

# **Access to Justice for Non-human Animals – Possibilities and Challenges within the Swedish Legal System**

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## 1 Introduction

In my research and work with animal organizations, I have become aware of the systemic shortcomings in legislation and law enforcement related to animals and the relationship between humans and animals. With this article, I want to highlight these shortcomings and point out how Swedish law and law enforcement can be used today or must change in the future in order to advance animals' legal positions and raise their legal status.

In the first part of this article, I will focus on the ideological and political background of animal welfare laws and discuss whether it is possible to derive any rights for animals from animal welfare legislation, correlative to explicit animal welfare duties. Further, I will discuss how animals are valued in criminal law and what procedural possibilities are available, for example regarding the right of appeal for an animal. If the law refers directly to the intrinsic value of animals, does this have a normative effect?

A distinction is made between animal welfare and animal rights. Consequently, the legal arguments will be different if one wants to use animal welfare legislation to improve the situation for animals, compared with if one wants to move towards judicial creation of certain basic animal rights. An example of the latter could be lawyers who work to ensure that animals are given the status of legal persons instead of being seen as property – a change that would open for animals to be given the status of plaintiffs and victims of crime, with the right to their own legal representatives.

In the second part of the article, I will report some results from my study on the link between violence against people (especially men's violence against women and children) and violence against animals, and the legal complications in domestic violence cases where both humans and animals are victims.

## PART I

### 2 The Principle of Intrinsic Value and the View of Animals as Sentient Beings

EU legislation has gradually strengthened the protection of animals. Since 2009, it is stated in Article 13 of the Treaty on the Functioning of the European Union (TFEU) that the Union and the Member States, when formulating and implementing the Union's policies on agriculture, fisheries, transport, the internal market, research and technological development and space, shall take full account of the welfare of animals as *sentient beings*, while respecting the Member States' laws and other statutes as well as customs especially in matters of religious rites, cultural traditions and regional heritage.<sup>1</sup>

Article 13 has inspired several Member States to amend their animal welfare laws and therein state that animals are not things.

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<sup>1</sup> [https://eur-lex.europa.eu/eli/treaty/tfeu\\_2012/oj](https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj).

For example, the status of animals was changed in the French Civil Code in April 2014. Animals went from being categorized as personal property to being recognized as “living beings equipped with consciousness.” Opinions on the significance of the change in the law differ among animal rights and animal welfare organizations in France. While some have worked hard to realize this change, others believe that it will have a primarily symbolic significance as long as the system that allows animals to be exploited remains. No actual changes to the law have been proposed as regards how animals may be treated.

The EU Directive concerning animals in medical research reads as follows:

Animals have an intrinsic value which must be respected. There are also the ethical concerns of the general public as regards the use of animals in procedures. Therefore, animals should always be treated as sentient creatures and their use in procedures should be restricted to areas which may ultimately benefit human or animal health, or the environment.<sup>2</sup>

The wordings of the TFEU and the Directive are important expressions of the idea that animals have a form of moral value that goes beyond a purely economic interest. However, in reality, the recognition of animals as sentient beings is of little importance. For example, animals’ “right” to be free from unnecessary pain and suffering has no value if virtually any instrumental interest in using animals is deemed to be a sufficient justification for infringement of said right.

The Norwegian Animal Welfare Act stipulates that animals have an intrinsic value, regardless of their usefulness for humans. Compared with past legislation, the act should provide stronger protection for an animal’s right to live its life and stricter conditions for keeping animals in captivity, but it has not changed the animals’ legal status from that of object.<sup>3</sup>

The same ambition to regard animals as sentient beings was found in the report ahead of a new Swedish Animal Welfare Act, Chapter 1, Section 1:

This Act aims to ensure good animal welfare, including good animal health. It also aims to promote respect for animals and their welfare, as animals have an intrinsic value regardless of their benefit for humans.”<sup>4</sup>

The fact that the wording of a legal text recognizes animals’ intrinsic value could be an important step towards seeing them as actors in the legal sense, and could open for the possibility that animals in the future will be given a set of “rights.” However, the Government did not adopt the investigator’s proposed wording in the bill.

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<sup>2</sup> Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, pretext (12).

<sup>3</sup> Note that Norway is not an EU Member State.

<sup>4</sup> SOU 2011:75 Report of the investigator in review of the design and content of animal welfare legislation.

### 3 New Animal Welfare Legislation

Chapter 1, Section 1 of the new Animal Welfare Act was instead worded as follows:

This Act aims to ensure a high level of animal protection and promote good animal welfare and respect for animals.

According to the bill, animal welfare means that an animal feels well, both physically and mentally. The term encompasses all aspects that affect the animal's wellbeing, such as health, biological function, behavioral needs and emotions. It can be seen that the Government believes that the fundamental purpose of the Animal Welfare Act should remain the prevention of suffering and disease in animals.<sup>5</sup>

In this context, the consultation bodies – the Swedish Board of Agriculture and the Swedish University of Agricultural Sciences – emphasized that it was a positive, important and new step towards a better life for animals to move from merely “animal protection” to “animal welfare”.<sup>6</sup>

Several consultation bodies, including the Swedish Farmers' Association (LRF) and the Parliament's ombudsmen (JO), objected to the wording “intrinsic value” in the legal text. JO did so for legal technical reasons and because the concept was considered argumentative and therefore not appropriate in a legal text. LRF stated that the effects of a statement that animals have an intrinsic value should be carefully considered, as this wording would raise the level of animal legal rights.<sup>7</sup>

The Government's rationale for not including the wording “intrinsic value” in the legal text was that the wording “respect for animals” should mean awareness of and recognition that animals are living and sentient beings with certain needs that must be taken into account. This, according to the Government, also meant that animals have an intrinsic value regardless of their benefit for humans. The very fact that there is a law that aims to protect animals from suffering and that regulates how animals may be handled and treated, is clear evidence that the Swedish legal system recognizes that animals an inherent value going beyond instrumental value as an asset or otherwise providing benefit or pleasure to human.<sup>8</sup>

In objection to the Government's rationale, it could be argued that the true meaning of “intrinsic value” is that animals are in fact assigned a value independent of people's view of them, while the wording “respect for animals” is aimed at humans, as a strengthened call to observe existing animal welfare.

