# “Unlike any other thing” – A Historical Discussion about the Status of Domestic Animals in the Swedish Legal Tradition

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"When a man loves cats, I am his friend
and comrade, without further introduction."

Mark Twain

## 1 Introduction

One of the most striking patterns of the Western legal tradition is the conceptual division of entities – natural as well as socially constructed – into subjects and things. The former are entities capable of having rights, while the latter have no rights and can be owned or at least controlled by subjects.[1] Of course, this division does not – neither historically nor currently – perfectly overlap the distinction between humans and everything else. No Roman scholar ever expressed any doubt about the humanity of slaves. Indeed, Greek slaves were frequently used as teachers to the children of Roman patricians. They were, however, property. On the other side of the scale, no-one would say that corporations are in themselves human beings, but they have nonetheless been granted legal personality. They do, in other words, have rights as well as duties.

In 2001, the Swedish Supreme Court had to deal with a type of entity which challenges the neatness of our legal distinctions: domestic animals.[2] The Court decided two remarkably similar cases in an identical fashion. The first case concerned a cat who had been bitten by a dog. The cat's owner had spent 6 186,5 SEK in veterinary costs. The cat had nonetheless been put down on the veterinary's recommendation due to the severity of the injuries. The second case involved a small dog, named Rocky, bitten by a larger dog. Rocky recovered with the help of extensive veterinary assistance, costing his owner in the north of 20 000 SEK. The cases can be legally framed in a similar fashion. In both cases the injured party was a domestic animal, in other words somebody's property. In both cases the liability was never under dispute, due to the strict liability rules concerning cats and dogs.[3] In both cases the owner spent much more in veterinary costs than the market value of the pet. In both cases the owners of the injuring dogs argued that their liability only extended to the market value of the injured pet and not the veterinary costs exceeding that amount. The difference was particularly large in the case of the cat, whose market value was estimated to be a meager 100 SEK.

These few details are sufficient to point out an obvious clash between the sensibilities of most contemporary Westerners and the conceptual categories on which legal thinking is based. On the one hand, most people readily understand the difference between an inanimate object and a cat or a dog. It is a difference that is clearly mirrored in our everyday speech. One can obviously feel a great

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1 This traditional view is not without its critics. See V. Kurki, *A Theory of Legal Personhood*, Oxford, Oxford University Press, 2019, *passim*.

2 NJA 2001 p. 65 I and II.

3 Lag (1943:459) om tillsyn över hundar och katter § 6, replaced in 2008 by Lag (2007:1150) om tillsyn över hundar och katter § 19.

deal of attachment to material possessions such as a car, a ring or a guitar, but nobody would qualify these things "friends" or "family members" and those who did would be considered rather odd. The same is not true for cats, dogs, and other animals with whom humans create emotional bonds. It is therefore obvious to most of us that the value that we attach to our four-legged friends often far exceeds the exchange value of the pet on the market. On the other hand, the traditional categories of Western private law do not include a middle ground in-between the traditional categories of objects and subjects. The plaintiffs of the 2001 cases had standing in court as owners – not as friends or family members – of their cat and dog.

The decision of the Swedish Supreme Court is a testament to this clash. The Court determined that a pet "cannot generally be regarded as a thing like any other and it must therefore be deemed reasonable that the owner seeks treatment for the animal even if the cost of such treatment can be calculated to exceed the animal's economic value".[4] True to its pragmatic tendencies, the Swedish Supreme Court managed to crawl around the hurdles put up by traditional private law concepts.

One could of course conceive the Court's language as suggesting a new legal category, on the one hand reaffirming the status of domestic animals as property, but on the other hand stressing an important distinction between a cat and a piece of furniture. The Supreme Court, however, does not adventure very far in this kind of systematic exercise, nor does it address the potential broader implications of the decision – for instance in terms of compensating the sentimental value of property as well as the status of domestic animals (or at least pets) in the private law sphere. In fact, the Court is content to refer to the rather vague rule according to which "particular circumstances" may dictate that the owner's expenses for repairing the thing are compensated even if they exceed the cost of replacing the item.[5] The "particular circumstance" is in this case something as significant as the very nature of the "thing" that is "damaged", which might suggest the need for a closer look at the adequacy of the conceptual architecture.

The sense that traditional private law categories are becoming inadequate to frame our modern sensibilities with regards to domestic animals is confirmed by the abundant public law legislation concerning animal welfare, sometimes implicitly or explicitly referring to the intrinsic value of animals. Such expressions certainly have a symbolic rather than an operational value, but they contribute to question whether the view expressed by private law categories is consistent with the ideals expressed in other areas of the legal system. Of course, inconsistencies are far from unusual, especially when crossing the public law-private law divide. While I am not suggesting that we stand in front of a rare oddity, I claim that studying such inconsistencies can help us update our legal categories and modes of reasoning adapting them to changed historical circumstances.

I intend to approach the discussion by studying the historical development of the status of domestic animals in Sweden with regard to private law as well as public law. My ambition is to highlight the rise of the systematic structure that

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4 NJA 2001 p. 65 I and II.

5 The Court refers to, among other sources, the case NJA 1971 p. 126 (that recognized the rule but did not find any such circumstance in the actual case).

guides our discussion about the status of animals in general and domestic animals in particular.

## 2 Domestic Animals in Swedish Medieval Legislation

One feature that clearly stands out to those who examine Nordic legal history is its high level of continuity, at least when compared to the codified systems on the European continent. From this perspective, the Nordic legal family can be said to resemble the English legal tradition: the history of both families can, relatively speaking, be characterized in terms of evolution rather than revolution. However, where the common law owes its continuity mainly to the early emergence of a strong system of royal courts, the historical red thread of the Nordic legal family is rather to be found in its legislative tradition. Its earliest known expression is the so-called provincial legislation of the 12-13th century, followed by the first national statutes of the 14th century and the more mature (but still deeply influenced by their medieval roots) statutes of the 17th and 18th century.

