The Status of Non-human Animals in Nordic Contract Law

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1 Introduction

1.1 Non-human Animals Are Not Just Property

Just as other types of property, sentient beings – as long as they are not human – can be goods in sales agreements, rental property, deposits, collateral property, and objects of insurance, to name a few examples. In a legal sense, non-human animals are property, but the fact that they are living beings has, in addition to the ethical and moral issues that arise, some legal consequences.

The subject of non-human animals in contract law is indeed a broad subject because of the number of diverse contracts that are relevant. Maybe non-human animals as the object of sales of goods contracts is the easiest example to grasp and assess, partly because it is common to buy and sell non-humans, partly because the various Nordic Sale of Goods Acts are applicable to trade in non-human animals. But even when limiting the discussion to sales contracts, the subject remains broad because of the diversity of trade in different species and because humans perceive different species in different ways. There is certainly a market for production animals such as cows, hens and goats. There is also a market for feeder animals, i.e. non-human animals that are bought live for the purpose of being used as feed for other non-human animals. Since the Swedish Board of Agriculture took the position that it is incompatible with animal welfare to feed with live food,[1] the trade in mainly live mammals as feeders has decreased, at least in Sweden. However, it is still possible to buy and keep live feeders and then euthanize them with permitted methods before feeding. Furthermore, trade in live insects and larvae used as feeders for hens, reptiles, arachnids and birds still occurs, even in commercial trade.[2] In consumer trade, the typical case would be trade in pets.

There are different types of traders in the pet market. Some species such as birds, guinea pigs, mice and fish are sold both in pet stores and by private breeders. Trade in other species such as cats, dogs and horses are more exclusive to private breeders, although this is also an import trade market. Some exotic species such as reptiles, amphibians and arachnids are sold to a more limited extent by both pet stores and private breeders; there is a relatively large amount of trade in that market at the exotic exhibitions held in the Nordic countries annually. That market is in itself even more complex, partly because import trade is more common and the non-human animals are thus handled as traditional goods to a greater extent, partly because transport sales are common for certain species where, for example, arachnids and insects are delivered to buyers

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1 The Swedish Board of Agriculture's position on feeding with live food, Dnr: 31–6812/10.

2 Although insects and larvae are animals and hence should be protected by the above referred statement on feeding with live food, it seems that the Swedish Board of Agriculture's position only was meant to be applied to mammals. See the Swedish Board of Agriculture, *Insekter som foder,* (2019), [https://tinyurl.com/y62whv2e] Accessed 26 October 2020.

through mail and partly because several species require special permits. Examples of this are CITES-listed[3] animals and venomous reptiles.

Given this complexity, one article is hardly enough to achieve a full understanding of the concept of non-human animal rights within Nordic contract law, simply because there is not enough research on how non-human animals differ from other types of property from a legal standpoint. Which thread to start pulling is a tough call but a logical choice would be to start with what defines property and the law being applied to it, namely cases about ownership and corresponding rights and obligations. Ownership traditionally means a right to use the property as desired and from the perspective of the non-human animals there is some obvious friction that needs to be discussed in order to understand when and why limitations on the Nordic contract law should apply in that regard.

1.2 Animal Studies and Legal Reasoning

In order for legal argumentation not to stagnate when solutions to legal problems are lacking, legal scholarship must be allowed outside the task of establishing what the black letter law is. With this starting point, the question arises as to what the limits of the argumentation in legal scholarship are. One suggestion could be to allow argumentation for solutions up to and including the outer limit of the precedential authority of decisions by the Supreme Courts for the Nordic countries. When a Supreme Court rules within the framework of its precedent-establishing activities, new norms are formed. The task of legal scholars can only be to seek to predict what the Court would decide, if faced with legal issues not yet before it. The method of solving problems without given solutions in the black letter law should be similar both for the Supreme Court and for legal scholars.

It has been stated before that a great challenge of animal studies is to imagine a future different from the reality we know, and that the future remains to be chosen.[4] For those who have a strong commitment to non-human animals, it can be tempting to choose arguments that strengthen their rights and legal status. The problem with choosing such lines of argumentation is that these interpretations of what the law already is today will often be unrealistic. In my opinion, whether the intention is to describe only what the law is (*de lege lata*) or whether the intention is to argue for an improved legal status for non-humans (*de lege ferenda*), it is helpful to analyse the matter at hand with an approach from legal realism and legal prediction theory. This means establishing what the law is by assuming the role of a judge and using the same method and material that a court would use when considering a legal issue. This manner of solving the issue results in as accurate an estimation of what a court would do as possible. The advantage of this theoretical standpoint is that unrealistic conclusions are avoided.

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[3] The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is a voluntarily international treaty between states and organizations. The purpose of the treaty is to ensure that the survival of endangered species are not threatened by trade.

[4] P Waldau, *Animal studies: an introduction* (Oxford University Press 2013) 1 & 289.