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<sup>5</sup> Animal Welfare Act (2018:1192), which encompasses all animals kept in captivity or possession, Chapter 1 Section 2.

<sup>6</sup> Bill 2017/18:147 New Animal Welfare Law, p. 53.

<sup>7</sup> Bill 2017/18:147, p. 52.

<sup>8</sup> Bill 2017/18:147, p. 54.

## 4 The Structure of Legal Animal Rights

The formal structure of rights is generally explained based on a Hohfeldian typology of rights, and distinguishes between four different types of basic conceptual rights: Claims, liberties, powers and immunities.<sup>9</sup> Claims and liberties are first-order rights, which means that they directly concern someone's actual conduct rather than normative conduct, whereas powers and immunities are second-order rights that concern other legal relations.

### 4.1 Animal Claims

To have a claim to something and against a person corresponds to that person's correlative duty towards the right holder to do or not do something. Claims seems suitable for animals, since they would concern the duties of others (human individuals or authorities) towards animals, and would not require any action on the part of the animals themselves.

### 4.2 Animal Liberties

Liberties are active rights related to the right holder's own conduct. A liberty would indicate that an animal is free to engage in or avoid certain behaviors, in the sense of being free from a specific duty to do otherwise. However, since animals are generally incapable of having any legal duties, liberties seem rather pointless.

### 4.3 Animal Powers

A power refers to having control over a given legal relation and entails a normative ability to alter another entity's legal position. Powers are active rights that have to be exercised, not passively enjoyed (like claims), and thus require legal – rather than practical or behavioral – agency. The position of animals could here be compared with that of children who also cannot exercise their powers (e.g., powers of enforcement) on their own without an agent.

### 4.4 Animal Immunities

Immunities are passive rights, meaning freedom from the legal power of another – that is, what the person affected by the animal's immunity cannot legally do.

One of the most basic rights frequently discussed for animals is the right not to be property. It could be explained as an immunity that would preclude the legal powers that go along with the animal's status as legal property, and would thus prevent human owners from making decisions over the animal.<sup>10</sup>

<sup>9</sup> Nigel E Simmonds, *Central Issues in Jurisprudence, Justice, Law and Rights*, CE Fritzes, Stockholm 1988, pp. 135–140.

<sup>10</sup> Gary Francione, *Introduction to Animal Rights: Your Child or the Dog?* Temple UP 2007 (first printed 2000).

## 5 Changing Legal Status from Property to Person

The issue of the legal status of animals is linked to the political and moral issue of animal rights. In law, rights function as positions and dispositions of persons in relation to each other and to the state, and as instruments for making demands and defining freedoms. The liberal rule of law has dominated (primarily Western) societies ideologically since the Second World War. Its premise is that everyone should be able to act in order to protect their own interests and to have legal personhood, for example being able to appear as a party in court, while the interests of the public must be served by public bodies, such as elected politicians and authorities. All people, regardless of age and functional ability, have legal personhood, as do companies, organizations and authorities. A legal person may have a material claim but lack formal authority to pursue the claim legally. This is the case for minor children, who are usually represented by their parents. If there are conflicting interests between a parent and a child, the child can instead be represented by his or her own legal representative.

With his thesis on the social contract theory in “A Theory of Justice”, the liberal philosopher John Rawls takes the position that only people can be moral agents, because only those who have obligations can have rights. According to Rawls, it is wrong to be cruel to animals – but we are not obliged to show them strict justice, only not to be cruel.<sup>11</sup>

Rawls’ view is criticized by the animal rights philosopher Tom Regan in “The Case for Animal Rights”. According to Regan, animals are moral objects with the same and equal right to respectful treatment as moral agents (such as people). Animals have inherent rights in the same way as humans, and animal suffering can never be offset by human benefits. Regan believes that moral rights, unlike legal ones, are universal. Examples could include an unconditional right to life and protection against exploitation. Legal rights, on the other hand, are created by humans and are given their contents by the laws of the society in which they exist. This means that legal rights vary between different countries, but also within the same country in different eras.<sup>12</sup>

The division into moral and legal rights stems from Greek philosophy and Roman law and often leads to conflicts. For example, there is an *ius naturale* that is universal and common to both humans and animals, and that extends beyond the rights of citizenship. According to this natural law, humans and animals must have the same freedoms and rights, meaning that slavery or enslaving animals is prohibited. There is also a people’s law, or law of nations, *ius gentium*, which is based on customs and human reason – that is, what people themselves have decided to legislate on. According to *ius gentium*, slavery can be allowed and animals are lawless beings that anyone can own, buy, sell or kill.

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<sup>11</sup> John Rawls, A Theory of Justice, The Belknap Press, USA 2005 (first printed 1972) “Each person,” writes Rawls, “possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.”

<sup>12</sup> Tom Regan, The Case for Animal Rights, University of California Press, USA 2004 (first printed 1983).

This conflict between natural (or moral) and legal rights is clearly expressed in EU law – animals are regarded as sentient beings with intrinsic value, but are also subjected to national customs.<sup>13</sup>

### 5.1 *Extended Rights*

In a 1972 article, “Should Trees Have Standing? – Towards Legal Rights For Natural Objects”, the American lawyer Christopher D. Stone advocated that natural objects should be granted legal rights. The reason they are not is that we humans have difficulties incorporating new norms that break with established thought patterns and find it hard to think beyond what already is: “each successive extension of rights to some new entity has been...a bit unthinkable throughout legal history.” At the same time, he pointed out how people in various societies have been denied rights due to gender or skin color, but that legal norms in Western legal systems have historically been extended to include previously oppressed groups.<sup>14</sup>

### 5.2 *Different Legal Systems Offer Different Legal Possibilities*

In the US, the Nonhuman Rights Project (NhRP), run by a civil rights organization, aims to create legal rights for species other than humans.

Under the leadership of Professor Steven Wise, a group of lawyers are working to change the common law status of great apes, elephants, dolphins and whales from “legal objects” which lack the capacity to possess any legal rights, to “legal persons” in possession of fundamental rights like bodily liberty and bodily integrity.

