

# RELIGIOUS MINORITIES AND ANIMAL SACRIFICE: ANALYSIS OF THE EXTRAORDINARY APPEAL 494.601/2019 IN THE LIGHT OF MACCORMICK'S THEORY

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## ABSTRACT

This article aims to analyze, from the perspective of Neil MacCormick's argumentative theory, the decision of Brazil's Federal Supreme Court in the Extraordinary Appeal No 494.601/2019-RS, which established the thesis, with general repercussion, of the constitutionality of the law of animal protection which, with the purpose of safeguarding religious freedom as a cultural right of religious groups of African origin, allowed animal sacrifice in liturgical acts. The investigated hypothesis also addressed the fundamental right to religious freedom and constitutional protection of the environment, in terms of forbidding cruel treatment of animals. After classifying decision arguments into linguistic, systemic, and teleological, we conclude that, from a general perspective, the decision met the criteria of universality, consistency and coherence, and can be considered a correct solution for the Democratic State of Law, in the terms proposed by MacCormick. The research carried out used national and foreign doctrine as a source, as well as national legislation and jurisprudence, analyzed by the deductive and inductive methods, respectively.

**Keywords:** legal argument; MacCormick; religious minorities; multiculturalism; African religions.

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**MINORIAS RELIGIOSAS E SACRIFÍCIO DE ANIMAIS:  
ANÁLISE DO RE NO. 494.601/2019 À LUZ DA TEORIA DE  
MACCORMICK**

**RESUMO**

*Este artigo propõe-se a analisar, sob a ótica da teoria argumentativa de Neil MacCormick, a decisão do Supremo Tribunal Federal no Recurso Extraordinário No. 494.601/2019 do Rio Grande do Sul, que fixou a tese, com repercussão geral, da constitucionalidade da lei de proteção animal que, com a finalidade de resguardar a liberdade religiosa como direito cultural de grupos religiosos de matriz africana, permitiu a sacralização de animais no ato litúrgico. A hipótese perquirida abordou, ainda, o direito fundamental à liberdade religiosa e a tutela constitucional ao meio ambiente, no que se refere à vedação do tratamento cruel de animais. A partir da classificação dos argumentos da decisão em linguísticos, sistêmicos e teleológicos, foi possível concluir que, em uma perspectiva geral, a decisão cumpriu os critérios de universalidade, consistência e coerência, podendo ser considerada uma solução correta para o Estado Democrático de Direito, nos termos propostos por MacCormick. A pesquisa realizada utilizou como fonte a doutrina nacional e estrangeira, bem como a legislação e a jurisprudência pátrias, sendo analisadas pelos métodos dedutivo e indutivo, respectivamente.*

**Palavras-chave:** *argumentação jurídica; MacCormick; minorias religiosas; multiculturalismo; religiões africanas.*

## INTRODUCTION

Religiosity, as a manifestation of human rationality, is the attitude or willingness to believe in something beyond the material world, as well as to question the mysteries surrounding life and death. There is no human culture without a history of cult practice and beliefs. Precisely because of its universality, religious freedom was the first human right to be historically recognized. This legal recognition came about with the Edict of Nantes of 1598, approved by King Henry IV of France, through which the Huguenots were granted the right to freedom of belief and private worship, considering them essential to people's lives, and that the State should not interfere in them, thus seeking to put an end to conflicts between Catholics and Protestants.

This historical fact reveals that not all religious manifestations have always had equal recognition and legal protection. Even today, although religious freedom is guaranteed as a fundamental right in practically every self-proclaimed democratic state, discrimination against religious minorities is still a constant. Such is the case of the treatment given in Brazil to African-based religions, which have the sacralization of animals as an inherent part of religious practice.

In this context, this article analyzes the decision of Extraordinary Appeal No. 494.601 from Rio Grande do Sul (RS), rendered with general repercussion by the Federal Supreme Court (STF) on March 28, 2019. In this judgment, the STF faced the controversial issue of the sacralization of animals in the cults of African religions, having decided on the constitutionality of the Sole Paragraph of Art. 2 of Law No 11.915/2003-RS, later added by Law 12.131/2004-RS, establishing the argument protecting this minority's religious freedom.