To the modern reader the Swedish provincial laws offer a fascinating picture of the societies they intended to regulate, mainly due to their remarkably casuistic style. Particularly striking to the contemporary eye is the mix of rules that we would qualify as belonging the sphere of private law (tort law in particular) with others that, from our perspective, are more typical of public law legislation.

The casuistic nature of the provincial legislation means that abstract definitions typical of the much later continental codification are nowhere to be found. For the subject of this article, this means that we will not find provisions elegantly mirroring the classifications of *res* in Gaius' *Institutions*. We will rather have to evaluate the legal status of animals by examining the particular cases illustrated in each provision.

The material presents a rather coherent picture. As Rolf Karlbom pointed out in a 1985 article, the most striking distinction drawn in the provincial laws is that between the wild fauna and domestic animals.[6] This is not by itself surprising, as a similar distinction is commonplace in contemporary legislation as well. What is remarkable for our modern sensibilities is the antagonistic relationship between humans and the wilderness described in the provincial legislation. Contemporary Westerners are separated from their medieval ancestors by a historical fault line with regards to the way wilderness is perceived. Karin Johannisson has pointed out that "with a conscious generalization, one can claim that the educated European of the seventeenth century would have described [wilderness] as frightening, disharmonious and lacking beauty. The same type of human, a century later, would describe it in different terms: attractive, capable of refreshing the soul and beautiful."[7] The provincial legislation thus refers to wild animals as vermin to be eliminated or as an overbearing threat to the

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6 R. Karlbom, *Juridik och ekologisk balans — djurplågeri i svensk rättshistoria*, SvJT, 1985 p. 782 ff.

7 K. Johannisson, *Det sköna i det vilda: en aspekt på naturen som mänsklig resurs*, in T. Frängsmyr (ed.), *Paradiset och vildmarken*, Stockholm, Liber, 1984, p. 15.

community. For instance, the provincial law of Västmanland prohibited trap hunting on someone else's land, unless the traps were intended for bears, foxes or wolves. Such animals could be killed freely by everyone everywhere.[8]

Domestic animals are on the contrary treated like a precious resource. Their economic value is attested by provisions regulating the sale and barter of horses and bovines. These are, for instance, one of the very few types of property whose purchase were explicitly regulated in the provincial law of the Swedish region of Uppland.[9] The law of the region of Östergötland opened its part (*balk*) on sale contracts with a provision concerning the purchase of slaves, horses as well as "animals with horns and hoofs" requiring the presence of "friend and witnesses".[10] Similar provisions can be found in the provincial statutes for the regions of Dalarna,[11] Västmanland,[12] and Gotland.[13]

In addition to provisions concerning sale or inheritance, the provincial legislation contains two more groups of rules involving domestic animals, namely those concerning damages caused by an animal as well as to an animal. Common preoccupations concerned situations in which someone's horse, dog or bull injured another human being or damaged his property, such as his crops or cattle. For instance, the provincial statute of Dalarna established that the owner of a cattle who invaded someone else's field had to compensate the farmer for the crops. However, the farmer was not allowed to kill the animal.[14]

Specific provisions concerned damages to dogs and cats. The provincial statute of Uppland determined that someone who killed or stole someone else's cat had to pay one öre in damages.[15] A dog was instead worth three öre. The statute for Östergötland drew a distinction between herding dogs and lapdogs:

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8 Västmannalagen, Byggningabalken XV as translated in Å. Holmbäck, E. Wessén (ed.), *Svenska landskapslagar tolkade och förklarade för nutidens svenskar – Andra serien: Dalalagen och Västmannalagen*, Stockholm, Hugo Gerbers Förlag, 1936, p. 140.

9 Upplandslagen, Köpmålabalken Chapter V as translated in Å. Holmbäck, E. Wessén (ed.), *Svenska landskapslagar tolkade och förklarade för nutidens svenskar – Första serien: Östgötalagen och Upplandslagen*, Stockholm, Hugo Gerbers Förlag, 1933, p. 151.

10 Östgötalagen, Köpmålabalken I as translated in Å. Holmbäck, E. Wessén (ed.), *Svenska landskapslagar tolkade och förklarade för nutidens svenskar – Första serien: Östgötalagen och Upplandslagen*, *supra* note 9, p. 162.

11 Dalalagen, Byggningabalken XXX as translated in Å. Holmbäck, E. Wessén (ed.), *Svenska landskapslagar tolkade och förklarade för nutidens svenskar – Andra serien: Dalalagen och Västmannalagen*, *supra* note 8, p. 55.

12 Västmannalagen, Köpmålabalken VII as translated in Å. Holmbäck, E. Wessén (ed.), *Svenska landskapslagar tolkade och förklarade för nutidens svenskar – Andra serien: Dalalagen och Västmannalagen*, *supra* note 8, p. 121.

13 Gutalagen 33, 34, 35 as translated in Å. Holmbäck, E. Wessén (ed.), *Svenska landskapslagar tolkade och förklarade för nutidens svenskar – Fjärde serien: Skånelagen och Gutalagen*, Stockholm, Awe/Gerbers, 1979, p. 232.

14 Dalalagen, Byggningabalken XXXIX as translated in Å. Holmbäck, E. Wessén (ed.), *Svenska landskapslagar tolkade och förklarade för nutidens svenskar – Andra serien: Dalalagen och Västmannalagen*, *supra* note 8, p. 58.

