THE INCREASE OF PUNISHMENT FOR ILL-TREATMENT OF DOGS AND CATS AND THE PERSISTENCE OF THE ANTHROPOCENTRIST PARADIGM IN BRAZILIAN LEGISLATION

O AUMENTO DE PENA PARA MAUS-TRATOS DE CÃES E GATOS E A PERSISTÊNCIA DO PARADIGMA ANTROPOCENTRISTA NA LEGISLAÇÃO BRASILEIRA

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ABSTRACT: The Federal Law 14.064/2020 altered the Article 32 of the Environmental Crimes Law, which refers to the ill-treatment of animals, in order to increase the punishment when the act is committed against dogs and cats, prescribing 2 to 5 years of imprisonment, in addition to a fine and prohibition of custody. This provision treats equally sentient animals differently, overvaluing the sentience and suffering in dogs and cats in spite of the same characteristics on other animals, such as vertebrates and even octopuses. Therefore, the aim is to introduce an analysis of the arbitrariness of the different legal consideration between dogs and cats and the other animals, especially the group of the sentients, regarding to criminal protection against ill-treatment. The research is bibliographical and in what comes to the analysis of what is hidden in the norm it is exploratory, using the phenomenological method, to achieve the expected result, which is to unveil the meaning and paradigm that underlie the quoted legislative reform, exposing the difference in legal treatment among animals, its arbitrariness and what lies behind it.

KEY-WORDS: Crime; Especiesism; Ill-treatment; Sentience.

RESUMO: A Lei 14.064/2020 alterou o artigo 32 da lei de Crimes Ambientais para aumentar a pena de maus-tratos aos animais quando ocorrer, exclusivamente, em face de cães e gatos para 2 a 5 anos de reclusão, além de multa e proibição de guarda. Essa alteração trata diferentemente animais igualmente sencientes, sobrevalorizando a senciência e o sofrimento de cães e gatos a despeito de iguais características de outros animais, como os demais vertebrados e até polvos. Diante disso, a presente reflexão tem por objetivo apresentar uma análise da arbitrariedade da diferença de consideração entre animais (cães e gatos) face aos demais quanto a proteção penal contra maus-tratos, principalmente no que se refere ao grupo dos sencientes. A pesquisa tem caráter bibliográfico e quanto à análise sobre o que está oculto na norma, é exploratória, utilizando-se o método fenomenológico, para alcançar o resultado

esperado que é o de desvelar o sentido e o paradigma que subjazem à mudança legislativa, expondo a diferença de tratamento entre animais, sua arbitrariedade e o que a embasa.

PALAVRAS-CHAVE: Crime; Especismo; Maus-tratos; Senciência.

1 Introduction

Taking into account the significant increase in the punishment for the crime of ill-treatment of animals, provided for in Article 32 of Federal Law 9.605/98 (Environmental Crimes Law) when the conduct affects dogs and cats, carried out by Federal Law 14.064/2020, it can give the impression of greater appreciation of the animal situation in Brazilian legislation or even a tendency to acknowledge their interests and/or rights (in a moral or legal sense) in order to move towards overcoming or mitigating legislative anthropocentrism in this sense.

After all, the minimum punishment provided for the ill-treatment of dogs and cats is currently - with the inclusion of paragraph 1-A in Article 32 - of 2 (two) years of imprisonment - doubled in relation to the maximum punishment hitherto in force, which was 1 (one) year of detention, in accordance with foreseen in the head of the Article in question (still in force for the other species of animals). In addition, the new provision cumulatively imposes fines and prohibition of keeping the animal(s).

The provision deserves more accurate analysis and, therefore, the purpose of this Article is to expose and analyze the arbitrariness of the difference in consideration between animals (dogs and cats in relation to others) in what comes to criminal protection against ill-treatment, especially regarding to the sentient group (or the undoubtedly sentient, like other vertebrates) and, beyond that, to unveil the underlying human values, judgments, and assumptions that informed this reform.

The protection against ill-treatment of animals is enshrined in the Brazilian Constitution, considering that its article 225 (§1) (VIII) provides that it is incumbent on the Public Power to prohibit practices that submit animals to cruelty. Not neglecting righteous criticisms about the provision (such as the one relating to the insufficiency of prohibiting cruel

conduct, since its focus is on the intention of the perpetrator and not on the objectivity of the victim's situation), this is a rule of great importance in what refers to the relationship between human and non-human beings, allowing a minimum degree of protection and an underlying duty of dignified treatment to animals.

Thus, after the forthcoming introduction of the basic features of the crime of ill-treatment of animals and the change promoted by Federal Law 14.064/2020, with a brief review of the respective procedural regime, the differentiation made between dogs and cats and other sentient animals for purposes of penal punishment in case of ill-treatment will be addressed, introducing then concepts such as sentience and speciesism, based on ethical doctrines and scientific finds about the animal condition. Moreover, the important Cambridge Declaration on Consciousness in Human and Non-Human Animals will be invoked to support some biological and psychological conclusions on sentient animals.

