WuGFodNubpA; http://www.medicinekillsmillions.com/articles/doctors_oppose_animal_research.html; http://www.aboutanimaltesting.co.uk/organisations-against-animal-testing.html; X., "Organisations Against Animal Testing", R., GREEK, " How to argue against vivisection in the 21st century", http://www.ourhenhouse.org/2013/05/how-to-argue-against-vivisection-in-the-21st-century-by-ray-greek-m-d/; A. HUS, "Dierenarts André Menache: 'Dierproeven zijn minder betrouwbaar dan een muntje tossen",

easiliy be argued that experiments on animals for cosmetics purposes are not necessary for our survival. From this point of view, the European Union has prohibited such experiments since 2013.[546] The debate would be different if experiments on animals are being conducted for helping to develop lifesaving cures and treatments. The European Directive 2010/63/EU states that the final goal is a full phasing out of animal testing but acknowledges that the use of animals is still necessary on the way to reaching this goal.[547] The European Union keeps investing in research in order to ban experiments on animals on the long run.[548]

281. Proportionality – Although that experiments may still be necessary today – according to science – and hence should be allowed. There should be noted that the principle of proportionality still needs to be respected and that the total abolition in the near future needs to remain our main objective. It goes without saying that unnecessary tests should be prohibited. There should be pointed out that Belgium still uses cats and dogs to experiment on and more than 530.000 animals in a year.[549] According to the government of Brussels the amount of animals used for experimentations did not decrease. Hence, they urge to reduce this amount with 30% by 2025.[550] Also, the Walloon Minister for Animal Welfare, DI ANTONIO also (i) urges to limit animal experiments to the strict necessary (ii) to promote research in finding other alternatives (iii) to more strictly enforce the current norms (iv) to enhance the transparency. He also states that Belgium is one of the only countries in the European Union that has a so-called 'ethical commission' that (dis)approves the experiments on animals. He states that – based on an advice of the State of Councils – this commission should be replaced by a competent public authority, as required by the abovementioned Directive.[551] Moreover, after the scandal that has been exposed by *GAIA*, it is very doubtful if we would succeed the test of 'proportionality'.[552]

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http://www.knack.be/nieuws/belgie/dierenarts-andre-menache-dierproeven-zijn-minder-betrouwbaar-dan-een-muntje-tossen/article-longread-1138983.html.

[546] https://ec.europa.eu/growth/sectors/cosmetics/animal-testing_en.

[547] Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, *Pb.L.* 20 October 2010.

[548] M. CRONIN, " Non-animal approached the way forward", *Publications Office of the EU,* 2017, http://ec.europa.eu/environment/chemicals/lab_animals/3r/pdf/scientific_conference/non_animal_approaches_conference_report.pdf; https://ec.europa.eu/jrc/en/research-topic/alternatives-animal-testing-and-safety-assessment-chemicals.

[549] https://www.lne.be/sites/default/files/atoms/files/Statistieken%20proefdieren%20Belgie%202016.pdf.

[550] X., "Een derde minder proefdieren in Brussel", http://www.standaard.be/cnt/dmf20171019_03142385.

[551] X., "Expérimentation animale : Carlo Di Antonio dément fermement les rumeurs vehiculées", http://diantonio.wallonie.be/home/presse--actualites/publications/experimentation-animale--carlo-di-antonio-dement-fermement-les-rumeurs-vehiculees.publicationfull.html.

[552] X., "Staatssecretaris geschokt over undercoverfilm over behandeling proefdieren over VUB (VUB)", http://www.knack.be/nieuws/belgie/staatssecretaris-geschokt-over-undercoverfilm-over-behandeling-proefdieren-over-vub-vub/article-normal-783123.html.

Section 3: Critical note on the Belgian legal framework and recommendations

§1. Critical note

1.1. Current legislation

282. The world rethinks the animal's status – The world is rethinking the animal's legal position. In the Americas, there exist several legal cases in order to recognize some animals as legal persons. Animal rights activists try to challenge the animal's status in front of the courts through the writ of *habeas corpus* because they have a common law system. In Europe, this trend is not that visible in the jurisprudence but rather in the legislation and legal doctrine. The approach is also different. In Europe – maybe it also has a slower pace – countries acknowledge that animals are not mere goods. They recognize that animals are sentient beings and that their intrinsic value should be protected.

283. Belgium's legal framework – Despite of the above, in Belgium, animals are still considered as movable tangible goods (or immovable by destination or *res nullius*). In other words, they are considered as legal objects. This status does not correspond anymore with society's mindset towards animals. It became clear that if we want to extend fundamental rights to animals and hence offer them better legal protection, this status needs to be amended. Animals should not be considered as legal objects anymore. The current status of the animal has several consequences. However, these consequences could be reduced to two very important ones. First of all, the status of the animal as a legal object does not recognize the intrinsic value of the animal and it denies the sensibility of every animal. As long as animals will retain this status, they will never be fully protected. Secondly, it also denies the link of affection that could exist between humans and animals. Other consequences generally stem from these two main consequences.

