

DOCTRINA

Animal protection in Spain: Historical evolution and consequences of the entry into force of Law 2/2023, of March 13, on the Protection, Welfare, and Keeping of Companion Animals and other animal welfare measures

La protección de los animales en España: Evolución histórica y consecuencias de la entrada en vigor de la Ley 2/2023, de 13 de marzo, de Protección, Bienestar y Tenencia de Animales de Compañía y otras medidas de bienestar animal

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ABSTRACT In recent years, the mistreatment of animals has increased notably, which has motivated legislators to regulate this social problem in a different way than in the past. This research aims to expose the Spanish regulatory tradition regarding these acts of cruelty, which has allowed the establishment of a pioneering law that allows the effective protection of animals against their aggressors. Throughout the article, the reader will be able to observe the different theories that legislators have been following and how they have positively impacted the Spanish legal system. Finally, this research aims to specify the protected legal right on which the different rules are based and, at the same time, a study of the penal system and its continuous modifications up to the present time. It is important to highlight, and this has been the intention of this research, the importance of the recent regulation in the Spanish legal system since it has served as an example for other countries where animal rights have not yet been treated in a remarkable way, leaving these living beings unprotected against the barbarity and uncivil behaviors of human beings. Uncivil behaviors of human beings when our responsibility should be to watch over and protect the world we live in.

KEYWORDS Animal rights, crimes against animals, environment, animal cruelty.

RESUMEN En los últimos años el maltrato contra los animales se ha incrementado notablemente, lo que ha motivado al legislador a regular este problema social de una manera distinta a cómo se venía haciendo en el pasado. La presente investigación pretende exponer lo que la tradición normativa española ha hecho acerca de estos actos de crueldad y que ha permitido establecer una ley pionera que permite proteger eficazmente a los animales frente a sus agresores. A lo largo del artículo, el lector podrá observar las diferentes teorías que ha ido siguiendo el legislador y como se ha integrado positivamente en el ordenamiento jurídico español. Finalmente, la presente investigación se propone concretar el bien jurídico protegido sobre el que se asientan las normas y, además de un estudio del sistema penal y sus continuas modificaciones hasta la actualidad. Es importante destacar, y esa ha sido la intención de esta investigación, la importancia que ha tenido la reciente normativa en el ordenamiento jurídico español y cómo ha servido de ejemplo para otros países donde los derechos de los animales aún no han sido tratados de forma notable dejando a estos seres vivos desprotegidos frente a la barbarie y las conductas incívicas de los seres humanos cuándo nuestra responsabilidad debería ser velar y proteger el mundo en el que vivimos.

PALABRAS CLAVE Derechos de los animales, delitos contra los animales, medio ambiente, crueldad animal.

Introduction: The dissemination of videos through the Internet and social networks

As stated by Minahim, Carvalho, and De Santana (2017: 23-40), based on the studies conducted by Bauman (2013: 16), postmodern society has replaced traditional means of communication and personal contact with an online virtual one, giving rise to fetishist marketing for a new “digital environment”. This new paradigm lays the foundations for a new type of society: the information or knowledge society, which is based on numbers, calculations, communication flows, and information speed.

Regarding this environment, De Castro (2013: 107) points out that the ethical challenge and the devirtualization of the media are proportional to the virtualization of life, the deterritorialization and dematerialization of relationships and instruments and, consequently, the dehumanization of people, which on many occasions causes the proliferation of cruel behaviour towards the defenceless, such as animals. This scenario can be found on social networks, in countless videos,¹ that reveal the suffer-

1. There are numerous reports of young people committing these crimes. Recently in the USA a young woman has been accused of raping her dog and spreading the images on the internet («Detenida una joven por violar a un perro y difundir las imágenes», *Antena 3 Noticias*. April 9, 2023. Available at <https://tipg.link/NLS4>) or the dismantling of a network that swindled by buying and selling animals on the internet, in Spain («Golpe a una red de venta de perros online que morían días después de ser entregados», *20 Minutos*, May 16, 2022. Available at <https://tipg.link/NLS9>).

ing and death of animals. Therefore, confronted by this reality, the State is obliged to assume new inspection and surveillance functions.