Still in this reflection, we will deep in the reasons underlying this differentiation, exposing ethical and scientific arbitrariness. In support of the argument will be presented two ethical theories that mirror and – by the hypothesis adopted here – support that difference in the consideration of equally sentient animals in what refers to the criminal legislation protecting against ill-treatment. Namely they are the theory of indirect duties towards animals, and consequently with the figure of crimes of "protection of feelings", and the so-called selective speciesism.

To achieve the proposed objectives, the research has a bibliographic character and, regarding to the analysis of what is hidden in the norm (unveiling), exploratory. The method used is the phenomenological, aiming to unveil the meaning and paradigm that underlie the legislative reform, exposing the arbitrariness of the difference in treatment among animal species and what supports this in human thought and feelings, bringing to light what is covered behind the norm.

2 The offense of ill-treatment of animals (art. 32 of Law 9.605/1998)

Based on the constitutional commandment that the Public Power is responsible for protecting flora and fauna, prohibiting conducts that submit animals to cruelty (art. 225, §1º, VIII, of the CF) the legislator inserted in the Environmental Crimes Law (LCA) – among others,

but for the purposes of this research – the Article 32, which defined as a crime the conduct of ill-treatment of animals. In order to understand the conduct prohibited by the aforementioned Article, the wording of the head provision of the provision follows: “Art. 32 Committing an act of abuse, ill-treatment, injuring or mutilating wild, domestic or domesticated animals, native or exotic: Punishment - detention, from three months to one year, and fine. […]”.

Thereby, a conduct characterized as abuse, ill-treatment, injury or mutilation of animals is prohibited and subject to criminal sanction if practiced with intent or risk assumption (Article 18 (I), of the Brazilian Criminal Code). The unintentional conduct (result caused by recklessness, negligence or nonfeasance, as defined in Article 18 (II), of the Penal Code) is not punishable in the absence of a provision in this regard in the text of the Article, knowing that the unintentional modality must be expressly defined in each crime, pursuant to Article 18, sole paragraph, of the Criminal Code.

The definition of the offense of ill-treatment of animals (*v.g.* the described conducts, materialized in the verbs) is not doubtless, mainly concerning to what precisely means “abuse” and “ill-treatment” of animals.

Even though this is not the primary objective of the research, but in order to explain the definition of the crime under consideration, Fiorillo and Conte[1] define that “abusive act” is configured by demanding excessive effort of animals, as well as its “inadequate use” (this expression already indicates the sense of normality of animal objectification by the authors). On the other hand, ill-treatment would mean the submission of the animal to food and care deprivation or treatment with any kind of violence. Similar terms are used by Gonçalves and Baltazar Junior[2] for whom, however, the term ill-treatment would be a normative element of the definition of the crime so that “it is up to the judge, and not the expert, to assess its occurrence under the facts of the case”.

Luiz Regis Prado[3], even further from acknowledging any animal dignity of its own, states that practicing an act of abuse would mean “using it [an animal] badly or inconveniently (e.g. demand excessive work from the animal), extrapolate limits, prevail upon it" and that ill-treatment would be - succinctly - "damage, outrage", terms that are still vague and do not clarify the behavior characterizing the hypothesis, not even its difference in relation to the verbs hurt and mutilate (which can be also interpreted as causing harm or even outrage).

Guilherme Nucci[4] also calls, laconically, an act of abuse as an “unfair action” and ill-treatment as “harmful handling of use”.

An important question about this criminal offense, which permeates the discussion and the vary bases of this research, is about the position of the animal subjected to abuse. Is this animal seen as a victim of the crime or the material object on which the conduct falls (as in the case of the stollen object with respect to the theft, hypothesis in which the protection is set on the person's patrimony and not the object as such in itself)?

When analyzing the dominant opinion of the jurists, the position of the animal subjected to ill-treatment as a simple material object of conduct is clear[5]. On the other hand, the collectivity[6] or the society[7] are indicated as the victim in this case. Likewise, the legal interest protected by the provision would be the preservation of the natural heritage[8] or the protection of the environment[9] and not the life or integrity of the animal itself.

The absence of acknowledgment of the animals as victims of the crime is compatible with the position they still occupy in the Brazilian nonconstitutional legislation, where animals are seen as things/goods, more specifically as self-moving (moving by their own force), as can be seen from Article 82 of the Brazilian Civil Code. Other provisions of the Brazilian Civil Code, such as the Articles 445, 1397, 1442, 1446 etc., leave little doubt about having categorized animals as simple objects, since they are subject to appropriation, alienation, pledged as collateral and expropriation for satisfaction of debts.

It is important to notice that in some countries (*e.g.* France, Belgium, Portugal) civil law started to acknowledge a special status for animals, which means they are placed among humans (subjects of right) and mere things, such as in Germany, where paragraph 90a of its Code Civil (the *Bürgerliches Gesetzbuch* - BGB) now states that “animals are not things” and must be protected by special laws, authorizing the use of property regulations related to them only when there is no specific provision. In Brazil there is a bill in progress in this regard, which, however, has wording that ends up deepening the problem exposed in this article, as will be seen in a brief mention at the end.