284. Illustrations – There can be mentioned a few illustrations in order to point out the current odd state of affairs.

i. The current animal's status renders every balancing exercise meaningless

On one hand, civil law considers the animal as a good that can be appropriated. On the other hand, the Animal Welfare Act tries to protect the animal as a vulnerable being. More specific, article 1 of the Animal Welfare Act tries to protect the animal against cruelty acts and unnecessary killing.[553] However, with every committed cruelty act the interest should be balanced. In reality, the trade-off exists between the *interest* of the property (protected under criminal law but considered as a legal object) and the *right* of the property-owner (a legal subject that has a subjective right, namely property right). The applicability of this article is hence limited to the

[553] Article 1 of the Belgian Animal Welfare Act of 14 August 1986, Published in the *Belgian Official Gazette* on 3 December 1986 and Belgian Draft Act of regarding the protection and welfare of animals, *Parliamentary Documents,* Senate 1982-83, nr. 469, 3.

cases of animal cruelty where humans have no 'real' interest.[554] This odd state of affairs renders every balancing exercise meaningless. Animals will never be properly protected through animal protection legislation as long as their status does not change.

ii. Difficult enforcement

The most important source of legal protection for the animal is the Animal Welfare Act. However, enforcing this Act is not self-evident. There is no legal basis for animal rights organization to introduce a civil action in a criminal procedure since they would have no personal interest in the sense of article 17 of the Belgian Judicial Code[555] according to the Belgian Court of Cassation. Hence, it is not an easy task for animal rights organization to enforce the applicability of the Belgian Animal Welfare Act.[556] If animals would have rights, there would be several mechanisms thinkable in order to enforce them.[557]

iii. Forgotten about the wild animals

The current status of the animal also has as a consequence that we have forgotten about animals that are no appropriated (*i.e.* animals considered as *res nullius*). The Belgian Animal Welfare Act aims at protecting certain – mostly domesticated – animals. Wild animals today are not protected enough. These animals are protected from the point of view of protecting certain species e.g. through the CITES. Consequently, if we want to rethink the animal's position, these wild animals should not be forgotten.

iv. Commercial contracts

Considering that an animal is a good means that several commercial contracts can be applicable to them. It should be rethought whether these contracts as f.e. regarding sales, usufruct and renting are adequate to be applied on animals. In my opinion, these contracts are designed to relate to mere goods and to apply in commercial contexts. For example, having a two-year guarantee when buying a new cell phone and as well when buying a dog seems very odd to me when we claim that we want to recognize the animal as a sentient being and not as a mere thing.

285. Remarks – The above-mentioned list is obviously not exhaustive. In this thesis, there have been set out several complications concerning the current status of the animal. For example, there

[554] Cfr. *Supra* n° 211 and footnote 147 where there has been stated that the drinking of live fish has been justified for cultural historical reasons.
[555] Article 17 of the Belgian Judicial Code of 10 October 1967, published in the *Belgian Official Gazette* on 31 October 1967.
[556] The Belgian Animal Welfare Act of 14 August 1986, published in the *Belgian Official Gazette* on 3 December 1986.
[557] Cfr. *Infra* n° 301.

can also be recalled that the current status prevents legitimate self-defense for defending an animal. However, the above-mentioned main consequences were worth recalling at the end of this thesis with a critical note. There should also be added that not every consequence of the current animal's status is bad. The legal rule regarding the unseizability of companion animals for example is of course a good thing and can be maintained. Also, the rules regarding the liability of the owners for their animals can be maintained (at least the principle behind it).[558]

286. Gap in Belgian doctrine – During my research it was very notable that there is a big gap in the Belgian legal doctrine regarding animal rights. There were very few articles that could be counted on one hand. However, an important legal scholar and member of the Belgian Court of Cassation clearly stated – on a one page article – that animals are not and should not be considered as goods.

1.2. Proposed amendments to the Civil Code

287. 'Wait-and-see' approach – Apparently, Belgium indeed noted that the animal's status under the current legal system needed to be rethought. The reform of the animal's status in the Belgian Civil Code has been introduced from a 'wait-and-see' approach. If the reform will be approved by the Council of States, Belgium will follow the trend in the legislation that has been discussed above.[559] This means that an animal will be recognized as a 'sentient being'. Ironically enough, the new article recognizing the sentience of animals is located under the title dealing with 'goods'. Also, this new article explicitly states that the provisions dealing with goods will be applicable to animals.[560]

288. Symbolic amendment – It does not require a lot of thinking or reasoning in order to conclude that this amendment to the Civil Code is a mere symbolic one. It does not change anything to the animal's current status. Animals will still be considered as property and property law still will apply to them. In my opinion, animals *de facto* will still be considered mere goods. The reform of the Belgian Civil Code is a missed opportunity for rethinking the animal's position under the Belgian legal system.