When taking into account the motivations of these criminals who record the acts and later post them on the Internet —boasting at the same time about them—, we observe that their main motivation is to obtain online exposure or to draw attention to themselves (Camargo, Monsalve, and Bermúdez, 2023: 1-12). In many cases, these perpetrators suffer from some mental pathologies such as Conduct Disorder (De Santiago Fernández, 2013: 1-11), which manifests itself in acts of animal abuse or unjustified cruelty towards animals. One notable event occurred, as Palomino Gutiérrez (2016: 75-77) recounts, in Huércal-Overa, province of Almería, when two young men crushed to death 72 piglets and later spread their deed using WhatsApp. It was precisely thanks to the dissemination of this video that the owner of the farm became aware of the acts and informed Seprona (Guardia Civil), who were then able to identify the perpetrators and send them to court for trial.

As a result, this has required the establishment of policies aimed at educating on the values of dignity and respect related to the treatment of other living beings. In fact, these new crimes have raised the concerns of the Spanish national legislator, who has established in the criminal legislation a series of crimes against animals, by reforming, in 2023, Title XVI bis of the Criminal Code (“Crimes against animals”);² while the Ministry of the Interior has created a mobile application which allows rapid reporting of cases when animal abuse is committed to the National Police and the Civil Guard.

Additionally, the recent reform on crimes of animal cruelty —introduced in Law 2/2023, March 13th, on the Protection, the Welfare and the Keeping of Animal Companions as well as other animal welfare measures— has a very ambitious objective: to extend legal protection to all vertebrate animals, extending the number of species granted protection, and establishing the implementation of measures for the prosecution of offenders, which in turn raises society’s awareness towards this topic.

The protection of animals in the Spanish Constitution

To define the environment from a legal point of view, we must first give a definition of what it is. Garrido Falla (1985: 808) defines it as a “set of natural or cultural elements that determine the conditions of life characteristic of a human-geographical and temporally delimited member”. In this sense, our Fundamental Rule (following the model of section 66 of the Portuguese Constitution of 1976) contemplates the protection of the environment in article 45.³ But, as Fernández Rodríguez (1981: 337-350)

2. In this sense, compare articles 340 bis to 340 *quinquies* of the Penal Code.

3. Article 45: “1. Everyone has the right to enjoy an environment suitable for the development of the individual, as well as the duty to preserve it. 2. The public authorities shall ensure the rational use of all

warns,⁴ its inclusion was not free of tensions, since it responded to a fundamental policy decision based on the achievement of a model of society compatible with the development of community life. This makes it one of the first in the world to reflect social concern for the protection of the environment.

As a result of this approach, the legislator opted to accommodate environmental concerns in the doctrinal part of our Constitution by establishing it as a new economic-social right, and not as a fundamental right. Thus, by linking the environment to the quality of life, it is established as a right and duty, and as a guiding principle of economic and social policy.

For his part, López Ramón (2015: 84-91), when analysing the constitutional precept, establishes its dual character, constituted at the same time as a subjective right: an appropriate environment for the development of a person, which carries the duty to conserve it.

Therefore, article 45, by establishing a right and a duty, also enables the State to resort to legal action for the purpose of restoring it in the event of injury or breach of the duty to preserve it. All this, by virtue of the principles of prevention, correction, and liability. In turn, the State itself will resort to administrative law, criminal law, and even civil law.⁵

Non bis in idem: Criminal or administrative tort?

The legislator, in accordance with the provisions of article 45, establishes a double mechanism for the protection of the environment. In this way, acts of cruelty against animals (including those carried out on the Internet) find their legal expression either as an administrative infraction or as a criminal offence. However, this dual nature entails, in practice, important problems and raises the possibility that the same conduct can be punished, on the one hand, from the criminal perspective and, on the other, from that of administrative law.

In the context of such circumstances, the *non bis in idem* principle allows us to resolve these conflicts by providing a solution in those cases in which both criminal and administrative offences are applicable simultaneously. In this sense, as Pérez

natural resources in order to protect and improve the quality of life and to defend and restore the environment, relying on the indispensable collective solidarity. 3. For those who violate the provisions of the previous section, criminal or, where appropriate, administrative penalties shall be established under the terms established by law, as well as the obligation to make reparation for the damage caused”.

