

FROM FREEDOM TO CAGE: DIAGNOSIS OF INSTRUMENTS TO FIGHT TRAFFICKING IN WILD BIRDS IN PERNAMBUCO

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ABSTRACT

Wildlife trafficking leads to the extinction of species all over the world, and birds are the main victims. Thus, the research aimed to study the actions of the state in the criminal prosecution of those involved in the aforementioned illegal trade, analyzing if the actions carried out by the Public Power in Pernambuco led to effective punishment of criminals. The research collected data from the environmental police database (2018-2019), as well as through the application of a semi-structured survey applied to its members. Data from State Judiciary procedural monitoring systems (2014-2019)

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were also collected. The results show that the capture of birds in the wild is continuous and without control, being the flea markets as the main points of commercialization of birds. Despite its small contingent, the environmental policing company plays a limited but essential role in combating the illegal bird trade. The absence of evidence of environmental damage or difficulty in measuring its scope is another aspect that usually exempts the agent from any liability under the law. Overall, animal trafficking seems to be considered no relevance to criminal law levels, which in part derives from the low coercive power of punishment of the environmental laws, the precariousness of inspection bodies, and cultural reasons. To minimize the negative impacts of the activity, it is not enough to change the law and impose stricter sanctions. There is a need to restructure defense entities and invest in environmental education.

Keywords: birds; illegal trade; environmental crime; effectiveness of the law; impunity.

RESUMO

O tráfico da fauna silvestre provoca a extinção de espécies em todo o mundo, sendo as aves as principais vítimas. Assim, o trabalho teve por objetivo estudar a atuação do Estado na persecução penal dos envolvidos com a comercialização ilegal de aves, a fim de verificar a efetividade da punição dos infratores a partir das ações promovidas pelo poder público. Os dados para a pesquisa foram obtidos por meio de acesso à base de dados da polícia ambiental (2018-2019) e questionário semiestruturado aplicado a seus membros. Também foi realizada consulta aos sistemas de acompanhamento processual no Judiciário Estadual (2014-2019). Por fim, realizou-se estudo de legislação, de jurisprudência e de doutrina pertinentes. Os resultados mostram que a captura de aves na natureza é contínua e descontrolada, figurando as feiras-livres como principais pontos de comercialização dos pássaros. A Polícia Ambiental, apesar das limitações estruturais e de pessoal, realiza um importante papel no combate ao comércio ilegal de aves, mas a dificuldade de identificar os envolvidos, de provar o dano ambiental ou de mensurar seu alcance, são aspectos que costumam isentar o agente de qualquer responsabilidade perante a lei. Classificado como delito de menor potencial ofensivo, o tráfico de aves é favorecido em parte pelo baixo poder coercitivo da pena,

pela precariedade dos órgãos de fiscalização e por questões culturais. Para minimizar os impactos negativos da atividade, não basta mudar a lei, impondo sanções mais rigorosas. Há necessidade de reestruturar as entidades de defesa e de investir em educação ambiental.

Palavras-chave: *comércio ilegal; crime ambiental; efetividade da lei; impunidade.*

INTRODUCTION

Researchers agree that birds are the most usual victims of the illegal trade in wild animals, while illicit activity arises as one of the main reasons for the extinction of species around the world. Brazilian rich diversity of fauna captures the interest of collectors, breeders, irregular zoos, and ordinary people adept at the culture of keeping wild animals as pets; aspects that drive the action of wildlife traffickers.

Pernambuco is also on the route of this illegal trade. According to the Management Reports of the Pernambuco State Environment Agency (CPRH), in 2018 alone, the Wild Animal Screening Center (CETAS) sheltered over thirteen thousand wild animals. Birds account for the majority of these seizures.

Trading wild birds, or keeping them in captivity in violation of the legislation, constitutes a crime against the environment, giving rise to the accountability of offenders, both in the civil and administrative spheres, as well as in the criminal sphere, because in addition to cruelty to the living being, the conduct leads to environmental imbalance, compromising biological diversity, which is subject to protection in several international normative instruments that have Brazil as a signatory.

In this context, this article intends to study the role of the State in the criminal prosecution of those involved in the illegal trade of wild birds to verify if the actions taken by the public authorities have been effective in the combat of trafficking in Pernambuco.

This qualitative-quantitative research used the logical-deductive method with a focus on two aspects: the performance of the environmental police, concerning the 2018/2019 biennium, and judicial proceedings in the interval of five years between 2014 and 2019. An electronic questionnaire regarding police activity was applied to members of the environmental police, and data were also collected on the number of police investigations

carried out, as well as how many animals were apprehended in the period.

In the second part, information was obtained on the number of lawsuits related to the subject and the type of punishment imposed on offenders, by consulting the system of procedural records of the Judiciary of the State of Pernambuco. The relevant legislation, specialized doctrine, and jurisprudence of the local Court of Justice and Superior Courts were also the object of the research, with emphasis on the type of penalty effectively applied in cases related to the illegal trade of birds.

