

***Animals, Rights and Property:
The (Un)attachment of Pets in Israeli Law***

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I. Introduction

In recent years there has been an increasing interest in the legal status of animals in general, and of pets (companion animals) in particular. The question arises as to whether pets should be considered property, and what the legal consequences would be.

Generally, the question of animals as property is related to sale or gifts, abandonment or compensation for damages. Less attention has been paid to the status of the animal in relation to its possible attachment in the framework of an execution file. Let us suppose the following case: John has a dog, but he has also debts. A creditor with a debt against John opens an execution file against him, and in order to collect the money attaches the property. He also wants to attach the dog in order to sell it and have his debt paid. How should the law view this possibility? The Israeli Execution Law was amended in 1999 to include a prohibition for the attachment of pets.

Although at first glance this amendment may seem insignificant, it raises a number of problems relating to the place of animals in society and the evaluation of our attitudes towards them.

The discussion of this issue could take place on two levels. The first one is the normative sphere, i.e., an analysis of the rule and coping with the problems of interpretation in connection with the rights of the debtor, and generally with the person that may be separated from his pet. On the second level, we face the question of to what extent this exemption belongs to the realm of the recognition of rights for animals. In the following discussion, I will attempt to explain why this prohibition is justified on account of the special relationship between a man and his pet.

After characterizing attachment, and referring to the question of the assets protected from the execution, I will deal with the definition of “pet” according to the Israeli execution law. A central part of the discussion will focus on the criteria used to characterize the exemption from attachment of pets, and the way the law protects the particular relationship between the animal and his owner. In understanding the rule, particular attention will be paid to the question of the pet’s sentimental value. Finally,

I will deal with the possibility of understanding the rule as a defence to animals and the influence of the rule on the status of animals as property. In my discussion of Israeli law I will also refer to other legal systems in which a similar solution is found.

II. Attachment in Execution Law

Execution is the process whereby a creditor who has rights against a debtor, may materialize the debtor's property in order to collect the money he is entitled to, on the grounds of a judgement or a bill. Attachment¹ may be defined as legal action taken against the owners of assets, or those who hold them, in order to limit the negotiability of the assets and their use, so that the creditor can settle the debt that he is owed.² The process is founded on the idea that the assets of the debtor constitute a security for the realization of the rights of the creditor, which are expressed in the judgment.³ As part of the execution process, attachment has two principle functions: firstly, to be used as a tool in order to ensure the rights of the creditor and to prevent the concealment of property by prohibition of transfer of the assets from the debtor to another body.⁴ Secondly, to enable the realization of assets as a means for collection of the monies that are owed to the creditor by virtue of a court decision, a bill of exchange, a promissory note or a cheque⁵.

In order to understand the status of pets in the attachment process, it is important to make a distinction between assets that may be attached, and assets exempt from

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¹ Let us distinguish between attachment and garnishment. Attachment means a remedy by which a plaintiff acquires a lien upon the property or effects of the defendant for the satisfaction of a judgment which the plaintiff may obtain in an action, or the act of taking, apprehending or seizing property. The term "garnishment" would be reserved for the process which permits a creditor to enforce the payment of a debt or claim through the property or money of the debtor held by another, execution of money or interest that are in the hand of third persons. See *American Jurisprudence* 2d. Vol. 6 (1999) at 477 ff.

² See D. Bar Ophir, *Execution of Judgments - procedures and practices*, 4th ed. Tel Aviv, 2000, p. 237 (Hebrew); L. Rosenberg, H. Gaul, E. Schilken, *Zwangsvollstreckungsrecht*, 11. ed. München, 1997, pp. 830 ff.

³ S. Mazzamuto: *L'Esecuzione Forzata*, Torino, 1998, pp.12 ff.

⁴ I relate here to attachment in execution, although there is also attachment in the civil procedure. This is what is known as provisional attachment. This function is expressed in provisional attachment according to the Civil Procedure Regulations (1984) and in existing attachment in execution.

⁵ Section 81 (a) of the Execution Law, 5727 - 1967 [hereinafter "the Execution Law"].

attachment. In every legal system we find a list of articles that cannot be attached in order to preserve the debtor's dignity, but also to allow him to continue working and in this way to repay his debts.⁶ Thus for example, it is accepted that food required for the subsistence of the plaintiff and the members of the family, bed apparels or household effects essential for the debtor and his family, articles needed for devotional purposes, instruments required for the exercise of the profession or a certain sum of the salary or the wage are generally exempt from attachment⁷.

Since in the execution of property, there is a conflict of interests between the rights of the debtor and of the creditor, the law tries to find a balance via the determination of immune assets so as to preserve the ability of the debtor to continue with his life and be able to work in his occupation. In Israel, the decision of which assets are to be exempt from attachment has been guided by a minimalist approach: this means that only and exclusively the most basic assets are retained and thus certain needs of the debtor, such as education and culture (except for objects of ritual purposes),⁸ are not taken into account.⁹ Furthermore, the sentiments of the debtor are absent from the legal considerations in establishing what sort of objects should be exempt from attachment. On this point, an exception has been made with the addition of pets to the list of assets that are exempt from attachment. By determining the non-attachment of companion animals the Execution Law departs from the utilitarian criteria for the sake of other values like the sentimental value towards animals.

⁶This is clear in the case of retention of the wage for the debtor. Only a part of the salary is garnished and some sums are allowed to remain in the hands of the debtor, not only to ensure his minimal subsistence but also to encourage him to continue to work, for, if his entire wage is attached then the debtor may feel that it is more worthwhile to abandon his work. Regarding the Israeli Law see Section 50(1) of the Execution Law, which refers to section 8 of the Wage Protection Law 5718-1957 that refers to section 5 of the Income Assurance Law 5741-1980.

⁷ See for example Israeli Execution law, sec. 22, Italy, CPC, sec 514, Germany, ZPO, sec 811, Oregon, ORS 18. 845 (2001) title 2, chapter 18; Maryland, Code Ann. 11-504, title 11 subtitle, 5; Vermont Court Rules, Form 34.

⁸ The recognition of religious and ritual needs as criteria for prevention of attachment is accepted in most legal systems. See for example in Italy, section 514(4) of the Civil Procedure Code.

⁹ This differs from the situation in other legal systems where study books for example are exempt from attachment, as in Germany (ZPO sec. 811(10)) and in Spain (The Civil Procedure Code sec. 1449). With regard to execution law in Spain see B. Cremades & E. Cabiedes: *Litigation in Spain*, Madrid, (1989) pp. 356.

III. The Position of the Execution Law Regarding Animals

The execution law is not the only Israeli law that refers to animals.¹⁰ With the exception of laws related specifically to the protection of animals, the consideration of animals appears in the legislation in various contexts.¹¹ For example, animals appear in laws concerning religious duties,¹² people's health,¹³ diseases,¹⁴ or tort law,¹⁵ and we also find animals in the law of execution.

In its original text, the Israeli Execution Law relates to animals as part of the list of movable property exempt from attachment. According to the letter of the law, the animals exempt from attachment are those serving as tools, without them the debtor cannot pursue his occupation, his craft or profession.¹⁶ According to section 22 (b) it is still possible to attach the animal if its value is unusually high, and when the debt is the result of the purchase of the animal.¹⁷ The idea that guides the law is the protection of animals as part of the person's estate or the basic livestock¹⁸ in order to ensure the subsistence and the possibility of work for the debtor.¹⁹ This conception is not particular to the Israeli law and we find it in other legal systems as well, for instance in France, where the old civil procedure code allowed the debtor to remain

¹⁰ With regard to the definition of what is an animal see for example D. Favre & M. Loring: *Animal Law*, Westport, Conn., (1983), pp.5 ff.; P. Frasch, S. Waisman et al.: *Animal Law*, Durham, (2000) pp.26 ff.

¹¹ In Israel we find the Protection of Wild Animals Law 5726-1965; Prevention of Cruelty to Animals (protection of animals) Law 5755-1994; Prevention of cruelty to Animals (experiments on animals) 5755-1994.

¹² See the Pig Breeding Prohibition Law 5722-1962.

¹³ Animals Diseases Order (new version) 5745-1985, Regulations for Licensing of Businesses (Suitable sanitary conditions for the marketing of food) 5734-1973.

¹⁴ See the Rabies Order 1934.

¹⁵ See Torts Ordinance, which deals, among other things with damages caused by animals. In 1996 the Torts Ordinance was reformed to include the strict liability in the case of corporal damages caused by dogs (section 40 and onwards in the Torts Ordinance).

¹⁶ Section 22(a) (4) of Execution Law.

¹⁷ See section 22(b) of the Execution Law.

¹⁸ All legal systems admit, however, that it is possible to attach livestock kept for purposes of sale.

¹⁹ We will see that the protection of the animal as an instrument of work may raise questions also today. See Section IV 2 below.

with a certain number of cows, horses or sheep.²⁰ This list does not exist today, yet nevertheless the law guarantees the debtor the protection from attachment of the animals aimed at the subsistence of the debtor.²¹

The second case in which animals are protected against attachment in Israeli Law appears in the addition to sub-section (5) of section 22(a) enacted in 1974,²² according to which it is not permissible to attach utensils, tools and “animals” that are required for a disabled person because of his disability.²³ The clearest case of this is that of guide dogs for the blind.²⁴ Here the legislator was not trying to protect the animal or the sentiments of the debtor, but to look after the needs of the disabled person, and to grant protection of his property essential for his functioning, in this case the animal. In both these cases, the law sees the animal as a sort of “tool”, an instrument of assistance for work, or a tool which ensures the mobility and functioning of the disabled person.²⁵ In the past, the relationship of man to animal was solely utilitarian, in other words the animal constituted a part of a person’s property,²⁶ and its importance was determined according to its utility.

In 1999 The Israeli Execution Law was amended. The addition of Amendment 19²⁷ introduced a number of alterations to the Law, among others, the addition of sub-section (6) to section 22(a), establishing the prohibition of attachment of companion animals. From a study of the discussions that took place in the committee that

²⁰ We find the same principle also in Germany, ZPO 811 (3): The debtor may choose between one cow or two pigs, sheep or goats. These rules are based on a concept of agricultural society where animals are the basis of human economy and have nothing to do with the sentiments of the debtor or the protection of the animal.

²¹ See French *decret* 31/7/1992, sec. 39. The change was due to the transformation in the rural character of French society. See M. Donnier, *Voies d'exécution et Procédures de Distribution*, Paris, 1999, p. 91.

²² Law of State of Israel, 748.

²³ We find the same solution in France: *Decret* 31/7/1992, sec. 42.