1.3 Animal Law, Contract Law or an Interdisciplinary Approach?

The subject of non-human animals in private law can be approached from different points of view. Firstly, it should be said that there is a fundamental difference between analysing the status of non-human animals as property from a private law point of view and analysing the private law concerning non-human animals from an animal law point of view. In this article the legal arguments are meant to belong in the latter category.

Animal law scholarship is defined, not by the sources of law, but by the perspective used when studying them. Animal law scholarship is studies from the perspective of the non-human animals. Just like environmental law includes sources that traditionally are categorized within criminal law and administrative law among other areas, animal law includes sources from virtually all traditional areas of law, and is defined by the perspective through which the sources are assessed.

The focus of this article is non-human animals in contract law. From the view of the non-human animals this could be done in several ways, depending on what the goal of the argumentation is. With *lege lata* arguments, the outcome of applying Nordic contract law to non-human animals as if they were property in a traditional meaning could be analysed. In many cases the conclusion will be that the outcome does not conform with the fact that non-human animals are living beings and generally held beliefs on how living beings should be treated. With *lege ferenda* arguments it is possible to assess what the outcome should be.

This article aims for something in between the two. The thesis of this article is that non-human animals as property is yet to be defined within Nordic contract law. There are some indications that non-human animals are not just any category of property generally subjected to the principles of contract law in the legal sources. This means that courts, legal scholars and lawyers should perhaps rethink using traditional analogies and legal principles in interpreting contracts concerning non-human animals, and that new exceptions to existing general principles or even entirely new principles may be useful or even necessary for future application of existing contract law to factual situations involving non-human animals.

2 The Sources of Nordic Contract Law

2.1 The Importance of Analogies and General Principles in Nordic Contract Law

In contract law, analogies and general principles are important sources of law, therefore studying one area of private contract law can open doors in others. All legal systems have gaps in the law. Courts and other authorities that apply and interpret law must, regardless and in one way or another, resolve new legal issues. In administrative law and criminal law, the absence of rules usually means that the right or obligation claimed in the process is not recognized by the courts. For example, if a person is prosecuted for morally unacceptable behaviour and the court finds that the defendant's actions are not covered by a statutory penalty, the outcome of the case will be that the defendant is acquitted of the charge. In private law, it does not generally work that way. The court may,

within the limits of rationality, apply rules outside their scope, constructing unwritten law by arguing that there is a general principle that establishes a certain right or obligation without having to take into account principle of legality in the same way as in the above example from criminal law.

The fact that there are gaps in contract law is not unique to the Nordic countries. On the other hand, it must be stated that the use of analogies and general principles is more extensive in the Nordic countries compared with many other legal systems. This is because the Nordic countries never obtained a comprehensive and coherent civil code in the way that, for example, Germany did. Instead, the Nordic model means that only some central contract types such as those for sales and agency services are regulated in special legislation, and the large majority of contract types have been left unregulated. The general statutory rules of contract law that exist in the respective Nordic countries cover only very basic issues concerning the validity of contracts.

In addition, there is certainly legislation on for example interest and damages, but these rules are not only optional but also deviate from general principles and customs. Courts in these instances may overrule the statutory rules and interpret contracts to include additional terms, in many cases even without the parties having anticipated or agreed on these issues.

2.2 Gap Filling with Foreign Law

Constructing legal norms by the use of analogies and general principles with reference to foreign law is traditionally not used as an independent method of so-called gap filling, possibly because of the deep-rooted tradition of solving unregulated issues through analogies in Nordic contract law. Another explanation may be that only with the recent development of international contract law sources such as the Draft Common Frame of Reference (DCFR) has it become justified to gap fill with reference to foreign law. However, it is clear that reference to the laws of the other Nordic countries is not viewed as gap filling with reference to "foreign" law and is widely accepted within Nordic contract law.[5] Gap filling means constructing norms, or at least extending the existing norms. Even if the adoption of foreign legal norms can be said to be one of the rarities in Nordic law, gap filling in contract law cases is an occasion when it may be considered necessary.

Foreign law means norms that belong to foreign legal systems, that is foreign and international legal systems. As an example of such obviously-foreign norms is the principle of consideration found in British law. The example is easy to identify as foreign to Nordic law because a corresponding principle with different content exists here.

With other examples, it is more uncertain whether the norms can be considered foreign. Hagstrøm discusses the relationships with the Germanic-Roman principles that exist in Nordic law and mentions the principle of

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[5] See T Wilhelmsson, Den nordiska rättsgemenskapen och rättskälleläran, in TfR nr 1985/2 (TFR, 1985) 181–197. M Laakso, Prejudikatverkan över Bottniska viken, in H Sundberg (ed.), *Skrifter till minnet av Halvar G. F. Sundberg* (Institutet för offentlig och internationell rätt, 1978) 93-114.

condictio indebiti as an example.[6] It could certainly be of theoretical interest to discuss whether the Swedish principle of *condictio indebiti* is the same norm as the Norwegian one or whether these are now two different norms with similar content and the same historical origin. However, such a discussion would not be particularly useful. Far more interesting is the question of the legal value of, for example, Norwegian case law on the application of the principle *condictio indebiti* in a Swedish court. When a question concerning the application of *condictio indebiti* is unclear in Swedish law, can case law from systems where the principle exists be used to decide the issue? The same question can be asked for norms deriving from Nordic legislative works such as the Nordic Sale of Goods Acts. These norms can be both identical legal rules and norms that have become so widespread that they may be considered to constitute general principles in the respective Nordic legal systems.