4. In this sense, compare Simón Yarza (2012: 153-179).

5. In this sense, we can bring up article 333 bis. 1 of the Civil Code, in relation to the provisions of our Constitution, which establishes that: “Animals are living beings endowed with sentience. The legal regime of goods and things shall only be applicable to them to the extent that it is compatible with their nature or with the provisions intended for their protection”.

Manzano (2005: 73-108) clarifies, the application of the principle is intended to prevent the application of a double sanction in those cases in which, in accordance with the jurisprudence of the Constitutional Court, there is a subject and act identified, and legal basis. Consequently, as stated by Jaén Vallejo (2003: 75-94) —taking into consideration the warnings of the Constitutional Court—, the application of the principle inevitably implies the preference of criminal law over the administrative legal system. The same position is defended by García Sanz (2008: 117-137) who, when analysing the effects of the application of *non bis in idem*, rules that the sanctioning activity of the administration must yield to the criminal courts without the criminal and administrative sanction being applied jointly.

In summary, we can assert that the *non bis in idem* principle is the key to avoiding double punishment, permitting us to decide whether to apply the criminal or administrative legal system to punish those who commit the crime of animal abuse (in this case, whilst using the Internet).

The protected legal right

The High Court (or Supreme Court, hereinafter SC), in STS 940/2021 (Criminal Chamber) of December 1, 2021,⁶ has shown that the criminal protection of animals lies in the need for a common public morality, thus adopting the moral position held by a large part of the presently accepted legal opinion. Consequently, animal welfare does not imply that animals are entitled to rights, but rather that human nature entails a duty to respect the rest of living beings, this requirement being shaped by society and by the specific formulation of the different types of criminal law by the legislator.

Thus, the criminal legal system requires that human conduct results in the injury, death or sexual exploitation of an animal that is normally under the care and protection of men. That is to say, the type of criminal offence implies that the disregard for animal welfare lacks justification, thus excluding other legally authorized conducts, such as animal experimentation, bullfighting events, or slaughter for food or industrial ends, and subject to the corresponding administrative regulation, among others. This implies that the burden of proving the offence (that is, the disregard for animals) reflected in the normative element corresponds to the prosecution. However, as we shall see below, this position offered by the Supreme Court is not unanimous (Mor-

6. Compare, STS 940/2021 (Criminal Chamber) of December 1, 2021. In this sense, the European Convention of Human Rights also pronounced a statement on this public morality by ruling in favor of the prohibition of the slaughter of animals without prior stunning with halal and kosher rituals, typical of the Muslim and Jewish religions, in the aforementioned regions. See, Sentencias del Tribunal Europeo de Derechos Humanos of February 13, 2024.

adell Ávila, 2020: 1-12), and there are numerous theories that defend different interpretations of the protected legal right or even those that deny that there is a protected legal right.

Early precedents: Animals as objects

As Arribas Atienza (2018: 3) warn, although animals have played a very important role in society (as labor force, transportation and warfare use, for example), law and the economy throughout our history have traditionally considered them as moveable things. In Roman law, for example, Ulpianus proposed a regulation of this in the Digest (1.1.1.31), referring to the existence and application of a right proper to nature that is common to all living beings —regardless of whether they are humans or animals—. However, the reality is that, as Kelch (2012: 23-62) points out, man's respect and veneration for nature has faded over the centuries.

In this sense, Giménez-Candela (1999: 1-4) points out that animals have in our continental legal system, the consideration of things of property with this attribution of the status of things (*res*), following the Roman legal technique which, at the time, integrates the two main work forces of an eminently agricultural society (slaves and animals) —especially draught and pack animals—, being among the most important elements of the patrimony (*mancipium*) and the head of a family clan (*paterfamilias*), that is, the owner and sole holder of all the goods with which a family lived its life and economic activity. At that time, the inclusion of animals within the Roman legal system, as a specific category within the integral elements of property, signified a very important change given that in other societies they were not even included within a system of law.⁷

Applying the same logic, today we are considering a change in the legal status of animals to provide them with authentic rights of their own, as it is the intention of the recent Law 2/2023, of March 13, on the Protection, Welfare and Keeping of Companion Animals and other animal welfare measures.