15 Upplandslagen, Byalagsbalken XXIX as translated in Å. Holmbäck, E. Wessén (ed.), *Svenska landskapslagar tolkade och förklarade för nutidens svenskar – Första serien: Östgötalagen och Upplandslagen*, *supra* note 9, p. 183-184.

the latter were worth more.[16] This pattern did not change in later legislation. Indeed, the unified *landslag* (statute for the countryside) and *stadslag* (statute for the cities) of the Swedish king Magnus Eriksson mirrored many of the provisions in the provincial legislation.

The examples could be multiplied but the tendency should already be clear: although domestic animals were precious, they were chattels. Prohibitions against damaging and killing them were predicated on them belonging to someone else. Nothing was said about cruel behavior against one's own animals. Their value was not intrinsic but conditioned to their utility for the agrarian society in which they existed. Indeed, decisive changes in the substantive rules were not even introduced in the reorganization of legal materials that resulted in the Sveriges Rikes Lag of 1734. The *bygninga balk* (literally "part on construction") Chapter 22 § 2 punished the hurting of domestic animals, but only if they belonged to others.

It is tempting to project legal concepts such as subject, property and tort liability on these medieval rules. The Nordic provincial laws, however, were not built around the legal categories that constitute the inner structure of contemporary legal analysis on the European continent.

## 3 The Development of a System: Things and Persons

A greater conceptual refinement emerged in conjunction with the development of a sophisticated Nordic legal academia in the 17th and 18th century. The influence of continental European scholarly models is obvious in the works of David Nehrman Ehrenstråhle, the most celebrated Swedish legal scholar of the 18th century. His most well-known work was published in 1729 and bears the title *Inledning til then swenska Jurisprudentiam Civilem af naturens lagh och Sweriges Rikes äldre och nyare stadgar uthdragen och upsatt* ("Introduction to the Swedish civil jurisprudence as extracted and enacted by nature's law and the older and newer statutes of the Kingdom of Sweden").

The title is largely self-explanatory. As Nehrman clearly states in his introductory remarks, he intended to "show what Swedish law, without interfusing it with foreign statutes and opinions, is capable of (…)". These words must be understood in their context. The first key to comprehend Nehrman's intention is his choice to publish the book in Swedish. Nehrman explains that he did not want to prevent those who did not understand Latin from reading the work. He alludes however to "a multitude of reasons that [he] could have invoked to release the book in Swedish", leaving us with the impression that the choice of language was embedded in a broader cultural program.[17]

Part of that program was certainly national pride, which in the period of years between the end of the 17th and the beginning of the 18th century was a fairly

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[16] Östgötalagen, Byggningabalken XXIV as translated in Å. Holmbäck, E. Wessén (ed.), *Svenska landskapslagar tolkade och förklarade för nutidens svenskar – Första serien: Östgötalagen och Upplandslagen*, *supra* note 9, p. 213-214.

[17] D. Nehrman Ehrenstråhle, *Inledning til then swenska Jurisprudentiam Civilem af naturens lagh och Sweriges Rikes äldre och nyare stadgar uthdragen och upsatt*, Lund,1729 in the *företal* (unpaginated introduction).

common theme in Swedish academic circles.[18] A deeper cultural project emerges, however, from the book's pages: a desire to erect a bridge between the cultivated legal academia and the practical necessities of the Swedish legal system. Nehrman, a professor of Swedish and Roman law at the University of Lund, displayed great skepticism towards the idea that substantive Roman law could be of practical importance to Swedish lawyers. In the very beginning of the book, Nehrman even rejected the idea that the study of Roman law could be of propaedeutic value to those wanting to achieve expertise in Swedish legal matters. In fact, those who undertook such studies before obtaining some understanding of Swedish law would "get incorrect notions on many things and would later find it hard to interpret and apply Swedish law."[19] Further below Nehrman added that one should refrain from assuming that foreign rules could be used and applied in Sweden "[as] they are taken from either Roman or Canonic law". The former had been a state with "no resemblance to our own", while the latter was attached to a faith "that the Kingdom of Sweden has rejected a long time ago."[20]

Nehrman's words must, however, not be construed as a rejection of continental European modes of legal analysis. The title itself when referring to "nature's law" is alluding to the natural law scholarship with which Nehrman had an extensive familiarity. Indeed, the book contains abundant references to the likes of Grotius and Thomasius. Therefore, despite Nehrman's cautious attitude towards the direct application of Roman legal rules, his work could not escape the conceptual scaffoldings that continental natural law scholars had borrowed from the medieval jus commune. Such debt towards romanistic models is clear from the very beginning of the book, when Nehrman refers to the classical partition in *personae*, *res* and *actiones*, vowing to focus on *res*.[21] Nehrman attributes this mode of thinking to not better specified "experts in legal matters" (*lagkloka*), but the original source is of course the *Institutiones*, one of the four parts of the Corpus Juris Civilis, in part based on the *Institutiones* of Gaius. More generally, the book makes an admirable effort to apply a continental matrix to Swedish legislative materials. This is true also for the subject that concerns us in this paper.

Nehrman discusses animals in the first chapter of the second part of the book, dedicated to "Property and its acquisition in general." There the author provides a classification of things that is clearly reliant on the second book of the *Institutiones*, although he only explicitly refers to Swedish legislation. Nehrman addresses the concept of movable things. These could be divided into movables because of their nature and movables in the eyes of the law. The former were further divided in things that had to be carried and "things that could move by

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[18] The perhaps most egregious example of these tendencies is provided by a treaty by Carl Lundius published in 1687, *Zamolxis primus Getarum legislator*, that tried to trace back the Swedish legal tradition to the semi-mythical Zalmoxis of the Getae.

[19] D. Nehrman Ehrenstråhle, *Inledning til then swenska Jurisprudentiam Civilem af naturens lagh och Sweriges Rikes äldre och nyare stadgar uthdragen och upsatt*, *supra* note 17, p. 14.