1 REGULATORY FRAMEWORK AND THEORETICAL FUNDAMENTALS OF FAUNA PROTECTION

Internationally, the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) is relevant as a basis for protecting wild birds, which establishes rules to prevent the trade in animals from causing the extinction of species (DEL' OLMO; MURARO, 2018; HARFOOT, 2018), in addition to the Universal Declaration of Animal Rights, which guarantees each species the right to live freely in its natural terrestrial, aerial, and aquatic environment, as well as the right to reproduce (DINIZ, 2017). Safeguarding wild fauna can also be extracted from the Convention on Biological Diversity, which has in its preamble the concern with the effects of human intervention on nature (BRASIL, 1994). In the same sense, Agenda 21's Chapter 15 focuses on this discussion and proposes measures for the achievement of sustainable development. Among the measures to be adopted for this purpose, we should highlight that which aims at "deepening scientific and economic understanding of the importance of biological diversity and its role in ecosystems" (BRASIL, 1992; MELO, 2019). Among the Sustainable Development Goals (SDGs), item 15 recommends measures to contain biological diversity loss (MELO, 2019). These documents should guide the actions of governments and private entities with a focus on the three pillars of sustainability: economic, social, and environmental (FALCÃO SOBRINHO *et al.*, 2017; SILVA; EL-DEIR *et al.*, 2017; MELO, 2019).

Inspired by such international commitments and conventions, the Brazilian legal system approaches environment protection as a fundamental right (CANOTILHO, 2010) and establishes guidelines for its implementation.

Back to the subject of this research, Art. 225, § 1, VII, of the Constitution, imposes on the public power the duty to "protect the fauna and flora,

prohibited, in the form of the law, practices that jeopardize their ecological function, cause the extinction of species or subject animals to cruelty” (BRASIL, 1988).

This care for non-human life enshrined in the constitutional text reveals that, even through an anthropocentric bias⁵, the Major Law assumes an ecocentric⁶ stance concerning the subject (DINIZ, 2017; BORTOLOZI, 2018; MELO, 2019), by prescribing that humankind does not override the environment but should live in harmony with nature, as it is comprised by this complex chain in which each one has a role, utility, and all are needed for the balance of the system, regardless of their species.

Attributing rights to other living beings is a way of limiting human actions, but is the recognition that the concept of dignity must encompass all kinds of life on the planet (SILVA, 2015; DINIZ, 2017; DEL’OLMO; MURARAO, 2018; GONÇALVES, 2018). This paradigm shift, an apparent epistemological rupture regarding the scope of the concept of dignity, relativizes human protagonism and may implement a new order of values benefiting different forms of life.

Within the infraconstitutional scope, Art. 29 of Law No. 9,605/98 provides for the criminal implications for the improper handling of passerines, establishing a penalty of six months to one-year detention for those who practice any of its criminal actions. The reprimand could be doubled or tripled, if the crime is committed against a rare or endangered species and if an instrument capable of mass destruction is used, respectively, in addition to other hypotheses listed in the paragraphs and items of the legal provision referenced (BRASIL, 1998).

While the penalty is detention but does not exceed two years, the conduct provided for in the aforementioned criminal type is classified as having less offensive potential, under the terms of Art. 61 of Law No. 9,099/95, allowing the offender to benefit from alternative penalties to imprisonment, consisting of restricting rights, community service, or a pecuniary benefit (BRASIL, 1995). To be entitled to the benefit, the offender must repair the damage, or prove the impossibility of doing so, as required by the rule of Art. 27 of Law No. 9,605/98 (BRAZIL, 1998).

However, although the formal protection of the fauna is consolidated, controversy on its instrumentation persists, whether regarding the means of punishing the offender or what pertains to the legal nature attributed to the animal.

⁵ It centralizes the actions of the State in function of humanity’s well-being.

⁶ Nature is approached as a reference for state actions, with the human being as one of the elements of the system, instead of a privileged hierarchical position.

As for punishment, extrication measures, idealized as an alternative to imprisonment, are commonly applied for this type of crime. Well regarded by the legal community, this sort of less stigmatizing social control, which is more likely to meet the expectations of the convict's social reintegration and prevent new crimes, tends to be expanded, not only because of the low rates of recidivism but mainly the ineffectiveness of the prison system, unable to resocialize the perpetrator (REGUEIRA, 2012; SOUZA, 2013; CALVES, 2016; DINIZ, 2017).

Part of the doctrine, however, understands that the sanction provided for in the law is inexpressive, incapable of intimidating offenders (DINIZ, 2017; DEL'OLMO; MURARO, 2018), and recommends the "creation of new, more specific criminal types, seeking to apply a '*lex specialis*', to the detriment of the generic provision of Art. 29 of the Environmental Crimes Act" (DEL'OLMO; MURARARO, 2018).

Such legal provision does not differentiate sporadic conduct for domestic purposes from those practiced for commercial purposes, punishing both with the same measure, even though these are much more harmful to the animal and the environment, and, therefore, deserving of a specific criminal offense and a more severe sanction.