Bioethical and moral perspective

As stated by Jaurrieta Ortega (2019: 181-202), the supporters of this theory advocate for the protection of that set of bioethical obligations that men have towards animals. In this way, García Solé (2010: 36-43) defends that the purpose of considering it as a protected legal right is the protection of nature as a whole and the damage that animals may suffer as a consequence of their exploitation. This, because animal abuse

7. In this sense, compare Giménez-Candela (2015: 1-4).

violates a basic interest regarding the biological-bioethical obligations that humans have towards animals, including respect for the environment from which the aforementioned obligations derive. These are established as a constitutional mandate, since the crimes of animal mistreatment are configured as a crime against the environment in article 45 of the Spanish Constitution: that is, the care of domestic animals.

This article, then, establishes a recognition of rights regarding the enjoyment of the environment, stating that those who violate such rights will be punished with criminal or administrative sanctions. However, it should be noted that, at present, this thesis has been losing support and is no longer the majority position, as reflected in the aforementioned ruling of the Supreme Court.⁸

On the other hand, on a moral perspective, a theory has been proposed by Álvarez García (2009: 40-53) that finds its basis in legal philosophy: it was considered that animal abusers had a high possibility of becoming people abusers, which could pose a risk to peaceful human coexistence. Therefore, as Rocha Santana (2016: 30-53) argues, rather than advocating for the protection of animals, the purpose of this position is an attempt to make society aware that different forms of life must be respected and that taking care of animals entails a responsibility towards them.

Theories on the dignity, physical and psychological integrity of animals

Finally, as defended by De Lucas (2009: 7-19), the prevailing theory and the majority accepted legal opinion holds that this legal right must protect the dignity and physical and psychological well-being of the animals. Hence, this position is one which considers that by criminalizing animal abuse the legislator is undertaking the protection of the life and well-being of the animals, that is to say, it would imply a recognition of the rights to life and the integrity of the animals, or even their wellbeing.

In this way, there are numerous authors (Ríos Corbacho, 2016: 1-55; García Álvarez and López Péregrin, 2013: 1-65) who sustain and defend this position, as well as national and community jurisprudence,⁹ which supposes a recognition of the subjective rights to animals, despite the fact that these beings do not have the capacity to exercise them themselves.

In contrast to the above, there is a minority that accepts the legal opinion —such as Rodríguez López (2007: 37-43) or Matellanes (2008: 1-117)— that denies the existence of a protected legal right regarding crimes of animal cruelty and, therefore, that

8. On the change in jurisprudence and the entry into force of the new law, compare José Manzanares Samaniego, «La protección de los animales en la Ley Orgánica 3/2023, de 28 de marzo», *La Ley*, May 9, 2023.

9. Among others, the *Sentencia de la Audiencia Provincial of Madrid of 19 April 2004*. Also, the Treaty on the Functioning of the European Union, which is one of the constituent treaties of the European Union that refers to animals as “sentient beings”, in accordance with the foundations of this sector.

they should not be subject to the protection of the criminal legal system, since they believe the protection offered by administrative law is sufficient.

The crime of animal abuse

An approximation to the effects of Organic Law 3/2023 in the matter of animal cruelty, in the Penal Code of 1995

Before proceeding to the study of the crime of animal cruelty, it should be pointed out that this type of crime has undergone important modifications as a consequence of the coming into force of the recent Organic Law 3/2023, of March 29, which modifies Organic Law 10/1995, of November 23, of the Penal Code, in the matter of animal cruelty.

Firstly, we note that Chapter IV, of Title XVI of Book II has changed its heading to “Crimes against flora and fauna” (which includes the articles referred in articles 334 to 336, and deleting articles 337 and 337 *bis*), as well as the addition of a new chapter called “Crimes against animals” (which establishes articles 340 *bis* to 340 *quinines*).¹⁰

Secondly, analysing the new elements introduced in this law —and given that it constitutes a new wording, despite the fact that it maintains important similarities with the previous legislation—, we consider it necessary to make a number of clarifications (regardless of the fact that these will be dealt with in greater depth later in this article). Regarding article 340 *bis* of the Penal Code,¹¹ we observe how the legislator,