[20] D. Nehrman Ehrenstråhle, *Inledning til then swenska Jurisprudentiam Civilem af naturens lagh och Sweriges Rikes äldre och nyare stadgar uthdragen och upsatt*, *supra* note 17, p. 82.

[21] D. Nehrman Ehrenstråhle, *Inledning til then swenska Jurisprudentiam Civilem af naturens lagh och Sweriges Rikes äldre och nyare stadgar uthdragen och upsatt*, *supra* note 17, p. 25.

themselves, such as animals that therefore are called walking cattle." Nehrman illustrates the point with examples taken from the *Landslag* (in the 1442 version of Christopher of Bavaria) as well as from the provincial statute of Uppland. Sometimes the abstract nature of Nehrman's systematic efforts clashes with the casuistic nature of the medieval legislative materials. For instance, the professor from Lund claims (without pressing the point very far) that Swedish legislation draws a distinction between dogs (*hundar*) and cattle (*fä*).[22] While it is true that the medieval sources contain provisions about dogs injuring or killing cattle, these should be read as illustrative cases rather than as compelling reasons for taxonomic distinctions.

Nehrman discusses animals also with reference to the concept of *occupatio*, the mode of acquiring ownership by taking possession over a *res nullius* (an unowned thing). The most important distinction concerns that between tame, tamed, and wild animals. The first class of animals (*animalia mansueta*) included all domestic animals. As such, they had an owner and could therefore not be the object of *occupatio*. The same rules applied to tamed animals (*animalia mansuefacta*), animals that were originally wild but had been domesticated by someone who in so doing had acquired ownership over them. Wild animals were instead *res nullius*, they did not belong to anybody. Nehrman, however, introduced a further distinction: that between species that were considered vermin – such as wolves and lynxes – and other types of wild animals. The former could be killed by anybody. The latter could only be hunted by the king and the aristocracy.[23] Here Nehrman's analysis intercepts a much broader (and, at the time, politically charged) discussion about hunting rights, which was directly tied to the feudal idea of the *double domaine*. At its core, the *double domaine* divided land ownership in *dominium directum*, belonging to the Crown, and *dominium utile*, belonging to the lower layers of the feudal pyramid. This is of course not the right occasion for a more in-depth discussion of this institutional arrangement. It suffices to say that Nehrman was promoting a system which had never really found fertile ground in Sweden. Indeed, the political clash about hunting rights became so heated in parliament as to cause a rift between the aristocracy, the clergy and the peasants (whose estate was represented in the Swedish *riksdag*).[24]

With the exception of this more hotly political dimension of Nehrman's text, his systematization of the status of animals in Swedish law was left relatively untouched by the following generations of scholars. The fundamental distinction between tame and wild animals – especially with regards to *occupatio* – was passed from one author to the next with unremarkable changes. Schrevelius (1799-1865), Nordling (1832-1898) and Undén (1886-1974) all adopted similar

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[22] D. Nehrman Ehrenstråhle, *Inledning til then swenska Jurisprudentiam Civilem af naturens lagh och Sweriges Rikes äldre och nyare stadgar uthdragen och upsatt*, *supra* note 17, p. 105-106.

[23] D. Nehrman Ehrenstråhle, *Inledning til then swenska Jurisprudentiam Civilem af naturens lagh och Sweriges Rikes äldre och nyare stadgar uthdragen och upsatt*, *supra* note 17, p. 135-136.

[24] J.E. Almquist, *Skattebondens jordäganderätt perioden 1719–1789*, in AA.VV. Minnesskrift ägnad 1734 års lag, vol. II, Stockholm, Marcus, 1934, p. 119–120 and S. Jägerskiöld, *Kring tillkomsten av 1734 års lag*, SvJT 1984, p. 685-686.

categorizations. Indeed, the status of animals as either property or *res nullius* has remained stable in Swedish private law until this very day.

While this is hardly surprising, it is interesting to observe that some of these authors started to take notice of the emerging friction between the private law categories and new sensibilities concerning animal welfare. Fredrik Schrevelius, in the second edition (1851) of his coursebook on Swedish private law, dedicated ample space to animals. The third chapter of the first volume, dedicated to property, follows Nehrman's categorization quite closely. Of greater interest is the second chapter, dedicated to persons. Schrevelius feels the need to stress that "[e]ven when one *could imagine* that some other entity has rights, nonetheless it is *in reality* only humans that can have those" (italics in the original). Schrevelius continues: "It could sometimes appear as if even animals have rights, for instance when there are statutes prohibiting the torture and abuse of animals. Such a statute, however, must nonetheless be considered as having been enacted for the benefit of humans rather than animals, to prevent a cruel disposition to take root in the population."[25] It is worth noticing that these thoughts were a novelty introduced in the second edition. Nothing of the sort appears in the first edition of the volume (1844). This may suggest the circulation of new ideas concerning animal welfare in the mid-19th century.

This new argumentative trend was confirmed, a few decades later, by Uppsala professor Ernst Viktor Nordling, who like Schrevelius argued that statutes about animal welfare simply aimed at protecting "the general sense of decency that [acts of cruelty towards animals] violate".[26]

While these analytical efforts are logical, given the a priori assumption that only humans can be persons/subjects, they nonetheless mark the beginning of the same uneasiness, for lack of a better word, that the Swedish Supreme Court expressed many years later when talking about domestic animals as a thing unlike any other.

## 4 Advances in Public Law

What legal developments were inducing Schrevelius and Nordling to insert a disclaimer about the legal status of animals in their works? Interestingly, in the case of Schrevelius, Sweden had yet to enact a statute on animal welfare when the second edition of his work was published in 1851. However, a political debate concerning measures against the cruel treatment of domestic animals had started to take shape in the 1840s.