The controversy is about how the claim for the right will take place regarding the *status* attributed to the animal. Is it a subject of law, a person, a thing, a public good, a depersonalized entity, a sentient being? There is also the question of whether protection is justified by the intrinsic value of the animal, or if the right comes indirectly from the interest of protecting the community (OLIVEIRA, 2017; DINIZ, 2017; DEL'OLMO; MURARO, 2018; BORTOLOZI, 2018; GONÇALVES, 2018).

Postulating the condition of holder of rights for animals is legitimate, insofar as living beings do not fit the definition of a thing, nor the exercise of rights is a monopoly of the natural person, but on the contrary, the condition of subject of law dispenses with the personality attributes⁷. Observe that the legal entity, a mere fiction of the Law, and the depersonalized entities (bankruptcy, estate, and unborn child) also enjoy this condition, allowing for the possibility of legally approaching animals similarly, given their very quality of living beings endowed with sensitivity, capable of developing affective bonds and of organizing collectively.

The treatment of fauna specimens as mere objects occupies a minority position in society and has already been discarded in recent modern legal

⁷ Life, intimacy, privacy, physical integrity, honor, name, image (SARLET *et al.*, 2014, p. 395).

systems such as France and Portugal, which grant the *status* of subjects of rights to animals (SARLET, 2015).

Brazil follows this trend, not only because the legislation in force prohibits cruelty to animals, but also, thanks to the passing of Bill No. 27/2018 by the Senate on 07/08/2019, which amends Art. 82 of the Civil Code and Law nº 9.605/98, to assign to animals a *sui generis* legal regime of “disembodied subject of law”, expressly prohibiting the treatment of animals as a thing, which is “recognized as sentient beings, that is, endowed with a biological and emotional nature and subject to suffering” (BRASIL, 1998), aspects already empirically verified and ratified by science.

By amending the civil law and the environmental crimes act, the legislator opted for an intermediate position, recognizing the peculiarities of animals, differentiating them from things, but not endowing them with subjective rights (ROCHA; LOPES, 2020). The measure is perceived as an advance and ratifies the understanding, which has already been consolidated in the jurisprudence of the courts, even before the legislative changes, in the sense of rejecting the “thingification” of animals, as observed by the numerous decisions related to issues such as vaquejadas, cockfights, bullfights, in which the interest of the animal prevailed, indicating that adherence to ecocentric values, based on respect for all species, is continuous and growing (ROCHA; LOPES, 2020).

The opposing arguments are based on the anthropocentric theory, especially on the Kantian thesis according to which everything that is not human classifies as a thing, and has relative value in this context, serving as an instrument for the single purpose of meeting human interests (SILVA, 2015; ROCHA; LOPES, 2020).

There is also the thought that, if the basis for conferring animals the *status* of a subject of law is biological complexity and sensitivity to suffering, such benefit would encompass all species (gorillas, cows, dogs, birds, insects) and commercialization, slaughter and, in any other way, use these animals would no longer be possible, given the fact that holders of subjective rights are not negotiable, leading activities such as agricultural production, among others, whose essence is the management of fauna components, unfeasible. Finally, there is speculation that establishing exceptions would not be enough to solve the problem, as the punctual and casuistic choice of the protected species would entail much more questioning and legal uncertainty than the pre-existing utilitarian situation, which protects non-humans, but always according to the human will (SILVA, 2015; ROCHA; LOPES, 2020).

The issue is quite complex and seems far from a single solution. The law itself provides for exceptions and eventual inconsistencies can be resolved through hermeneutic activity, by weighing principles, bearing in mind that “recognition of rights is not a zero-sum, but a constant-sum game and Brazilian law has advanced in this sense, valuing actions that affirm a future interspecies equality” (SILVA, 2015, p. 93), with the modification of the civil law representing an important step towards the revision of values incompatible with the evolutionary stage we now experience.

Once the law has been established, the circumstances of the specific case will provide elements to prudently decide whether the basis for the animal’s defense will be approached by its intrinsic value, the condition of a component of ecosystems and biomes, or, yet, if in the function of both aspects, so that the most relevant will always be effective protection.

2 POLICE ACTIVITIES TO COMBAT ANIMAL TRAFFICKING

Ostensible and repressive policing actions against the trafficking of wild animals play a fundamental role in effecting the protective norm. In Pernambuco, work is carried out by a Military Police team specialized in the environment.

To understand the Company’s environmental policing routine from the perspective of those who act directly against the illegal trade of animals, a questionnaire was applied to the people involved, exploring aspects such as physical and personnel structure, equipment used, strategies implemented by the agents, the places with the highest incidence of crimes against fauna, in addition to the relationship between CIPOMA, the population, and other control bodies.

The answers to the questionnaire regarding the structure of the body revealed that the Department has telephones, computers, Internet connection, vehicles, and fuel, as well as GPS, drones, and photographic cameras at its disposal, but 97.2% of those who answered the questionnaire consider the equipment insufficient to meet the needs of the task.

Another relevant issue concerns the size of the environmental police, as 94.6% referred to a shortage of personnel, preventing, for example, a better distribution of agents in places prone to illicit practices.