²⁴ But the law does not refer exclusively to dogs; there are other animals, for instance monkeys, that aid people with various physical disabilities.

²⁵ From this point of view the rule reflects the Cartesian idea of seeing animals as tools. See R. Descartes, *Discours de la Méthode*, Paris, 1991, pp. 124 ff.

²⁶ There are those who claim that the legislation that developed concerning the protection of animals was the product of a need to protect property and not the animals. See S. Brooman & D. Legge: *Law relating to Animals*, London, (1997) at 50.

²⁷ Law of State of Israel 1708, p. 138.

prepared the law, we learn that there was no significant disagreement between the initiators of the law (two members of the Israeli Parliament, and the representatives of the Ministry of Justice) with regard to the essence of the prohibition against attachment of pets.²⁸ It was more difficult to determine what should be included in this term. In their original draft, the initiators of the law avoided defining a pet, and this was in order to prevent the attachment of pets completely, but the Ministry of Justice demanded that a pet should be defined, in order to prevent a sweeping exemption.

The text was finally drawn as follows:

- 22(a) The following movable property cannot be attached:
 - (. . .)
 - (6) Pets – in this section a pet is an animal that is present in the home or premises of the debtor and that is not used for business of a commercial character.

In fact, the Israeli section is similar to the German sec. 811c. ZPO that establishes that the animals that are in the area of the house are not attachable, short of those aimed at commercial activities. But where the price of the animal justifies it, the execution judge may be entitled to order the attachment, taking into account the animal's interest.²⁹ The definition of the Israeli law should be analyzed. Since its definition of the pet is very particular, it leads to some problems of interpretation.

²⁸ The discussion took place in the sub-committee of the Constitution, Law & Justice Committee for amendments of the Execution Law. See the protocol from the date of 10.12.1998 (on file by the author).

²⁹ "1) Tiere, die im häuslichen Bereich und nicht zu Erwerbzwecken gehalten werden, sind der Pfändung nicht unterworfen. 2) Auf Antrag des Gläubigers läßt das Vollstreckungsgericht eine Pfändung wegen des hohen Wertes zu, wenn die Unpfändbarkeit für den Gläubiger eine Härte bedeuten würde, die auch unter Würdigung der Belange des Tierschutzes und der berechtigten Interessen des Schuldners nicht zu rechtfertigen ist." It is interesting to note that the approach adopted by the Israeli legislator is quite similar to that of the German legislator. I talked with M.K. A. Poraz (one of the initiators of the law) and he was not acquainted with the German solution, neither were the members of the Ministry of Justice that worked on the drafting of the section.

IV. What is a Pet?

Even those who do not have a pet cat or dog in their home seemingly know what is meant by the word. However the definition or characterization of a pet may be vaguely sketched especially when attempting to pin legal consequences to this term.

It is an accepted practice to distinguish between “wild animals” and domestic ones.³⁰ In Israel, the legislator defined a wild animal as an animal that by nature is not found in the vicinity of man.³¹ And thus animals that are not wild animals are considered to be within the bounds of a domesticated animal.³² This distinction relates to the character and type of animal, but it does not mean that a person cannot own an animal that according to its nature is a wild animal. For instance, monkeys are by nature wild animals but they are sometimes owned by a private person who keeps them in his home, or exotic birds that are domesticated and may be qualified as pets.³³ Otherwise, animals that are kept in a zoo are not considered to be domesticated animals, but captive wild animals.³⁴

A pet (or companion-animal, as it is referred to) is an animal domesticated for social reasons.³⁵ Not all animals that are found in the vicinity of man are within the bounds of a pet, and - as mentioned, there are some animals that generally may be considered wild animals but that are owned by a person, and considered as pets. On the other hand, animals that by nature are domesticated may exist without owners. Not every domesticated animal is a pet. Animals used for food – such as cows or chickens - are domestics, but they should not be viewed as pets,³⁶ although there may be a situation

³⁰ See P. Frasc, S. Waisman et al., *supra* note 10 at 44 ff.

³¹ Section 1 of the Protection of Wild Life Law 5726-1965. This definition is slightly different from the definition appearing in section 2 of the Torts Ordinance according to which a wild animal is that which is not encaged or held under the supervision of a person.

³² See the second addendum to the Animal's Disease Ordinance (new version) 5745-1985.

³³ *Hodges v. Manon County, Florida* 730 So. 2d. 786 (1999).

³⁴ See H. Hemmer, *Domestication* (trans. N. Beckhaus) Cambridge, (1990) pp.1 ff.

³⁵ R. Huss, “Separation, Custody, and Estate Planning Issues relating to Companion Animals”, 74 *Univ. Colorado Law Review* (2003) 181-240 at 195.

³⁶ See A. Shalev, *The Furry Therapist*, Tel Aviv, 1996 p.21 (in Hebrew). Can farm animals (such as chickens, turkeys or milking cows) that are held in order to provide for the debtor and his family, be attached? In Germany the answer is negative. See ZPO sec. 811(3).

in which a person keeps cows as pets.³⁷ The definition of an animal as a domesticated animal is in fact a cultural definition and not biological.³⁸ To decide which sort of animal should be characterized as pet we may apply to a range of criteria such as: whether the animal receives personal care, whether it is related to in an emotional way, whether it lives in the vicinity of its owner and generally constitutes part of his daily life.³⁹ This list is not definitive and may change from place to place, since in various cultures different animals are kept as pets.

In countries like Britain or the United States,⁴⁰ we find special legislation regarding pets. In Israel, short of the Execution Law, we find the term “pet” only in the Prevention of Cruelty to Animals Law (protection of animals) 1994,⁴¹ but this reference does not include any definition of a pet. So the only operative definition regarding pets is the one in Execution Law, which is a definition that does not take into account the nature of the animal. Accordingly, the “nature” of a pet for the purposes of execution of judgments is based on two principles: 1.) The location of the animal 2.) The purpose of the animal.

1. The Location of the Animal

According to the law, a pet is an animal found in the home of the debtor or in his premises [‘chatzer’ in hebrew]. The clear intention is to protect the animal, who lives with the debtor and with his family, from attachment.⁴² If we compare this with the solution offered by the German law, we shall find that there too, it is not possible to attach animals that are to be found “in the area of the home”.⁴³ In other legal systems

³⁷ Compare *Smith v. State Farm Fire* (Louisiana App. 1980) 381 So. 2d. 913.

³⁸ With regard to this matter, in an English ruling, a camel was defined as domesticated. See *McQuacker v. Goddard* (1940) 1 KB 687, 1 All Eng. Rep. 471.

³⁹ D. Favre & M. Loring, *supra* note 10 at 13.

⁴⁰ See for example The Pet Thefts Act, 7 USC 2158.

⁴¹ Although this is only as a side issue regarding the matter of legislation of rules regarding the holding of pets in shops (clause 19 of the Law).

⁴² I shall discuss this subject in detail below.

⁴³ See ZPO sec. 811c(1) – “hausliches Bereich”; see also U. Gottwald, ed.: *Zwangsvollstreckung*, Berlin, (1999), p.472.

like in France, there is no reference to the location of the animal, and so any pet is non-attachable.⁴⁴

The very fact of keeping the animal in the home or premises constitutes an elementary component of the definition of the animal as a pet, and thus even animals that are not within the bounds of a “pet” will be included in this category because of their being in the home or premises of the debtor. This is so since there is a clear-cut relationship between the place where the animal is located, that is, in the house of the owner, and the existence of an emotional or sentimental relationship towards it.

The term “premises” is meant to include structures or areas that are not adjacent to the debtor’s home: even an enclosure that is located outside the home may constitute premises.⁴⁵ The question may be posed as to whether a pet that for various circumstances lives outside the home or premises of the debtor, in another home or in a place of care for a long period, may be attached? Since according to the letter of the law such an animal is not within the “home or premises” of the owners, it could therefore be attached. This is the case where the animal is under a bailee, like in the event that the owner is on holiday, or due to some reason cannot leave the pet at home. It is not physically in the debtor’s premises, but there is no reason to see this fact as severing the sentimental connection of the human towards the pet.⁴⁶

If we try to protect the relationship between man and pet, the interpretation of what is the house of the premises of the debtor should be rather flexible, and, as a matter of fact, it may be possible to find cases in which the debtor’s pet is kept outside the home and even outside his premises and yet it does not lose its characterization as a pet. Thus, for example the home includes not only the permanent residence but also a summer home or temporary residence. And what about the attachment of the animal which is kept at the debtor’s workplace? The workplace is not within the bounds of the debtor’s home. However the fact cannot be ignored that people often keep

⁴⁴ See sec. 39 *Decret* 31/7/92: “Les animaux d’appartement ou de garde”. French law does not define of a pet.

⁴⁵ In American Law the meaning of “premises” will be determined by the context and by the circumstances. See for example *Gibbons v. Brandt* 170 F. 2d. 385; *Commeaux v. State* 42 SW 2d 255; *Franz v. City of New Rochelle* 124 NYS 2d. 525.

⁴⁶ Perhaps the solution could be different in a case where the animal is put indefinitely under the custody of other person and so the sentimental relationship with the owner is weakened.

animals in their workplace (for example guard dogs). The sentiments towards animals are independent of the fact that they may be located in the work place.⁴⁷

In general, I do not believe that a narrow interpretation should be given to the terms “home” or “yard,” since in the end it is not relevant *where* the debtor keeps his animal but *why* he keeps it. Therefore, in my opinion, greater weight should be given to the second part of the rule, i.e., the affinity between the animal and its owner, and its use for “an occupation of a commercial character”. This may raise several questions.

2. The Purpose for Which the Animal is Kept

At first glance, the question why a person keeps a companion animal seems superfluous. Sentimental values, companionship and so on, are generally the grounds for having companion animals at home. Thus it seems logical to argue that one who has an animal for exclusively economic reasons should not be protected against the attachment.⁴⁸ Nevertheless, things are not so simple, since the very definition of a “business activity” [‘hisuk ba’al ofi mischari’ in Hebrew] is not so simple.

A Business of Commercial Character

In principle, when talking about an occupation of a commercial character, we refer to a permanent activity from which the person makes a living. Primarily, this embodies an intention to allow the attachment of pets intended for sale – and more specifically, animals that are kept in shops or animals that constitute part of a certain stock. Accepting that the law intends to protect the relationship between the pet and the owner⁴⁹ it seems clear that people who keep animals for sale cannot claim this defence since they lack sentimental relationship, and so it seems logical to allow the attachment. On the other hand, the attachment does not cause the pet suffering since it is the same to remain in a cage within the shop or be conveyed to another place, and

⁴⁷ The problem may appear regarding big work places where dogs belong to the firm and are kept by the workers. The sentimental relationship is here between the worker and the animals and not between the animal and the owner, who is a juristic person.