10. See Book II, Title XVI, Chapter IV, and Book II, Title XVI *bis* of the Penal Code.

11. Article 340 *bis*: “1. It will be punished with a prison sentence of three to eighteen months or a fine of six to twelve months and with the penalty of special disqualification of one to three years for the practice of profession, trade or commerce that is related to animals and for the possession of animals, whoever outside of legally regulated activities and by any means or procedure, including acts of a sexual nature, causes injury to a domestic animal, tame, domesticated or living temporarily or permanently under human control that requires veterinary treatment for the restoration of their health. If the injuries of the preceding paragraph are caused to a vertebrate animal not included in the preceding paragraph, a prison sentence of three to twelve months or a fine of three to six months will be imposed, in addition to the penalty of special disqualification of one to three years for the exercise of the profession, trade or commerce that is related to animals and for the possession of animals. If the crime was committed using firearms, the judge or court may impose the penalty of disqualification from possession and carrying of firearms for a period of one to four years. 2. The penalties foreseen in the previous section shall be imposed in its superior half when any of the following aggravating circumstances concur: a) Use of weapons, instruments, objects, means, methods, or forms that could be dangerous for the life or health of the animal. b) Execution of the act with cruelty. c) Causing the animal, the loss or uselessness of a sense, organ, or main member. d) Execution of the act by its owner or whoever has entrusted the care of the animal. e) Execution of the act in the presence of a minor or a particularly vulnerable person. f) Executing the act for profit. g) Committing the act to coerce, intimidate, harass, or cause psychological harm to a person who is or has been a spouse or a person who is or has been linked to the perpetrator by

when classifying the conduct of this crime—in the spirit of preserving the physical well-being of animals and granting them a dignity that they previously lacked under the already repealed regulation— considers them as something more than mere things, and as possessors of dignity and, therefore, deserving of protection. Thus, it follows the most moralistic positions that call for conferring dignity to these beings.

Among the typical conducts we observe is that they are extremely diverse, categorizing both attacks against their physical well-being and those of sexual nature¹² committed against animals—considering that these conducts are the most common in the dissemination of videos through social networks, as mentioned previously—, as well as those aggravated by the nature of the conduct committed—that is, if there is cruelty and is carried out in the presence of children or if the animal is killed, among others.¹³

Furthermore, we can see in the recent provisions an important change with respect to previous legislation, since it makes a distinction between vertebrate animals and non-vertebrate animals, significantly extending the object of protection of the law—before the reform a number of species, especially those not considered domestic, were automatically excluded from such protection and, in any case, were covered by other criminal offences such as the crime of damage, which protects the property of the owner of the animal and not the animal itself.

For its part, article 340 *quater* of the Penal Code includes the abandonment of any vertebrate animal in conditions in which its life or physical well-being could be threatened.¹⁴ Unlike the previous definition, which was a result-based offence, this

an analogous affective relationship, even without cohabitation. h) Executing the act in a public event or spreading it through information or communication technologies. i) Using poison, explosive means or other instruments or arts of similar destructive or non-selective effectiveness. 3. When, on the occasion of the acts provided for in the first paragraph of this article, the death of a domestic, tame, domesticated animal or one that lives temporarily or permanently under human control is caused, a prison sentence of twelve to twenty-four months shall be imposed, in addition to the penalty of special disqualification of two to four years for the exercise of profession, trade or commerce that is related to animals and for the possession of animals. When, on the occasion of the acts provided for in the first paragraph of this article, the death of a vertebrate animal not included in the preceding paragraph is caused, a prison sentence of six to eighteen months or a fine of eighteen to twenty-four months shall be imposed, in addition to the penalty of special disqualification of two to four years for the exercise of the profession, trade or commerce related to animals and for the possession of animals”.

12. In this sense, compare Sentencia de la Audiencia Provincial of La Rioja 227/2019, of June 13, 2019.

13. In this regard, compare Sentencia de la Audiencia Provincial of Badajoz 133/2020, of October 6, 2020 or Sentencia de la Audiencia Provincial of Santa Cruz de Tenerife 154/2020, of May 27, 2020; among others.