§2. Recommendations

299. Closing the gap – As mentioned above, there is a big gap in Belgian legal doctrine when it comes to animal law. This could be illustrated by the articles dealing with animal law that could

[558] If we would eradicate the property status of animals, this article should however be rewritten.
[559] Cfr. *Supra* n° 57 ff.
[560] The new article will read as follows : *"Article 53. – Animals: Animals have a certain sensibility and comply with biological laws of nature. The provisions applicable to goods will also be applicable to animals. However, the legal and regulatory provisions dealing with animal protection should be taken into account as well as the general provisions of public order and common decency."* (Free translation)

be counted on one hand. A first step in closing the gap is to offer animal law courses at the Belgian universities. If society requests a better protection for animals, we should also educate legal practitioners to become specialists in this field of law that is growing exponentially around the globe.

300. Rethinking the animal's position – An animal is still considered as a mere good under Belgian law. The proposed modifications to the Belgian Civil Code – recognizing that animals are sentient beings – will in my opinion not change anything about the animal's status. Hence, this issue requires more attention and research. There should be highlighted that the animal's status should be rethought for every animal that can be considered as a sentient being. This was a very clear trend in the legislation. In other words, not only the position of the few 'smartest' animals needs to be rethought.[561] When wanting to revise the animal's status, several aspects should be taken into account. First of all, we should start by breaking the legal wall (*i.e.* the summa division between legal objects and legal subjects). There is a growing need to define the status of animals in a way that would make them capable of holding some rights. As long as they remain mere legal objects, the attempts of their personification will continue. Animals essentially differ from things. As stated by KURKI, they have their own inherent good that cannot be plausibly reduced to an instrumental value for human beings.[562] As proposed by PIETRZYKOWSKI a third category should be developed, *i.e.* 'the non-personal subjects of law'. Secondly, the disentanglement of legal right-holding from the institution of legal personhood, as proposed by KURKI, is a valuable train of thought that should be considered and further analyzed. This disentanglement of legal right-holding could offer a possibility to extend fundamental rights to animals without needing to consider an animal as a 'person'. As illustrated by the trends in the jurisprudence, this is the main reason why judges are so reluctant to grant animals fundamental rights. There should however be noted that there are two cases in Argentina where the judges have already granted some animals fundamental rights (and hence considered it as a 'subject of rights' or even as a 'legal person').[563] Thirdly, rethinking the animal's position also entails rethinking its current property status. In my opinion, the animal's interests cannot be fully protected as long as it is considered as property.[564] However, eradicating the property status would have several (practical) consequences. For example, sales agreements won't be the ideal way to 'acquire' an animal. This type of agreement could for example be replaced by the institution of adoption. A full analysis of these possibilities falls outside of the scope of this thesis.

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[561] There can for example be refered to the public indignation in Belgium of the selling of baby chicks. These small animals were being kept in an overcrowded box while several of them were even dead. This can illustrate for example the concern about very small animals that are not that smart as for example chimpanzees. Cfr. X., "Paaskuikens vertrappelen elkaar in winkel: 'Écht niet meer van deze tijd'", http://www.standaard.be/cnt/dmf20180331_03440992.
[562] V.A.J., KURKI and T. PIETRZYKOWSKI, *Legal Personhood: Animals, Artificial Intelligence and the Unborn,* London, Springer, 2017, 57.
[563] Cfr. *Supra* n° 86 ff.
[564] Cfr. *Supra* n° 204 ff.

301. Enforcement fundamental rights – It is recommended to also think about the legal enforcement of fundamental animal rights. As analyzed above, today it can be hard for animal rights organizations to become a civil party in criminal proceedings since the Belgian Court of Cassation is of the opinion that they do not possess a 'personal interest' in the sense of article 17 of the Belgian Judicial Code. This article deserves an evolutionary interpretation in my opinion. These organizations do have a personal interest when intervening in proceedings because they claim the enforcement of animal welfare legislation. These animal rights organizations would hence deserve a legal recognition to enforce animals' fundamental rights.[565] Another possible solution for enforcing these rights is the introduction of a so-called '*Animal Ombudsman*'[566] as already mentioned above or an '*animal rights lawyer*'.[567] There can also be thought of introducing a special section specialized in animal rights matters within the public prosecutor's office.[568] They would be responsible for investigating the cases regarding breaches of the animal's fundamental rights.[569] A last possibility would also be the establishment of 'animal tribunals'. These tribunals would be specialized in animal rights matters. They would be responsible for balancing the humans' interests and the ones of the animals. The judges in these tribunals would also be responsible for example to apply the three criteria (*i.e.* utility, necessity and proportionality) when allowing derogations to the animals' fundamental rights.[570]

302. Fostering cooperation with scientists – Today, in Flanders for example there already exists a '*Council for Animal Welfare*' with scientific experts and other stakeholders.[571] This organization could also be responsible for further developing the fundamental rights that should be granted to animals. For legal practitioners, it is not easy to determine which rights exactly would benefit animals. Hence, the cooperation between scientists and legal practitioners should be fostered.