⁴⁸ In this point it is clear that the approach of the Israeli law is done from the point of view of the relationship debtor-creditor and not from the point of view of the animal.

⁴⁹ About this relationship see below, section V 2.

to the animal it makes no difference whether it is sold in an auction within the framework of the execution process or in a private sale.⁵⁰

But pet shops are not the only case that can be defined a “business of commercial character” and we should be aware that in certain circumstances basing the attachment of the animal on its relationship of commercial activity, may lead to some dubious solutions. Take for example a valuable racehorse. Is participation in a competition in order to win prizes for the appearance or breed of the animal considered a commercial occupation? If we give a positive answer, the conclusion should be that when a debtor keeps the horse in his yard without using it to compete in competitions, it is not possible to attach it in any case, but, in contrast, if the horse is intended to race or for activity of a commercial nature, it will possible to attach it. I think this conclusion is problematic, since if we understand the law as protecting the sentimental relationship between owner and animal, this relationship may exist with a racehorse as well, and should therefore not be attached.

Interpretation of the law should not be made according to the letter of the law, but in order to try to find out the purpose of the law.⁵¹ I do not think that participation in a competition is within the bounds of a “commercial occupation.” I do not think that any economic activity connected with the animal should be grasped as being at odds with having the pet due to a sentimental relation. But another problem comes to light: the limit between the definition of an animal as performing activities of a commercial character which admits attachment, and the animals with which the debtor carries out its profession, which is not attachable by Execution law. I will elaborate this point.

The Animal for Work

According to the Israeli Execution law, the question may arise regarding pets held for carrying out the debtor’s profession. As I pointed out before, if the animal is used for the work or the profession of the debtor (such as a an animal trained for performances) it is not protected by force of sub-section (6) (since it is used for an occupation of a commercial character), but at the same time it cannot be attached

⁵⁰ Regarding the question from the animal’s perspective see below VI.

⁵¹ See A. Barak, *Judicial Discretion*, Yale 1989, passim.

according to sub-clause (4) which protects the animal needed to carry out the debtor's profession. For example, the owner of a parrot that participates in performances uses the animal for an occupation of a commercial character, which excludes the protection given by section 22 (a) (6). At the same time, however, the parrot constitutes the source of his income, without which the debtor is unable to carry out the performance, which is the grounds of the protection given by section 22 (a) (4). The same is true for a riding teacher that keeps a horse for riding-lessons.⁵² It should be taken into account that these sections do not entirely overlap, since according to sub-section (b) it is possible to attach an animal whose price is above a certain amount,⁵³ while with regard to pets, this determination has no validity since the letter of the law does not determine any limitation regarding the sum for the pet.

It would have been preferable in my opinion, if the legislator had chosen clearer wording that would allow the attachment of pets if they are part of a stock intended for sale. However the legislator did not adopt this solution, and we are left to cope with the various cases in which a pet may be the subject of a commercial occupation. As a matter of fact, the gap that is created between sub-section (4) and sub-section (6) is extremely narrow and thus there is no point in searching for a niche in which domestic pets are used as tools of work. The fact that a person has a companion animal and this animal is used for some sort of commercial activity (or if the animal is used for the occupation of the debtor) should not justify its attachment.⁵⁴

Having a Number of Pets

What about a debtor who keeps a number of pets? What is the position with regard to attachment? According to the opinion of Judge Bar Ophir, an expert in Execution law, when a debtor has a number of valuable animals then all the animals may be attached, excepting one of them. According to this opinion, this is the obligatory solution since the defence against attachment of pets must be provided within reasonable limits and the determination of this for each case will be made by the Chief

⁵² In any case, the earnings resulting from the work or activity of the animal may be attached.

⁵³ See the Execution Regulations 5740-1979 section 50 (since in practice the sums have not been updated, they have no significant meaning).

⁵⁴ Regarding the grounds for justification see below in section V.

Execution Officer.⁵⁵ With all due respect I cannot agree with this interpretation. The wording of the law does not mention the number of animals or their value.⁵⁶ In my opinion, as long as the pet is not kept for commercial purposes, it cannot be attached. However, in the case that holding a large number of animals would constitute a commercial enterprise (as I noted when talking about a stock of animals), the court should be entitled to authorize the attachment according to the circumstances.⁵⁷ Furthermore, owning several animals may indicate the economic situation of the debtor and his ability to pay the debts, and this point should be taken into account by the Chief Execution Officer in order to determine the monthly instalment that the debtor should pay. In any case, I see no problem in the Chief Execution Officer recommending to the debtor to sell some of the pets, and use the income from the sale along with the saving of monthly expenses, for the payment of the debt.

Animal Breeding

How would we view animal breeding? Can it be considered “an occupation of a commercial character”? The rearing of a female animal often involves reproduction, however this has no significance regarding exclusion from the prohibition of attachment. And what should be the solution regarding the offspring that the animal produces? Should these also be seen as included in the prohibition of attachment? The answer must be positive, i.e. it is not possible to attach them, but if they are sold then it is possible to attach the sums that the owners receive for their sale.

In Conclusion

The Israeli law did not established the concept of the companion animal according to sociological or cultural patterns, but by establishing what sort of animals can be attached, if they fall short of the definition of section 22 (a) (6). According to the purposes of the law and in order to provide effective protection to the debtor, the prohibition of pet attachment should be excluded only in the case of being part of a shop’s stock, where the aim of the owner is to sell them. Unfortunately, the letter of

⁵⁵ Bar Ophir, supra note 2 at 254.

⁵⁶ See below, section V 2.

⁵⁷ As in Germany, where section 811(c) allows the judge, in certain circumstances, to authorize the attachment of pets.

the law is not clear enough, and we should wait until the courts decide regarding the scope of the prohibition facing a concrete case.

To understand the meaning of the rule regarding pets, it is important to pay attention not to what appears in the letter of the law, but precisely to what is lacking in the rule: there is no reference to the value of the animal.

V. The Value of the Animal, and the Debtor's Sentiment

According to section 22(a) (6) the Israeli law protects all pets, making no distinction as to their value. This solution is different from the solutions adopted in other systems. Thus for example in France, the Execution Regulations include domestic animals and guard animals in the list of articles exempt from attachment.⁵⁸ But the same regulation determines that an asset that is immune from attachment can be attached anyway if its value justifies this, or if it is non-essential for the debtor in consideration of its quantity or numbers and if this will not harm the feelings of the debtor.⁵⁹ In Germany, as well, the immunity of pets from attachment is not absolute, since the legislator grants the judge certain discretion to decide on the attachment of an animal that is very valuable.⁶⁰ A similar rule appears in some American jurisdictions, which recognize the exemption of attachment of pets, but nonetheless establish a monetary limit.⁶¹

In my opinion, the solution that was adopted by the Israeli legislator is justified, both from the point of view of the debtor's sentiments and from the point of view of the animal, as will be discussed presently.

⁵⁸ Section 39 of the Regulations from July 31st 1992. See J.Vincent & J. Prévault, *Voies d'Execution et Procédures de Distribution*, Paris (1995) pp. 74 ff.

⁵⁹ See section 39 above.

⁶⁰ See ZPO 811c(2) that gives discretion to the Execution judge to allow the attachment of an animal according to the request of the creditor if the value is high enough to justify this, if the non-attachment is liable to cause difficulty to the creditor and in consideration of the need to protect the debtor and his interests.

⁶¹ See for example, Oregon Revised Statutes, 18.845 (2001) establishing that domestic animals are exempt of attachment at a value not exceeding \$ 1000; Maryland, pet exempt up to \$500 (Annotated Code of Maryland 11-504).

1. Valuable and Valueless Animals

According to the explanations that were included in the draft law, the drafters did not intend to ignore the price of the animal: “[. . .] There is nothing in this draft to prevent the attachment of creatures that are not companion animals, and which have *a substantial economic value*.”⁶² Conforming to this, the intention was to distinguish between expensive pets and pets without monetary value, but this intention did not receive any expression in the Israeli law. The lawmaker preferred the use of the formula “business of commercial character,” which clearly does not include a reference to the market value of the animal.

In order to understand this lack of reference to the price of the animal we should take a step back and refer to the reasons that generally justify exempting certain assets from attachment.⁶³ These are basically two:

- 1) Injury to the basic needs of the debtor
- 2) Lack of tangible benefit to the creditor

It seems quite logical that the attachment should not be justified when the sale of the assets does not produce any benefit to the creditor, and at the same time causes irreparable harm to the debtor. The execution proceedings is, as a principle, aimed at collecting the debt, and so it should not harm values or sentiments when they have no real benefit to the creditor and are carried out as revenge. Indeed, in most legal systems the list of items that are not attachable are generally of little value, since there is no reason to leave the debtor without the minimal elements for subsistence, while the benefit to the creditor is practically negligible.⁶⁴

⁶² See the discussions in the sub-committee of the Law, Justice & Constitution Committee for the amendments of the Execution Law from December 10th 1998, p.5. (On file with the author - italics not in the original.) During the discussions for the preparation of the rules in Israel, the representative of the Ministry of Justice raised the possibility of granting the Chief Execution Officer discretion to attach pet animals in certain cases. This proposal was not expressed in the wording of the Law.

⁶³ Compare Bar Ophir, *supra* note 2 at 320 ff.

⁶⁴ The power to attach movables of high value is expressly recognized in French Law. See *Loi* 9-7-1991, sec. 14 (4). In American jurisdictions we find that the protection of movable property is limited to certain sums. For example, Vermont legislation protects motor vehicle of the debtor not exceeding \$2500, professional trade books or tools of the profession not exceeding \$5,000 (Rules of Civil procedure, Form 34). In Maryland, property of any kind,

These arguments may also be used as a justification for not allowing the attachment of animals, and it may be said that the main motivation for the legislation for the prohibition of attaching pets, was to prevent superfluous damage to the debtor. In most cases, the market value of pets is insignificant⁶⁵ or nonexistent. This is clear in the case where the companion animal is a stray cat that was “adopted” by the debtor, and the realization thereof will not bring any benefit to the creditor due to its lack of market value. It may even be presumed that if the price of the animal is negligible, the creditor will not attach it or at least will not realize the attachment, since the costs involved in the realization of the attachment, the holding of the animal, such as payment for the removal of the movable objects and their storage, may cause the sale to become unprofitable.