It is true that authors such as Ataíde Junior[10] defend that the provison of Article 225 (§1 (VIII) (final part), of the Federal Constitution, added to the: "[...] principles that also emanate from the same constitutional provision, such as the principle of animal dignity and the principle of universality" would give rise to the fundamental animal right to a dignified

existence, not least because “all dignity must be protected by fundamental rights”. For the author, therefore, because of this "[...] Animal Law operates with the transmutation of the civilistic concept of animal as a thing or a moving good, to the animalistic concept of animal as subject of rights"[11].

However, as seen, this is still not reflected in the Brazilian civil and criminal legislation, despite finding support in the specialized opinion of jurists and in some important court rulings, such as the one relating to the prohibition of the “vaquejada” (ADI 4983/CE) or those that regulate custody and visitation rights by companion animals in the context of divorce[12].

Likewise, based on the Universal Declaration of Animal Rights - apparently mistakenly reputed by the author as a legal norm[13] , when in fact it is just a "declaration", without binding force[14] - and in the ever quoted constitutional provision of the Article 225 (first paragraph) (VII) Célia Regina Nilander de Souza[15] argues that the victim of the crime of ill-treatment is the animal itself, by its intrinsic value, arising from the dignity that had been conferred on it.

João Alves Teixeira Neto[16] states that this way of understanding things in criminal law, arising from the anthropocentric-radical paradigm, “acquired a canonical form in the dogmatic tradition, a kind of 'paralysis' that tends to reject outright any kind of revision of that understanding”. Thus, “the question about the possibility of animals being holders of legal and criminal assets is not just missing an answer, it lacks clarification of the conditions of possibility of the question itself”. This brings to light the fact that “this question is veiled by countless layers of misunderstandings and simplifications that need to be promptly overcome”[17].

One can conclude thereby that, in general terms, the opinion of jurists perhaps lacks the critical notion that species is as relevant as gender, race, and class, as elaborated by Adrian Barbosa and Silva[18], for whom:

> Thinking about social emancipation, yes, comprises the construction of practices to confront racism, social stratification, patriarchy, but it also demands resistance to speciesism. If, on the one hand, there are social relations of political-economic imbalance between humans, responsible for generating castes, maintaining hegemony and social marginalization, on the other, on the threshold of the new century, it is necessary to realize that one can no longer live a species of ethics of everyday life concerned solely and exclusively with the human being (anthropocentrism) […].

As long as criminal knowledge, incorporated in opinion of jurists and court precedents, does not assimilate issues involving the prejudice based on species (which means speciesism, a concept originally coined by Richard Ryder and which will be addressed later)

and also biological finds about animals, their behavior and abilities, non-human animals will continue to be deemed only as material objects of their own ill-treatment but not victims (subjects) endowed with dignity and deserving of consideration of its own.

3 Innovation brought by Federal Law 14.064/2020 regarding the crime of ill-treatment of animals

The Article 32 of the Environmental Crimes Law (Law 9.605/98) was amended by Law 14.064/2020 of September 29, 2020, which added paragraph 1-A to the provision in order to aggravate the punishment for those who practice the conducts of the head of the Article (ill-treatment of animal) when it is directed to dogs and cats. Thus, in these cases, the punishment for the offense that was - and still is in relation to other animals - from 3 (three) months to 1 (one) year of imprisonment (detenção) becomes 2 (two) to 5 (five) years of imprisonment (reclusão), in addition to a fine and prohibition of custody of animal as follows:

> [...]
> § 1-A In the case of a dog or cat, the punishment for the conduct described in the caput of this Article will be imprisonment[reclusão], from 2 (two) to 5 (five) years, fine and prohibition of custody. (Included by Law No. 14.064 of 2020) [sic]
> § 2 The punishment is increased from one-sixth to one-third if the animal is killed. (Our emphasis)

From the point of view of criminal law and criminal procedure, it is immediately certain that the increase in the maximum punishment provided for 5 (five) years of imprisonment removes the offense from the aegis of the Small Criminal Claims Court, because it is no longer classified as a lesser offense (minor/petty offense) when the victim is a dog (*Canis lupus familiaris*) or a cat (*Felis catus*). This is because according to the Article 60 of Federal Law 9.099/95, the Small Criminal Claims Court are competent for the judgment of crimes of "lesser offensive potential" (lesser/minor/petty offense), thus considered "criminal misdemeanors and crimes for which the law imposes a maximum punishment not exceeding 2 (two) years, cumulative or not with a fine" (art. 61 of the same law).

Therefore, in the event of ill-treatment of dogs and cats, the investigation will not take place through a simple "police report of a minor offense" (Termo Circunstanciado de Ocorrência), as is the case of petty offenses (art. 69 of Law 9,.099/95) , but through the regular "police investigation" (Inquérito Policial), in accordance with Articles 4 to 23 of the Code of Criminal Procedure and related provisions, including specific issues relating to environmental

crimes (Federal Law 9.605/98).