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[565] This is already the case for example in Bern (Switzerland). It is possible for the animal rights organization ('*The Animal Protection Organization*') to introduce a lawsuit. Cfr. M. MICHEL, and E.S. KAYASSEH, "The Legal Situation of Animals in Switzerland: two steps forward, one step back – many steps to go", *Journal of Animal law* 2011, 19.

[566] Cfr. *Supra* n° 267 and footnote 530.

[567] This already exists in Zürich (Switzerland). The core activity of the animal rights lawyer exists in defending animals in front of the courts. In exercising this activity, he or she possessed all the rights as a 'normal' party in the proceedings. Moreover, this lawyer could also propose sanctions, just as the public prosecutor. Cfr. V. GERRITSEN, "Animal Welfare in Switzerland – constitutional aim, social commitment, and a major challenge", *Global Journal of Animal Law* 2013, 13 and A.F. GOETSCHEL, "The Animal Voice: Ensuring interests through law", 2014, http://www.afgoetschel.com/en/downloads/The-Animal-Voice.pdf, 6.

[568] In Dutch: '*dierenauditoraat*'.

[569] Neither this is new since it already exists in St. Gallen (Switzerland). Cfr. M. MICHEL, and E.S. KAYASSEH, "The Legal Situation of Animals in Switzerland: two steps forward, one step back – many steps to go", *Journal of Animal law*, 2011, 19.

[570] R. GIELEN, *Dier en Recht – Mensenrechten ook voor dieren*, Antwerp, Maklu, 2000, 130; E. ESKENS, "Slaven en andere dieren. Peter Singer en Paul Cliteur over de mogelijkheden van een Internationaal Gerechtshof voor dierenrechten", *Filosofie magazine* 2001-02, http://www.ravagedigitaal.org/2001_2002/0201a3.htm.

[571] https://www.lne.be/structuur-en-werking-van-de-raad-voor-dierenwelzijn#samenstelling/.

303. Introduction Animal Code – Very recently, the Walloon Government approved a Code for Animal Welfare. This code would assemble all the provisions dealing with animal welfare and animal protection.[572] This Animal Welfare Code could become an 'Animal Code' and include the animals' fundamental rights. In the Belgian Civil Code a provision could be introduced recognizing the intrinsic value of animals, their sentience and that they belong between the categories of persons and goods. There should also be stated that they possess certain fundamental rights (and no duties) and that the 'Animal Code' will be applicable upon them.

[572] X., "Un texte inédit pour le bien-être des animaux approuvé par le gouvernement wallon!", http://diantonio.wallonie.be/home/presse--actualites/publications/un-texte-inedit-pour-le-bien-etre-des-animaux-approuve-par-le-gouvernement-wallon.publicationfull.html.

CONCLUSION

CHAPTER I: ANIMAL RIGHTS IN A GLOBAL CONTEXT

Section 1: Historical and philosophical background

304. This chapter started with an analysis of the animal's status from an historical and philosophical point of view. Although animals have always played a role in our life, they rarely have been the subject of studies. This has changed enormously the last 40 years. The historical approach shows us that our way of thinking and talking about animals has changed and will continue changing. Until the Enlightenment, there were only a few persons that were convinced that there are some similarities between humans and animals. Stronger, some were even of the opinion that animals were mere machines, without a soul and that they could not suffer (cfr. DESCARTES). However, the scientific development during the Enlightenment showed us that this is far from being the truth.

305. The proof that society's point of view towards animals is changing, is the emergence of animal law as a legal discipline. Several legal scholars started to write about animal protection as well about animal rights. Slowly, the first lawsuits and changes in legislation started to emerge.

306. Since the legal discipline goes hand in hand with the philosophical one, this aspect has not been neglected either. Another proof of the changing mindset of society towards animals is the amounts of philosophers that addressed the 'issue' of animal rights. There are several philosophical theories that could be used to explain the extension of fundamental rights e.g. Utilitarianism, Kantianism etc. However, the emergence of the so-called 'Animal Rights Theories' is until now the most adequate theory when speaking of fundamental rights for animals. This theory proposed an interesting criterion for moral consideration, namely 'selfhood'. This would mean that as soon as a being is 'subject-of-a-life', it should not be viewed as mere means-to-ends. In other words, the being should possess certain 'beliefs or desires' and merely being alive won't be sufficient.