The objections to this argument are that in principle, the lack of market value does not always constitute an absolute defence against attachment. At least in Israel, articles that do not appear in the list of section 22 of the Law may be attached even if they lack value. We may even deduce from the lack of value of the articles in the list of Execution Regulations that the legislator did indeed expect cases where assets with an extremely low price would be attached.⁶⁶ Furthermore, it is well known, that a creditor often imposes attachment, even when he knows in advance that the possibility of realizing the asset is almost nonexistent, in order to exert pressure on the debtor. Sometimes simply the registration of the article as attachment may bring pressure to bear on the debtor, who does not know if the creditor intends to realize the attachment or not.⁶⁷ It can cause the debtor to cooperate with the creditor and to be more amenable to an agreement.

according to the election of the debtor, is exempt not exceeding \$ 3,000 (Courts and Judicial Proceeding Code Ann 11-504). In Oregon, household goods, furniture, radios, television sets are exempt of being taken not exceeding \$3000, books and pictures not exceeding \$600, jewelry not exceeding \$1,800 and a rifle or shotgun not exceeding \$1,000. (Oregon revised Statutes, 18. 845). As observed before, in the case of exemption from attachment of animals there are also limits to the value of the pet.

⁶⁵ See G. Francione: *Animals, Property & the Law*, Philadelphia, (1995) p.57.

⁶⁶ Regulation 61 (g) of The Execution Regulations 5740-1979 (In Hebrew).

⁶⁷ This is clear for example in the case of a Television set. The money the creditor may gain by selling the TV is not considerable, but the fact that the Television was attached may bring the debtor to try to find ways to achieve some sort of compromise with the creditor, and pay the debt.

From the standpoint of a creditor (perhaps not an overly scrupulous and sensitive creditor), the very attachment of a companion animal even if it has not a real value, may bring the debtor to pay the debt. The creditor may attach the pet not because he is really interested in “materializing” the value of the animal, but because he finds this way useful for “convincing” the debtor to pay the debt.⁶⁸ If so, the attachment here is not aimed at collecting the money, but at exploiting the affection of the debtor towards the animal. Here we have a rather solid justification for the prohibition: The attachment should not be admitted, since it shows *mala fides*,⁶⁹ or alternatively, it constitutes an abuse of the execution proceedings.⁷⁰ The legislator, balancing the interest of the debtor and the creditor, effectively ruled in favour of the debtor, wishing to prevent such a situation of a *mala fides* attachment.

These arguments may be convincing, but what will be said regarding animals of great value? Can the attachment be justified when the realization of the animal could be of benefit to the creditor? Let us suppose that the debtor has a very expensive bird, or a fine Siamese cat, whose market value is over the average value of other artefacts owned by the debtor. Why should attachment be prevented when it involves a valuable animal whose market price could justify the attachment proceedings? This question balances market value and sentimental value on the scale, and asks: When does one outweigh the other? Here, unlike the former case, we cannot talk about an “abuse” of the attachment procedure or lack of good faith, since the creditor may gain substantial revenues from the sale of the animal.

⁶⁸ This happens in rare cases. However, in discussions of the Law and Justice Committee prior to the first reading a case of attachment of a dog was mentioned.

⁶⁹ In Israeli law every juristic act should be made according to the principle of good faith, according to section 12 and 61 of Contract Law (General Part) 1973.

⁷⁰ I use the expression “abuse of rights” in the sense that the Continental law gives to it. Thus for example section 226 of the B.G.B.: “The use of a right is not allowed when there can be no other intention of the user than to cause harm to another”. See also the Italian Civil Code section 883, the Spanish Civil Code section 7(2), the Swiss Civil Code, section 2. The idea of abuse of a right is not common in Israel in the context within which I use it and “bona fides” may be used as a criterion for the determination of the behavior of the creditor. In the end the idea is similar: not to exploit the attachment proceedings as pressure on the debtor when it is known in advance that the realization of the asset will not bring any benefit, but that the injury to the debtor is in practice used as a lever to “encourage” him to pay the debt. In the matter of the abuse of a right see A.M. Rabello (ed.): *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions*, Jerusalem, (1997) pp.583 ff.

At this point, we discover the difference between companion animals and other assets - objects which are exempt from attachment - a difference that justifies the special treatment of pets. As I have explained before, the legislator usually defines assets that cannot be attached, and they are mostly things of no great value. Even when this concerns essential things such as food, the law may determine limits of time – for example nutritional needs for the existence of the debtor and his family for a period of 30 days – as a way to prevent a situation of hoarding beyond the immediate needs of the debtor.⁷¹ Moreover, even when the legislator does not explicitly determine the maximum price of the asset as a basis for immunity, judicial decisions take care to sketch the outlines of this matter. Thus it was decided by the Israeli courts that the immunity from attachment for a disabled person's vehicles should not prevent the creditor from attaching expensive vehicles, since a disabled person can make do with a vehicle that is of a lesser value.⁷² A debtor who has no means to pay his debts should adapt his level of life accordingly.⁷³

But the same criteria cannot be applied to a pet: no one can compel a person to “exchange” his pet for a cheaper one. As a principle, animals have peculiar value, since they are unique and irreplaceable.⁷⁴ This is what characterizes the uniqueness of the animal that finds expression in the sentimental value. Therefore, the reasons for the justification of the exemption should be sought in the importance of subjective value vis à vis the market value of the pet.

2. Objective Value - Subjective Value

Animals are personal property,⁷⁵ and as property they have value.⁷⁶ We should distinguish between two values that constitute the real value of a pet. One is the

⁷¹ See Israeli Law of Execution, sec. 22(a) 1, Italy CPC. Sec. 514 (3) (referring in both cases to food for one month).

⁷² Civil Appeal 2886/92 in *Katavi v. Algov* (unpublished) (Hebrew).

⁷³ In France the owner of a taxi was compelled to sell his uniquely modeled car and buy a much more modest one instead. Tribunal de Fontainebleau, 4-12-1978, cited in Donnier, *supra* note 21 at 91.

⁷⁴ G. Duckler, “The Economic Value of Companion Animals: a Legal and Anthropological Argument for Special Valuation”, 8 *Animal Law* (2002) 199-221 at 203.

⁷⁵ See section VII below.

⁷⁶ Duckler, *supra* note 66 at 199.

market value (the objective value) that is the consequences of the characteristics of the pet, his breed, uniqueness and so on. The other component is the subjective value that is the outcome of the peculiar relationship developed between the human and his pet. The market value of the animal is not only the nominal price at the market or the price a similar animal may have, for a series of factors should be taken into account. For example, some American jurisdictions have recognized that market value is also the outcome of the prizes the animal has won.⁷⁷ The market value is only one component of the value. The subjective value, however, has nothing to do with the objective characteristics of the animal and it derives from the animal's contribution to the happiness and well being of the animal's human companion.⁷⁸ I am aware that it is preferable to deal with "subjective value" in a comprehensive way and not refer only to the "sentimental value," since the subjective value of the animal is not only the outcome of sentiments. Thus for example, an animal that has been trained to take part in an artistic exhibition, may only exhibit these abilities when it is with its owner. For a third person buying the animal, the value of the animal is only the market value, and so the gap between subjective and objective value is clear. Nevertheless, since, as I have pointed out before, the use of pets for entertainment, or commercial activities does not weaken the sentimental link between the human and the animal, I will focus my analysis on the sentimental value.

As mentioned,⁷⁹ the attachment could be justified when the market value is reasonably high so as to contribute to the paying off of the debt entirely or at least partially. Thus for example, the attachment of a television set is justified only if the selling of the television set (according the attachment procedure) affords the creditor a certain profit. To refer to an attachment as justified or not according to the principles of good faith, we should base our arguments on the grounds of the relationship between the market value and the subjective value of the asset attached. We could express it as follows:

⁷⁷ Missouri P. Ry Co. v. Edwards, 14 S.W 2nd, (Ark.) 230, (1929). In the case the animal has been harmed.

⁷⁸ J. Raz, "On the Nature of Rights" 93 *Mind* (1984) 194, 204; Francione, supra note 57 at 101.

⁷⁹ See section V 1.

Subjective value \subseteq Market value \Rightarrow Justified attachment

Subjective value \supset Market value \Rightarrow Unjustified attachment

In this scheme, the market value represents the benefit that the creditor may receive from the selling of the animal. But this market value plays a minor role for the debtor. Insofar as the gap between market value and subjective value is greater, the need to protect the debtor increases, and in the case of pets the gap is large since the animal has a sentimental value difficult to evaluate.⁸⁰ For those who love animals, the sentimental value is *always* greater than the market value. By excluding the market value and focusing on the sentimental value the law recognizes that the sentimental value cannot be estimated in proportion to the market value. This special relationship is also expressed in the investment of the person in the animal over a period of time, in treatment, in training, in adaptation of habits, in teaching the animal to recognize locations etc. All this may be destroyed because the animal is removed from the person's vicinity. There are those who speak of bereavement following the separation from the animal;⁸¹ The pet is part of the family.⁸² Incidentally, it is important to note this fact for another reason: it should be remembered that the pet, at least on the emotional plane, belongs to the entire family,⁸³ and not only to the debtor alone.⁸⁴ All

⁸⁰ See the decision in France regarding pain and suffering following the death of an animal.

⁸¹ See A. Shalev: *The Furry Therapist*, Tel Aviv, 1996, p.103 ff. (In Hebrew).

⁸² This approach is expressed, for example, in the granting of pain and suffering as damages following the death of the animal. Thus for example in France see S, Antoine: "Le Droit de l'Animal: Evolution et Perspectives" in *Recueil Dalloz*, (1996) chr.126-130 at 129. In USA the situation is not so clear since animals are generally still considered property, and in practice the damages awards has been minimal as the market value approach. There have been some exceptions like case where the injury has been caused due to malicious or willful conduct. Some jurisdictions, like Hawaii, recognize recovering for emotional suffering. See *Campbell v. Animal Quarantine Station*, 632 P 2.1066 (Haw. 1981). See also *LaPorte v. Associated Independents, Inc*, 163 So. 2d. 267 (Fla. 1964). See more generally W. Root, "Man's Best Friend: Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for their Wrongful Death or Injury", 47 *Vill. Law Review* (2002) 423-450.

⁸³ "There is no doubt that some pet owners have become so attached to their family pets that the animals are considered members of the family," *Johnson v. Douglas*, 723 NYS 627 (2001). See also *Lockett v. Gary Hill*, 51 P. 3d. 5 (2002).