More precisely, a member of parliament for the aristocratic estate, Nicolaus Torsten Roos, on the 17th of August 1844 presented a motion to criminalize the abuse of domestic animals. The motion is clearly influenced by its author's social prejudices. Roos was convinced that, while abuse of domestic animals may occasionally occur also by those who claim to be cultured, it could be presumed that the members of "the well-educated classes" had the good sense of not

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[25] F. Schrevelius, *Lärobok i Sveriges allmänna nu gällande civil-rätt – Första delen: Inledning eller allmänna prænotationer*, 2:a uppl., Lund, Berlings Förlag, 1851, p. 58.

[26] V.E. Nordling, *Anteckningar efter Prof. E.V. Nordlings föreläsningar i Svensk civilrätt – Allmänna delen H.T. 1877 – V.T. 1879*, Uppsala, Juridiska föreningen, 1882, p. 43.

mistreating their animals. As we shall see, considering later developments, this assumption would prove quite ironic.

Roos' main concern was mainly aimed at the behavior of coachmen. He had witnessed how these men "in the most barbaric way and with the roughest clubs hit the horses, packed beyond their tolerance, and how these poor animals [were] violently driven to pull their load on hilly roads as the driver [was] too lazy to take a smoother and somewhat longer way."[27] Roos suggested that culprits should be sanctioned with fines that would get progressively larger as their cruel behavior was reiterated.

The competent parliamentary committee (*lagutskottet*) rejected the motion. The committee reasoned that legislation already criminalized the mistreatment of animals owned by others. As for Roos' main concern, i.e. the mistreatment of one's own animals, the committee claimed that it was nearly impossible to determine by legislation what kind of treatment each animal would require to make it obey its owner and thus what limit the owner should not cross. The minutes of the committee include a reservation by provost Adolf Säve, a representative of the clerical estate, who argued that it was the duty of the legislature "to fight crimes that (…) attack our sense of decency". Säve also claimed that a majority of "civilized Nations [had] adopted provisions against the cruel treatment of domestic animals in their criminal legislation." More specifically, provost Säve referred to Chapter 23 § 19 of the Norwegian criminal statute (*criminallov*) of 1842 which sanctioned mistreatment of one's own animals with fines or imprisonment.[28]

Indeed, the movement for a more humane treatment of domestic animals was well underway in Europe. In the Nordic countries, voices in favor of animal protection had started to emerge as early as during the 18th century. Two Danish intellectuals, Frederik Christian Eilschov and Lauritz Smith had been particularly prominent in the debate.[29] The first statute on the matter was, however, enacted by the British Parliament in 1822, under the sponsorship of MP Richard Martin. In Norway, the cause of animal welfare found a prominent sponsor in Christian Magnus Falsen (1782-1830), who eight years earlier had co-authored the first draft of the Norwegian Constitution. His proposal for an "Act on the Mistreatment of Animals" (*Lov om Mishandling af Dyr*) found its way into the already mentioned criminal act of 1842. It is likely that Schrevelius had this development in mind when he decided to amend the 1851 edition of his book.

The following years saw a noticeable change in the orientation of the Swedish legislature. While Roos' motion of 1844 had fallen on deaf ears, a new attempt, made in the final months of the year 1856, was destined for greater success. While Roos' had been rather lonely in 1844, the new initiative came in the form of a wave of motions presented by representatives for three of the four estates: Johan Jakob Hagströmer, representing the aristocracy, Per Olof Carlander, for

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[27] Protokoll hållna hos högloflige ridderskapet och adeln vid urtima Riksdagen i Stockholm, 1844, första häftet, p. 293.

[28] Bihang till samtlige riks-ståndens protocoll vid urtima riksdagen i Stockholm åren 1844 och 1845, sjunde samligen, afd. 1, n. 2, p. 2-3.

[29] G.H. Liander, *Djurskyddstankens framväxt och gång genom tiderna*, Stockholm, Djurskyddsföreningarnas centralförbund, 1930, p. 6.

the clergy, as well as Pehr Östman, Sven Ersson, Gustaf Johansson and Paul Fritz Mengel, representing the peasantry.

Common to all the motions was a particular distress about the conditions of working animals, such as horses and oxen. This is hardly difficult to explain, considering that these were the animals with whom contacts were the most frequent in mid-19th century as well as those subject to some of the most glaring mistreatment by their owners. Provost Carlander pointed out that "the legislation of other civilized nations has not considered it unworthy to dedicate some provisions to the protection of these 'silent martyrs'".[30] Hagströmer made an explicit reference to the English statute of 1822, as evidence that the presumed difficulties of regulating the owner's treatment of his own animals were surmountable.[31] Mengel, in a similar fashion, referred to the legislation in England, France, Denmark and Norway.[32] Ersson focused on the "the noble and to humans supportive horse", invoking Christian values to justify the protection of these animals. Interestingly, Ersson also compared animals to human workers (the social class he represented), although the comparison was made with the purpose of stressing that he was not arguing that the energies of animals should be used more sparingly than those of working men.[33] Östman stressed that "the habit since childhood to see animals, and in particular our domestic animals, mistreated in various ways, without the perpetrator getting punished, has naturally dulled the sensitivity of the masses and promoted the indifference of the many."[34]

This time around the parliamentary committee (*lagutskottet*) was much more inclined to listen to the humanitarian arguments of the motions, perhaps at least in part influenced by the recent enactment of a Danish statute on animal welfare, to which the committee explicitly referred. The motions were boiled down to a reform of Chapter 22 § 2 of the book on building (*byggningabalk*) of the Sveriges Rikes Lag of 1734 and received final approval in 1857. The new rule sanctioned with fines (up to one hundred *riksdaler*) those who displayed "manifest cruelty" (*uppenbar grymhet*) in the treatment of domestic animals belonging to themselves or others. It should be noted that the provision did not concern the treatment of wild animals.