14. “Whoever abandons a vertebrate animal under their responsibility in conditions in which its life or integrity could be endangered will be punished with a fine of one to six months or community service of thirty-one to ninety days. In addition, a penalty of special disqualification of one to three years shall be imposed for the exercise of a profession, trade or business involving animals and for the keeping of animals”.

one is presented as a dangerous offence, consequence of the owner's lack of responsibility towards the animal, and so even criminalizing the moment prior to the occurrence of any harmful result. Also, this article is dedicated to punishing the liability of the legal persons responsible for committing the criminal offences described above.¹⁵ Meanwhile article 340 *quinquies* is dedicated to the precautionary measures that can be imposed by the courts and tribunals.¹⁶

Historical evolution of the offence of animal abuse

Just as we have discussed, in light of the most recent changes to the regulation of criminal conduct, it is worth going back —briefly— to the regulatory tradition in order to understand the reasons why the legislator has decided to give this new meaning to the criminal law. Thus, concern for animal welfare has been a constant concern of the different Spanish legislators throughout history. In this sense, Petit (2011: 53) reminds us that the first example of this type of regulation in our criminal legal system can be found in the prohibition of bullfighting in 1785 (albeit later lifted by Charles IV, who established certain limitations).¹⁷

In addition to this historical anecdote, we can also consider the most distant antecedent of the crime against animals to be that introduced in article 810 of the 1928 Criminal Code, which prosecuted those who publicly mistreated domestic animals. However, it was not until the last decades of that century that animal rights awareness became clear where —in the drafts and preliminary drafts of the penal codes of 1980, 1983, 1992 and 1994— animal mistreatment was again incorporated as a crime or misdemeanour (the penal codes of 1932 and 1944 did not typify such a crime as they considered them merely property or things), although without great progress.

15. “1. When, in accordance with the provisions of article 31 bis, a legal person is responsible for the offences set out in this Title, the following penalties shall be imposed: a) A fine of one to three years, if the offence committed by the natural person is punishable by law with a prison sentence of more than two years. b) A fine of six months to two years, in all other cases. 2. In accordance with the rules established in article 66 bis, in cases of liability of legal persons, the judges and courts may also impose the penalties set out in article 33.7, paragraphs b) to g)”.

16. “Judges or courts may adopt any precautionary measure necessary for the protection of the assets protected in this Title, including provisional changes in the ownership and care of the animal. When the penalty of special disqualification for the exercise of a profession, trade or business related to animals and for the keeping of animals falls on the person who has been assigned the ownership or care of the mistreated animal, the judge or court, ex officio or at the request of a party, shall adopt the relevant measures regarding the ownership and care of the animal”.

17. Pius V, in his bull *Salutis Gregis Dominici* dated 1567, condemned to excommunication of those faithful who attended these festivities.

For all these reasons, it was not until the 1995 Penal Code came into effect that a real offence of animal abuse was established, which included the predominant positions defended by the national and international majority accepted legal opinion. Thus, article 632 of the Penal Code (currently repealed) punished those who cruelly mistreated domestic animals or any other animal in unauthorised shows.

With the reform carried out in 2003, a real starting point in the prosecution of these conducts took place with the drafting of article 337, although it was conditional on these conducts being committed with cruelty. Fortunately, in 2010, it was decided to remove the term “cruelty to domestic animals” due to serious harm and to differentiate between tame animals, thus extending the object of protection both in terms of the perpetrator and the conduct committed.

Finally, the last modification of the Penal Code (without prejudicing the one mentioned above implemented in 2023) took place in 2015, where sexual exploitation was introduced as a conduct protected by the criminal precept.

Criminal analysis

As previously stated, the basic type of animal abuse is found in the new Title XVI *bis* of the Penal Code, under the heading “Crimes against animals” (articles 340 *bis* to *quinquies*).

In the first place, we identify that —according to the literal wording of the penal provision— the active subject can be anyone. Thus, Brage (2017: 23-45) affirms that it is not necessary to be the owner of the animals or that they are under his or her protection, and that it is not a first-hand offence, since direct mistreatment is not required (as it occurs in dog fights where the animals are whipped, and the resulting harm is caused by other animals). The conduct of sexual exploitation is more complicated,¹⁸ however, making a comparative or analogical study (from a doctrinal point of view) with the crime of prostitution: it would be possible to punish both the person who profits from the exploitation and the person who solicits such sexual acts, as pointed out by Luzón Peña (2016: 19). Subsequently, the passive subject of the offence cannot be any other than the animal itself.