⁸⁴ It is commonly accepted that pets "belong" to the children. This does not only concern a clarification of ownership of the animal (as occurs for example when there are articles in the home of the debtor that do not belong to him but to his wife or to another person) but the

these considerations make the market value irrelevant for being a criterion for justifying the attachment.⁸⁵ Since the sentimental value is greater than the market value, the attachment should not be justified.

There is room to complicate this and ask: if the solution is justified with regard to pets, then why should this same approach not be used in the treatment of other articles that have very great sentimental value to the debtor? For example, let us say that the debtor has a picture that has sentimental value for him. Here the sentimental value does not constitute an impediment to attachment in Israeli law. Even if we would follow the French law,⁸⁶ however, which protects objects of sentimental value, such as pictures, from attachment, in my opinion, it would still be necessary to distinguish between animals and other objects that can have a sentimental value. Firstly, it is clear that it is impossible to depend on the sentimental value that the debtor may express with regard to each and every article, since this would empty the entire execution process of its content. Who could prevent the debtor from explaining how attached he is to his washing machine or his car? But even if we consider the cases in which certain articles can indeed be of special emotional importance for the debtor, there would still be a significant difference between the relationship that a person can develop towards an inanimate object and that which he can develop with an animal that would justify the distinction. This difference between a pet and an inanimate object is due to the special interaction that is created between the animal and the man, an interaction that cannot exist with regard to an inanimate object.

The attachment of pets should be prohibited not only because it shows a harsh attitude of the creditor, who, lacking good faith, may abuse of the animal to collect his money, but because it destroys the particular relationship established between the animal and the man. The exemption privileges the particular place that a companion animal plays

understanding of the complex relationship that has evolved between the animal and members of the family.

⁸⁵ Nevertheless perhaps in very extreme situations for instance when the debtor clearly has very expensive pets only for ornamental aims without any sentimental connection, it could be possible to authorize the attachment, as it is established in the German law.

⁸⁶ As in the case of "souvenirs à caractère personnel et familial". Sec. 39 D. 31/7/1992. Compare in Germany sec 765 a (1) ZPO, regarding the need of proceedings being done in good faith.

in the life of a person and avoids using emotional pressure to compel the debtor to pay. By recognizing pets as assets that cannot be attached, the legislator abandons the utilitarian criterion as a basis for exemption from attachment, and determines that the animal is also an essential element in the life of the person.

But there is yet another aspect that should be analyzed. It is possible to attempt to understand the exemption from a different point of view . . . the point of view of the animal. To what extent does the prohibition of attachment grant a direct right to the animal?

VI. Protection of the Animal

The idea, that the animal is exempt from attachment, may be based upon the lawmaker's wish to avoid the suffering of the pet. As I will explain, however, basing the prohibition of attachment upon the suffering of the pet is problematic. I will cope with this problem, and then refer to a more general question: the recognition of rights to animals, or more precisely, to what extent can the prohibition of Israeli Law be understood as granting a direct right to the pet.

1. The Suffering of the Animal

We can accept that at least for certain species, to a certain extent (and short of the suffering of the owner) the attachment can cause suffering to the animal. It is enough to think about a dog being taken from his home to a confined space without food or water or a cat being taken to a place he does not like. The transportation of the animal to the new destination, the condition of the bailment of the pet and the injury to its physical and mental health as a consequence of the attachment should be taken into account.⁸⁷ Suffering does not necessarily mean cruel or unreasonable pain,⁸⁸ and even discomfort caused to an animal is a matter that should be prevented and that could be

⁸⁷ See Israeli High Court 1684/96 *"Let Animals Live" Society v. Hamat Gader Entertainment Industries*, P.D. 51 (3) 832, 850 for a case of mental suffering.

⁸⁸ "Suffering occurs when unpleasant subjective feelings are acute or continue for a long time because the animal is unable to carry out the actions that would normally reduce risks to life and reproduction in those circumstances." M. Dawking, "From an Animal's Point of View: Motivation, Fitness, and Animal Welfare", 13 *Behavioural and Brain Sciences* (1990) 1,2 cited at M. Radford, *Animal Welfare Law in Britain*, Oxford, 2001, at 271.

forbidden by law.⁸⁹ The attachment would hinder the accepted standards of care due to the pet.⁹⁰ Thus, in the same way that we have referred to the separation from the point of view of the debtor, it is also possible to see the separation from the point of view of the animal. If we focus the discussion on the animals that do develop a relationship with their owners or to a place, these animals can suffer as a result of the separation.⁹¹

The argument that the suffering of the animal should be recognized as a reason to make the pet exempt from attachment is not free from difficulties. In the first place it may be argued that there are types of animals who cannot form a relationship with a man or a place (for example, the case of decorative fish) and who could therefore be attached. Therefore, in order to place the suffering of an animal as the foundation of non-attachment we must distinguish between various animals.⁹²

From a strict legal point of view, the Israeli execution law does not propose to deal with the suffering of animals. This aim is covered by the Prevention of Cruelty Law (1994) [‘Tza’ar Ba’alei Chaim’ in Hebrew] that prohibits causing maltreatment, torture or cruelty to animals, and establishes the mechanism for controlling and punishing these practices thereof.⁹³ It could be argued that the fact that a special rule is included in the Execution Law intended to prevent attachment of pets indicates that the legislator did not believe that attachment should be included in the Law for the Prevention of Cruelty to Animals (1994), since it does not involve cruelty or abuse. The Israeli Law for the Prevention of Cruelty to Animals does not explicitly forbid the

⁸⁹ “...[A]lthough ‘discomfort’ is not ‘suffering’, yet the question as to whether an animal in a certain case bears literal ‘discomfort’ or whether it suffers and is tormented, is a question that will be decided according to the circumstances of each and every case. ‘Discomfort’, ‘suffering’ and ‘difficult suffering’ are nothing but terms that are located on a scale, and the question as to whether ‘discomfort’ becomes suffering or suffering becomes ‘difficult suffering’ is not an abstract question but a question to be decided according to the essence of the picture of the facts that are spread out before us” Justice Hashin in High Court 1684/96 *The “Let the Animals Live” Society v. the Hamat Gader Leisure Enterprises*, P.D. 51 (3) 832, 850.

⁹⁰ Compare Radford, *supra* note 88 at 317 ff.

⁹¹ See, E. Pluhar, *The Moral Significance of Human & Nonhuman Animals*, Durham, (1995), p.21.

⁹² See the opinion of Regan who believes that all animals should be related to as equals, T. Regan, *The Case for Animal Rights*, Berkeley, 1983, pp. 239 ff.

⁹³ The law has established the trustees for the Protection of Animals, who are entitled to bring before the competent authorities cases of maltreatment (sec. 7).

attachment of animals, and thus it could be argued that attachment cannot be seen as cruelty or abuse. This argument is indeed weak, since the Law for Prevention of Cruelty to Animals does not include specific rules, but only a general determination that does not deal with all the cases of abuse. The law also does not explicitly forbid the killing of animals⁹⁴ and yet it is clear that the killing of animals – at least killing without “a suitable purpose” is within the bounds of a forbidden act.⁹⁵ The distinctions between suitable and unsuitable purpose, lead me to think that it may be better to sever the prohibition of the attachment from the suffering of the animal. I will explain this point.

In Israel, the question of the suffering of animals has received a detailed treatment in the Supreme Court decision in the Hamat Gader Case.⁹⁶ This case involved a request by the “Let Animals Live” Society [‘Tn’u LaChiot Lichiot’ in Hebrew] to cancel the performance of crocodiles at the leisure park of Hamat Gader because of the suffering that this caused the animals. The High Court allowed the petition, since it considered that the commercial performance in Hamat Gader caused an unreasonable and unjustified suffering to the crocodiles. However the Supreme Court refrained from deciding that the suffering of the animals constituted a basis for the absolute prohibition of all injury to animals. Indeed, according to this decision, in certain circumstances, causing a certain amount of suffering to animals may be within justifiable limits.⁹⁷ The Supreme Court determined that a balance should be made between the suffering caused to the animal and the purpose for which the suffering was caused, and that it should be ascertained that the means used by man to achieve

⁹⁴ The law prohibits the killing of animals using certain kind of poison (sec. 4).

⁹⁵ Thus for example the killing of dogs or cat infected with rabies. See Israeli High Court of Justice 6446/96 *The Association for Cats v. The Municipality of Arad et al.*, Takdin-AI 70 (1) 1142, 1156. The Hon. Justice Goldberg discussed the ecological consequences of mass exterminations of animals, a slightly different matter from individual extermination of an animal. This subject deviates from the framework of my article.

⁹⁶ Bagatz 1684/96 *The “Let Animals Live” Society v. The Hamat Gader Leisure Enterprises*, P.D. 51 (3) 832, 850 [hereinafter, Hamat Gader].

⁹⁷ This is the position adopted by the animal welfare theory which condemns “unnecessary” suffering of animals. See G. Francione, “Animal Rights and Animal Welfare”, 48 *Rutgers Law Review* (1995/96) 397-469 at 426 ff.

this purpose should be suitable means.⁹⁸ As expressed by the American Judge Campbell, quoted by the Israeli Court:

“Not every act that causes pain and suffering to animals is prohibited. Where the end or object in view is *reasonable* and *adequate*, the act resulting in pain is, in the sense of the statute, *necessary* and *justifiable*, as where a surgical operation is performed to save life, or where the act is done to protect life or property, or to minister to some of the necessities of man....”⁹⁹

This is to say that on the one hand, suffering should not be caused to animals, but at the same time, if the suffering brings a benefit to man then it is warranted to allow the animal to suffer.¹⁰⁰ According to this line of thought, the prevention of the animal’s suffering is a function of the benefit that this suffering may bring. If the benefit is great and overrides the suffering, then the suffering of the animal is justified. Although when discussing humans we negate the possibility of causing them suffering, without any connection to the benefit that may be derived by others, yet when animals are involved, the criterion used is utilitarian.¹⁰¹ If we allow animals to suffer, the question is by whom and how should the delimitation be determined between “permissible” suffering and “forbidden” suffering.¹⁰²

If we were to use the utilitarian determination of the Israeli court in the Hamat Gader case, we might reach a dubious outcome, for if we adopt the distinction between purposeful suffering, and non-purposeful suffering we can arrive at the conclusion that the interest that is embodied in the execution process – that is to say, the

⁹⁸ Hamat Gader, pp 854.

⁹⁹ Hamat Gader, pp 855 (the italics not in the original).