An underlying condition is that this will apply to species with highlight developed cognitive abilities, that do not have a natural habitat in the US. The primary legal argument of the group is that the animals are illegally detained according to the principle of habeas corpus.<sup>15</sup>

No US court has yet approved the lawyers’ applications to grant personhood to the client-animals on the basis of habeas corpus, although some progress has been made. A judge in the Bronx Supreme Court issued a decision in February 2020 that supported the NhRP’s arguments.<sup>16</sup> Justice Alison Y. Tuitt recognized Happy the elephant as an autonomous being and rejected the Bronx Zoo’s arguments that it was in Happy’s best interests to remain imprisoned in their

<sup>13</sup> Article 13 of the Treaty on the Functioning of the European Union.

<sup>14</sup> Christopher D. Stone, *Should Trees Have Standing?* OUP, USA, 2010. First published in 1972, this book was a rallying point for the then burgeoning environmental movement, launching a worldwide debate on the basic nature of legal rights – a debate that eventually reached the U.S. Supreme Court.

<sup>15</sup> Habeas corpus is a centuries-old means of testing the lawfulness of one’s imprisonment before a court. It was used extensively in the 18th and 19th centuries to fight human slavery, and abolitionists often petitioned for common law writs of habeas corpus on behalf of enslaved individuals.

<sup>16</sup> *The Nonhuman Rights Project v. Breheny*, New York Supreme Court, County of Bronx, case no. 260441/2019.

facilities, but in the end the court held that Happy was not a person: “Nonetheless, we are constrained by the caselaw to find that Happy is not a ‘person’ and is not being illegally imprisoned.”

The NhRP has also influenced animal advocacy in other countries. For example, the Argentinean judge María Alejandra Mauricio in November 2016 issued a ruling that changed the life of a chimpanzee.<sup>17</sup> Thanks to litigation brought by an Argentinean organization<sup>18</sup> and modeled on the NhRP’s habeas corpus petitions in the US, the chimpanzee Cecilia – formerly held in solitary captivity at the Mendoza Zoo – was considered a “non-human legal person” with inherent rights, and was released to a sanctuary for great apes. Cecilia is the first nonhuman animal in the world to be recognized as a legal person with rights.

A significant difference between American and Swedish law is that Anglo-American law is based on the common-law tradition under which the courts are lawmakers, while Swedish law is based on the continental European law or civil law tradition, in which the written law is most important. The practical consequence of this is that while it in the US (and other countries with common-law systems) is possible to change animals’ legal positions and raise their legal status through the courts, the move towards animal rights in Sweden (and the EU) must essentially go through legislation. However, this does not prevent the Swedish Supreme Court from creating precedent when legislation does not keep pace with the times, which could have its explanation in the Parliament and the Government not having adopted the amendments and clarifications of laws that prove necessary in practice.

In Swedish law, the idea of “rights” is weak. There is a tradition of using legislation as a political tool, and the pursuit of the “Scandinavian Legal Realism School,” meaning that the judiciary should be free from “values,” has contributed to the view that moral and legal philosophical reasoning is metaphysical and extraneous. The philosopher Axel Hägerström (1868–1939) had a large impact on the lawyers of the “Uppsala School” and shaped the basis of the Social Democrat Party’s legal philosophy. According to the “Uppsala School,” moral views are neither true or false – they merely have an emotive function.<sup>19</sup>

Since animals in Swedish law have the status of legal objects, lawyers cannot conduct proceedings as agents for an animal, which means that crimes against animals rarely have any serious consequences. For example, the provision that criminalizes animal cruelty and aims to protect all animals from harm or painful treatment is placed in Chapter 16 of the Criminal Code (1962:700), which deals with crimes against the public. This means that the animal is not regarded as the primary victim; the law considers animal cruelty as an offense of disturbing the peace, and the object of protection is the human sensibility, not the animal itself.

Cases of animal cruelty are subject to public prosecution and the animal is dependent on a prosecutor’s assessment of whether anyone should be held accountable for the suspected crime. If the animal has an owner (who did not commit the injurious act), there is also a potential property crime with the owner

<sup>17</sup> Judicial Power Mendoza, case no. P-72.254/15.

<sup>18</sup> Association of Professional Lawyers for Animal Rights (AFADA).

<sup>19</sup> Stig Strömholm, *Law, Sources of Law and Application of Law - A Textbook in General Jurisprudence*, Studentlitteratur Lund 1992, pp. 94.



as plaintiff. However, if the animal owner is not interested in participating in the investigation, there is a risk that the prosecutor does not pursue the case, as the following case illustrates:

A woman in her 20s reported that her ferret was subjected to animal cruelty when her ex-boyfriend dipped the ferret's paws in boiling water. The ferret had suffered burns, but survived after extensive and expensive veterinary treatment. According to the woman's information, the boyfriend had tortured the ferret out of jealousy, in order to punish her. She herself had not been at home at the time, but a mutual friend had been present and told the woman about the incident. A preliminary investigation into animal cruelty was initiated, but after two months the woman no longer wanted to participate. The relationship with the suspect had ended and she did not want any further contact with him. She had received compensation for the veterinary care costs through her insurance and was "satisfied." The case was dropped on the grounds that "further investigation will not lead to evidence that a crime has been committed."<sup>20</sup>

The grounds for closure are incorrect, as the case could have been prosecuted without much effort on the part of the police even without the woman's participation. If the ferret had had a legal counsel of its own, the deficiencies could have been remedied by the legal representative requesting that the police hear the witness and obtain veterinary certificates. Counsel could have requested a judicial review of the closure decision and the offender would most certainly have been convicted of animal cruelty.<sup>21</sup>

## 6 Animal Welfare Offenses

Animal welfare offenses constitute an umbrella concept for animal cruelty and crimes against animal welfare legislation. The penal provisions of the Animal Welfare Act are subsidiary to the animal cruelty provision in the Criminal Code. A difference is that the crime of animal cruelty can be committed against *all* animals. The Animal Welfare Act only encompasses animals that are human property and subject to human control; the main purpose of the act is to provide regulations on animal care.

Crimes against animals are not prioritized in criminal investigations, partly because these crimes have a low penal value – the higher the penal value, the greater the investigative resources that are assigned. The maximum penalty for violations of the Animal Welfare Act and the animal cruelty provision in the Criminal Code is two years' imprisonment.<sup>22</sup>

However, a change is underway, as a public inquiry has proposed that a crime of gross animal cruelty be introduced during 2021, with a maximum of four years' imprisonment in the penal range.<sup>23</sup>

An animal protection offense can be suspected if animals suffer or are injured or neglected. Not all violations of the Animal Welfare Act are punishable, as the idea behind the law is that the supervisory authority – the County Administrative

<sup>20</sup> Nacka Chief of Police District, preliminary investigation in 2006.