During the preparatory works to the Criminal Act (*strafflagen*) of 1864, the Supreme Court – which according to the constitution of the time was required to provide its opinion on new legislation[35] - insisted on including the provision in

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30 Högvördiga preste-ståndets protocol vid lagtima Riksdagen i Stockholm, 1856-1857, första bandet, p. 615-616.

31 Protocoll hållna hos högloflige ridderskapet och adeln vid lagtima Riksdagen i Stockholm, 1856, första häftet, p. 407-408.

32 Hedervärda bonde-ståndets protokoller vid lagtima Riksdagen i Stockholm, 1856-1857, Tredje Bandet, p. 245.

33 Hedervärda bonde-ståndets protokoller vid lagtima Riksdagen i Stockholm, 1856-1857, Tredje Bandet, p. 41-43.

34 Hedervärda bonde-ståndets protokoller vid lagtima Riksdagen i Stockholm, 1856-1857, Första Bandet, p. 466-468.

35 RF (1809), 87 §.

Chapter 18 § 16. Chapter 18 was dedicated to public order crimes (*sedlighetsbrott*), crimes against the moral fabric of society.[36]

In the following years two major fronts developed in the discussions surrounding animal welfare legislation. The first front concerned the sharpening of sanctions for those guilty of cruelty against domestic animals. In 1890, a reform of several provisions of the Swedish Criminal Act (*strafflagen*) of 1864 removed the limit of one hundred *riksdaler* from Chapter 18 § 16.[37] This meant that the maximum penalty was increased by five times, as the highest fine allowed by Chapter 2 § 8 of the Criminal Act was five hundred *riksdaler*. A further reform of the provision, in the year 1900, introduced the possibility of sanctioning cruelty against domestic animals with imprisonment up to six months, in case of particularly aggravating circumstances.[38]

The second front concerned the scope itself of the provision, which in its original formulation only covered domestic animals. An important contribution to the debate was included in the same motion that led to sharper sanctions for those guilty of animal cruelty. The motion, presented to the second chamber of the Parliament on the 25th of January 1899 and authored by Edvard Wavrinsky, proposed several changes beyond a sharper punishment. These included the change of the original term "domestic animals" (*kreatur*) to the more generic "animals" (*djur*) and the inclusion also of animals not owned by anybody (*res nullius*). Wavrinsky referred to "a preponderance of foreign legal systems that [punished] cruelty against animal regardless of whether the animal can or cannot be regarded a domestic animal and of whether it is or is not owned by somebody."[39] While the proposal of a harsher punishment was ultimately approved by the legislature, the increase in scope was rejected, mainly on the ground that the provision could already be interpreted more generously than Wavrinsky suggested. The competent parliamentary committee argued that a wild animal became someone's property immediately after having been captured (because of *occupatio*) and that the term "domestic animals" also included "similar animals".[40]

The Parliaments position on the matter changed in the following years, leading to a widening of the scope of the provision by using the generic term "animals" (*djur*) in 1907.[41] Of some interest is the fact that the Parliament had rejected the very same motion a year earlier, in 1906. The reasons that warmed the Parliament's heart to the situation of animals in less than a year are a matter of speculation. One contributing factor may have been the great attention given by the Swedish press to an awful act committed in 1906 by a group of five students in Uppsala.

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[36] *Uttrag af protokollet öfver ett justitieärende, hållet i Kungl. Maj:ts Högste Domstol, onsdagen 30 april 1862*, as reported in Bihang till samtlige riks-ståndens protokoll vid lagtima riksdagen i Stockholm, 1862-1863, 1sta samlingen, 1sta afvdelningen, p. 43.

[37] SFS 1890:33.

[38] SFS 1900:49.

[39] Motioner i Andra Kammaren, 1899, n. 82, p. 2.

[40] Lagutskottets Utlåtande, 1899, n. 26, p. 7.

[41] SFS 1907:44.

The men, all belonging to the aristocracy, led by Gösta Patrik Hamilton, concluded a dinner by buying a cat and letting two dogs kill it for show. The lengthy struggle was witnessed by the cook, Ida Carolina Larsson, who tried to save the animal but was prevented by Hamilton and his merry company of sadists. Larsson, whose name deserves to be remembered, had then the moral standing of reporting the incident to the police. This led to the men being prosecuted and condemned. The students were also expelled by the university and, at least in the case of Hamilton, by the student association (*Stockholms Nation*). The incident was covered by all Swedish newspapers. Hamilton received the contemptuous moniker *Kattgreven* (the Cat Count) that he carried for the rest of his days and was by and large considered persona non grata in the upstanding social circles he used to belong to.[42]

Of course, the Hamilton incident did not involve wild animals and was indeed sanctioned under the old version of Chapter 18 § 16 of the Criminal Act. However, the great indignation generated by the case may very well have been sufficient to push the Parliament towards more animal friendly positions with regards to expanding the scope of the provision.

The parliamentary debate on the scope of the provision continued in the following years. The central social issue that took center stage was the docking of horse tails.[43] This led, in 1921, to a reformulation of Chapter 18 § 16 of the Criminal Act. Despite the intentions expressed in the government's bill[44], the new version of the provision did not get rid of the requirement "manifest cruelty". However, the legislature clarified what the notion of "manifest cruelty" covered, adding the words "through mistreatment, overwork, neglect or in other ways".[45]

The next phase in Swedish legislation concerned the drafting of a more pervasive animal protection statute. The initial impulse came from Parliament, which in 1935 requested the government to start preparing a proposal for such an act. One source of inspiration was, in this regard, the Danish, Finnish and German legislation. In particular, the parliamentary memorandum observed that the more advanced rules expressed in foreign legislation "gained great opportunities to lead the public's mindset on these matters in a new direction".[46] The Swedish legislature was undergoing an important change in attitude. Where the earlier focus had been on mirroring the "perception of rightfulness" (*allmänna rättsmedvetandet*) of the public, now legislation was perceived as a social engineering tool, capable of modifying the national culture in a desirable direction.