¹⁰⁰ See High Court of Justice 6446/96 *The Association for Cats v. The Municipality of Arad et al.* Takdin 70(1) 1142. Regarding the test for establishing unnecessary suffering in Britain see Radford, supra note 88 at 242 ff.

¹⁰¹ This is what is known as “Kantianism for People – Utilitarianism for Animals”. See R. Nozick, *Anarchy, State & Utopia*, N.Y., (1974) pp. 35,239 ff. See also Pluhar, supra note 80 at 58 ff.; H. Guither: *Animal Rights*, Illinois, (1998), pp.15 ff.; Francione, supra note 57 at 18 ff.; Regan, supra note 92 at 174 ff.

¹⁰² In other words, the Israeli court adopts an amalgamation of considerations of morality and utilitarianism on the subject of prohibition of cruelty to animals, however it is clear that the utilitarian consideration is predominant, since from a moral point of view, this imbalance is problematic. See P. Singer: *The Liberation of Animals* (Translation into Hebrew by S. Dorner) Or-Am, (1998), p. 41.

collection of the debt – turns the suffering of the animal, whether real or ostensible, into a fitting purpose: to bring about the settlement of the debt, where the means used is the sale of the animal. Thus, if the value of the animal brings about payment -even partial - of the debt it is possible to consider the suffering of the animal as opposed to the benefit that the action would grant to the creditor. According to this approach, expensive animals would be destined to suffer more than inexpensive animals. As I have explained before, this sort of conclusion is hardly acceptable. But this is not the only problematic point we face.

Focusing the question of pet attachment upon the suffering of the animal may lead to a misperception of the whole question, not because the suffering of the animal is not important, but because at the bottom line the application of the prohibition of the attachment is not a consequence of the suffering of the animal, and I would even say that it is independent of it. But perhaps the prohibition of attachment may be understood as the recognition of a direct right of the animal, without relation to its suffering. In other words: could we argue that the protection of the animal is based not only on the right of the debtor but also on the right of the pet?

Using of the suffering of the animal to justify the exemption from attachment may cause an outcry particularly among those who defend the rights of animals since they will ask why the animal needs to suffer in order for it to receive the right? Does suffering alone entitle it to a right?¹⁰³ I am not advocating Bentham's approach that affirms that the basis for granting rights to animals is whether they can suffer,¹⁰⁴ and surely this discussion is beyond the scope of this paper. However, perhaps we can see the pet's exemption from attachment as a right granted by the law directly to the animal. If the Execution Law forbids the attachment of pets why is it not said that there is a right "belonging" also to the animal (and not only to the debtor)? Could the determination of an exemption from attachment for pets mark the abandonment of the

¹⁰³ See R. Frey: *Interests & Rights – the Case Against Animals*, Oxford (1980) pp.140 ff.

¹⁰⁴ J. Bentham, *An Introduction to the Principles of Morals and Legislation* , Oxford, 1907, Ch. 17, at 311.

“homocentric approach”¹⁰⁵ and the adoption of a wider approach that sees the animal as bearing rights?¹⁰⁶

2. The Non-attachment: a Right for Companion Animals?

The issue of the status of animals has occupied many scholars, both legal and philosophic.¹⁰⁷ Today to think in Cartesian terms and to refer to animal as machines seems an extremist position. In some way or another the need to protect animals is well accepted. But the idea of protection may find expression in different approaches.

Generally, there are two different philosophical lines regarding the question: is the protection of animals a consequence of *indirect duties* towards them or of *direct duties*. The indirect view recognizes duties towards animals but these duties do not translate into rights for animals. Perhaps the most important exponent of this approach is I. Kant¹⁰⁸ who asserted that duties to animals are derived from duties to human beings since animals are not ends unto themselves. In more recent times, the idea of indirect duties was adopted by philosophers like John Rawls,¹⁰⁹ who subscribes to what is known as the “contractualist” theory, which bases moral obligations upon reciprocity. Since there is no place for reciprocity between humans and animals, there is no place for direct rights of the animals. The duty not to be cruel to the animal does not entail that the animal has the *right* not to be inflicted by an act of cruelty.

The direct duty view finds expression in two different tracks: One is the utilitarian theory; the other is the inherent value theory. The Utilitarians, especially those known

¹⁰⁵ See Pluhar, *supra* note 80 at 12 ff.

¹⁰⁶ See Francione, *supra* note 57 at 42.

¹⁰⁷ With regard to this question see among other J. Feinberg: “*The Rights of Animals and Urban Generation*” in Broome & Legge, *supra* note 25 at 81 ff.; J. Raz: *The Morality of Freedom*, Oxford, (1988) pp.176 ff.; C. Wellman, *The Proliferation of Rights*, Oxford (1999), pp.97 ff.; J. Caspar: “Tierschutz unter Rechtsphilosophischen Aspekt” in *Archiv für Rechts und Sozialphilosophie*, 81 (1995) 378-404; V. Haksar: “The Nature of Rights”, in *Archiv für Rechts und Sozialphilosophie*, 64 (1978) 183-204; T. Regan, *The Case for Animal Rights*, Berkeley, 1983; R. Huss, “Valuing man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals”, 86 *Marquette Law Review* (2002) 47-105 at 60 ff.

¹⁰⁸ I. Kant, *Lectures on Ethics* (L. Infield, trans.), N. York, 1963, p. 239. For a critic to this approach see T. Regan, *Defending Animal Rights*, Chicago, 2001, pp. 12 ff.

¹⁰⁹ J. Rawls, *A Theory of Justice*, rev. edition, Cambridge, Mass, 1999, pp. 441 ff.

as “Preference Utilitarians” like Peter Singer,¹¹⁰ accept that humans have direct duties towards animals, but these direct duties are not the consequence of the existence of rights of the animals but of the need for equal treatment, including the equal treatment respecting the desire to live. The interests of animals are taken into account (as is suitable to an utilitarian approach) in the same way that we take into account the interests of humans. Otherwise we fall into what is called “speciesism,” that is to discriminate between men and animals on the basis of the fact that they belong to different species exactly in the same way that racism discriminates between people on the basis of their race or national identity. According to Utilitarianism, we achieve this aim of equal treatment, fight against exploitation of animals and even defend vegetarianism without needing to talk about rights. In fact, for Singer, the only basic right granted to the animal is the right to equal treatment.¹¹¹

The most important contribution to the recognition of animals as having rights has been by Tom Regan.¹¹² Regan belongs to the “direct view” approach, but he criticizes the utilitarian approach and argues that animals have an inherent value and that their rights are a consequence of the recognition of this inherent value. Every subject-of-life has an inherent value and thus has a right not be exploited, irrelevant of utilitarian considerations.¹¹³ Based upon the distinction between moral agents (those who can understand what a moral attitude is and are thus able to act in a moral way) and moral patients (those who have not this capability), Regan maintains that moral patients (such as animals) have the right to respectful treatment.¹¹⁴ Notwithstanding the theoretical differences, the theses of Singer and Regan do not lead to very different practical consequences. In fact both of them support vegetarianism, both of them are against animal exploitation like industrial farming. It is not my aim here to analyze or

¹¹⁰ Singer, *Animal Liberation*, supra note 93.

¹¹¹ “I have little to say about rights because rights are not important to my argument. My argument is based on the principle of equality... I think the only right I ever attribute to animals is the ‘right’ to equal consideration of interest...” P. Singer, “The Parable of the Fox and the Unliberated Animals” 88 *Ethics* (1978) 122 cited in Regan, supra note 92 at 219.

¹¹² *The Case for Animal Rights*, supra note 92.

¹¹³ *Ibid* at 241 ff.

¹¹⁴ *Ibid* at 276 ff.

critique these approaches¹¹⁵ but only to deal with the question of the grounding of exemption of attachment in the light of the idea of recognizing animal rights.

Although I feel sympathy to the direct duties theory I think that in reference to the prohibition of attachment, the legal situation is better explained by the indirect duties theory.

It is clear that it has become increasingly accepted that animals enjoy a special status expressed in the creation of legal mechanisms that are intended to ensure their health and security. There is also a growing notion that society or a certain group within the society has the right to intervene in order to protect animals, even sometimes in opposition to the wishes of their owners. Today it is increasingly acceptable to relate to animals in terms of legal entities,¹¹⁶ expressed for example in international documents such as the Declaration of Animal Rights (signed on 15th October 1978 in the UNESCO House in Paris),¹¹⁷ or in the Declaration of the European Council regarding the protection of animals.¹¹⁸ There are even those who believed in the past that it is possible to compare the situation of animals and the situation of certain minority groups, for example the blacks,¹¹⁹ immigrants of all types, and even women, who, were also thought of as being devoid of rights while today obviously their rights

¹¹⁵ Regan has been criticized since his argument involves some internal contradictions. For example Regan deals with the well-known dilemma of a boat where there is room for four persons, but in the boat there are five: four people and one dog. Who would be thrown away? For Regan there is no doubt that the dog will be taken out of the boat, since it is the less worse off. That notwithstanding the inherent value of the dog and the principle of equality, all are equals but in certain cases some beings are more equal than others. See L. Gruen, "Animals", *A Companion to Ethics* (P. Singer, ed.) Blackwell, Oxford, 1993, pp. 343-353 at 346 ff.

¹¹⁶ See for example Antoine, *supra* note 82 at 130.

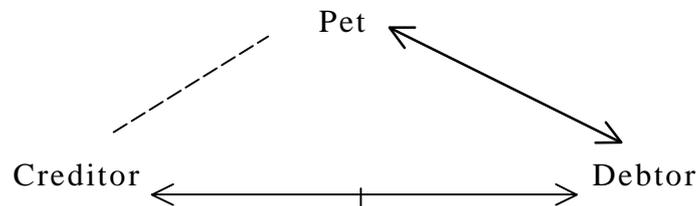
¹¹⁷ The World Organization of Animal Rights prepared the text in the year 1989. See F. Burgat: "Res nullius, l'animal est objet d'appropriation" in *Archives de Philosophie du Droit*, 38(1993) pp. 279-289 at 285; and J. Higuera Guimerá: "La Protección Penal de los Animales en España" in *Documentación Jurídica* 79 (1994) pp.33 ff. Although the issue of execution does not appear explicitly in the text, it can be understood within the overall perception of the recognition of rights of the animal including the right to respect. See section 2 of the Declaration.

¹¹⁸ The Declaration deals with the international transportation of animals (1971), with protection of animals in farms (1976) and with the prohibition of animal slaughter (1979).