Section 2: Global emergence of 'animal rights'

307. The global emergence of animal rights was visible on the three levels of legal sources, *i.e.* legislation, jurisprudence and legal doctrine. In this section, there has been analyzed what the trends were in the legislation as well in the jurisprudence. The trends in the legislation and jurisprudence do not have the same object. Obviously, both types of trends are related to the status of the animal.

308. The trends in the legislation are mostly visible in European countries that have a civil law system. European legislators are rethinking the animal position by changing their civil codes. They are of the opinion that *all* the animals do not fit in the category of 'things' anymore. Hence, there are a lot of countries that write in their civil codes that animals are sentient beings. However, this does not change the status of the animal. The animal still remains a thing. The only nuance is that animals are now things with certain feelings. This trend can be considered as a mere symbolic dereification.

309. The trends in the jurisprudence are on the contrary mostly visible in the Americas (the US and Latin-American countries). Some lawyers try to argument in front of the courts why *certain* animals – with high cognitive capabilities – should be considered as legal persons. They use the legal instrument of *habeas corpus* to claim the bodily liberty and integrity of certain animals e.g. apes, bears, dolphins, elephants etc. In the US, the judges are more reluctant in extending fundamental rights to animals. Some state that animals cannot have rights because they cannot have duties, while others support the movement, but are of the opinion that this should be addressed through a change of legislation instead of in front of the courts. In Latin – America, judges are more progressive and have already granted the *habeas corpus*. Some judges state that animals already possess some rights and should be considered as 'subject of rights'. A judge even stated that some animals should be recognized as 'legal persons'.

Section 3: Analysis of the concept 'fundamental rights' *in globo*

310. This section started with describing the legal wall that currently exists between things and persons. On one side of the wall there are things that cannot have fundamental rights and on the other side of the wall there are persons that can possess these rights. Since animals are considered as things, fundamental rights cannot be extended to them.

311. An analysis of the concept of fundamental rights has led us to the conclusion that these rights are granted to humans based on the mere fact that they are humans and worthy of a dignified or decent life. There exist several generations and categories of fundamental rights.

Section 4: Analysis of the concept 'animal rights' *in globo*

312. The importance of defining 'animal rights' in the issue of extending fundamental rights to animals is not that big. However, in trying to formulate a definition it became clear that there exists a big confusion about 'animal rights'. The first use of this concept refers to the current animal welfare rules that protect the animal against cruelty acts. The second use of this concept refers to 'moral animal rights', meaning as mere moral claims that animals could have on society. The third use refers to valid claims of animals that could be enforced by law. For the purpose of

this study, the third use is the most relevant. This has also shown us that animals would need to be considered as legal right-holder before fundamental rights could be extended to them.

CHAPTER II: LEGAL FRAMEWORK OF THE ANIMAL'S STATUS IN BELGIUM

Section 1: The animal's status under Belgian law

313. Under the current Belgian legal framework, animals are considered as legal objects. More specific, they are considered as movable tangible goods or immovable by destination. If animals haven't been claimed they will be considered as '*res nullius*'.

314. There have been a few legislative proposals in order to recognize the animal as a sentient being and not as a mere object. Animals are able to feel pain and emotions. Moreover, the mindset of the Belgian population towards animals has changed. Animals keep playing an increased role in our daily lives and society in general. According to the legislators, this mindset is not enough reflected in the Belgian animal welfare legislation. Hence, this all should be reflected in the Civil Code through an amendment. The legislators stated that this will increase the animal's protection.

315. Recently, the Belgian government has proposed its New Civil Code. Apparently, they also noticed the global emergence of animal rights. The Belgian Minister of Justice took into account the above-mentioned proposals and the animal will be recognized as a sentient being. Belgium now follows several other European countries. However, as already mentioned, this is a mere symbolic dereification. Animals remain things and hence legal objects. The New Civil Code is a missed opportunity for changing the animal's status.

Section 2: Complications of the current status of the animal

316. The second section analyzed some of the consequences that derive from the animal's current status as a legal object. The most importance consequence is that animals can be appropriated. The right of ownership is one of the most absolute rights. This right can only be limited by law or when wanting to protect the public order or common decency. A relevant example of a limitation to the right of ownership is the Belgian Animal Welfare Act. Based on this Act, animals have the 'right' not to be tortured or to die for unnecessary reasons. It should however be highlighted that only appropriated animals could benefit such protection. In other words, wild animals (*i.e. res nullius* animals) are in general not protected by such legislation. The only 'protection' they are entitled to is to preserve their species. Other consequences related to this property status are that animals can be the subject of several agreements that are used in a commercial context e.g. sales, usufruct or renting agreements.