Through the Helsinki Agreement of 1962,[7] the Nordic countries have agreed to continue the legal co-operation that has long been part of the Nordic legal culture. Article 4 of the Helsinki Agreement stipulates that cooperation shall aim at achieving the greatest possible conformity in the field of private law. Although the agreement does not imply an obligation to achieve legal uniformity or to even de facto cooperate in every legislative matter, Nordic legal equivalence should be taken into account when deviating from the fundamentals in private law. This is especially true when the same issue, due to the Nordic EU membership, must be taken into account in several of the countries. The fact that trade in live non-human animals takes place across the borders of the Nordic countries is another argument for considering the value of Nordic unity in matters concerning non-humans.

Nordic contract law has essentially a similar character and the neighbouring countries' legislation, preparatory work and case law, as well as Nordic legal literature (scholarship), play an important role in understanding the law of the respective Nordic countries.[8] In regards to the similar content of contract law in the Nordic countries, the conclusion is undoubtedly that Nordic sources can be used in solving national legal problems.[9] What the actual legal value of Nordic legal sources is cannot be determined as easily. As an example, it is hardly controversial to refer to Norwegian case law in order to shed light on different interpretations of legal acts deriving from the co-operative Nordic legislation such as the Sale of Goods Act. Whether it is possible or appropriate in Swedish law to gap fill contracts with norms that appear in the Nordic material is not as obvious.

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6 V Hagstrøm, *Obligasjonsrett*, (Universitetsforlaget, 2013) 88–89.

7 Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden (the Helsinki Treaty). The treaty entered into force in 1962 and has since been revised several times, last in 1996. Although the agreement is still in force, a dissolution on co-operation between the Nordic countries can be seen in the legislative work. The reasons for this are probably several, including the Nordic EU, EMU and NATO memberships as well as a reduced linguistic understanding of the neighbouring Nordic languages.

8 SOU 1979:36 s. 85-86.

9 T Wilhelmsson, Den nordiska rättsgemenskapen och rättskälleläran, in TfR nr 1985/2 (TFR, 1985) 181.

The difference has to do with the type of argument the material would support. Wilhelmsson talks about the difference between supporting factual arguments and authority arguments with Nordic sources. With Nordic law, it is the case that for certain issues, the neighbouring countries' legal systems are to be equated with other foreign systems because the norms have not been constructed in the legal community or because legal developments have led to identical rules being applied differently. In other cases, the legal community is so strong that the Nordic systems must be taken into account in order for an analysis of a particular issue to be said to be complete. [10]

2.3 Private Law-making

The possibility for private organizations to create autonomous "legal systems" is great in the Nordic legal tradition. Ownership of non-human animals is in various ways linked to private organizations such as equestrian federations, kennel clubs and cat clubs. The Swedish kennel club (SKK) is one of the organizations that has had great success in private law-making. Therefore, SKK's regulations can serve as an example in the analysis. Section 2:7 of SKK's basic rules for members states that breeders affiliated with the SKK organization are bound to use the organization's contract forms. In theory, dog breeders are of course not bound to be members of the SKK organization, but in practice the value of membership is so great that it is in principle a requirement to have any success in the dog breeding world.

Without membership in SKK, breeders cannot register puppies as purebred according to section 6 of SKK's registration rules, they cannot participate in shows and competitions to prove the quality of breeding dogs according to section 16 of SKK's show and championship rules, nor mediate puppies through the organization. In practice, this means that the economic value of the puppies decreases considerably and that the circle of potential buyers decreases because an unregistered dog cannot be used in show and competition activities. This creates a unique opportunity for the SKK organization to regulate the sales of dogs through the contract form established by the organization and which must therefore be used by the breeders. If a breeder does not follow the rules, SKK's disciplinary committee can decide on a warning, ban or exclusion from the organization. A ban can, for example, include a ban on registering puppy litters, a ban on participating in shows, tests or competitions. Usually such a ban applies for six months up to three years.