The Extraordinary Appeal, which took about 12 years to be placed on the trial agenda of the Supreme Court's plenary, consisted of a *hardcase* of great social repercussion on the issue of religious minorities, by putting under discussion not only the fundamental rules relating to freedom of expression, free exercise of religious freedom and the principle of secularism of the State, but also the constitutional guarantee of protection of the environment and the prohibition of cruel treatment to animals.

Thus, the analysis of this decision will be based on the argumentative theory of the Scottish legal philosopher Neil MacCormick, aiming to, based on the parameters of correctness of judicial decisions proposed by the

author, elucidate whether the STF judged the Extraordinary Appeal No. 494.601/2019-RS with adequate interpretative technique and reasoning consistent with the requirements of Art. 93, IX of the Federal Constitution.

To this end, a data survey based on bibliographic research was carried out in the national and foreign doctrine, as well as a documental research in the legislation and jurisprudence of the country. The analysis of these data followed deductive and inductive methods, respectively.

The paper is divided into three parts. Thus, initially, a brief exposition of Neil MacCormick's argumentative theory will be made, in order to explain the criteria adopted for the analysis of the decision under discussion. Next, the arguments of the Attorney General of the Public Prosecutor's Office of Rio Grande do Sul (PGJ/RS), the STF justices, and the decision's ementa will be schematized based on their classification into linguistic, systemic, and teleological interpretative arguments. Finally, the decision will be analyzed in light of the requirements that a decision must meet to be considered correct, as proposed by MacCormick, namely: coherence, consistency, and universality.

## 1 NEIL MACCORMICK'S THEORY OF LEGAL ARGUMENTATION

The legal argumentation theory of the Scottish legal philosopher Neil MacCormick starts from an understanding of law as a systemic set of norms, which guides the conduct of the being in society towards social order and legal security. Law is thus understood as an institutional normative order, translating into an interpretive framework shared among people in the same social context (MACCORMICK, 2016).

Because this institutional order is a normative and practical order, there is a continuous need for interpretation and adaptation to the reality experienced by the society in which it is applied. After all, the certainty of law is subject to change (*defeasible*), and it is exactly this exceptionable nature that dialogues with the argumentative nature of law (MACCORMICK, 2016).<sup>3</sup>

However, although MacCormick considers legal security an intrinsic consequence of the Rule of Law, consisting in its greatest value, the

<sup>3</sup> As for the certainty of the law, the author explains: "La certeza del Derecho es, por tanto, una certeza rebatible. El hecho de que sea así no es, después de todo, algo que contraste con el carácter argumentable del Derecho, sino algo que comparte con él un mismo fundamento. Ese fundamento es una concepción de los derechos de la defensa que es intrínseca a la ideología del Estado de Derecho vista como una protección de la acción arbitraria de los gobiernos" (MACCORMICK, 2016, p. 72).

conflict that is established between legal security and the argumentative character of Law is, for the author, only apparent, because it starts from an exacerbated conception of this security, denying the dynamism that is characteristic of the Rule of Law itself (MACCORMICK, 2016).

In this sense, MacCormick proposes a reconciliation of the aforementioned figures, starting from a necessary fundamental restriction of the process of legal argumentation, electing Alexy's "special case thesis" (2001), in which legal argumentation, under the aspect of practical argumentation, should comply with the conditions of rationality and reasonableness of legal discourse (MACCORMICK, 2016).

In other terms, interpretation must be accompanied by an argumentative praxis from the decision-making of the best rhetoric ("rival arguments") presented by the parties, being the task of the theory of legal argumentation the election of the best arguments from objective and rational criteria that provide this choice (MACCORMICK, 2016). Thus, decisions issued by the authority endowed with judicial power will be valid, impartial, and respected when faced with a controversy about the meaning of a norm, its practical context, or its application in a concrete case (MACCORMICK, 2016).