317. Another consequence of this status is related to judicial law. As mentioned before, animals are entitled to a certain type of protection but since they are legal objects their rights cannot be enforced in front of the courts. Animal rights organizations try to enforce these rights in their personal name but there is no legal basis under Belgian law. Moreover, the Belgian Court of Cassation is reluctant to admit the claims of these organizations.

318. A last consequence that is mention worty is related to the interaction with criminal law. On one hand, the Animal Welfare Act (*i.e. lex specialis* of the general criminal law) tries to protect the animal as a vulnerable being. While on the other hand, the animal is still considered as a legal object that cannot have any rights. This paradox leads to a very limited protection for the animal. A small consequence related to criminal law is also that legal-defense in order to defend animals is not accepted (since animals are considered goods). The law completely denies the link of affection that can exist between the owner and the animal.

CHAPTER III: *DE LEGE REFERENDA*

Section 1: Breaking the 'legal wall'

319. This section tried to research how the 'legal wall' could be broken. In other words, how the position of the animal could be rethought in order to extend fundamental rights. When wanting to recognize the intrinsic value of the animal as a sentient being or when wanting to extend fundamental rights to them, their property status should be rethought as well. On one hand, property rights deny the sensibility of an animal. Animal welfare protection laws fail to properly protect domesticated animals. It renders every balancing exercise meaningless. Also, as mentioned above wild animals are in general excluded from this type of protection, while they are also sentient beings. On the other hand, there is a clear emergence of the protection of the tie of affection between the human and the animal. However, the property status denies this tie of affection. Moreover, the property concept is far more than a mere legal one. It is a central psychological, social, economic, religious, intellectual, cultural, political and environmental reality. It is one of the main reasons why societies have failed to notice animals or take them seriously.

320. Another possible obstacle when wanting to extend fundamental rights to certain animals is the current account of the institution of legal personhood. The first problem is the current definition of this institution. Legal personhood means to have the ability – according to the law – to hold rights and bear duties. The inability of animals to bear duties was an argument put forward by the judges in the US and by several legal authors when refusing to extend fundamental rights to animals. However, a thorough reading of the courts' reasoning and legal doctrine shows us that this inability is not the real obstacle. The main issue is that legal personhood has always been linked with humanity. Legal personhood has been granted to the natural person and the juridical

person (to serve human interests). It is hence difficult to try to let the animal fit in a category that has been exclusively reserved for humans. Nor is it desirable. Humans have similarities with animals but also several dissimilarities.

321. If we know that legal personality is something that is granted by the law but preserved for humans, then we would need to find a solution to extend fundamental rights to non-humans. The idea of disentangling legal right-holding from legal personhood offers an interesting train of thought. From a conceptual point of view, a new category between legal objects and legal subjects should be created because animals fit under none of them. Legal scholar PIETRZYKOWSKI proposed that we should consider animals as 'non-personal subjects of law'.

Section 2: The fundamental rights aspect in practical terms

322. When wanting to determine which animals 'deserve' fundamental rights. There could be followed two approaches. The first approach is followed by animal rights lawyer, WISE. This approach is based on the current account of legal personhood. WISE tries to argument in front of the US courts why certain animals are very similar to humans based on their 'practical autonomy'. In my opinion, this 'personification' of animals is not an answer when wanting to rethink the current status of the animal. Animals do not fit in the category of persons, regardless of how smart they are. While some great apes may be treated as persons, most vertebrates lack the awareness of their own agency but it does not diminish the intrinsic value of their lives. Although that I have a tremendous amount of respect for WISE, despite more than 20 years of efforts, the practical effects remain very modest. Moreover, the legal trends in the legislation try to rethink the animal's status for every sentient being and not only for the few smartest species on this earth. Therefore, the second approach should be followed when wanting to extend fundamental rights to animals. This approach is based on the alternative account of legal personhood (*i.e.* the disentanglement of legal right-holding from legal personhood). If we stop to trying put animals in a certain category where they don't really fit in, we will realize that we need to create a new category. Consequently, all animals that are sentient and that have the ability to possess "*beliefs and desires*" should be extended fundamental rights and be considered as 'non-personal subjects of law'.

323. There are certain fundamental rights that are necessary in order to protect the animal's interests. However, the most important aspect is the right to be taken into account. So, legislators and judges should acknowledge that animals have certain rights. However, animals are still not on the same level as humans. There will be some cases where the human's interests will prevail. Hence, it is the task of the legal practitioner to find a solution to balance both interests. In order to effectuate this balancing exercise, three criteria have been proposed to limit the animal's fundamental rights (*i.e.* utility, necessity and proportionality) in some cases.

Section 3: Critical note on the Belgian legal framework and recommendations

324. This section provided a critical note on the current Belgian legal framework. The main point of criticism is that the current position of the animal is not adequate anymore since it will render every balancing exercise (between humans and animals) meaningless. Another point of criticism is the lack of interest that exists among Belgian legal scholars to rethink the position of the animal.