<sup>21</sup> See further discussion on the consequences of animals' lawlessness in Part II.

<sup>22</sup> Chapter 10 of the Animal Welfare Act and Chapter 16, Section 13 of the Criminal Code.

<sup>23</sup> SOU 2020:7 Crimes against animals - Stricter penalties and a more effective sanction system.

Board – will remedy deficiencies in animal husbandry through administrative law measures such as injunctions, prohibitions and fines. Only more serious offenses may lead to prosecution and conviction. Individuals and organizations can report misconduct to the supervisory authority – with animal health personnel even having a duty to make such reports – but cannot influence what measures are taken. This is decided by the authority at its own discretion and there is no possibility for individuals or organizations that are not stakeholders to appeal if the supervisory authority decides not to take any action.

The Swedish Board of Agriculture is the authority in charge of animal welfare and issues regulations on how animals are to be kept and cared for. It is also the main authority for the animal industry. In this dual position, the authority must make constant trade-offs between the economic interests of the animal industry and animal welfare levels – and animal welfare can be expensive.

Chapter 2, Section 1 of the Animal Welfare Act states that animals shall be treated well and protected against unnecessary suffering and illness. Section 2 states that animals must be kept and cared for in a good animal environment and in a way that promotes their welfare and natural behavior. These texts are central to the Swedish self-image of having a high level of animal protection. The sections can be interpreted as granting animals some material rights – to receive certain welfare – but no one can take procedural action to claim these rights on behalf of the animals.

The consequence is often that the animals are allowed to be treated in a way that is not consistent with the Act's purpose of promoting animal welfare. There are many examples of this: Fur farming where minks – swimming predators that have large territories in nature – are forced to live in small grid cages. Hens that are kept in tiny cages for egg production. Slaughter transports where animals are at risk of serious injury or death from heat stroke because they are packed in so tightly. Cows that are tied up indoors most of the year. Rats and mice being subjected to casual animal experiments, where questions about whether there are animal-free alternatives have not been answered in accordance with the statutory 3R principle.<sup>24</sup>

The rules to protect animals have a conspicuously low threshold for justifiable infringements. Trade-offs are regularly made against human interests that are comparatively less important or even trivial, notably dietary and fashion preferences, economic profit and recreation.<sup>25</sup>

## **7 Legal Standing**

The material rights of animals are weak in the sense that there are no effective means for claiming them on behalf of the animals, and no effective sanctions on those who violate them.

Improving the legal status of animals requires a two-party procedure in court and the right to appeal for animal organizations, so they can represent animals in court and appeal decisions contrary to animal interests, for example in cases

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<sup>24</sup> The 3R principle stands for Replace, Reduce and Refine and is central to the use of animals for research purposes and the ethical review of animal experiments.

<sup>25</sup> Gary Francione, *Animals, Property and the Law*, pp. 17, 109.

of animal welfare offenses or regarding animal experiments which has been incorrectly approved by an Animal Experiment Ethics Committee. Such right to appeal has been granted environmental organizations in the Environmental Code (1998:808) Chapter 16, Section 13, meaning that they have the opportunity to participate in decision-making processes and appeal decisions, in order to safeguard nature conservation or environmental interests – even though they are not stakeholders. This has meant that the legal positions of wild animals have shifted, at least when it comes to species having special protection.

A controversial issue has been whether environmental organizations should have the right to appeal hunting decisions as representatives of the interest of predators.

The hunting legislation<sup>26</sup> includes no particular animal welfare aspect, except for a provision in Section 27 that game may not be subjected to unnecessary suffering. It is mainly an administrative legislation, where the ban on hunting of protected species corresponds to the Environmental Code's protection of animal species.

A guiding decision was made in February 2013 in a case with the Swedish Environmental Protection Agency and the Swedish Society for Nature Conservation as parties.<sup>27</sup> The Court of Appeal in Stockholm announced that the Swedish Society for Nature Conservation had invoked an interest which could be taken into account when considering whether protective hunting of wolves should be permitted. The background was that the Swedish Environmental Protection Agency had granted an application for protective hunting of an individual wolf on the basis of provisions in the Hunting Ordinance, taking the EU Habitats Directive into account.<sup>28</sup> The Swedish Environmental Protection Agency's decision involved protective hunting of an animal species that enjoys strict protection and is classified as a priority species in the Habitats Directive, which has been implemented in Swedish law through the Species Protection Ordinance and provisions in Chapter 8 of the Environmental Code. In this case, the Swedish Society for Nature Conservation demanded that it be granted the right to appeal with reference to EU law and Sweden's accession to the Aarhus Convention.<sup>29</sup>

Sweden has been a party to this convention since 2005. The EU is also a party to the Aarhus Convention, which is thus part of the Union's legal system. According to Article 9 (3), each acceding party shall ensure that the public, including non-governmental organizations promoting environmental protection and meeting any criteria of national law, are given the right to have acts and omissions of persons and authorities, in breach of national environmental law, tried by a court or in administrative procedures.

The European Court of Justice has ruled on Article 9 (3) of the Aarhus Convention and its application at the national level in a case concerning exemptions from rules in the Habitats Directive. The question was whether a

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<sup>26</sup> The Hunting Code (1987:259).

<sup>27</sup> Court of Appeal in Stockholm case no. 4390-12 and 4396-12.

<sup>28</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of habitats and wildlife.

<sup>29</sup> UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

Slovak environmental organization would be considered entitled to appeal against a national authority's decision to hunt bears.<sup>30</sup> EU legislation did not provide such a right of appeal. However, both the EU and Slovakia are parties to the Aarhus Convention ("shared competence") and the issue concerned "an area largely covered by Union law" – in this case the strict protection of certain animal species under the Habitats Directive. It was therefore found that the national authority should make a "Treaty interpretation" in accordance with the Convention Article 9 (2) and, in so far as possible, interpret national provisions in accordance with that Convention Article.