Regarding the corporation’s routine, the responses indicate that there is permanent inspection against the illegal wildlife trade. The diligences

are planned beforehand, with the place, day, and time based on investigations and complaints received. Visits to potentially attractive places for trading wild animals are undertaken every week. Open markets are pointed out by 97.3% of respondents as the main place for selling birds, followed by homes (62.2%) and clandestine breeders (51.4%). The answers also revealed the lack of control of such activities on highways and airports.

Regarding the perception of the members of the corporation concerning the evolution of the number of animals seized, most respondents (51.4%) between 2018/2019 mentioned that the number of birds increased in the evaluated biennium, and 27% stated that they did not notice a quantitative change. Most respondents stated that the environmental police work in partnership with other institutions, highlighting the State Environment Agency (CPRH), IBAMA, and the Civil Police as the main forces.

Educational campaigns and lectures in schools, public institutions, and private entities were mentioned among the activities carried out by the environmental police as an attempt to raise awareness of environmental preservation. The answers show that reports are the main means of societal collaboration with the work of the environmental police, with the main communication channel being their hotline (62.2%), followed by WhatsApp (32.4%). Communication vehicles such as Facebook, Twitter, and Instagram are available but are less popular.

As for police action, data records show that between 2018/2019, 2,266 police investigations were carried out to repress crimes against wildlife, which led to the seizure of 14,307 animals, being 13,323 birds – 93 % of the total.

6,290 birds were seized in 2019, a slightly lower amount than in 2018 when 7,033 were rescued. May/2018 stood out in relation to other months, with 1,399 birds seized, followed by January of the same year when 1,060 specimens were rescued, and July/2019, with 1,034 birds apprehended. The lowest number of birds seized (133) was recorded in February/2019, leading to an average of 555 birds rescued per month in the 2018/2019 biennium.

Another aspect perceived in the research results is that there is no proportional relationship between the number of police investigations and the number of birds seized per period. For example, taking the month of July as a parameter, 18 investigations were carried out by public agents, with 1,034 birds being apprehended. In the previous year, in the same month, 70 raids were carried out, leading to the seizure of 351 birds, a much lower

amount than previously recorded, when a much smaller number of police interventions resulted in the seizure of three times more animals. This is evidence that the result of the diligence is always unpredictable and that the fact that a small difference, the smallest, was noticed in the number of animals apprehended in 2019, compared to the previous year, does not mean that there was a reduction in illicit activity, being much more related to the failure of the actions promoted by the control bodies. The only pattern perceived in the data collected from the environmental police concerns the perpetuity of illicit trade. Figure 1 illustrates the oscillation of apprehensions verified both between months and in the period studied as a whole.

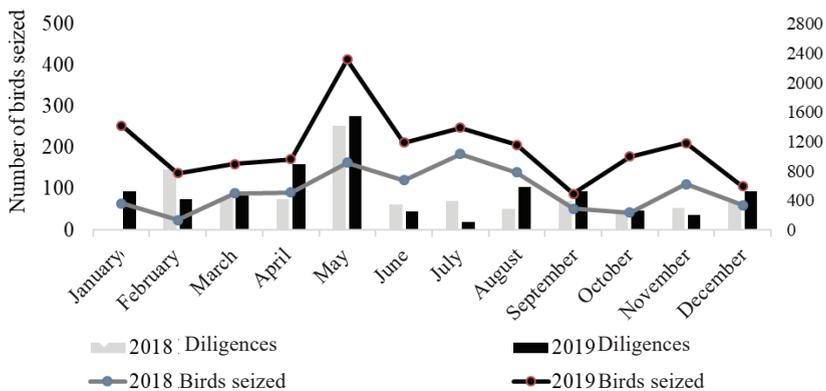


Figure 1. Comparison between the number of police investigations carried out by CIPOMA Pernambuco and birds seized between 2018 and 2019.

Source: Prepared by the authors.

3 CRIMINAL PROSECUTION

Regarding the criminal liability of those involved, data collection within the sphere of legal influence was based on the classification of cases by subject, as established by the National Justice Council (CNJ). Using the subject “crime contra a fauna” (crime against fauna) and filters with the expressions “matar, perseguir, vender/expor à venda/ adquirir/fauna” (kill, persecute, sell/expose for sale/acquire/fauna), behaviors provided for in Art. 29 of the LCA, 750 cases were found between 2014/2019. Of these, 369 were processed by Special Criminal Courts⁸ and 381 were distributed

⁸ Special Criminal Courts are organs of the Judiciary Branch of Pernambuco, competent to judge crimes of lesser offensive potential, governed by Law 9099/95 (Art. 14 and Art. 90-B of the COJE). Crimes against fauna, provided for in Art. 29 of Law No. 9,605/98, fall into this classification.

across common Courts in other districts of the State⁹.

A period of five years was chosen to reduce the incidence of lawsuits pending trial, prioritizing ruled processes. From the total, 100 cases were randomly selected for examination among those distributed across Courts, which are judicial units in the split of competencies. The details of the crime are not included in the procedural monitoring system, nor are they available for virtual access on another platform, which made it impossible to compare cases and the number of animals involved in each incidence, but according to the criminal type registered, it was found if that 62% are related to the conducts provided for in Art. 29 of the Environmental Crimes Law, that is: killing, capturing, hunting, keeping in captivity, selling/exposing for sale, acquiring. The rest refer to other infractions provided for in the aforementioned law, such as fishing during closed season and mistreatment involving animals in general.