The contract form for sales of dogs currently used by SKK largely reproduces the consumer legislation. In other words, the parties are obliged to use a contract where legislative text is used as contract terms. It can be assumed that this has primarily been done to call the parties attention to the content of the applicable law. A consequence is that otherwise non-compulsory parts of the legislation are solidified in the contract. For example, clause 5 of the agreement regulates an obligation for the buyer to consult with the seller before veterinary care due to deficiencies. In addition, clause 7 of the agreement stipulates that, with the exception of consequential damages, the seller's liability is limited to the price

[10] S Strömholm, Användning av utländskt material i juridiska monografier in *SvjT 1971 s. 251* (SvJT, 1971) 254–255.

of the dog; insofar the seller has not acted fraudulently. Anyone who buys a mixed breed dog should thus be in a better position with regard to the below-mentioned precedent NJA 2001 p. 65 I & II.

Clause 1 of the contract form also contains a condition that the dog is sold for use mainly for companion purposes. The Swedish Sale of Goods Act stipulates that deficiencies shall be assessed with so-called abstract assessment based on the buyer's legitimate expectations. For example, the breeders advertising can invoke a legitimate expectation on a certain breeds or specific litters suitability for hunting-, show- or competition purposes. In its wording, the clause means that so-called abstract assessment regarding the buyer's legitimate expectations of the dog's characteristics that fall outside companion purposes should not be taken into account.

Of the nine breed groups into which the dog breeds approved by SKK are divided, only one refers to companion dogs. Some examples of characteristics of the dogs that occur in other breed groups are qualities relevant for hunting, sled dog sports, shows and various performance sports such as agility. In the case of consumer sales, however, the clause cannot have such a meaning because of the mandatory nature of the Consumer Sales of Goods Act.

Furthermore, clause 6 of SKK's contract form stipulates that complaints must be made according to the model regulated in the Consumer Sale of Goods Act, i.e. complaints must be made within a reasonable time. Two months from the time the “defect” is discovered is always considered a reasonable time and the far limit for valid complaint is three years. This construction is thus applied both to consumer sales and when private individuals or traders trade with each other under the SKK regulation. With regard to the rule on presumption of errors of origin contained in the Consumer Sale of Goods Act, the agreement stipulates that the assessment of whether the dog is faulty must be assessed with regard to its nature on time of delivery. The seller is responsible for errors that existed at this time, even if the deficiency only appears later (so-called hidden deficiency). A deficiency that appears within six months after the dog has been handed over must, according to the Consumer Sale of Goods Act, be considered to have existed at the time of delivery, unless otherwise shown or this is incompatible with the dog or the nature of the deficiency.

In addition, the agreement contains several clauses which have no equivalent in the Sale of Goods Act. Examples of such clauses are a requirement that at the time of sale there must be a veterinary certificate that must not be more than seven days and that disputes due to the agreement can be tried by SKK.

In summary, it can be stated that in the case of purebred dogs, there are private legal systems which in some respects deviate from the optional provisions of law and that regardless of the theoretical legal validity of these deviations, the SKK regulation is in fact being applied outside the courts.

3 Construction of Rights in Contracts

3.1 Contractual Rights

Contractual obligations constitute a commitment to meet the other party's contractual rights. [11] The existence of an obligation can thus be described as the prerequisite for a claim. Such a relationship is characterized by the fact that a creditor has a right (claim) and that a debtor has an opposing obligation to meet it. In order to better understand the meaning of the concept of rights used here, it is therefore important to discuss what is meant by legal obligations.

Contractual responsibilities in the broadest sense are norms that either call for a certain action or require that one abstains from a certain action.[12] Responsibilities can be graded with regard to whether there is an opposing right and whether such right is enforceable or not. In the field of private law, this can be linked to whether the legal responsibility is associated with a contractual penalty in the event of failure to fulfil the obligation. In order to use a taxonomy for what has now been said, contractual responsibilities can be said to be an expression of all types of legal norms which mean that a contracting party must act in a certain way, while obligations are such responsibilities where the obligated party also has an opposing right that can be enforced.[13] It should be clarified that it is not enforcement in the broad sense referred to here but enforcement through civil penalties. However, it is not possible to reason in reverse order. The fact that a sanction can be imposed on someone does not mean that there is a breach of contract.[14]

In summary, a party who legally can invoke a sanction intended to enforce the other party's obligations has a right. The problem in this respect is that the non-human animal covered by a contract, regardless of whether it is sold, is subject to veterinary care or is used for breeding, the non-human animal has no right to appeal, but instead it is the owner who can invoke the contractual penalties. At most, it is possible to talk about the non-human animal having indirect rights that can be enforced through the owner.

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[11] K Rodhe, *Lärobok i obligationsrätt* (Norstedts, 1986) 33. V Hagstrøm *Obligasjonsrett*, (Universitetsforlaget, 2013) 26.

[12] K Rodhe, Några reflexioner rörande förmögenhetsrättens systematik, in Karlgren H., (red.) *Teori och praxis: studier i svensk civilrätt: skrifter tillägnade Hjalmar Karlgren* (Norstedts, 1964) 275.