The Court of Appeal in Stockholm found that Swedish legislation had been applied in such a way that there had been no possibility in practice of having a court review of a decision to allow protective hunting of wolves, as no one had the right to appeal such a decision. The Swedish Environmental Protection Agency's decision concerned an issue regulated by EU law. Thus, there was not only a statutory right of appeal arising from the Aarhus Convention's provisions, but also a substantive EU law obligation, whose effective judicial protection must be ensured. A decision to hunt a genetically valuable wolf, especially when the wolf population did not have a favorable conservation status, was of importance in nature conservation, according to the Court of Appeal, and could be considered to have such a significant impact on the environment as referred to in the Aarhus Convention. In order to ensure effective judicial protection of rights under EU law, the Swedish Society for Nature Conservation should therefore, in accordance with Section 22 of the Public Administration Act, have been granted the right to appeal the Swedish Environmental Protection Agency's decision.

The judgment of the Court of Appeal is interesting from several aspects, not least because an individual animal, a wolf, received legal representation, albeit on the basis of environmental law rules on species protection.

## **8 A Paradigm Shift for Animals**

Advocating for the rights of animals demands courage. The development of our view of animals – from their being legal objects to their becoming legal subjects – challenges not only societal norms, but the entire prevailing societal order, such as the constitutional rights to freedom of trade and property. Under the Swedish constitution, property rights and freedom of trade may only be restricted in favor of urgent public interests<sup>31</sup> – but which interests are intended? These may be, for example, the right of public access or environmental considerations protecting an animal species – but never the consideration of individual animals which do not have any special protection as species. Animal welfare is a pronounced public interest and Sweden is, from an international perspective, considered to have a high level of ambition in the field. However, as long as animals have the legal status of property, ownership rights outweigh the interests of animal welfare.

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<sup>30</sup> ECJ C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*. ECLI:EU:C:2011:125, "the Slovak Brown Bear Case".

<sup>31</sup> The Instrument of Government Chapter 2, Sections 18 and 20.

Swedish animal welfare legislation may become stricter, in line with scientific findings on the cognitive abilities and needs of animals. Still, the Animal Welfare Act does not give animals “rights,” only the right to better treatment – a weak right that can easily be impaired by administrative decisions, as the Animal Welfare Act is a framework law with content given through regulations by the competent authorities.

The practical and principal reason for allowing authorities to represent the public interest “animal welfare” is that they often have expert knowledge that individuals do not. However, there is a risk that some public interests are prioritized when weighed against others or that expert knowledge is actually lacking. Therefore, it is important that individuals and animal interest organizations are given the opportunity to initiate legal proceedings. In the same way that environmental organizations can bring action in cases of wild animals threatened by hunting, animal organizations should be allowed to bring action in cases of non-compliance with animal welfare legislation, when animal welfare is at stake or in cases where animals have been victims of crime.

## **PART II**

### **9 Violence Against Humans and Violence Against Animals**

In the year 2010, there was a referendum in Switzerland on if each canton should be required to establish attorneys serving to protect animal rights in court. The proposal was suggested by the animal rights organization Schweizer Tierschutz, with the result of 30% for and 70% against. Switzerland is considered to have one of the world’s most stringent and detailed animal welfare laws, where the legal description of animals in 2004 was changed from “things” to “creatures equipped with sensitivity”. A practical consequence is that in the event of divorce, for example, it must be assessed which party is most suitable to take care of the animal, much like in a custody dispute. This gives animals better protection than if such disputes are considered to concern ownership, where assessment revolves mainly around who is the rightful owner.

Despite the strict legislation, there are complaints about non-compliance, that the law’s most severe punishment is never imposed and that the judges do not take crimes as seriously if they “only” affect animals. One of the arguments put forward for taking crime against animals more seriously and for working preventively was that there is a link between human violence against animals and violence against other people.

#### **9.1 Feminist Theory**

During the 1990s, researchers in the US began to study the link between violence against women, violence against children and violence against animals.

The American literary scholar Carol J. Adams has in several publications highlighted the connection between meat consumption, slaughter and the expression of the masculinity norms of misogyny and violence. Adams focuses on the symbolic cultural context and the patriarchal connection between men’s

consumption of meat and men's consumption of female bodies as "pieces of meat".<sup>32</sup>

Catherine A. MacKinnon, an American professor of law at the University of Michigan Law School and the University of Chicago School of Law, has pointed out that men's violence against women and animals is an expression of a patriarchal, hierarchical social structure. MacKinnon's radical feminist view is that humans dominate animals, just as men dominate women. Further, she has stated that the fact that both women and animals throughout history have been considered the property of men can form a common basis for an analysis of power:

Comparing human's treatment of animals with men's treatment of women illuminates the way the legal system's response to animals is gendered, highlighting its response to women's inequality to men as well. Interrogating how animals are treated like women and women like animals, and both like things, can shed reciprocal light.<sup>33</sup>

## **9.2 The Link**

The National Link Coalition is an American organization whose purpose is to make visible and disseminate knowledge about violent relationships. Over the past 35 years, researchers and professionals in a variety of human services and animal welfare disciplines have identified significant correlations between animal abuse, child abuse and neglect, domestic violence, elder abuse and other forms of violence. Mistreating animals is no longer seen as an isolated incident that can be ignored; it is often an indicator or predictor of crime and a "red flag" signaling that other family members in a household may not be safe.

American researcher Phil Arkow, the coordinator of the National Link Coalition, and his research colleague Frank Ascione, have developed a model – the Link – whose basic assumption is that all victims of abuse have a common need of protection. They have facilitated collaboration between professionals who works with children and animals, such as the judiciary, crime victim shelters, women's shelters and animal organizations. An example of their work is that social services have learned to ask questions about and be observant of how family animals are treated. Such information can provide valuable clues about a family's situation. Social interventions are planned so that they include the safe care of both children and animals, and there is an awareness that children who show cruelty to animals may themselves have been exposed to violence or witness to domestic violence.

Among law enforcement agencies, the Link can be used as a model for investigations into domestic violence and child abuse.<sup>34</sup>

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<sup>32</sup> Carol J. Adams, *The Sexual Politics of Meat - A Feminist-Vegetarian Critical Theory*, The Continuum International Publishing Group, USA 2010 (first published 1990).