Among the cases examined, 91% had been ruled, but 30% of them were declared time-barred, leaving the offender exempt from any responsibility for committing the crime, because the deadline for judgment had expired. It was also observed that in 52% of the procedures ruled, the offender accepted an agreement to escape prosecution, resulting in a penal transaction consisting of the provision of community services for a certain period or the payment of a cash benefit (Art. 89 of Law No. 9,099/95 and Art. 27 of Law No. 9,605/98). Figure 2 shows a percentage analysis of how cases have been ruled.

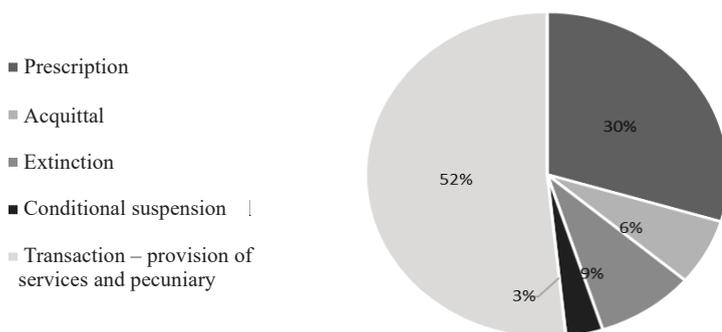


Figure 2. The situation of cases closed on the crime of trafficking in birds between the years 2014 and 2019, in the State Court.

Source: prepared by the authors.

⁹ For administrative reasons, some Districts of the State do not have a Special Criminal Court installed, so that the crimes of lesser offensive potential are transferred to the common Courts, but processed and judged following the proper procedures (Law No. 9,099/95).

In cases in which the offender opted for a cash benefit, the parameter chosen was the minimum wage with installment payments accepted, depending on the debtor's financial situation. The highest fixed amount was two thousand BRL. Figure 3 presents the values applied to the sampled cases.

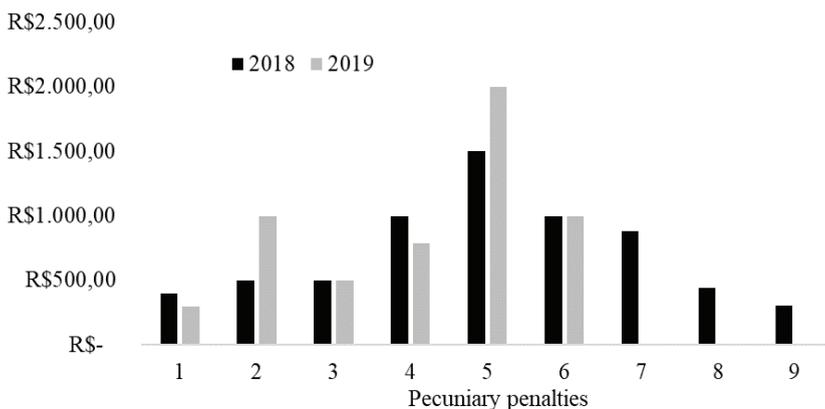


Figure 3. Values of pecuniary penalties – the parameter is the minimum wage, with the amount fixed according to the offender's possibilities.

Source: Prepared by the authors.

Acquittal, extinction for procedural reasons, and conditional suspension of the process, together¹⁰, amounted to 18% of the cases ruled. The conditional cessation of the deed is also provided for in cases of crimes against fauna, since the minimum penalty in the abstract should not exceed one year, according to the rule of Art. 89 of Law No. 9099/98. Both criminal transaction and the conditional suspension of the process lead to the extinction of punishment if the defendant fulfills the conditions established without engaging in other crimes during the agreed period, releasing them of all reprimands, including any criminal record. The only caveat is not being able to access the same benefit for five years (BRASIL, 1998).

The offender's conduct only led to more severe punishment when the offense was related to international animal trafficking or the counterfeiting of identification rings from authorized breeding sites¹¹, both offenses within the jurisdiction of the Federal Court, and, therefore, not analyzed under the present work.

¹⁰ Such benefit is granted to first-time defendants who are not yet criminally prosecuted. The measure consists of appearing monthly at the judicial unit to report activities or some other restriction of law.

¹¹ The law authorizes wild animals breeding in captivity for commercialization in order to avoid capture in the wild. IBAMA's normative instruction 169/2008 governs the activity.

In the jurisprudence research, it was observed that the conducts typified in Art. 29 of the LCA were deemed of low harm, resulting in either the ruling of sentences alternative to imprisonment, as mentioned or the acquittal of the offender based on the principle of insignificance¹².

4 IMPUNITY: REFLECTION OF THE THEORY/PRACTICE MISMATCH

The results show that, despite the whole normative apparatus of (formal) guardianship of animals and the recognition of their relevance for environmental balance, protection is not effective. Illegal trade in birds is perennial, favored by the low coercive power of the penalties in place, the precarious structure of the inspection bodies, as well as cultural issues.