As a direct consequence of this in case of flagrante delicto (hypothesis are described in the Article 302 of the Code of Criminal Procedure) of ill-treatment of dogs and cats, the perpetrator will be subject to proper arrest in flagrante delicto by the police authority or by anyone (citizen's arrest - Article 301 of the Code of Criminal Procedure), which does not occur in lesser offenses , where, according to Article 69 (sole paragraph) of the same Code, after the conclusion of the "police report of a minor offense", the author is released on his own recognizance.

Furthermore, as the minimum punishment was also raised (to 2 (two) years) the "diversion program" – provided be Article 89 of Federal Law 9.099/95, which is applicable only to offenses with a minimum punishment of imprisonment equal to or less than 1 (one) year – is inapplicable.

In addition to these issues relating to the criminal procedure, the aggravation of the punishment in the specific case of dogs and cats ends up influencing the analysis of the definition of the crime of ill-treatment as a whole allowing some conclusions to be drawn about the offense and its scope. This is because for some legal scholars there was a certain doubt about the extension of the rule inscribed in the head of Article 32 of the Environmental Crimes Law considering the respective wording. More specifically they discuss which categories of animals would be protected by this provision.

As for Guilherme Nucci[19], for example, only wild animals would be protected, whether domestic or domesticated, native or exotic. Nucci does a grammatical analysis of the provision, understanding that the comma after "wild" would inaugurate an apposition, explaining the categories of wild animals that would be protected by the provision (domestic or domesticated, native or exotic).

Luiz Regis Prado[20], by the way, considers an "undue equalization effort" of domestic animals with wild and domesticated ones for the purpose of the crime of ill-treatment, as for him, as regards domestic animals, legal protection should not have the nature of a crime/felony, but only a lesser offense (misdemeanor) or even an administrative offence. The author does not explain which factual characteristic (biological, psychological etc.) would allow this differentiation he argues.

The wording of the head of the Article 32 is in fact not the best, however, it seems

that the definition of the crime is not restrictive to that point, primarily because a “domestic wild animal” (first combination proposed by Nucci) seems, if not a contradiction, at least an unlikely interpretation an animal category. In any case, it should be considered that with the enactment of Law 14.064/2020 and the inclusion of paragraph 1-A in the provision, this doubt cannot persist. As the change was included by a new paragraph to Article 32, its interpretation is inextricably linked to the respective head of the Article, so much so that the reference to it is clear as follows: “[...] in the case of a dog or cat, the punishment for the conduct described in the caput of this Article will be […]” (Our emphasis).

As known, Complementary Law 95/1998, which implements the command of the sole paragraph of Article 59 of the Brazilian Constitution and regulates the preparation, drafting, amendment and consolidation of laws, provides in Article 11 (III) (c):

> Art. 11. The normative provisions will be written with clarity, precision and logical order, observing, for this purpose, the following norms: […]
> III - to obtain a logical order: [...]
> c) express through paragraphs the aspects that are complementary to the rule set out in the main section of the Article and the exceptions to the rule established by it;

The fact that the enactment of this Complementary Law was briefly prior to the enactment of Law 9.605/98 does not change this reasoning, as it only came to standardize the logical structure that is already known to be adequate for good legislative technique and which is commonly used.

Consequently, as the law itself emphasized that the punishment for the conduct described in the head of the Article is higher when the conduct affects specific domestic animals (dogs and cats), there can be no doubt that the basic conduct provided for in the head provision includes other animals that are not wild, such as dogs or cats highlighted in paragraph 1-A.

Moreover, the first paragraph of Article 32, already included in the original wording of the law, deals with "painful or cruel experience in live animals, even if for didactic or scientific purposes". It is known that animals used in experiments are not only wild but includes domesticated or domestic animals such as rodents, pigs and even dogs and cats[21]. Therefore, the first paragraph of art. 32 of the Law was already part of the interpretation of the head provision, ruling out any restriction to wild animals only, as argued by Nucci.

That said, it is possible to extrapolate this reasoning based on the wording of the law itself and conclude that the same reasoning regarding dogs and cats (§1-A) applies to

institutionalized animals (domesticated and domestic in general), such as cattle, pigs, chickens etc, with no reason to limit it to wild species only.

What follows is to undertake the analysis of this law reform in an attempt to uncover its meaning according to scientific knowledge about animal sentience and also what it means when examined against the background of anthropocentrism and animal ethics.

4 The arbitrariness of legal differentiation among animals made by Federal Law 14.064/2020

Despite the position of non-human animals in its relation to humans and the consequent moral consideration of the former being object of attention since antiquity, it was from the 1970s that the debate was deepened and intensified[22]. Authors such as Richard Ryder, Peter Singer, Tom Regan, among others, were responsible for raising the level of the debate and also for contributing with concepts that are still considered essential, even when they just improved long known ideas and concepts.