The result of this new mentality was Sweden's first Animal Protection Act of 1944.[47] The most striking feature of the Act was the focus on promoting animal

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42 G. Broberg, *Kattens historia – Sverige speglat i djurets öga*, Stockholm, Atlantis, 2004, p. 161 ff.

43 In this regard see Motioner i andra kammaren, 1917, n. 246.

44 Prop. 1921:6.

45 SFS 1921:187. The motivation can be found in the opinion by the parliamentary committee (*lagutskottet*). See Första lagutskottets utlåtande, 1921 n. 11.

46 Första lagutskottets utlåtande, n.13, 1935, p. 8.

47 SFS 1944:219.

welfare rather than on just preventing the most egregious cases of cruelty. This purpose was declared in § 2, which stated that "[a]nimals should be treated well and whenever possible protected from suffering. (…)". The statute also provided a system of public monitoring to insure the respect of the new standards. Moreover, the old criminal provision, Chapter 18 § 16, was finally changed to remove the "manifest cruelty" requirement. Finally, in 1948, the Criminal Act was revised, and the provision was moved to the newly created Chapter 11 containing crimes against public order (*allmän ordning*). The drafters of the Penal Statute of 1962 (*brottsbalken*), which replaced the Criminal Act, kept the provision in an identically titled chapter.[48] An amendment in 1972 made the provision more effective by opening up its application also to instances of "grave negligence", thus dispensing with the requirement of intentional harm to the animal.[49]

I will now stop the description of the legislative history and move on with an analysis of the relationship between the conceptual matrix, largely developed in the private law domain, and the more fast-moving and complex political and cultural data that underlies the historical developments observed so far.

## 5 A Case Study in Legal Methodology

Those with even a passing interest in the relationship between culture, society and law can find interesting material in the Swedish development of animal welfare legislation. In fact, the history that has been described could function as a fairly clear illustration of the relationship that the German historical school, particularly Savigny and Stahl, identified between the magmatic production of social and cultural facts, their formalization in sources of law as well as the system-building work by legal scholars.

This excursus towards Germany is relevant for our discussion as the historical school had a major influence on 19th century Swedish legal scholarship. Schrevelius made his debt towards Savigny clear in the foreword of the first edition of his "Lärobok i Sveriges allmänna nu gällande civil-rätt – Första delen: Inledning eller allmänna prænotationer" (1844). Nordling was an even more ardent follower of the teachings of the historical school. Indeed, during the whole 19th century the Swedish legal scholars were avid readers of German works and spent significant periods of study in Germany, marinating in environments heavily influenced by the methodological principles of Savigny and Stahl.[50] The two Swedish scholars who most recently have devoted their energy to the topic are Marie Sandström and Adam Croon. I will mainly refer to their research.

The theoretical frame of the historical school can be visualized as three intercommunicating dimensions of legality. The first one consists of *das natürliche Recht*. This notion should not be confused with *Naturrecht*, the eternal and universal law of nature which earlier generations of jurists considered the true object of legal scholarship. *Natürliches Recht* is in fact the very opposite. It

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48 Chapter 16 § 13.

49 SFS 1972:629.

50 J.O. Sundell, *Tysk påverkan på svensk civilrättsdoktrin 1870-1914*, Stockholm, Institutet för rättshistorisk forskning, 1987, p. 25-26.

can be described as a culturally and historically determined notion of what a community considers right or wrong. Its closest Swedish term, that we have encountered in the legislative history pertaining to animal welfare, is *allmänna rättsmedvetandet*, the "public's perception of rightfulness". Far from being universal or eternal, the *natürliches Recht* is fast changing and historically situated.[51]

*Natürliches Recht* undergoes a process of formalization by being captured by recognized sources of law. In the process of making positive law, the inputs coming from history in the form of economic facts, political ideologies, religious beliefs, and cultural idiosyncrasies are filtered and simplified. Not all elements produced by the hot magma of history can be subsumed in a statute or even in customary law. The advantage of this perspective is the alignment between society and the sources of law. Its main disadvantage is that, despite its filtering and simplifying action, the flow of social data into formal sources of law still produces an unacceptable state of legal chaos. The historical school thus elaborated a concurring perspective designed to balance the previous one, a philosophic-systematic view that put legal scholars in charge of creating an orderly system based on legal institutes.

These two perspectives combined give shape to positive law.[52] Positive law, while more slow-moving than *natürliches Recht* is still too unstable for the purpose of being handled by the courts in their everyday activity, at least if legal certainty and rule of law (in the formalistic sense of *Rechtsstaat*) are considered desirable social goals. This consideration led the historical school to formulate a third dimension: the notion of the law in force (*geltendes Recht*). The perspective in this instance changes from historical to dogmatic. It is admittedly and unapologetically a fiction that on one hand "freezes" law in a specific point in time and on the other hand orients the work of the courts by methodological assumptions about the coherence and completeness of the legal system.[53]

It should now be stressed that, while natural law scholars from earlier ages saw a deep divide between the universal and eternal law of nature and its imperfect historical manifestations in positive law, the German historical school conceived no such wall between the fast-paced production of positive law and the dogmatic perspective necessary for its application. Both the continuous production of potentially legally relevant materials and the concepts, categories

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[51] "In verschiedenen Zeiten also wird bey demselben Volke das Recht natürliches Recht (in einem andern Sinn als unser Naturrecht) oder gelehrtes Recht seyn, je nachdem das eine oder das andere Princip überwiegt, wobey eine scharfe Gränzbestimmung von selbst als unmöglich erscheint." F.C. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, Heidelberg, Mohr und Zimmer, 1814 p. 13. On the matter see A. Croon, *Jura novit curia – En rättsgenetisk undersökning av den juridiska metodlärans utveckling under 1800-talet*, Stockholm, Institutet för rättshistorisk forskning, 2018, p. 31.