Certainly, because they are more abundant in Brazilian fauna (ICM-BIO, 2018), birds represent the majority of seizures. Another hypothesis that may justify the high number of captures of this kind of animal is the public preference, led by the beauty of their plumage, their singing, and even a taste for their meat (HARRIS *et al.*, 2015; BURIVALOVA *et al.*, 2017; GRIESER *et al.*, 2018; SOARES, 2018; GONZALEZ-HERRERA *et al.*, 2018), placing birds in a position of greater vulnerability when compared to other species.

The commitment of the environmental police does not seem to intimidate offenders, who, driven by the high profitability of illegal trade (ALVARENGA, 2016; DEL' OLMO; MURARO, 2018; HARFOOT, 2018), always find ways to keep it active. According to police reports heard during the research, this is a tricky activity supported by a network of collaborators, from those responsible for the capture of the animal in the wild, to those who will store them near the points of sale, to intermediaries and even the "clients" who, aware of the irregularities, help to maintain the secrecy of the business. With unbridled audacity, offenders advertise specimens of fauna on digital media (social networks and sale sites), trying to convey an appearance of legality to animals captured in the wild, using forged identification rings to confuse them with those coming from legal breeders. (MAYRINK, 2016). According to Bezerra (2012), most trafficked birds die before reaching their destination. Many are captured young, from their nests (BEZERRA, 2012). In the dynamics of open-air

¹² The principle of insignificance, or trifle, is applied in cases where the damage to the protected legal interest is slight, to the point of not being considered a crime, for example the theft of objects of small value without violence or threat, leading to the exemption of any responsibility.

markets, it is customary to use food stalls to disguise the real “product” being traded or hide cages.

Adopting communication codes to alert other traffickers about the presence of the police in the place, in addition to unconventional working hours, usually, before dawn, are other common subterfuges used to escape the action of public agents who, even uncharacterized, find many obstacles to surprise offenders. The expansion of criminal activity to the virtual environment (DINIZ, 2017) is another great challenge for those who work in the defense of fauna, lacking the minimum resources to exercise their profession.

Within the sphere of legal influence, the data of the present research show that almost 50% of the procedures destined to determine responsibilities for crimes involving wild fauna selected for this study were filed without the conviction of those involved, 30% by expiration (Figure 3) through the loss of opportunity to investigate the crime within the period provided for by law, which, in this case, is four years (Art. 109, V, of the Penal Code), exempting the offender from any punishment.

In jurisprudence, besides the criminal transaction, the acquittal of the accused on the principle of insignificance has been present, as illustrated by recent rulings of the local Court and the Superior Court of Justice:

The conduct of the accused in keeping the aforementioned species in captivity shows a small degree of harm to the protected legal asset, namely the environment and wild fauna, not bringing about the ecological imbalance in said region, supporting the application of the Principle of insignificance by the judge. Resource lacking. Unanimously – TJPE – Criminal Appeal 465527-20002052-27.2013.8.17.0660, Rapporteur Fausto de Castro Campos, 1st Criminal Chamber, judged on 12/17/2019, DJe February 3, 2020 (PERNAMBUCO, 2020).

In the hypothesis, in which the aggravating party was caught keeping 4 birds of the wild fauna in captivity, of the rufous-collared sparrow, green-winged saltator, and double-collared seedeater specimens, the vectors of minimally offensive conduct, absence of dangerousness by the agent, reduced degree of disapproval of the behavior, and inexpressive legal damage, which authorizes the application of the claimed principle of insignificance, given the vast evidence base constituted in the ordinary instances. 4. Interlocutory appeal without provision – STJ – AgRg in HC 519.696/SC, Rapporteur Justice JORGE MUSSI, FIFTH CLASS, judged on 11/21/2019, DJe 11/28/2019 (BRAZIL, 2019).

The grounds for granting the benefit are always the small number of animals, the fact they are not threatened with extinction, the absence of mistreatment, and the long time the animal has lived in the domestic environment.

Another rule used in favor of offenders is that provided for in Art. 29, § 2 of the LCA, which allows for judicial pardon. In such cases, if there is a good record, and favorable social behavior, the animal is in good shape and belongs to a non-endangered species, and there is an affective bond consolidated over time, the judge may not issue any reprimand (NUCCI, 2015). It is also common to grant custody of the animal to those who keep it in captivity, considering that, depending on the time spent outside its *habitat*, the animal is unable to survive if released back into its natural environment. The delivery of the bird to specialized institutions or an authorized guardian would be an alternative to prevent the permanence of the animal with those who acquired it clandestinely, however, the measure is not always recommended as it would cause the ties built during long years of coexistence to be broken, causing even more suffering to the animal. In these terms, the decision of the Superior Court of Justice in Special Appeal No. REsp 1,797,175/SP, judged by the Second Panel on 03/21/2019 (DJe 03/28/2019).