In addition to Darwin's findings about evolution and thereby dismantling the view of human beings as biologically diverse or "special" compared to other animals, biology, neuroscience and other branches of science eventually converged to demonstrate that non-human animals have biological structures very similar to those of the human being, including with regard to the ability to exhibit intentional behavior (provided by what we call consciousness).

This became clear and public in 2012 when a group of scientists, consisting of neuroscientists, neuropharmacologists, neurophysiologists, neuroanatomists and cognitive computational neuroscientists, met in Cambridge (UK) and proclaimed the "Cambridge Declaration on Consciousness in Human and Non-Human Animals".

This declaration is of great importance in what comes to the evaluation of the ethical issues involving non-human animals, as it states that, contrary to what one might think, a wide variety of animals, including octopuses, have the "neuranatomic, neurochemical and neurophysiological substrates of states of consciousness along with the ability to exhibit intentional behaviors", that is, they suggest that non-human animals have conscience. The declaration ends as follows:

> We declare the following: "The absence of a neocortex does not appear to preclude an organism from experiencing affective states. Convergent evidence indicates that

> non-human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors. Consequently, the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness. Nonhuman animals, including all mammals and birds, and many other creatures, including octopuses, also possess these neurological substrates".

It is noteworthy that the scientific statement in question includes as equally endowed with the generative structure of consciousness animals often neglected in such matters because their classification as such is not intuitive. In general, it is not difficult to defend the attribution of consciousness or sentience to dogs, cats, primates and other mammals, but not so when it comes to, for example, birds and octopuses, as stated in the declaration.

As for the link between consciousness and sentience, despite admitting the existence of the debate, Daniel Lourenço[23] states that it is possible to state that "all animals capable of fundamental conscious experiences, even if in degrees, intensities and forms varied, they are also, with the same variation, sentient".

By the way, sentience is the capacity to suffer or feel pleasure[24]. A sentient being "is a being that has an experienceable well-being, that is, capable of suffering and feeling pleasure"[25]. For Singer[26], it is to say, sentience would be the differentiating criterion for considering that a being has interests, so that "[if] he suffers, there can be no moral justification for disregarding this suffering or for refusing to give it a weight equal to that of the suffering of any other being".

In addition, as Gabriel Trindade[27] argues, animals would be distributed in arbitrary categories by human beings, being thought of in terms of "animals for consumption", "pets", "research animals", "circus animals", "zoo animals" etc, resulting in different behaviors in relation to each animal classified in such groups. Hence, it is possible to question whether such different animals have sentience and, possibly, self-awareness, how can one justify the different treatment given to them? As Gary Francione[28] claims, the fact of not knowing exactly where the sentience boundary is located (for example in the case of insects) "does not relieve anyone of their moral duties towards all beings of whose conscience is known".

According to Trindade, "[the] non-humans slaughtered for consumption do not have any relevant physiological characteristics to the point of making them ethically distinct from the non-human companions whom human beings cherish so much"[29]. It is important to mention that if sentient animals have the same ability to perceive the world when feeling

pleasure and pain (sentience), desiring the first and running away from the second, it is because they present responses to these stimuli, as opposed to inanimate beings that demonstrate mere reactions [neural nociceptive] to them[30].

Thus, what should be emphasized is that there is no gradation of sentience, and such divisions and discriminations – which will be analyzed in the next item – are merely arbitrary. Vicente Ataíde[31], dealing with cruelty (an act that causes pain and suffering) gives the notion of this lack of gradation, analyzing it from the perspective of Brazilian law:

> Cruel practices against animals are constitutionally prohibited. It does not matter if the practice is sport, if it is a cultural manifestation, if it is registered as an immaterial asset that is part of the Brazilian cultural heritage or if there is a local law regulating the activity. [...]. The cruel practice has no gradations. Cruelty is, however, incompatible with the values enshrined in the Constitution. In the judgment of ADIn 4983, the STF[Brazilian Supreme Court] acknowledged, through empirical data, that the practice of "vaquejada" is intrinsically cruel, there being no way to exist "vaquejada" without cruelty. This same conclusion can be extended to other practices similar to "vaquejada" – such as rodeos –, if verified, by empirical data, which are also intrinsically cruel. Well, there is no way to change the nature of things! If the "vaquejada" is cruel, there is no way to create a rule – like the one created by Constitutional Amendment n. 96 – simply saying that it is not considered cruel under certain conditions! (Our emphasis)

How to justify, thus, the much more serious punishment of harmful conducts aimed at dogs and cats compared to other animals, especially the sentient ones (mammals, birds, octopuses etc.)? Beyond the biological issues that defy this arbitrariness, from an ethical point of view one must be aware that similar beings with similar interests should receive the same consideration, as a basic principle of equity. It is the principle of "equal consideration of similar interests", a principle that is said to be formal in philosophy, that is, "it concerns the form of moral reasoning, without proclaiming anything about its content"[32].