As Hava García (2011: 259-304) notes, although there has been a disagreement as to whether to consider these as mere descriptive or normative elements, the truth is that, at present, such a discussion is not possible since the law has been articulating concepts such as “tame”, “domestic” and, with the recent modification, “vertebrates”. Therefore, there is no doubt that regarding the passive subject as the holder of the protected legal right, that has been extensively dealt with previously.

18. Compare Toribio Alfageme, 2020: 111-137.

Focusing on the conduct, as indicated by Bosio Cuenca (2021: 82-111): “[Whoever] by any means or procedure, including acts of a sexual nature, causes injury to a domestic animal, tame, domesticated or living temporarily or permanently under human control requiring veterinary treatment for the restoration of its health”; we can observe that there have traditionally been two main currents. The first maintains the existence of two conducts (mistreatment and sexual acts), while the second understands unjustified mistreatment as the common denominator of both conducts (which in our opinion is the correct one according to the current wording). Therefore, as Requejo (2010: 97) points out when analysing the *iter criminis*, the crime is one of result and its perpetration can be viewed as an attempt —causing minor injuries by means of unjustified mistreatment that does not reach the level of causing the serious injuries required to constitute this type of offence.

In terms of the subjective criminal offence, Luzón Peña (2016: 112-234) defines it as the knowledge and will to commit all the objective elements of this type of unlawful act. Although there are also other perspectives that believe that the wilful element is not so important, relegating it to second place and giving importance to the cognitive element, or more specifically to the knowledge of the risk to a specific legal right (Sentencia del Tribunal Supremo 2243/2014, of May 21). Applying such reasoning, in the present offence we observe that the offence of animal abuse is an intentional one—since the 2010 reform and the elimination of the requirement that the conduct be committed with malice aforethought, it can be punished with any type of malice, whether first or second degree or gross negligence—, and cannot be punished for mere recklessness.

However, opinions differ as to the punishments established for this type of crime, as there is a large body of previous court decisions which consider the custodial sentence to be totally insufficient (Marquès i Banqué, 2015: 667-683); while others defend (Menéndez de Llano, 2015: 1-18) the equating of the punishment with other legal systems. It is also understood that the dissuasive effect of this penalty is totally questionable, as it is not even enforced on most occasions, and considering that, in order to punish so leniently, it would have almost been better to limit oneself to imposing an administrative penalty. Nonetheless, recent reforms have resulted in punishing this conduct more harshly, with these discussions being more a matter of criminal policy than of law.

Regarding the specific circumstances that aggravate conduct (and which are included in the aforementioned article 340 *bis*), we can state that these are very diverse and refer to a multitude of situations which affect both the result produced (death), instruments used (such as poison) or who they are used by (when committed in the presence of minors). In this respect, we must highlight that the legislator, with their latest reform, has continued with the description already included in the Penal Code and has only increased the applicable sentences. Furthermore, as Prats (2020:

965-1002) states, the way of increasing the seriousness of these conducts has been the subject of wide and vague treatment, requiring specification from previous court rulings and, especially, from judicial practice. For example, concerning the use of the means, we can cite the Sentencia de la Audiencia Provincial of Huesca 77/2023 of 13 April 2023 or Sentencia del Juzgado de lo Penal number 4 of Bilbao 135/2010 of March 25, where an owner was sentenced for causing cachexia to a dog (which had not been fed or given water for more than ten days), the Sentencia de la Audiencia Provincial of Guadalajara 200/2023, of March 31, 2023, where, with the intention of intimidating his sibling, a man kicked his brother's dog; and, in particular, the STS (Criminal Division) 40/2023 of January 26, 2023, where a multitude of types of conduct that could constitute animal mistreatment are analysed.

Moreover, regarding the increase in the sentence for committing an act of cruelty, interpreted in relation to article 22.5a and following the study made by Arregui Montoya (2022: 6-18), this implies deliberately and inhumanely increasing the suffering of the victim, and causing unnecessary distress in the execution of the offence.¹⁹ However, based on the majority accepted legal opinion regarding this offence, it must be understood as observing the perpetrator showing a special enjoyment, perversity, or amusement with animal suffering (which implies a certain degree of subjectivity when applying this aggravating circumstance by the judge). Other circumstances that are also envisaged in these articles —parallel to the treatment of injuries in the Penal Code— are the seriousness of the damage suffered by the animal, such as the loss of limbs or major organs, senses, etcetera.