325. To conclude, this thesis ended with small recommendations that could help in extending fundamental rights to animals.

PERSONAL CONCLUSION

"Every great movement must experience three stages: ridicule, discussion, adoption" – John Stuart Mill

326. At this point in time, we find ourselves in the second stage. Times where people would laugh about granting rights to animals are behind us. I hope that this research can open up minds and hearts in order to develop a proper legal status for the animal. The law is not static and is continuously developing. It is hence possible that different categories of legal personalities will emerge and be recognized by law.[573]

327. I am aware that in order to preserve and protect animals all over the globe, – and ourselves and the planet we share with them – we should strive for a global change of the animal's status. However, we should not wait for an initiative on European or international level. We should start with our own country first.

[573] "*The law can do anything, except transforming a man into a woman*" (Free translation) – F.G. SCHELTEMA. In Dutch: "*De wet kan alles, behalve van een man een vrouw maken*". However, even this should be put into perspective with the upcoming transgender rights.

DUTCH SUMMARY

Het Belgisch recht maakt een onderscheid tussen enerzijds rechtsobjecten en anderzijds rechtssubjecten. Onder de eerste categorie vallen de 'goederen' en onder de tweede categorie de 'personen'. Echter, dieren die *de facto* noch goederen noch personen zijn, vallen dan maar onder de eerste categorie. Een belangrijk gevolg van deze tweedeling is dat dieren vandaag geen 'echte' rechten kunnen hebben. Deze thesis onderzoekt of dat dieren bepaalde rechten zouden moeten hebben. Indien deze vraag bevestigend beantwoord kan worden stelt zich de vraag hoe dat deze rechten kunnen worden toegekend binnen ons rechtssysteem. Deze vraag is bijzonder relevant aangezien de wereld de rechtspositie van het dier is aan het herzien. De meest prestigieuze universiteiten onderzoeken deze materie.

Het eerste hoofdstuk van deze thesis zal de opkomende stroming van dierenrechten in kaart brengen. Aangezien de juridische wetenschap hand in hand gaat met de filosofische en historische wetenschap, zullen ook deze twee kort benaderd worden in deze thesis. Eerst en vooral zal er worden aangetoond dat het standpunt van de maatschap ten opzichte van het dier geleidelijk veranderd is. De tijd waarbij de illusie heerste dat een dier louter een 'machine' was, ligt achter ons. De wetenschap heeft tijdens de periode van de Verlichting bijgebracht dat dieren veel gelijkenissen hebben met mensen. Ook somt deze thesis verschillende filosofische stromingen op die de positie van het dier in onze maatschappij proberen te verklaren. Vervolgens volgt er een analyse van de tendensen in zowel de rechtspraak als wetgeving op Europees en internationaal niveau. Er zal blijken dat de tendensen in de wetgeving zich vooral voordoen in Europese landen. De tendensen in de rechtspraak daarentegen zijn vooral kenbaar in Amerika. Langs de ene kant proberen advocaten in Amerika aan te tonen dat *bepaalde 'slimme' dieren* als rechtspersoon erkend zouden moeten worden. Zij zijn ervan overtuigd dat enkele dieren namelijk sterk op de mens lijken en daardoor bepaalde fundamentele rechten moeten bezitten. Langs de andere kant herdenken Europese landen de rechtspositie van *dieren in het algemeen.* De wetgevers in Europa zijn er terecht van bewust dat de huidige rechtspositie van het dier als goed en dus als rechtsobject niet meer het standpunt van de maatschappij weerspiegelt. Daarbovenop worden door deze huidige rechtspositie de ontwikkelingen in de wetenschap genegeerd. In het derde deel van dit hoofdstuk volgt er een weergave van het begrip 'fundamentele rechten'. Er zal blijken dat deze rechten worden toegekend puur op basis van het 'mens-zijn'. Deze fundamentele rechten willen ervoor zorgen dat mensen een 'menswaardig' leven kunnen leiden. In het laatste deel zal er geprobeerd worden om een definitie te formuleren van 'dierenrechten'. Voor dit onderzoek is een concrete definitie niet bijzonder relevant. Maar er zal niettemin blijken dat er vandaag veel verwarring bestaat over dit begrip. Daarom zal er geconcludeerd worden wat er precies bedoeld wordt met dierenrechten in het kader van dit onderzoek.