<sup>33</sup> Catherine A. MacKinnon, *Of Mice and Men – A Fragment on Animal Rights*, essay from *Women's Lives Under Men's Laws*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts and London, England 2005, pp. 91-102.

<sup>34</sup> [www.nationallinkcoalition.org](http://www.nationallinkcoalition.org). A knowledge overview is also available on the website of the Swedish organization "Se Sambandet" [www.sesambandet.se](http://www.sesambandet.se).

### 9.3 Case Studies

During the period 2005 to 2013, I participated in several research projects at the Department of Law of Stockholm University concerning violence against women and children in close relationships.

The research data were police and social investigations in Sweden, especially in Stockholm County, covering four categories of crimes: Violence against women and violence against children in close relationships, sexual crimes against adults and sexual crimes against children (younger than 15 years). In the review of cases, I also wanted to shed light on the situation of family animals.

Some of the questions at issue were:

- Crime classification.
- Prosecution frequency.
- Investigation quality (coercive measures, time required, interrogation techniques, etc.).
- Treatment of crime victims.
- If there were animals in the family or relationship.
- Under what circumstances the animals and their situations were made visible in the police investigation (and/or the social investigation, if there was one).
- What measures were being taken.

The results were as follows:<sup>35</sup>

There were several cases in which a woman, child or other party told the police that there were pets in their family and that a man could be suspected of violence against the animal or had exposed the animal to violence. The animals that appeared most frequently in the investigations were dogs and cats, but rabbits, birds, guinea pigs and a ferret were also mentioned. Large animals were subjected to direct violence, while smaller animals were more often neglected by being denied food and proper temperature.

The violence could take the form of a man wanting to discourage a woman from going out by deliberately mistreating their animal if she was not at home:

On several occasions, the man has shut the dog out on the balcony in the winter cold when the woman was out, as a clear signal that she should stay at home to avoid the dog getting hurt. The woman must stay in the relationship to protect the animal.

A man could also threaten to injure or kill an animal:

The social services reported an 18-year-old boy for rape, assault and unlawful threats against his 15-year-old girlfriend. He said in interrogation that he could not live with the fact that the girl has ended the relationship and therefore beat and threatened her. He had also threatened her family and their animals, saying that he should cut them and then take his own life. The girl said in interrogation that she was very scared that he would hurt them: her mother and sister, the dog and the cats. Out of fear, she

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<sup>35</sup> All of the excerpts in this sub-section are taken from: Christian Diesen and Eva F. Diesen, *Abuse of Women and Children - The Legal Process*, Norstedts Juridik, Stockholm 2013, pp. 338-343.

stayed with the boy and the case was closed on the grounds that there was “not enough evidence that a crime had been committed.”

There is a consistent pattern in these cases. If a woman exposed to crime does not participate in the investigation or withdraws her accusation, the case is often closed. The police do not always invest the resources required to motivate women to participate and there is sometimes a lack of knowledge regarding how fear can lead a woman to stay with, or return to, a violent man.

Other complications arise in cases where couples who have pets are separating and cannot agree on who should keep the animal. In non-violent cases this usually does not cause problems, the couple can agree on shared custody of the animal. But in cases involving violence, a custody dispute (legally an ownership dispute, as the animal has the status of property) can lead to a man keeping a woman in a destructive relationship because she does not want to leave the animal with the abusive man:

One case concerned cohabitants who were going to separate. The man was reported for rape and violence against the woman, and the couple were in dispute about who should have custody of the dog. The man threatened to “give the dog a shot to the neck” or make sure that it is run over, rather than letting the woman have it.

There are cases where a man has used sexual violence and forced a woman to perform sexual acts with an animal. In those cases, the animal must also be regarded as a victim of crime:

A man was convicted of aggravated rape, aggravated assault against a woman and aggravated assault against her former partner. Among other things, he had forced a dog to “participate” during the instances of rape.

Domestic violence also affects children and their animals or their feelings for animals:

A woman reported her ex-husband for rape and assault as well as assault against their daughter. The daughter said that she had always wanted a dog, but her father had prevented this. When she got a dog from her grandparents, he threatened to kill both the dog and the grandparents.

A preliminary investigation was initiated against a young man for aggravated assault and sexual exploitation of a minor. The victims were his wife and her little sister, who was between 11 and 14 years old at the time. Their mother said that the man had also kicked the family's dog. During questioning, the suspect confessed to the crime and said that “he felt insecure and wanted to pass his fear on to someone who was younger and weaker.”

In sexual abuse of children, perpetrators often use bribes, extortion and implicit or explicit threats to keep their victims in the destructive relationship and not reveal the “shared secret.” Due to shame and guilt, little persuasion is usually needed to keep a child quiet. Threats can be directed at a child itself, but also at the child's pet. The perpetrator may also use the child's feelings for a favorite animal:



A woman reported her former partner for rape of a child. According to the woman, the man has sexually abused her daughter (who was 11 years old at the time of the report) from when she was 7–8 years old. After they were separated, he had written to the girl that “it is such a shame that your mother does not let you come and see me and my cat that you love so much.” During the search of the premises, child pornography and e-mails with sexual content sent from the man to the girl were found.

In some of the cases I have studied, there was reason to suspect that a man’s violence had also affected the animals in the family. However, the police do not always ask the necessary questions about the animals’ situation. There are no general police routines for asking and reporting whether there are animals in a family when crimes against women and children are reported. This will depend on whether the women and children themselves talk about their animals and on the commitment of individual police officers in relation to animal welfare. In interrogation of children, the interrogator always begins with asking general questions about the child’s interests, school, friends, siblings and pets, etc. These serve as a gauge of the child’s maturity, creates trust and helps the child relax, which will help him or her open up to the inevitable and difficult questions about abuse. Children may mention that they have pets, but the context is usually vague and gives no explicit reason to suspect that the animals are treated badly:

A case of reported child and woman abuse. The couple was divorced, the violent husband had abused both the children and the mother and threatened to burn down their home. The children mention in several interrogations that they had a dog and a rabbit at home, but the interrogator did not follow up on this or ask the children if the father has ever injured the animals.