[13] T Strömberg, Om juridiska "bruksanvisningar", in A Bratholm, et al. (ed.), *Samfunn, rett, rettferdighet: festskrift til Torstein Eckhoffs 70-årsdag* (Tano, 1964) 666. K Rodhe, Några reflexioner rörande förmögenhetsrättens systematik, in H Karlgren (ed.) *Teori och praxis: studier i svensk civilrätt: skrifter tillägnade Hjalmar Karlgren* (Norstedts, 1964) 275. Cf. K Lilleholt, *Kontraktsrett og bligasjonsrett,* (Cappelen Damm, 2017) 462.

[14] T Eckhoff , N K Sundby, *Rettssystemer: systemteoretisk innføring i rettsfilosofien* (Tano, 1988) 69. K Rodhe, Några reflexioner rörande förmögenhetsrättens systematik, in H Karlgren (ed.) *Teori och praxis: studier i svensk civilrätt: skrifter tillägnade Hjalmar Karlgren* (Norstedts, 1964) 275–276.

3.2 Freedom of Contract

Although there are rules meant to ensure non-human animal protection and welfare in the Nordic countries it could be argued that the regulations, because of the systematics of the legal sources, do not constitute any fundamental rights for non-human animals, such as rights to property, safety, family life, or a right to life. Mainly because non-humans have no way of enforcing said rights. It is not uncommon to see clauses in contracts where such rights, at least indirectly, are constructed for non-human animals.[15]

The general principle on freedom of contract constitutes a freedom and a right to decide what terms to agree on. This right is of course not without exception.[16] If, for example, clauses in a sales contract are designed to give a non-human animal a right to life, a right to medical treatment or a right to a certain level of dignity, the buyer's property rights at the same time becomes limited. In Nordic contract law such limitations are generally not valid because of the absolute nature of ownership. For example, if a car is sold with a contractual clause stating that the car must be returned to the seller if it is not maintained and properly cared for, such clause would be considered void because choosing to neglect a car's maintenance is a right that follows with ownership. Since the ownership is passed to the buyer there are no possible ways for the seller to enforce the clause. However, this is the general principle applied on all sales of goods and some limitations do apply. One example is so called retention of title clauses [*swe: återtagandeförbehåll*]. If goods are sold on credit with a clause stating that ownership remains with the seller until the credit used as payment is payed, the seller can have a right to have the goods returned if the buyer doesn't pay in time.[17]

3.3 Agreeing on Rights for Third (Non-human) Parties

As stated above parties are normally free to agree on what ever terms they wish. A binding contract constitutes legal obligations and rights for the respective parties. It is generally not possible to bind third parties to contractual obligations. A contractual right on the other hand can be constituted for a third party within Nordic contract law.[18]

What has been said about obligations and the absence of corresponding rights up to this point is true, foremost within administrative law. I.e. the legislative obligation to care for non-human animals does not mean that they have a corresponding enforceable right. But, what if two human parties agree that a specific non-human animal does hold certain fundamental rights and that one of the parties must ensure those rights? For instance, If A and B agree that B can buy C, who is a non-human, provided that B is obligated to take all means necessary to ensure that C lives a healthy life and that a breach of these terms gives A the right to cancel the agreement on any given point. As stated above

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15 H Stirwing, *Djur som brottsoffer* (Nya Doxa 1998) 29–30.

16 B Lehrberg, *Avtalsrättens grundelement* (2nd ed, IBA 2006) 67–68.

17 J Ramberg, J Herre, *Allmän köprätt,* (8th ed, Wolters Kluwer 2016) 123.

18 O Lando, et al., *Restatement of Nordic contract law* (Jurist- og økonomforbondet, 2016) 70.

such clause would normally be considered void. But non-human animals are not just any property and there are good reasons to rethink the general principles of contract law in this matter.

4 Rethinking General Principles and Analogies

4.1 Analogies and General Principles in Nordic Contract Law

In the field of private law, general principles play a central role. Since most of the contract law is not statutory, legal issues must be resolved with what could be called unwritten law.[19] But what is the basis for the courts' ability to apply unwritten rules and how should a court proceed to construct general legal principles?

To begin with, perhaps a remark about the legal positivist spirit that prevails in Nordic legal culture should be made. The idea of *lege lata* is not based on the existence of a universal law or ultimate justice that can be discovered and applied. Instead, it is part of the Nordic legal tradition that valid law is the law constituted in the sources of law. The doctrine of authority of legal sources and their legal value is stated in customary law.[20] In other words, the idea of what the law is relies on the application of law and the idea is that the interpretation that gains sufficient dissemination and approval in the legal community is valid. With such a view on what the law is, it is of course more difficult to explain the method for establishing what the law is in unregulated cases.

The construction of law is thus something that takes place in the legal culture, but which from a legal positivist point of view is difficult to explain. Possibly it gives a greater peace of mind to the die-hard legal positivist to call the exercise revealing rather than construction. This model of thought, that there is an underlying unwritten law that can be discovered, is certainly no more problematic than a theoretical model where an unregulated case must be solved by constructing new norms. In the cases NJA 2009 p. 672 and NJA 2018 p. 19, the Swedish Supreme Court referred to construction of law.