By virtue of this principle "the same interest in not suffering has the same weight in similar situations"[33], which makes unequal treatment wrong in equivalent situations, by means of a "practice of impartiality and universality necessary for the evaluation of moral interests"[34]. Therefore, being dogs and cats sentient animals as well as other mammals or even birds and octopuses, all having an interest in not suffering (and in maximizing their pleasure), to consider the infliction of ill-treatment on the former more offensive than on the latter is a violation of the principle of equal consideration of similar interests, overvaluing the sentience of the former or underestimating that of others.

That said, we now go on to investigate the possible real background of this peculiar legal treatment, protecting dogs and cats in a much more intensely (and arbitrary from a moral

point of view) way than other animals.

4.1 What underlies this reform: the ethical relationship between human and non-human animals

Now Knowing that protection against ill-treatment of animals became differentiated by Brazilian legislation, punishing cruel conduct, injury or mutilation, omission in care and abuse in the "handling" of dogs and cats more severely than in relation to to other animals, one can try to unveil the meaning underlying this differentiation. This is because, as previosly said, there is no biological reason for this, since far beyond dogs and cats a huge range of animals is considered equally capable of experiencing pain and pleasure (that is, they are sentient) and endowed with consciousness (Cambridge Declaration).

Now, if all mammals, birds and octopuses (at least) are equally capable of feeling pain and pleasure and are aware of themselves while feeling, experiencing suffering, anguish, fear, surprise or even joy and satisfaction, what is the reason for the law to protect in a differentiated way dogs and cats? At this point, it is already possible to safely affirm the arbitrariness of the criterion, based not on objective reasons, but, as will be seen, subjective reasons of humanity when elaborating its rules of conduct towards non-humans.

Two hypotheses will be raised here about this differentiation. The first related to the theory of indirect moral duties regarding animals and the second to the so-called selective speciesism (Gary Francione).

The first hypothesis in support of this differenciation is based on human perception and feeling towards non-human animals, rooted on human exclusivity within the moral community and on merely indirect attention to non-humans. According to the theory of indirect moral duties, developed by Immanuel Kant, human beings are the only participants in the moral community, so that any protective or respectful conduct towards non-humans takes place indirectly[35], since the respective moral duty is directly addressed only to other human(s), such as the owner of the animal.

Furthermore, respectful conduct towards animals would be the cultivation of virtue, combating the bluntness of the spirit[36], as it is argued that harming a non-human animal can lead, in the end, to causing harm to other human beings, an idea that was already circulating,

for example, in the thought of John Locke[37], in the 17th century, or of Saint Thomas Aquinas, for whom “the only reason existing against cruelty to animals is that it can lead to cruelty to human beings”[38].

This view of indirect duties is based on the “cruelty-kindness view”, that is, “the moral stance that expresses that human beings should not act cruelly towards animals and, instead, treat them with kindness or compassion”[39], although “what an individual feels about animal suffering is logically different from what he should do”[40].

João Alves Teixeira Neto[41], when dealing with the discussion about what would be the legal interest protected in crimes of ill-treatment, points this view of protection the feeling of compassion for animals, exposing and criticizing the “crimes of protection of feelings” doctrine (*Gefühlsschutzdelikte*) in the criminal law regarding animals.

In such misunderstandings, “the animals would, in principle, be excluded from participation [of the moral community], their protection being just a reflection of the protection of man himself [...]”[42]. Therefore, from this point of view, the greater appreciation of dogs and cats by humans, given their strong presence as "companion animals" leads to a behavioral response and the respective institutionalization of the difference, resulting in the special protection of these animals.

Thus, the increase in the punishment for crimes that affect dogs and cats is a response to the human feeling about these animals (closer to humans) and not to their own interests/rights. Nor does it respect their similarity with other equally sentient animals, which have a comparatively disadvantaged treatment (significantly lesser punishment in case of ill-treatment of other animals).

A problem is the insufficiency of the criteria for the effective protection of non-human. A protection based on indirect duties towards animals, or that aims to grant them a merely superficial protection, will never be able to effectively safeguard them[43].

There is also inconsistency in this differentiation, as Daniel Lourenço[44] well pointed out, as this relationship (progression of violence from non-humans to humans) would demand a "similarity of reactions between certain 'things' and 'non-things'". But if this behavior in case of suffering and pain is similar, it would also be “reasonable to infer that their suffering should also be similar”. Therefore, the differentiated treatment would be totally arbitrary.

In the same way argues Gabriel Garmendia Trindade[45]:

> […] if there is a direct duty not to cause gratuitous suffering (cruelty) to human beings that is due directly to humans, as a matter of moral coherence, the same duty right not to cause gratuitous suffering would be due directly to other beings who are in the same position as human moral agents – that is, who do not want to suffer.

Apropos Tom Regan[46] had already said that " To make an animal suffer is not justified just on the grounds that one is not indifferent to its suffering, or just on the grounds that one does not enjoy making it suffer". The abstention of-causing suffering to non-humans (especially the sentient) is due to them on their own right, since they, like humans, avoid pain suffering by means of their sentience and the capacity to perceive this situation (which is to say: have conscience).