Het tweede hoofdstuk bestaat uit een analyse van het huidige rechtskader van het dier in België. Meer specifiek, de concrete rechtspositie van het dier zal hieronder worden geanalyseerd. Er zal

naar voor komen dat dieren drie verschillende 'statussen' kunnen hebben. Afhankelijk of ze al dan niet onder iemand zijn of haar eigendom vallen, zullen dieren beschouwd worden als (i) roerende lichamelijke goederen of (ii) onroerende goederen door bestemming of (iii) *res nullius*. Ongeacht tot welke categorie dieren behoren, ze worden door de wet beschouwd als goederen (en bijgevolg als rechtsobjecten). Dit wordt vandaag bekritiseerd. Er zijn enkele wetsvoorstellen geweest om het dier als een 'levend wezen met gevoel' te erkennen. De Belgische wetgever heeft deze kritiek en de internationale tendensen niet naast zich neergelegd. In het Nieuw Burgerlijk Wetboek zal er – hoogstwaarschijnlijk – worden opgenomen dat dieren levende wezens met gevoel zijn. Maar dit is louter een symbolische toevoeging die niets aan de huidige rechtspositie van het dier zal veranderen. Het dier blijft een goed en een rechtsobject. Dit hoofdstuk zal uiteindelijk afgesloten worden met een weergave van enkele gevolgen van deze huidige rechtspositie. Een belangrijk gevolg is dat dieren het voorwerp van een eigendomsrecht kunnen uitmaken.

Het laatste hoofdstuk zal concreet analyseren op welke manier fundamentele rechten aan dieren kunnen worden toegekend. Eerst en vooral zou de zogenaamde '*legal wall*' doorbroken moeten worden. Er heerst namelijk een juridische muur tussen de rechtsobjecten en rechtssubjecten. De dieren horen naar mijn mening in geen een van deze twee categorieën thuis. Een eerste stap voor het toekennen kennen van fundamentele rechten aan het dier, is de herziening van de huidige status als 'eigendom'. Hieraan zijn veel (rechts)gevolgen aan verbonden. Zolang het dier aanzien wordt als 'eigendom', is het moeilijk om de intrinsieke waarde van het dier te erkennen. Een tweede stap zou vervolgens zijn om 'het recht hebben' los te koppelen van het huidig concept van rechtspersoonlijkheid. De wet bepaalt wie rechtspersoonlijkheid kan en zal bezitten. Dit betekent dus ook dat de wet bepaalt aan wie rechten kan worden toegekend. Het probleem is niet zozeer dat dieren geen plichten zouden kunnen dragen maar eerder het huidig concept van rechtspersoonlijkheid. Dit concept is altijd geassocieerd met de mensheid. Dit brengt ons in moeilijkheden als wij een niet-mens bepaalde rechten willen toekennen bv. dieren of kunstmatige intelligentie. Er kan niet ontkend worden dat een dier bepaalde gelijkenissen heeft met de mens. Maar er kan ook niet ontkend worden dat wij verschillend zijn dan dieren. Om deze reden, is het aangeraden om een tussencategorie te ontwikkelen waaronder bepaalde niet-mensen kunnen ressorteren. Een tweede deel van dit hoofdstuk zal analyseren op basis van welk criterium dieren rechten zouden moeten hebben. Deze vraag kan beantwoord worden vanuit twee invalshoeken. De eerste mogelijkheid zou erin bestaan om het huidige begrip van rechtspersoonlijkheid te behouden. Er zou dan geargumenteerd kunnen worden dat bepaalde 'slimme dieren', gebaseerd op hun niveau van '*practical autonomy*', zo sterk op de mens lijken dat zij bepaalde rechten verdienen. Maar dit zou compleet de tendens in de wetgeving ontkennen alsook de intrinsieke waarde van de andere dieren. Zoals gesteld door BENTHAM "*the question is not can they reason nor can they talk but can they suffer*". Naar mijn mening verdienen niet enkel de 'slimste' wezens rechten maar ook al de dieren dat 'gevoel' bezitten. Volgens de huidige ontdekkingen in de wetenschap, zouden normaal functionerende zoogdieren en vogels hieronder vallen. Er zouden bepaalde fundamentele rechten aan deze dieren kunnen worden toegekend. Maar het belangrijkste is dat de belangen van

de dieren in overweging worden genomen. De belangen van de dieren zouden dus ook afgewogen kunnen worden tegen die van de mensen. Bijvoorbeeld het plezier van de mens zou niet mogen primeren boven het leed van een dier. Om dit te kunnen afwegen, kunnen er drie specifieke criteria worden voorgesteld. De nuttigheid, de noodzakelijkheid en de proportionaliteit zouden moeten worden afgewogen bij een beperking aan de fundamentele rechten van het dier. Dit hoofdstuk sluit af met een kritische noot over de huidige rechtspositie van het dier en met korte aanbevelingen. Na dit onderzoek kan er ook geconcludeerd worden dat er een juridische leemte bestaat wat betreft de doctrine over dierenrechten. De Belgische artikels die deze materie onderzoeken, kunnen jammer genoeg op één hand geteld worden.

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