The theoretical view taken by the court as to whether principles are constructed or revealed is certainly interesting in itself but has a limited value in practice. The view that general principles of contract law are built into the system and that the task of legal scholarship as well as the courts, is to uncover these through argumentation should also be included in the court's proposed method. What is central in this context is the court's position on the connection between the law in the regulated area and what should apply in unregulated cases.

Regardless of whether the unwritten law is considered to exist before it is applied for the first time or not, it may be of interest to mention something about the relationship to other sources of law in regards to Kaarlo Tuori's theory of the levels and dimensions of the law.[21] General legal principles can be said to be at

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[19] J Ramberg, C Ramberg, *Allmän avtalsrätt* (Wolters Kluwer, 2016) 18. E Taxell, *Avtal och Rättsskydd,* (Åbo akademi, 1972) 73.

[20] J Sundberg, *Fr. Eddan t. Ekelöf: repetitorium om rättskällorna i Norden* (Studentlitteratur, 1978) 26.

[21] K Tuori, *Critical legal positivism,* (Routledge, 2016) 192.

the intermediate level of the law, i.e. they are not viewed as legal acts at the surface level by default. Once established and having gained sufficient approval, general legal principles may possibly be elevated in status.

Principles at the intermediate level can be said to be rooted in the third and lowest level of the law. The private law system is based not only on society's ethics and morals but also on legal norms. In practice, however, it can be difficult to distinguish between moral norms and legal norms, which are often at least partly motivated by morality.[22] Though the underlying morality of the legal sources is not vital for the construction of legal norms. The important factor is that new norms are not introduced without arguments based on values in the legal sources. Arguments must cohere with the laws' deeper structure, be accepted in the legal culture and be coherent with the rules at the surface level.

The latter part of this statement is supported in the literature, where it has been argued that the lack of regulation and that the need for harmony in the legal system constitute grounds for allowing the application of a legal norm to extend into the unregulated area.[23] The argument about the need for harmony in the legal system should be particularly relevant when it comes to allowing a certain solution to a central part of contract law to serve as a model for the application of law in other cases.

The existence of several converging norms provides an incentive to proceed with a discussion on whether there is a basis for constructing a principle through legal analogy. However, such an analysis cannot take place at the surface level of the law, but it must be the underlying objective of the norm that forms the core of analogy-based arguments.

Further arguments in the literature consist of a view that several norms of similar meaning suggest that there is a general principle.[24] Studying patterns at the surface level of the law, that is, discovering norms with similar meaning, in this way can often be fruitful in an initial stage. The method can be said to be accepted and in practice constitutes a type of analogy.[25] In this context, it is usually pointed out that in German law a distinction is made between statute analogy [ger: *gesetzeanalogie*] and legal analogy [ger: *rechtsanalogie*] where the latter type of analogy is the now discussed method which consists of induction from several rules.[26] Whether the existence of several similar rules in itself means that there really is a principle that corresponds to the rules is very doubtful.

A position that can be taken on the question of the validity of general legal principles as legal norms is that it depends on whether they are perceived as valid

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[22] Cf. J Munukka, Lojalitetsplikten som rättsprincip, in *SvJT 2010* (SvJT, 2010) 844–845.

[23] J Hellner, et al., *Speciell avtalsrätt II: Kontraktsrätt. 2 häftet. Allmänna ämnen*, (Wolters kluwer, 2016) 104.

[24] J Hellner, et al., *Speciell avtalsrätt II: Kontraktsrätt. 2 häftet. Allmänna ämnen*, (Wolters kluwer, 2016) 21.

[25] J Hellner, et al. *Speciell avtalsrätt II: Kontraktsrätt. 1 häftet. Särskilda avtal*, (Norstedts, 2015) 27.

[26] M Jerkø, En taksonomi over rettslige prinsipper, in *Tidsskrift for rettsvitenskap vol. 125* (TFR, 2012) section 5. B Askeland, Om analogi og abduksjon, in Tidsskrift for rettsvitenskap 04–05/2004 (TFR, 2004) 501–503. J Hellner, Rättsteori: en introduktion, (Norstedts, 1994) 111.

and whether that perception has gained sufficient dissemination in Nordic legal tradition.[27] However, it does not say anything about whether it is desirable to refer to general principles in unregulated cases. Instead, the use of general principles is usually motivated by the idea that it contributes to the unity of the law as well as a predictable application of law.[28]

Legal argumentation should be free from arbitrariness and to make the argument for whether a principle should apply depending on values such as coherence and thereby equal treatment and predictability, keeps arbitrariness outside the equation.[29] Thus, when constructing general legal principles, the aim should be to develop principles that contribute to coherence and predictability, as principles with such characteristics should be widely accepted.[30]

To contextualize these arguments on the existence and validity of general principles as an important source of law in Nordic contract law, construction of a general principle, or the existence of an exception to an existing principle for that matter, should not be based on the structural similarities and differences of non-humans and other types of property, but instead on the objectives of the law meant for property in general and how the similarities and differences de facto will lead to similar outcomes when the law is being applied to non-humans.