Finally, the punishment is aggravated when the acts occur in the presence of a child.²⁰ The important thing about this circumstance is that the legal right to be protected is not only for the welfare of the animal, but also for the greater sensitivity of the minor. We believe that this should be result in the development of policies aimed at making children aware of the perversity of these behaviours so that, in their maturity, they are not motivated to commit them.

In short, we have been able to observe how the national legislator —more aware of the environment and the defence of the animal world— has been implementing measures and implementing policies aimed at guaranteeing the life and well-being of animals that have often been the target of despicable people who revel in the pain of others and, especially, of the most defenceless and unprotected beings such as animals in today's society.

19. "Aggravating circumstances are: [...] Deliberately and inhumanely increasing the suffering of the victim, causing unnecessary suffering for the execution of the offence".

20. In this sense is pronounced the STS (Sala de lo Penal) 1159/2020 of May 20, 2020, where an adult, in the presence of a minor (owner of the animal), lifts a dog by the neck and whips it with a cow herding rod; or the STS (Sala de lo Penal) 229/2022 of March 11, 2022, in a similar sense.

Conclusions

Firstly, after undertaking this study and having established a balance of the different existing theories on the offence of animal abuse and the legal right that the offence is intended to protect, we can draw our conclusions in relation to this, and we can even accept the existence of different currents of opinion to those set out by the different authors. However, in our opinion, we advocate a cohesion between the bioethical perspective, which defends that the protected legal right of these acts is the right to the environment protected in article 45 of the Constitution, and the recent position of the High Court which, together with the new regulation —Law 2/2023, of 13 March, on the Protection, Welfare and Ownership of pets and other animal welfare measures— that opts to provide animals with real rights (independent of the rights of their owners), in order to move away from the traditional and historical legal tradition which considered them as mere things.

In this way, the prosecution of these criminal behaviours that have increased with the use of social networks and their dissemination on the Internet, will have a more solvent legal mechanism that will give animals dignity and provide them with a legal framework that they have not had until now. However, the legal response is not sufficient to eradicate this scourge and it is, therefore, necessary to continue to make progress in raising awareness and establishing education policies (such as the various campaigns against animal abandonment, currently being promoted by the Ministry of Social Rights and Agenda 2030), so that this behaviour is not applauded by users of social networks, but on the contrary, becomes an instrument with which to prosecute these acts and ensure that they are punished.

Secondly, the way in which our criminal legal system has dealt with the criminalisation of the offence of animal abuse has been diverse and easily observable and identifiable throughout the different reforms that have shaped the current regulation of the conduct. Thus, thanks to the specification of the protected legal right and its independence, separating it from other protected legal rights where the protected victim was not the animal but its owners, it has gradually been possible to provide most living beings with the protection they deserve. This is because, by introducing the concept of vertebrate in the definition of the behaviour, the protected victim has been considerably extended. Moreover, the conduct no longer requires that it be particularly cruel, but simply that it endangers the life or well-being of the animal, including conduct related to the sexual exploitation of animals. For all these reasons, with the broadening of the definition of the offender, the diversity of criminal conduct and the specification of the protected legal interest, a ground-breaking legal instrument has been achieved (and an important example for the international community), which serves as a guarantee to protect these defenceless beings that, if attacked, as a result of the recent reform, shall be more severely punished and prosecuted.

Thirdly, the evolution and development of legislation has become an indispensable instrument for the protection of animals, establishing an end to the impunity enjoyed by those who have made the suffering of animals their pastime and pleasure. However, despite regulating these criminal acts, there remains a long road to travel given that, in our opinion, the legislator should have gone further when it came to punishing these offences. Thus, beyond considering whether the punishments are too harsh or lenient, not only should these harmful acts towards animals be punished, but it also should extend to the spreading of these crimes throughout the media and social networks. Therefore, awareness of unlawful conduct should be widened, and measures should be taken to re-educate society so that respect is shown to all living beings and that the suffering of animals must not be used as a source of pleasure for human beings, who as a species should be made conscious of the care and protection of the environment and all the inhabitants of our planet.

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