Likewise, Teixera Neto[47] for whom it would be enough to acknowledge that animals are subjects of an interest, that is, that of *not suffer*ing. This is due to the simple fact that they can suffer and, at the same time, their quest to avoid suffering. The author goes further by asking if in the case of human beings having a direct interest "to be protected for crimes against animals", that interest could be more affected "in the case of crimes against animals, than the interest of the animal itself?"

His answer is categorical and intuitive: no. "The animal's physical pain is what matters most to justify the criminal prohibition of cruelty to animals"[48].

Next, the second hypothesis to explain the arbitrary legal differentiation regarding the severity of acts of ill-treatment when affecting dogs and cats is what Gary Fracione called selective speciesism.

Preliminarily, it is important to say that speciesism itself is a term coined by the English psychologist Richard Ryder and that although receiving differentiated conceptualization by several authors and even at different periods by Ryder himself[49], can be understood as the idea that human beings arbitrarily privilege their own species, excluding other animals from the moral community without there being ethical or biological reasons for this, which is to say, characteristics that are exclusively human and that, at the same time, all humans have it. It would thus be a sheer prejudice based on belonging to the species.

As for selective speciesism, Francione develops the idea of a human "moral schizophrenia" in its relationship with non-humans: "According to Francione, there is a visible disparity between what humans say about the way non-human animals should be treated and how non-humans are actually treated"[50]. Thus, despite the current idea that non-human animals are capable of feeling and suffering and therefore must be protected, it is equally

common for animals – notably those institutionalized for human use (food, leather, etc.), research, zoos and circuses, etc. – are subjected to degrading treatment, fraught with deprivation (confined life, regulated or purposefully unbalanced food for specific purposes), suffering, early family separation (withdrawal of puppies), mutilations (beak trimming, tail or ear clipping, tooth extraction, etc.), forced labor (carts, plows, mills, circus performances, etc.) among others.

There is, in Francione's description, a moral abyss between what human beings in general think about the treatment due to non-humans and the effective treatment given to them, with pain and suffering inflicted even for trivial purposes[51], among which one can cite "leisure" ("vaquejadas", lasso related events, bullfights etc.), the use of leather for clothing and decoration (taking into account that are already synthetic materials that can easily replace this demand) and so on.

Gabriel Garmendia da Trindade[52] claims that this "moral schizophrenia represents a notoriously inconsistent relationship between human beings, their animal companions and the non-humans they consume every day". Although the relationship with animals is important for human social life and the practice of cruelty against them is abhorrent, it is not questioned whether "the multiple institutionalized and culturally sanctioned uses" can be seen "as essential to human life and justified" by ethic[53].

By the way, returning to the above question about the legal categorization of animals as a thing/good and its influence on the general regime of their treatment by humans, Trindade[54], again based on Gary Francione, states that "[…] the property status in which animals find themselves must be seen as the main factor enabling human moral schizophrenia towards non-humans and guaranteeing the exclusion of the latter from the moral community".

For Francione, this moral schizophrenia would be, after all, the background of the selective speciesism, as described by Heron Gordilho[55]:

> In selective speciesism, Gary Francione identifies a "moral schizophrenia" in our society, because while people consider certain domestic animals family members, they have no constraints in using products obtained from pain, suffering and death of animals such as cattle, chickens, sheep or pigs.

In other words, the proximity of human beings with dogs and cats and the affective bond between them does not extend to other animals. Thereby, human beings start to value these "companion animals" in a special way, feeling more empathy for them so as to give

greater consideration to their sentience and well-being compared to others, which ends up being reflected in the legal regime (in this case, the law against ill-treatment).

On the other hand, as for other animals, even unequivocally sentient ones such as primates and whales or even close relatives of cats and dogs, such as wolves, jaguars and other canids and felines, as this extra empathy arising from the companionship and home life did not develop, there is not extra concern about their situation, suffering and interests. Therefore, they are treated in a more generic way and their suffering is apparently less painful to human beings.

Thus, the selective speciesism described by Francione is also able to explain the reason why only dogs and cats had special human attention regarding their protection through criminal legislation, relegating the others to an arbitrarily less privileged position in this regard.

Finally, it is important to say that this selective speciesist pattern is in the process of being expanded with the vote of Bill (PL) 6054/2019 by the Brazilian [National] Congress, which announces provisions on the legal nature of domestic and wild animals.

This project intends to change the current classification of animals as simple things in Brazilian law (as in other countries already mentioned), however, due to selective speciesism and political pressures against this new categorization (to differentiate animals from mere clocks, as exemplified by Francione) in its present version it excludes animals of "agricultural production", those used in scientific research or in "cultural manifestations, registered as an intangible asset that is part of the Brazilian [intangible] cultural heritage".