When arguments for the existence or absence of general principles cannot be made with sufficient rationality the method to gap filling states that statute analogies would be the next means of solving a legal matter.

Statute analogy as a legal method in unregulated cases is deeply embedded in the Nordic legal tradition.[31] In order for an analogous application of a legal norm to be made, a basic assumption of legal unity and an ideal of equal treatment must first and foremost be accepted. [32] Part of this fundamental theory can be expressed as an assumption that the legislator has sought coherence and consistency in its legislative work and that analogies therefore are both possible

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[27] A Aarnio, *Reason and authority: a treatise on the dynamic paradigm of legal dogmatics (*Aldershot, 1997) 167–168.

[28] A Peczenik, *Vad är rätt: om demokrati, rättssäkerhet, etik och juridisk argumentation*, (Norstedts, 1995) 700.

[29] P Hultgren, *Fel i tjänst: om felbedömning och påföljdsbestämning vid avtal om tjänster i oreglerade fall* (Umeå University, 2019) 27–28.

[30] But see C Dahlman, Does making the law more coherent also make it more acceptable?, in A Aarnio, et al., (ed.) *Justice, morality and society: a tribute to Aleksander Peczenik*, (Juristförlaget, 1997) 119–122.

[31] J Hellner, Lagstiftning inom förmögenhetsrätten: praktik, teori och teknik, (Juristförlaget, 1990) 91. See also T Almén, R Eklund, Om köp och byte av lös egendom: kommentar till lagen den 20 juni 1905, (Norstedts 1990) 5.

[32] L Heuman, *Metoder för rättstillämpning och lagtolkning: generaliseringar, logik och argumentation*, (Jure, 2018) 107. A Peczenik, *Juridisk argumentation: en lärobok i allmän rättslära*, (Norstedt, 1990) 191–193. S Strömholm, *Rätt, rättskällor och rättstillämpning: en lärobok i allmän rättslära*, (Norstedts, 1996) 414. B Askeland, Om analogi og abduksjon, in *Tidsskrift for Rettsvitenskap 04–05/2004* (TFR 2004) 500. D Reidhav, *Reasoning by analogy: a study on analogy-based arguments in law*, (Diss), (Lund University, 2007) 45–46.

and desirable, [33] even if the legislator's intentions are not of the same dignity as customary law. [34]

The idea that when new norms needs to be constructed, norms should be developed in a way that forms uniformity and coherence in the law, also protects the system from arbitrariness in the application of law.[35] The ideal of uniformity, and generalizability advocates analogous application, and application of general legal principles for that matter, over other possible methods of gap filling. When values and norms already existing in the system are considered while constructing law, the risk of arbitrariness in the construction of a new norm in unregulated cases is eliminated. [36]

While the analogy as a legal method at first glance may seem arbitrary in relation to a model with an all-inclusive codification, analogies thus have a function that protects the system from arbitrariness.

When legal analogies in the field of contract law are discussed, it is perhaps mainly the gap filling in unregulated cases that comes to mind. Legal norms that have been found suitable for analogies in a particular case may, however, also be relevant in the interpretation of a contract. For example, if a legal term has been used in a contract without a definition of the term's meaning, case law, preparatory statements and legal comments that concern the same legal term when used in legislation may have an impact on how the term in question should be understood in the contract.

4.2 Property, but Not Just Any Property

What has been stated about the Nordic legal culture and the importance of analogies and general principles within Nordic contract law suggests that non-humans should be treated as any other property because such application of the law would lead to coherence and foreseeability, two key values in Nordic law. However, the principle of equal for equal should not be applied on the structural similarities of two cases, e.g. that two cases concerns property. But instead the principle should be applied on the functional similarities. Because the legal norms in statutory legislation, case law and general principles have been developed with inanimate things in mind, it is important to assess the differences in the outcome of applying the same norms to sentinel beings. The fact that, for example, limitations on freedom of contract are based on the fact that only the human parties, not the property itself, have interests, it is only natural that the principles are formed to protect the parties. But in a situation where the property de facto has interests, analogies cannot be conducted without assessing that fact.

In Swedish case law, which as stated above should be considered a legal source of authority in all Nordic countries, there are two cases that support this

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[33] See A Peczenik, Legal doctrine and legal theory, A Fogelklou, T Spaak (ed.), in *Festskrift till Åke Frändberg* (Iustus, 2003) 178.

[34] A Peczenik, *Juridikens metodproblem*, Almqvist & Wiksell, 1980) 82.

[35] P Hultgren, *Fel i tjänst: om felbedömning och påföljdsbestämning vid avtal om tjänster i oreglerade fall* (Umeå University, 2019) 27–28.