¹¹⁹ See *Dred Scott v. Sanford* 60 US 393 (1856).

are undisputed. Thus it is argued that full recognition of the rights of animals is only a matter of development.¹²⁰

Recognizing the rights of animals is not tantamount to saying that they have the same rights of human beings. No one will suggest that dogs and cats have the right to be candidates for the Senate, to publish their ideas without censure or to freedom of religion. But regarding the attachment of the pet, the dilemma is more complex, and in order to decide whether the pet can be said to be entitled to the right not to be attached (that is remain at the debtor's home) we should first understand that we are not facing a bilateral relationship (creditor- pet) but a trilateral relationship (creditor-debtor- pet). We may see the relationship as a triangle.



If we accept that, in a strict sense, a right is a claim that has a duty as its correlative,¹²¹ in the case of the attachment it is difficult to find the correlative duty.¹²² There is no legal relationship between the animal and the creditor, at least until the attachment is realized. From this moment the creditor or the bailiff that deals with the attachment has the general duties of non-cruelty and protection of animals,¹²³ but this relationship

¹²⁰ See P. Singer *supra* note 93 at 33 ff.; P. Fraisch, S. Waisman et al: *Animal Law*, Durham (2000) pp.80 ff.; T. Regan, *supra* note 92, p.348; See also D. Favre: "Equitable Self-Ownership for Animals" in *Duke Law Journal*, 50 (2000) 473-502 at 492. Comp. A. Sohm-Bourgeois: "La personification de l'animal: une tentation à repousser" in *Recueil Dalloz*, (1990), chr., pp. 33-37; Francione, "Animal Rights...", *supra* note 92.

¹²¹ In a broader sense a right could be also understood as a privilege, a power or an immunity. W. Hohfeld, *Fundamental Legal Conceptions*, New Haven, 1996, pp. 35 ff; Francione, "Animal Rights...", *supra* note 92 at 447. See also J. Harris, *Legal Philosophies*, London, 1997, pp. 83 ff.

¹²² Let us remember how Tom Regan understands the idea of right: "To have a right is to be in a position to claim, or to have claimed on one's behalf, that something is due or owed, and the claim that is made is *a claim against somebody*, to do or forbear what is claimed as due." *Supra* note 92 at 271. The italics are not in the original.

¹²³ Prohibition of Cruelty Law (1994) ['Tza'ar Baalei Chaim' in Hebrew].

falls short of the framework of the execution law. As a principle, the conflict of interest is not between the creditor and the pet but between the creditor and the debtor.

More significant is the relationship between the debtor and pet that provides justification for the prohibition. We cannot posit a right of the animal towards the debtor (the owner), because the exemption from the attachment is not obligatory and the debtor may always decide to attach the animal if he wishes, in the same way that he may decide to sell or to give the animal away as a gift. If indeed the attachment causes suffering to the animal and this suffering justifies the prevention of attachment, then what should we say if the debtor decides of his own initiative and according to his own considerations that the animal should be transferred to the creditor? Should we also argue, here, that this is forbidden? Certainly not. From the point of view of the pet, the right of the debtor to sell the animal and to transfer him to other owners is similar to the attachment situation. Who could bar the debtor from giving the pet to the creditor if by doing so he finds relief from his economic problems?

We should distinguish between two levels. The first level is the moral level, and the second level is expressed in the existing law and its interpretation.¹²⁴ These two levels do not necessarily correspond with one another. For example, in light of the legislation that prohibits cruelty to animals, it could be argued that the law “grants” the right to animals not to suffer as a result of cruelty towards them. So, it could be argued that it is immoral to eat meat but not “illegal.” This means that the animal has no legal right to be immune from being eaten. As opposed to this, it may be also argued that it is immoral to use a pet, while causing it to suffer, in order to collect money from the debtor.¹²⁵ I do not think that a creditor who uses the debtor’s pet in order to bring pressure to bear upon him, acts in a moral way,¹²⁶ but this does not justify going further and giving the rule a meaning that does not find explicit

¹²⁴ See Regan, *supra* note 92 at 122 ff.

¹²⁵ This distinction is parallel to the distinction between a “moral agent” and a “moral patient”. Only a human being can be defined as a moral agent but this does not prevent other creatures (moral patients) from being entitled to moral treatment. The human being also has moral responsibility to those of a difference moral status.

¹²⁶ However the creditor can also claim that a debtor who avoids payment is not moral.

expression in the letter of the law and that in my view, goes beyond the principles the legal system is based upon.

It is worthwhile to keep in mind one of the well-known theories used to negate the theory of animal rights, the “choice theory of rights.” Accordingly, in order to be a holder of rights one must choose between different situations and be able to enforce that choice. “A” has a right regarding “B” if and when “A” has the choice to demand from “B” that he behave in a certain way and to enforce that behaviour. According to this criterion, animals cannot be seen as having rights, since they do not have the choice to enforce the “right” that is owed to them, only a man can do so.¹²⁷ Although I am not sure that this theory is suitable in every case, I must say at least regarding attachment, I find that the theory of choice of rights describes the situation as is: In the case of exemption from attachment, the pet cannot, indeed, oppose the attachment, and therefore it cannot be seen as possessing a right.¹²⁸ This is not the case of cruelty, where the law grants a right to the animal that can be enforced through the public authority which has the means to stop the suffering and to punish the one who caused it.¹²⁹ In the case of attachment, the animal has no legal defence; the “choice” is only of the debtor.

I would like to stress again that I do not reject the recognition of rights to animals. We should not negate the possibility that they could have rights, unless we use the presumption that only human beings have rights, something known as “speciesism” as I explain before. I think that when the law prohibits acts of cruelty against an animal, the law grants it a right.¹³⁰ I may even support the idea that it would be desirable that

¹²⁷ L. Sumner: *The Moral Foundations of Rights*, Oxford (1987), pp. 46, 199 ff.

¹²⁸ This approach does not explain why people, who because of various circumstances – such as situations of bad health – are incapable of choosing between options, are still considered to be owners of rights.

¹²⁹ Law of Prohibition of Cruelty on Animal, 1994, sec. 6, 7.

¹³⁰ As Prof. J. Raz maintains, making a connection between the right and autonomy of the will. Since the animals have no autonomous will we cannot see them as having rights. Moreover, it may be claimed – as is done by Professor Raz – that in order to have a right it is necessary to belong to the same moral community and therefore animals cannot be considered as having rights. Raz, *supra* note 107 at 176, 179 ff. This approach is also open to criticism, since if this is so, is man not obliged to respect the rights of those who belong to different moral communities? And what are the boundaries of “the moral community”? If we talk in terms of morality, it would be advisable to distinguish between moral status and moral responsibility. This distinction is parallel to the distinction between a “moral agent” and a

the very prohibition of attachment should be recognized as a direct right of the animal. But when this is translated to a legal formula it clashes with the existing law that does not allow me to arrive to this conclusion. I think that at least regarding the question of attachment it is better to understand the protection of the animal according to the indirect duty theory, that is to see the protection of the animal as a consequence of the protection of the sentiments of the debtor.¹³¹ The animal enjoys the right that the law bestows on the person – the debtor, and therefore at least in this case, it is incorrect to talk about the right of the animal. At the most, the “right” of the animal is not direct but indirect.¹³²

Some have claimed not that the companion animal has a right not to be attached, but rather that there is an “interest” not to be attached and consequently be sold by the creditor.¹³³ But this distinction is rather semantic. Furthermore, similar deliberations to those concerning the matter of the rights of animals could arise with regard to the interests of the animal: is the interest that of the animal or that of the man? And what is the difference between saying that the animal has no right to be exempt from attachment but that it has an interest? The interests are not those of the animal as opposed to those of the person but the opposing interests of people: the creditor and the debtor.

Let us return to the question of suffering. As I pointed out previously, when a creditor wants to attach a companion animal, this attachment will be affected by two legal frameworks: one, the protection against attachment given by the execution law, and the other, in the case the attachment is carried out (for example in the case the

“moral patient”. Only a human being can be defined as a moral agent but this does not prevent other creatures (moral patients) from being entitled to moral treatment. The human being also has moral responsibility to those of a difference moral status.

¹³¹ This is not tantamount to saying that, in general, protection of animals is linked to the protection of human sensibilities and not direct rights of the animals. This position has been expounded in Israel by A. Ben Ze’ev: “The reason for prevention of cruelty to crocodiles” in *Law & Government* 4(1998) pp.763-784 (In Hebrew) who claims that the reason for prevention of cruelty to animals is sentimental and not moral, pp.774 ff. See the response to this stance in I. Wolfson: “The status of animals in Morality and in the Law”, in *Law & Government*, 5 (2000), pp.551-564 (In Hebrew).

¹³² See also M. Schlitt: “Haben Tiere Rechte?” in *Archiv für Rechts und Sozialphilosophie* 78 (1992) 224-241 at 240. For another approach see Regan, *supra* note 92 *passim*.

¹³³ See Frey, *supra* note 94 at 142 ff. See also J. Feinberg: *Harm to Others*, Oxford, (1984) pp. 70 ff.

exception is not invoked by the debtor) and it causes suffering to the animal, the application of the Anticruelty legislation. If the purpose of the lawmaker was to avoid suffering to the animal, there was no need for a particular rule within the framework of the Execution Law. There is no need to link the suffering of the animal to the exemption of the attachment because the right to avoid this “suffering” does not belong to the animal but to the owner.¹³⁴ The legislator did not intend to prevent the seizure of the pet from the possession of the debtor in every case, but to prevent the creditor from using the pet as a means for collection of the debt or even worse than this, as a means for putting pressure on the debtor. The law grants the right to the “debtor” not to lose the special relationship, which has been woven between himself and the animal, as a result of his difficult financial situation. The suffering of the animal – that is important in itself in other contexts – cannot have a role within the framework of the execution processes, inasmuch as pets are considered the *private property* of the person.

And it is precisely at this point that we see the importance of the rule being included in the Execution Law. While it can hardly be understood as granting direct rights to the pet, it does contribute to taking the animal outside the traditional and narrow framework of personal property. The consequence of the prohibition of attachment of pets is to strengthen a trend that is becoming increasingly accepted regarding animals: that we should not refer to them as chattel.

VII. Animals as Property

Companion animals have, since ancient times, constituted a subject for legal protection, not because of feelings of compassion, but because of them being the subject of property.¹³⁵ Even in the Bible we see that animals were thought of as assets.¹³⁶ In the Jewish *Talmud* there are many discourses on animals as the subject of ownership.¹³⁷ The Romans not only distinguished between wild animals and animals

¹³⁴ Or the guardian, in case the terminology of ownership raises some controversies and even hostility within animal lovers circles.