Therefore, even if they survive the stress of imprisonment and are rescued by environmental agencies, passerines captured in the wild do not escape the sentence of being forever imprisoned, given the difficulty or impossibility of returning them to their *habitat* (MAGROSKI, 2017). As a consequence of captivity, the animals lose the ability to defend themselves, reproduce, and seek food, they lose their essence, which leads to an insignificant existence, aspects that must be considered by the judge before dismissing the transgressor's punishment with a base on the principle of insignificance.

Under this approach, the requirements to enforce this principle are “minimally offensive conduct, absence of social danger of the action, reduced degree of disapproval towards the behavior, and insignificant legal damage” (STF – HC 117903, 2013). The measure is supported by the principle of minimal intervention, or criminal minimalism, which advocates for the decriminalization of certain conducts, considering that the fact they would only be criminally relevant when, in addition to being provided for in the law as a crime (formal typicality), they are also prone to causing significant damage to a protected legal asset (material typicality). In the absence of one of those elements, the conduct is deemed atypical and in-offensive, undeserving of State intervention in the freedom of individuals (GOMES, 2015; NUCCI, 2015; ROCHA; LOPES; 2020). This is what happens, for example, when someone goes to a supermarket and steals a

nail polish, or something similar. Although the fact indeed constitutes the crime of theft (Art. 155 of the Penal Code), the offense to the property is minimal, dismissing the enforcement of Criminal Law which, as a last resort of social control, must be reserved for situations of a serious offense to the most relevant legal interests. According to the authors, the remaining social conflicts must be resolved by other branches of law, such as administrative and civil law.

Regarding the trafficking of wild birds, however, the application of the principle of insignificance manifests a hermeneutic mistake, especially since the clandestine capture of the animal, by itself, causes irreversible damage to two protected legal interests – the animal and the collective right to an ecologically balanced environment. Therefore, the conduct does not equate to petty crimes against property or their like, especially after the passing of Bill No. 27/2018 by the Senate on 08/07/2019, which amends Art. 82 of the Civil Code to assign to animals a *sui generis* legal regime of “disembodied subject of law” (Agência Senado, 2019), expressly prohibiting the treatment of the animal as a thing. They are, thus, “recognized as sentient beings, that is, endowed with biological and emotional nature and subject to suffering” (Agência Senado, 2019). There are also mechanisms to acquire these animals legally, following Normative Instruction No. 169/2008, of IBAMA, and the benefit should not be granted to those who choose to acquire them clandestinely, mostly because the legislator was already quite generous in providing for a very lenient sanction.

The cases studied show that, even when the penal transaction was applied, the measure seemed insufficient, since the value was fixed in fractions of the minimum wage, with two thousand reais being the highest amount. Considering the high profitability of the illicit business (DEL’OLMO; MIRARO, 2018; HARFOOT, 2018), we conclude that people involved in birds trafficking are not intimidated by such sanctions, nor any of the restrictive measures in place are capable of intimidating other members of the community, who somehow identify with the illicit trade, as thousands of birds are continuously taken from the wild every year.

Impunity is perceived as a historical factor inherent to the man-nature relationship (FALCÃO SOBRINHO *et al.*, 2017; LE CLERCQ *et al.* 2016) and may seem negligible in the case under study, as it involves crimes of lesser offensive potential with nearly null social repercussion, but the issue is not restricted to this area. Crimes against life, property, tax crimes, drug trafficking, and corruption, for example, remain unattended with rates

estimated at approximately 95% (LEMOS, 2015; CALVES; FLORES, 2016). Similar to fractals, the impunity phenomenon is reproduced on much broader scales, at different levels of the Brazilian criminal justice system, leading to violence, insecurity, and discredit in institutions.

Characterized by selectivity (LEMOS, 2015) and casuistry, the criminal legal system is incapable of promoting social pacification and, while minimal intervention is idealized, what takes place is the absence of the State. When the victim is undetermined, as in the case of environmental crimes, which affect the whole community, the problem becomes even more evident:

An overview of Brazilian legislation reveals that the criminal justice system in the country primarily protects individual legal interests such as life, freedom, and honor; however, there is a large gap of inefficiency when it comes to the protection of collective legal interests, also called supra-individuals, affected by criminal practices that threaten the environment, the economy, the national tax order, and other areas (CALVES; FLORES, 2016. p. 38 et seq.).

Falcão Sobrinho *et al.* (2017) suggest that the inefficient action of the Public Authority to stop or minimize the negative impacts on the environment stems from the lack of preventive measures, since, as a rule, actions are aimed at correcting the damage, which is naturally more difficult, unfeasible, or impossible, and even without reliable elements to measure, studies indicate that environmental damage is always underestimated (REGUEIRA, 2012; SYMES, 2018).

The difficulty in gathering accurate data on the illegal trade in wild animals and its consequences is commonly reported in other research (SYMES, 2018; RUAS *et al.*, 2018). Ruas *et al.* (2018) suggest that the data imprecision would be because the current environmental legislation classifies almost all types of management regarding wild animals as ‘illegal conduct’, generating distrust in the people involved in the activity, who end up not collaborating with studies aimed at collecting data on the subject. The researcher also argues that the framing of any conduct as trafficking would be wrong, as cultural issues, related to people’s lifestyles, and not just the profit bias, would be responsible for hunting, capturing, and marketing animals, both domestically and overseas. He concludes by warning that “the barriers to research thus prevent an adequate understanding of the interactions between society and fauna and their potential ecological implications, making it impossible to formulate effective strategies for the protection of animals” (RUAS *et al.*, 2017).