[36] A Aarnio, Om rättssystemets slutna natur, in K Tuori (ed.), *Rättsdogmatikens alternativ*, (Juridica, 1988) 15.

statement. In the cases referred to in NJA 2001 s. 65 I & II, the general principle of compensation for property damage was assessed by the court. The principles states that compensation for damage to property would be either the cost of repair, or if such compensation exceeds the value of the property, the cost of obtaining surrogate property of the same type.[37] Talking about repairing a sentient being is of course peculiar, to say the least, but the principle can be translated to veterinary care needed to restore the non-human animal's health or economic value.

The court stated that although non-human animals generally are to be seen as any property, they are not just any property. In the two cases pets had been attacked by dogs and in Swedish law, dog owners have strict liability for damages caused by their dog. But in these two cases the pet owners had been caused damages in the form of costs for veterinary care exceeding the economic value of their pets. Despite the principle of limitation of liability for property damage, the Swedish Supreme Court ruled that liability for damages can exceed the economic value when the damaged property is a pet.

According to the court a pet owner will normally take their pet to a veterinarian even though the cost of the care will exceed the value of their pet and that it is seen as a normal expense for damage to pets and should therefore be compensated.[38] It is however not clear if the court based its ruling on the non-human animals' interest or the pets' sentimental value to their owners.

In another case from 1990 the Swedish Supreme Court ruled that unwanted mating between non-human animals is also seen as damage to property.[39] This is stated in NJA 1990 s. 80 where a loose Labrador retriever male dog bred a female German Shepard dog. The owner of the female dog was keeping her for breeding and the unwanted mating led to damages for the owner when the crossbreed puppies could not be sold and instead was euthanized. According to the Swedish kennel clubs' mandatory rules for breeders a female dog was recommended to not give birth to more than one litter per year and is only allowed to have six (now five) litters in her lifetime. In this case the Supreme Court stated that unwanted mating damaged the property because the German Shepard owner temporarily lost full access to her property and therefore should be compensated. In this case it is clearer that the court based its ruling on human interests. Regardless it is clear that non-human animals are not to be characterized as any property and the fact that they are sentient beings must be assessed when applying general contract law sources.

Some traits generally held by property are that it can be sold, given away, rented out, leased, abandoned and lost. The legal consequences of doing so however, differ for different types of property. Abandoning oil or losing a firearm can be a criminal offence. Selling tobacco or alcohol requires special permits, and so on. Also, within the law of obligations, different types of property are subject to different sets of rules. When shipping goods there is sometimes an obligation to insure the goods. Saying that non-human animals, because they are property, should be treated as property in general, is thus a hasty

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37 J Hellner; M Radetzki, Skadeståndsrätt (Nordstedts Juridik, 2014) 385.

38 B Bengtsson, Skadestånd utom kontraktsförhållanden 2001–2003, in *SvJT 2004 p. 829* (SvJT, 2004) 841. E Diesen, Djurens juridik (Wolters Kluwer, 2016) 33.

39 J Hellner; M Radetzki, Skadeståndsrätt (Nordstedts Juridik, 2014) 100.

conclusion. There are no statutory rules on non-human animals as property in contracts, the case law is very limited and therefore it is not yet clear if limitations to human property rights are valid when the subject of a contract is a non-human animal.

Article 13 of the Treaty on the Functioning of the European Union states that, through its membership, the Member States have to take full account of animal welfare and that they are to be recognized as sentient beings.

Regardless of how that relationship is consistent with society's and the population's moral and ethical view of living non-human animals, it is a fact that non-human animals can be owned by humans. This fact means, for example, that sales law disputes can and will arise and that it is therefore necessary that there are legislation and general principles that apply to non-humans as property. Whether it is appropriate to consider such cases with the same rules that are not specifically designed to meet animal welfare is another question.

5 Conclusions

Non-human animals are, in the strict legal sense, property and are therefore subjected to the same rules that apply to other property such as cars, furniture and electronics. What distinguishes living non-human animals from other movable property is that they are in fact sentient beings.

However, the fact that non-human animals are property in a strict legal sense does not mean that they should be treated as any property, not when statutory rules are applied, nor when unregulated cases are settled through analogies and general principles. It is clear that all private law principles that apply to property, for example that compensation for property damage is limited by the value of the property, do not apply to living non-human animals. In the same way, there can and should be other exceptions. For example, it is not unlikely that a court in a Nordic country would allow clauses stating that a non-human animal that is sold shall be returned to the seller if it is not taken care of in accordance with the terms of the agreement, even though the general principles of Nordic contract law state that clauses of that kind are void because they limit human property rights.

It can thus be said that, in addition to the fact that non-human animals are certainly property, it is uncertain what status non-human animals have in Nordic contract law.

For those who want to improve the status of non-human animals, there seems to be good opportunities to do so. For example, by developing private law-making with a greater focus on non-human animal rights, or by improving argumentation for analogies and general principles, not only accommodating and applying law designed for inanimate objects on non-human animals.