¹³⁵ See S. Brooman, & D. Legge, *supra* note 25 at 225 ff.

¹³⁶ See for example Genesis 1:20-26, see also Deuteronomy 25:4.

¹³⁷ See for example, S. Albak: *Trustee Laws in the Talmud*, Tel Aviv (1976) pp. 379 ff. (in Hebrew).

in private ownership,¹³⁸ but even distinguished between animals intended for agricultural work (cattle, horses) and other animals. I do not know what the extent of affection was of scholars such as the Medieval Grotius or Puffendorf toward animals, but when they debated questions concerning animals this was done in context of discussions concerning their ownership.¹³⁹ It seems natural that when we open a Code that was written in the 19th century we see that animals are defined as chattel or even as real estate.¹⁴⁰ The characterization of animals as property has been used as a justification for exploitation of animals. Today this view is gradually being abandoned.¹⁴¹ The change in the legal conception of animals as property is a consequence of a change in the understanding of the status of the animal in society, and of changing philosophical ideas.

Specifically in the American doctrine there is a strong trend towards abandoning the conception of the animals as property. This trend even finds judicial expression, as in the recognition of emotional distress in the case of wrongful damage to a pet.¹⁴² Animal protectors battle fervently in order to negate or to make exceptions to the status of animals as property; They claim that only when we cease to see animals as property, will we provide the animals with suitable protection,¹⁴³ and reduce the

¹³⁸ Thus for example in the case of wild animals, holding (occupatio) was sufficient in order to acquire possession. See D.J. Iglesias, *Derecho Romano*, 11th ed., Barcelona, (1994) at 242,41,1,5; see also Gaius II, 67, 68.

¹³⁹ See for example, H. Grotius: *The Law of War & Peace* (trans. F. Kelsey) Oxford (1925) book II Ch. VII, par 4,5,p.297; S. Puffendorf: *De Jure Naturae et Gentium* (C.H. & W. Oldfather trans.) Oxford, (1934) book IV, Ch. III pp. 524 ff.

¹⁴⁰ In France for example, animals intended for agricultural work that are transferred together with an estate that is leased or rented, are considered as part of the estate property (immeubles par destination). See section 522 of the French Civil Code. See also Ph. Malaurie & L. Agnès, *Droit Civil Les Biens*, (1994), p.38.

¹⁴¹ See Sohm Bourgeois, supra note 111 at 35.

¹⁴² See *Campbell v. Animal Quarantine Station*, 632 P 2d. 1066 (Haw. 1981); *Lamare v. N. Country Animal League*, 743 A. 2d. 598 (Vermont 1999); *Brousseau v. Brousseau*, 443 N.Y.S. 285.

¹⁴³ See Francione, supra note 57, passim; G. Francione, "Animals, Property and Legal Welfarism: 'Unnecessary' Suffering and the 'Human' Treatment of Animals", 46 *Rutgers Law Review* (1994) 711-770. See also P. Wiecklund: "Abrogating Property Status in the Fight for Animal Rights" in *Yale Law Journal* 107 (1997) 569-574; Th. Kelch, "Toward a non-Property Status for Animals", 6 *New York Univ. Envtl. Law Journal* (1998) 531-585; Favre, supra note 111 at 496 ff.

suffering of animals.¹⁴⁴ Just now this is only a theoretical approach that is not even unanimously accepted. I am not convinced that it is necessary to stop considering animals as property in order to protect them and in order to grant them a special status, however this discussion goes beyond the scope of this article. Perhaps in the future, the characterization will be different and there will be broad consensus as to the fact that seeing animals as property jeopardize their lives. Just now animals *are* accepted by all the legal systems as human property. But admitting that animals are property is not tantamount to say that they are “merely” property.¹⁴⁵

As is known, the right of ownership is associated with three features with regard to property: the ability to use the object (*jus utendi*), to enjoy its fruits (*jus fruendi*), and to perform any act to dispossess it (*jus disponendi*) including the destruction of the object (*jus abutendi*).¹⁴⁶ With regard to this last feature, this right does not appear with regard to animals, and especially not with regard to pets. The power to eliminate an asset – an inherent right of ownership – does not exist for animals, because of the legislation that prevents cruelty.¹⁴⁷ The right of the animal not to suffer exists without any correlation to the will of the man, who is not entitled to abuse any animal, including animals that are owned by him. In Israel, the law determines a prohibition of animal abuse and procedures for the transfer of the animal to a safe place¹⁴⁸ (‘mitkan mugan’ in Hebrew) in the case where abuse exists. Although these limitations (as important as they may be) do not constitute a basis for negating the notion of ownership with regard to the animal, they afford the animal a particular status.

The notion of ownership should not be assimilated to a complete dominion unlimited over animals, and it is not at odds with the recognition of its particular status.¹⁴⁹ In

¹⁴⁴ C. Sunstein, “The Rights of Animals”, 70 *University of Chicago Law Review* (2003) 387-401, at 400.

¹⁴⁵ Kelch, *supra* note 143 at 539.

¹⁴⁶ Even though these features do not exhaust the term ownership. See I. Weissman, *Property Laws, Ownership & Participation*, Jerusalem (1997) p.25 ff (Hebrew).

¹⁴⁷ *Ibid* 26.

¹⁴⁸ Law of Prohibition of Cruelty to Animals sec. 8.

¹⁴⁹ See Sunstein, *supra* note 144 at 399.

comparative law, we find examples of this trend: There is a new definition in the German Code, according to which animals are not within the bounds of an object [sache] and they are entitled to special protection.¹⁵⁰ A similar solution can be found in the Austrian law.¹⁵¹ It is clear that an animal should not be treated as an inanimate asset: it is a living creature, with whom the man develops a special relationship, and it cannot therefore be equated with the inanimate and in this sense it cannot be thought of as an object – however valuable the latter may be. As was determined by the court of New York in a well-known judgment regarding animals: “A pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.”¹⁵²

At this point we see the contribution made by Amendment 19 of the Israeli Execution Law: the recognition of the special status of animals, and especially of the special status of pets. In addition to the protection of the sentiments of the debtor, the prohibition of attachment constitutes an additional stepping-stone, although a modest one, towards a revised characterization of the animal as the subject of ownership, that prevents relating to it as an object. In other words, instead of saying that pets are included in the list of objects that are exempt from attachment, it is more correct to say that pets cannot be attached *because they should not be seen as “just” chattel*. It is noteworthy that in Germany, the prohibition of attachment was included in a separate section, following the list of articles that are exempt from attachment,¹⁵³ and thus the inclusion of the animal as part of the list of “chattel” was prevented. Even if this determination is symbolic, it constitutes recognition of the unique status of

¹⁵⁰ See section 90A of the B.G.B. (Amendment from 1990). See G. Möke: “Das Gesetz zur Verbesserung der Rechtsstellung der Tiere im Bürgerlichen Recht” in *Neue Juristische Wochenschrift* 43 (1990) 2238-2240; Staundigers: *Kommentar zum Bürgerliches Gesetzbuch*, Berlin, (1995), v.1 pp. 556 ff. It is true that the German doctrine is hesitant with regard to the true implications of the rule and there are those who believe that this is only a symbolic rule, since in the end the rules associated with ownership will be implemented on the animal, but in any case, even if this is a purely symbolic determination, this does not diminish its importance from the point of view of the status that it gives to the animal.

¹⁵¹ See section 285(a) in the ABGB (Amendment of 1988).

¹⁵² *Corso v. Crawford Dog & Cat Hospital*, 415 N.Y.S. 2d. 182 (1979). The case is often cited in articles, although it has rarely recognized as a precedent in similar decisions. See *Gluckmann v. American Airlines Inc.* 844 F. Supp. 151 (1994). See also *Oberschlake v. Veterinary Associates Animal Hospital*, 785 NE 2d. 811 (2003).

¹⁵³ In the past it was included in the list of chattel that was exempt from attachment.

animals. Concern for animals should be expressed in various legal frameworks even if the rule is bereft of real practical value, and its greatest importance is in the evaluative or symbolic level. Even in Israel, despite the inclusion of the rule in a list of objects, the prohibition of section 22(6) can be interpreted as a stepping-stone in the construction of a new attitude towards pets – and towards animals in general – as a special type of asset.

By excluding pets from the list of articles to be attached, the Israeli Execution Law stresses the importance of animals in our lives and emphasizes an additional facet, according to which it is not possible to relate to animals as objects. Between those who wish to see animals as a legal entity in all matters and those who believe that there is no reason to abandon the traditional perception that viewed animals as property in every sense, it is possible to find a compromising view that is beneficial to animals, even if it is not an overarching solution. Amendment 19 of the Israeli legislation is a step in this direction.

In Conclusion

As I have noted, in my opinion, the importance of the prohibition of attachment of pets is twofold. Firstly, protection of the sentiments of the debtor and his family members, based on it being unsuitable to use execution procedures in order to oppress the debtor without producing any benefit. No less important, the Amendment pays tribute to the importance of pets in the family, and in this way the Israeli legislator contributes - although it is a modest contribution – to the granting of a special legal status to animals.

I have attempted to demonstrate that the exemption of pets from attachment protects, first and foremost, the debtor; but the consequences of the rule with regard to the legal status of the animal need not be ignored. The legislator abandoned the narrow approach that had characterized him for many years in his determination of a list of immune assets, and at the same time he ensured the correct definition of the animal as property with unique features.

The legislator should be congratulated for considering this seemingly minor issue that does, however, have ethical and emotional consequences, and gives increased recognition to the importance of the animal in society, especially in the context of the Execution Law that was

considered to be only a “technical” law. The analysis of this rule diverges from the plane of debtor-creditor relationships and gives us an opportunity to discuss abstract ideas such as the nature of a right, the value of human emotions and the suffering of animals. In the end, this is further evidence - if such was necessary – that the legal text cannot be separated from other contexts.

The construction of a theory of animal laws, brick by brick, is required in order to provide protection for the animals. The theory of animal laws must be built on different levels, philosophical, ethical and of course legal. The legal status of the animal will be constructed in light of various rules that are dispersed throughout the legal system. The correct relationship to the animals will be the result of special legislation that is intended to protect them. However, at the same time, wide observation of many areas of the law, where animals are involved, can create a generalized and balanced picture with regard to the question: how do we relate to animals.

The prohibition of attachment of pets emphasizes the need to continue to deepen the discussion regarding human dignity and the balance of interests involved therein. The granting of suitable respect to animals will eventually empower a broader discussion concerning the basic rights of society and will make us more aware of the need for man to respect all creatures.