In one case, there were several testimonies of actual animal abuse without the police investigating this:

The police intervened in a family with a man, a woman, four children, a cat, two dogs and birds. In the interrogations, the woman said that the man had always been aggressive, threatening and violent towards everyone in the family and that she was afraid of him. The eldest son (15 years old) in particular was exposed to violence, and the man had beaten one of the dogs to death. The woman said that the man had waved a knife around and held the cat, the dog and the children in strangleholds. The man said in interrogation that they quarreled a lot and that he would lose his temper mainly when the woman provoked him. He also said that he had sometimes had to intervene with violence against the eldest son when he attacked his younger brothers and the dogs, and that the dogs were afraid of the son.

From the interrogation of the eldest son, it was thus known that there were animals in the family and that they were exposed to violence on the part of the father and of the son himself. The interrogator asked if they had pets and the boy answered “Yes, a cat and a dog.” Nothing more was said on the topic – the interrogator did not follow up and ask further questions relating to what had already been said about the animals’ vulnerable situation.

Since the crimes took place in a county with a Child Advocacy Center, the minor children were investigated at the center which is a place where police, prosecutors, social services, child psychiatry and pediatricians are gathered to take care of children exposed to crime, rather than having the children visit a

number of different places. Interrogations with children are recorded on video and then played back in court, so that they do not have to be present in the courtroom during any later trial.

Below is an excerpt from an interrogation with a younger son (13 years old), as recorded in the preliminary investigation report (full names are omitted to avoid identification):

In the interrogation room: Prosecutor, public defender, social services and police.

The interrogator (Q) asks the boy (P) about the animals in general:

Q: Who are your family? Who do you live with?

P: Mom and dad, but now mom and... and S, but A is with grandma... and R and the cat.

Q: R, who is it?

P: He's a dog.

Q: He's a dog?

P: And we have a cat called M and two budgies.

Q: Can you tell me about your home situation?

The boy talks about this a little in general, but downplays the violence in the family: "It wasn't so bad..."

After a while, the boy gets tired and the interrogator tries to motivate him:

Q: Do you find it difficult to talk to me about this?

P: Yes.

Q: I understand. What would you like us to do?

P: Let me go home.

Q: Mm, but I'm trying to help you, you know...do you have any fun in your family?

P: Mm.

Q: What do you do then? Tell me about it!

P: We take the dog to the playground.

Q: Anything else?

[...silence...]

Q: But you don't want to talk about your brothers, if anything has happened to them and you saw it?

P: Nothing has happened to them.

Q: Okay, we'll leave that topic. And you say that nothing has happened to you?

P: No.

The interrogation revealed the boy's answer to the question of who is in his family: "mother, father, the brothers, the dog (mentioned by name), the cat and the birds." The interrogator initially asked a little about the animals in general, but ignored the previous witness statements that the animals had also been exposed to violence and did not ask what the boy felt about this. Later in the interrogation, the boy got tired and wanted to go home. The interrogator tried to motivate him to stay and asked about what he enjoyed doing with his family.

When the boy answered “take the dog to the playground,” the interrogator replied “Anything else?”, despite the fact that the boy had several times during the interrogation made clear that the animals in the family meant a lot to him emotionally. When the interrogator asked again about any difficulties the boy and his brothers had been through, the boy did not want to talk about this anymore. This particular interrogation illustrates that an approach to get the boy to talk about his experiences of domestic violence could have been to empathetically ask and talk about the animals’ situation, but the interrogator was not sensitive to this.

The crimes against the animals were not investigated further. The woman and the children took refuge in a women’s shelter, and the animals were protected from further violence when the woman left them in the care of a relative before going to the shelter. Action was brought for crimes against the human family members, but not for crimes against the animals, despite the testimonies.

The family members were also clients of the social services, but there was no information about the animals’ situation in their file. I will leave unsaid whether this could be because the family members never talked to the social services about the animals (and social services therefore were unaware that animals had been abused) or because the social services simply ignored information about the animals (perhaps because they did not consider animals to be their responsibility). However, the case illustrated that both the police and social services are important actors in cases of violence against animals and humans, especially children.

The fact that animals do not have their own legal representatives has practical and legal complications in cases of violence against animals and humans in close relationships:

A woman says that a man exposed both her and their cat to violence, but the police did not address the violence against the cat in the report. The case was classified as aggravated assault, but with the cat in mind, a preliminary investigation into animal cruelty should also have been initiated.

In some cases, a prosecutor has initiated preliminary investigations into abuse of a woman and animal cruelty:

A man came to a woman’s home to walk her dog, but he was so drunk that the woman asked him to leave the apartment. He then banged her head against the floor, and when the dog intervened to protect the woman, he struck and kicked the dog. Action was being brought for abuse of the woman but not for animal cruelty, despite the fact that the suspect did not deny that he had beaten the dog, simply saying that he did not remember anything.

A woman reported her ex-husband for repeated crimes against the family (woman, child and dog). A preliminary investigation was initiated regarding abuse of the woman, rape, child abuse and animal cruelty. The man had abused their dog so badly that it died. According to the woman, there was a veterinary certificate describing the dog’s injuries. Eventually, charges were brought for crimes against the human victims, but not for the fatal beating of the dog. The veterinary certificate was not even included as evidence in the investigation.

The legal rationale for the lawlessness of animals is mainly procedural – action for animal cruelty is not brought if there are crimes against humans in the same case, as violence against animals has a lower penal value than violence against humans. If a perpetrator has committed crimes against both humans and animals at the same time (in the same criminal case), the crimes with a lower penal value will be ignored, as investigation and prosecution of crimes against animals would not lead to further punishment. A prosecutor is not obliged to drop the charges, but few prosecutors will invest resources to prosecute crimes that would not affect sentencing.

In conclusion, my research shows that the abuse of domestic animals and their suffering is a neglected field. Even when there are indications that animals have been exposed to violence and good evidence in the form of witnesses and veterinary certificates, the police and prosecutors have not taken any action. In some cases, a preliminary investigation into animal cruelty has been conducted in connection with crimes against women and children, but the prosecutors have in all these cases chosen to drop the animal cruelty charges. Not a single charge of violence against animals has been brought in the cases I have studied where violence against persons has also been investigated – domestic animals are the forgotten victims of men's violence against women and children in close relationships. It is certainly tragic, since a majority of pet owners consider their dogs and cats to be members of the family and have strong emotional bonds to them.