Thus, if it passes with this wording, domestic and wild animals would be considered of a *sui generis* (peculiar) legal category, but no longer simple things/goods. On the other hand, others, such as cattle, pigs, chickens, rabbits, guinea pigs and even dogs and cats (why not?) used in researches would still be deemed simple things, subject to full treatment as such, even if protected from cruelty (with all the issues that this concept carries) by virtue of the constitutional provision of art. 225, §1, VII of the Brazilian Constitution.

5 Conclusion

The Law 9.605/98 provided for the offense of ill-treatment of animals with a punishment of 3 months to 1 year of imprisonment (detenção) for the agent who committed

an act of abuse, ill-treatment, injured or mutilated wild, domestic or domesticated, native or exotic animals. With the amendment promoted by Law 14.064/2020, in the case of dogs and cats exclusively, the punishment is now from 2 to 5 years of imprisonment (reclusão), in addition to a fine and prohibition of custody.

Despite appearing to advance in the protection of animals, this reform carries a series of issues in its interpretation, especially the difficulty of justifying the different, aggravated, treatment only when the animal subject to the conduct is a member of the feline (*Felis catus*) and canine (*Canis lupus familiaris*) species.

From a strictly criminal and procedural point of view, the offense, when committed against dogs and cats, is no longer considered as a minor offensive, being removed from the regime of Law 9.099/95 (Law of small-claims courts), not applicable not even the diversion program (article 89 of Law 9.099/95) due the minimum punishment of deprivation of liberty of 2 years. There was, then, a substantial hardening of the punishment in this case.

On the other hand, this reform had the beneficial effect of leaving out of the question that domestic animals are included in the scope of protection of the provision, removing the current that defended that only wild animals could be the object of these conducts. As the new paragraph 1-A, where this new provision is inserted, expressly refers to the head of the Article, it is now clear that not only wild, but domestic, domesticated, etc. animals, are included in the respective provision.

It was also highlighted that much of the opinion of jurists, still attached to the radical anthropocentric paradigm, considers abused animals as a mere material object of the crime, deeming the community or even the environment as victims. This is a matter of immense importance for the animal condition, reflecting the situation and value that non-humans have on the scale accepted by human beings, and which still needs better elaboration, stripping away old prejudices and absorbing scientific discoveries on the mind and characteristics of non-human animals.

Also, a concept of sentience was presented, that is, the ability to consciously feel pain and pleasure, which is attributed to various animals, far beyond dogs and cats and not even restricted to mammals or vertebrates. Furthermore, the scientific findings about the evidence of consciousness in non-human animals was highlighted, as is stated in the Cambridge Declaration on Consciousness in Human and Non-Human Animals that mammals and birds,

and many other creatures, including octopuses, possess the neuroanatomical, neurochemical, and neurophysiological substrates of states of consciousness along with the capacity to exhibit intentional behaviors.

As there are no reasons that lead to the conclusion that there is a difference in the level of sentience between these types of animals, one can conclude that protecting some more than others – in this case dogs and cats – against acts that cause pain and suffering, which is also perceived between them, it is simply arbitrary.

Finally, an attempt was made to unveil the reasons behind this apparently arbitrary differentiation made in criminal legislation, overestimating the sentience of dogs and cats compared to other non-humans. Based on literature, it was found that one of the hypotheses would be the adherence of the legislation to moral theory of indirect duties, by which animals are ethically not recognized as moral subjects, even if in the position of moral patients, that is, those who cannot behave morally (moral agents) but to whom moral behavior is due, such as small children and people with severe mental disabilities.

Despite excluding non-human animals from the moral community, supporters of the indirect duty current admit that ill-treatment is morally wrong, but not because it directly offends animals, but rather human beings (their sense of morality). Consequently, animals would only be the object of this moral conduct (the attention towards them would be merely indirect, therefore), with other human beings – such as the owner of the abused animal – being the true direct recipients of this obligation.

It can be said that the closer proximity of domestic dogs and cats to human beings would lead to greater concern and empathy for them, reinforcing criminal legislation protection only in relation to them due to this prevailing human feeling, which is, generally, non-existent or less intense in regard to other non-human animals.

Another hypothesis that can explain this differentiation between equally sentient beings is selective speciesism, according to which, in the words of Gary Francione, there would be a “moral schizophrenia” in the way human beings think in general about the treatment due to non-humans and the effective treatment given to them, as well as the way we treat equally sentient animals. Domestic and wild animals are treated with reasonable respect and empathy, while institutionalized ones, for example, for consumption and research, have short and painful lives, confined in small spaces and subjected to treatments, handling and painful

experiences (marking with iron, dragging by rope etc.), terrifying (psychological experiments, separation of the young at an early age etc.) and violent (slaughter techniques, beating while handling etc.).

Thus, it appears that selective speciesism - along with the moral theory of indirect duties - is also capable of explaining the difference in the treatment of dogs and cats in relation to equally sentient animals by Brazilian criminal legislation, providing evidence of the moral schizophrenia that guide the relationship between humans and non-human animals notably after the publication of Federal Law 14.064/2020.

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