[52] W. Wilhelm, *Den juridiska metodlärans utveckling under 1800-talet*, Stockholm, Norstedts, 1999, p. 35-36. M. Sandström, *Rättsvetenskapens princip – Till frågan om rättsvetenskapens värdelöshet och Friedrich Julius Stahls rättsinstitutslära*, Stockholm, Institutet för rättshistorisk forskning, 2004, p. 242 and p. 282 ff. and A. Croon, *Jura novit curia – En rättsgenetisk undersökning av den juridiska metodlärans utveckling under 1800-talet*, *supra* note 51, p. 39.

[53] A. Croon, *Jura novit curia – En rättsgenetisk undersökning av den juridiska metodlärans utveckling under 1800-talet*, *supra* note 51, p. 46 ff. and 217-218.

and principles of the supposedly coherent legal system were historically situated. The latter was just mutating at a much slower pace than the former.

The three dimensions, while formally distinct, influence each other and not only in one direction. This is beautifully illustrated by the topic at hand. As for the first dimension, let us limit the analysis to the parliamentary motions leading to the legislation of 1857 presented. These contained a variety of arguments. The claim that cruelty against animals undermines the moral fabric of society was certainly among them. However, equally present were arguments dictated by sheer empathy and a sense of responsibility for the well-being of domestic animals: horses and oxen (the "silent martyrs"), actively served human society, and thus deserved a better treatment. A similar range of arguments characterize subsequent reforms. In fact, the impression one gets when reading the debates and the preparatory works to each reform is that the intentions of the legislature were primarily to protect animals from cruel treatment, rather than to simply protect society from the feelings of horror generated by the cruel treatment of animals.

These arguments were then filtered through the parliamentary process and translated into legislation in 1857, thus becoming positive law. When the provision was moved to the Criminal Act of 1864, one can observe how the systematic perspective influenced the structure and content of the statute.

The conceptual system elaborated by jurisprudence has already been outlined when discussing the development with regards to persons and things. Its operation with regards to animal welfare can be described in the following terms: there is a fundamental distinction between persons and things. Only the former can carry interests recognized by the legal order. Only humans (and some of their social aggregations) can be persons. Animals are conceptualized as things. Further distinctions between different types of things (such as that between movables and immovables or between property and *res nullius*) must be dictated by the interests of the subjects rather than those of the objects (which, of course, by definition have no relevant interests).

It is therefore hardly surprising that the Supreme Court thought it logical to request that the provision on animal cruelty had to be collocated in Chapter 18 of the Criminal Act of 1864, concerning crimes against the moral fabric of society. The power of this conceptual framework was such that animal welfare rules were forced into an awkward and unintuitive position, together with provisions concerning gambling and sexual immorality.

The Supreme Court case (NJA 2001 s. 65 I and II) that opened this paper clearly shows that, despite the anti-formalistic winds that have blown across the Swedish legal landscape since the first decades of the 20$^{th}$ century, this 18$^{th}$-19$^{th}$ century systematization still exerts influence over the topic of animal welfare. This is far from being a problem, if the legal categories are adjusted over time to reflect a mutated social and legal landscape, rather than being treated as perennial truths. Otherwise the dogmatic system risks paradoxically to become a cause of incoherence rather than a means to counteract it. In this sense, I find the timid suggestion by the Supreme Court that animals should be regarded as a particular category of property revealing. Given the basic legal grammar that Western jurists (not only Swedish, of course) use to navigate the legal system, it is hard to escape the idea that domestic animals are property, nor are systematic arguments suited to radical policy choices such as reclassifying animals as

subjects.[54] However, they are certainly a very special type of property given the protection that they are granted by legislation.

The rationale to categorize domestic animals as a category of things unlike any other has become increasingly stronger due to the more recent legislative developments. The Animal Protection Act (*djurskyddslagen*) of 2018 states in its opening provision that "[t]his statute aims at securing a good animal protection and respect for animals".[55] The preparatory works make it clear that the notion of "respect for animals" includes the idea that animals have intrinsic value regardless of their usefulness for humans".[56]

This clearly separates animals from other things protected under statutory law, such as archeological findings.[57] Such items have a value for our present and future generations, but nobody would argue that they have intrinsic value independent of their relationship to humankind. Of course, this perspective can be problematized. For instance, the Animal Protection Act only covers "animals kept by humans" and, to a somewhat lesser extent, "test animals living in the wild" (Chapter 1 § 2), thus suggesting that the animals' relationship to humankind still matters a great deal. There is nonetheless an undeniable tension between the ideals that manifest themselves in the public law legislation and some fundamental legal categories of the legal system. In other words, as the Supreme Court's vague expressions testify, our legal grammar lacks the tools to express the uniqueness of animals and of the very concrete legal issues that emerge around them.

One could be tempted to dismiss this discussion as the fruit of abstract conceptualism, irrelevant to the contemporary pragmatism of Swedish law. I would argue, however, that those who underestimate the power of categories in legal thinking do so at their peril. A more productive scholarly attitude would rather be to carefully adapt legal categories so that they fulfill their assigned role.

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54 I say this from a strictly legal and analytical perspective. My two cats are not only subjects in my life, they are indeed very dear family members.

55 Djurskyddslag (2018:1192), Chapter 1 § 1.

56 Prop. 2017/18:147, p. 305.

57 Kulturmiljölag (1988:950), Chapter 2 § 1.

# Animals in Nordic Legal System