Undoubtedly, the cultural aspect cannot be ignored in the formulation of strategies to defend the fauna, nor does it authorize complacency with those who commit the crime. There is no reason to preserve lifestyle habits incompatible or inappropriate to the context in which one is inserted.

Cultural identity suffers constant influence since the dawn of interactions between peoples. Language, food, rituals, and behaviors, in general, are incorporated by other cultures, enriching intersubjective relationships without any damage to their preexisting situation. Likewise, other customs, habits, rites, or lifestyles are rejected or lost in time due to lack of use or inadequacy of societal values adopted throughout the evolutionary process. Slavery and, more recently, sexism are examples of practices that are no longer supported by society or the law, at least in the Western world. Considering that animals “are as vulnerable as humankind in the face of imprisonment, violence, physical exploitation, and death itself” (BORTOLOZI, 2018), the habit of imprisoning birds purely on a human whim must be repudiated.

As suggested by the doctrine, changing the legislation to create a specific criminal offense for the trafficking of birds and impose a stricter penalty is necessary, including the rule of Art. 30, of Law No. 9.605/98 (BRAZIL. C. 1998), which provides for imprisonment of one to three years for conduct related to the irregular export of amphibian and reptile skins and hides, could serve as an inspiration to establish more severe penalties for the crimes in question.

According to Beccaria (2013), the penalty must be proportional and appropriate to the conduct practiced, neither excessively light, because it will not produce any effect, nor too severe to the point of frustrating the defendant’s expectations of being released from the burden.

However, the mere changing of the law is not enough to produce any practical effect if there is no restructuring of the State itself, with qualification of the institutions, as more important than the severity of the penalty is the certainty of the punishment in a reasonable period (BECCARIA, 2013).

Another urgent measure would be equipping the environmental police, investing in technology to allow them to monitor illegal activity, and identifying the heads of the criminal groups. From this perspective, Sosa-Escalante (2011) highlights that, after several attempts to combat the wildlife trade in the Charco Cercado region, three measures were successful in Mexico, namely: intelligence/investigation measures, partnerships

between entities with the sharing of information, intense, and constant surveillance and punishment of those involved. These are basic measures to deal with an issue that involves many variables and would certainly have good results in reducing the impacts of bird trafficking.

Regarding the sphere of legal influence, while the legislative change lies within the hypothetical field, the creation of a specialized sector to take care of environmental crimes can favor a more in-depth examination of the cases, allowing for a faster response against these crimes, being also decisive to avoid the occurrence of prescription. Failing to apply the principle of insignificance and adding participation in a preservationist course, among the conditions imposed on offenders, are other instruments that must be considered by judges.

Investing in environmental education, however, is the most important instrument to fight crime, arising as the only way of transforming the current situation. It is even a commitment undertaken by the signatories of the Convention on Biological Diversity, including Brazil, whose Art. 13 foresees that educational programs should include biodiversity conservation.

Indeed, the effects arising from education and awareness will not be immediate, but their results will be permanent. The technological resources to enable the dissemination of knowledge are already available. Also “there is considerable evidence at the individual level on the relationship between educational attainment and a wide range of pro-environmental behaviors, including consumption, conservation, and lifestyle” (CHANK-RAJANG, 2017, p. 4). Educating is always better than punishing.

CONCLUSIONS

Despite the paradigm shift regarding the ecological subject and its repercussion in the (formal) legislative field, there is still no significant evolution in terms of effectiveness. Birds remain vulnerable and exposed to all kinds of cruelty on illegal trafficking routes, with little or no consequences for the offenders. Even acquittal based on the principle of insignificance has been applied in these cases. Perhaps because it does not affect people’s daily lives, nor does it have the dramatic appeal of the rupture of a dam or a forest fire, the impact of this activity is usually underestimated. The absence of evidence of environmental damage or the difficulty of measuring its scope is another aspect that usually exempts the agent from any liability.

The phenomenon of impunity shows structural deficiencies of the

State itself, indicating that changing the law to establish a specific criminal type against the illegal trade in animals with a stricter penalty, although important, will not have any practical effect if there is no restructuring of the institutions responsible for combating crime. Within the sphere of legal influence, the application of the principle of insignificance in those hypotheses of domestic animal custody should be reviewed, since the irregular acquisition of an irregular animal, however well-intentioned, is one of the main factors fomenting crime, which can only operate if there is demand.

At the same time, it is imperative to invest in environmental education, focusing on children, as they are the ones who will occupy the most diverse roles in society and, in this condition, can act as vectors in the process of implementing the socio-environmental State.

We hope that the information collected can support the implementation of public policies or redirect their actions to promote the reduction of the impacts of illicit commercial activity on wild animals and the environment.

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