#### **9.4 Taking Action**

There are a number of measures that could be developed within the legal system to highlight the vulnerability of animals in violent relationships:

- Integrated actions and exchange of information between police, prosecutors, social services, animal welfare inspectors and veterinarians. A solution that might be close at hand, as the structure already exists, is to include animal protection personnel in Child Advocacy Center teams.
- During police interventions and interrogations regarding domestic violence cases, it should be routine to ask follow-up questions about whether there are animals in the family and what their situation is like. This should be documented and reported to the animal welfare inspector at the supervisory authority (the County Administrative Board). When animals are abused with injuries as a result, veterinary certificates should be routinely requested and used as evidence in cases of animal cruelty, e.g., about the occurrence of injuries. There is a similarity to cases in which very young children are victims of violence - the victim itself cannot describe what happened, so without a court certificate, there is seldom any evidence.
- It is important to increase the competence of those who work with crimes against animals, so that the crimes are taken seriously and lead to penalties and so it is possible to use animal welfare legislation more proactively. According to Chapter 9, Section 1 of the Animal Welfare Act, the County Administrative Board should issue an animal ban against

a person who has seriously neglected or abused an animal or been convicted of animal cruelty. This could lead to a violent party not being allowed to keep a shared dog (or other animal) if a couple divorce.<sup>36</sup>

- Legislation could be extended so that animals are provided with a legal status meaning that they are potential victims of crime, with the right to their own legal representatives.

Another aspect of the legal concept of the crime victim is that animals could receive crime compensation from the Fund for Victims of Crime. Thus, animal organizations that rehabilitate or care for animal victims of crime could receive part of the funds that all persons convicted of crimes which can lead to imprisonment (such as violations of the Animal Welfare Act and animal cruelty in the Criminal Code) must pay to the Fund. At present, these funds do not benefit animals, which must be considered deeply unsatisfactory.

- Violence against family animals should be seen as an aggravating circumstance and increase the penal value in cases of violence in close relationships. For example, an aggravating circumstance according to Chapter 29, Section 2 in the Penal Code with regard to crimes against children is that “the crime must have been likely to damage the security and trust of a child in its relationship with a caregiver.”
- Laws should be adopted to protect animal victims of domestic violence and to have animal abuse recognized as a form of domestic violence. This would be possible by extending the crimes of gross violation of a woman’s integrity and violation of integrity to include violence against animal.<sup>37</sup>

Other countries have found legal solutions. In Australia, in November 2020, new laws protecting animal victims of domestic violence passed through Parliament thanks to the Animal Justice Party. Animal abuse will be formally recognized as a form of domestic violence, and animals will be included on Apprehended Domestic Violence Orders. An amendment was also passed so that the law in New South Wales now recognizes the link between animal abuse and domestic violence.

The US National Link coalition lobbies for state laws that mean intimidating acts of animal abuse could be prosecuted as both domestic violence and animal cruelty.

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<sup>36</sup> In several US states, custody disputes with animals have been resolved by the presumption that the nonviolent party is the owner. The National Link coalition has lobbied for laws that allow courts to award custody of pets in divorce settlements based on the animal’s best interests.

<sup>37</sup> (In Swedish) *Grov kvinnofridskränkning* and *Grov fridskränkning*, Chapter 4, Section 4a in the Penal Code, “A person who commits criminal acts against another person having, or have had, a close relationship to the perpetrator shall, if the acts form part of an element in a repeated violation ...”.

## 10 Secrecy

A complication in investigations into violence against animals and people is that differing levels of confidentiality apply in cases involving people and animals, preventing the free exchange of information between different authorities.

A change has taken place through the introduction of a new provision in the Public Access to Information and Secrecy Act (2009:400). This makes it possible for staff in health care, social services and those performing activities under the Act concerning Support and Service for Persons with Certain Functional Impairments to provide information about an animal that is necessary for an intervention on the part the authority that receives the information. Such information can, without prejudice to secrecy, be submitted to a supervisory authority in the area of animal welfare or to the Police Authority.

Information can be provided if staff in health care or social services encounter an animal that

- (1) clearly is exposed to neglect or abuse, or
- (2) clearly shows symptoms of illness or serious injuries. Information pursuant to the first section may only be provided if it is deemed that the defect cannot be remedied in consultation with the person caring for the animal.

The amendment that breaks secrecy is a step forward, but the major problem is that the law places responsibility on individual staff in home care. It is up to them to determine whether an animal is being mistreated and to consider whether the situation is so serious that the authorities must be notified and confidentiality be broken. This places unreasonable demands on staff and becomes person-dependent, as it requires commitment on the part of home care staff.

Neglect and injury to an animal is occasionally reported. But, according to the Link model, domestic violence and child abuse should be sufficient to raise suspicion that any family animal is also exposed to violence. Suspicion alone should therefore suffice as a basis for reporting, much like reports of concern about children made to social services. Making a report should be mandatory. Then, knowledge on the complex relationship between violence against animals and violence against humans could also be fully reflected in the secrecy legislation.

## 11 Final Reflections on the Ethical Dilemmas in our Views and Treatment of Animals

Society distinguishes between different animals and treats them differently depending on legislation, traditions, knowledge and potential economic gains.

Some argue that the same moral guidelines must apply for all species. Others believe that the purpose of animal husbandry is morally relevant – compromise with animal welfare is less acceptable if the purpose is to produce fur than if it is to produce food, and the use of animals in medical research is more acceptable than the use of animals in the entertainment industry.

Ultimately, the level of legislation that determines how we treat animals is a political issue and a result of the choices we make. The realization of a society where animals have real legal rights requires that we change our minds, as well as our laws. The challenge lies in how legislation should deal with the conflicting

interests relating to the unequal balance of power that prevails between humans and animals.

Even if fundamental animal rights may not currently be fully realizable, the very act of introducing them into law and committing to them as normative ideals would place animals on the legal map. When courts derive legal animal rights from both animal welfare law and human rights law, the process of juridification will be in its early stages, and may ultimately lead to judicially recognized animal rights.<sup>38</sup>

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<sup>38</sup> For example, see the ongoing legal work by the Nonhuman Rights Project (<https://www.nonhumanrights.org/>) and the Animal Legal Defense Fund (<https://aldf.org/>).