The method presented by the author, therefore, does not deny deductive logic, but, since Law is not an exact science, syllogism is not the effective answer to all controversies, including complex issues that have no answers from the classic rule of subsumption (MACCORMICK, 2018). It is, however, regarding the complex cases (hard cases) that MacCormick (2016), in express agreement with Dworkin's concern (2002) through the decisionism of legal positivism, adopts a "rational reconstruction" to face "interpretativism", offering a method capable of analyzing the correctness of judicial decisions from objective criteria and the application of certain requirements that justify an adequate reasoning of the judge (LOPES; BENÍCIO, 2015).

MacCormick (2016) offers a typology for classifying judges' interpretive arguments into three main categories:

1. Linguistic arguments are those that appeal to the linguistic context of the norm, whether in terms of the ordinary or technical meaning of the terms employed.
2. Systemic arguments consider the law an element of the legal system and, for such, the adequate interpretation needs to consider the dialogicity of the specific law with the systemic context in which it is inserted,

- being subdivided into six types:
- a) contextual harmonization;
  - b) precedent argument;
  - c) analogy argument;
  - d) conceptual argument;
  - e) argument from general principles;
  - f) historical arguments.
3. Teleological-evaluative arguments are related to the purpose of the legislative text, seeking “the intention of parliament” from a rational and teleological view of legislative activity.

However, foreseeing the eventuality of these arguments conflicting among themselves, the author approaches the classic formula of the “golden rule”, which establishes a hierarchy among arguments, prioritizing the linguistic ones, followed by the systemic ones, and, as a last resort, the teleological ones. However, MacCormick stresses the importance of adopting the “golden rule” as a “maxim of practical interpretative wisdom”, and not as a rule, considering the absurdity that a *prima facie* conclusion could cause from the binary adoption of this hierarchy, leaving it up to the judge to decide the best way to conduct the prevalence of these different types of arguments (MACCORMICK, 2016).

Finally, despite the author’s own statement that his theory is not intended to provide “a single correct answer”, diverging on this point from the Dworkian position and bringing him closer to Alexy, it is possible to affirm that the rationality proposed by his argumentative theory is able to offer objective criteria to value what may be the “wrong answers” and thus rule out impermissible solutions (MACCORMICK 2016). It is, therefore, at this point that the solution of hard cases needs to meet the second-order justifications, satisfying the requirements of universality, consistency and coherence.

Universality means that a decision must be based on universal propositions capable of determining the resolution of other similar cases. This will ensure equity and, consequently, legal certainty (MACCORMICK, 2018).

By consistency, a decision that cannot confront its own arguments, nor contradict the established and binding rules of law (MACCORMICK, 2018).

By coherence, a decision that does not contradict the legal system is met, as a cohesive body of axiologically compatible norms, and that are

justified from a more general norm, being these rules more specific and concrete manifestations of that one (MACCORMICK, 2018).

## **2 THE CASE OF EXTRAORDINARY APPEAL NO. 494.601/2019 AND THE ARGUMENTS OF THE DECISION**

The state of Rio Grande do Sul, through State Law No. 11.915, of May 21, 2003 (Law No. 11.915/2003-RS), established the State Code for the Protection of Animals, aiming, in the terms of its inaugural article, at making local economic development compatible with the protection of fauna (RIO GRANDE DO SUL, 2003). In Art. 2, the aforementioned Code now lists a series of prohibitions (incs. I to VII) to administratively restrain cruel practices against animals, in addition to other prohibitions. In 2004, this article was altered by State Law No. 12.131 (Law No. 12.131/2004-RS), which added the Sole Paragraph to Art. 2 of the Code, including a proviso in favor of the practice of animal sacrifice in the cult of African-based religions (RIO GRANDE DO SUL, 2004a).<sup>4</sup>

In a first moment, the new law came to solve the misunderstanding that the prohibitions of Art. 2 of the Code had caused in relation to African-based religions. However, the reform of this article, in 2004, ended up further confusing the meaning of the rule.<sup>5</sup> This is because, in a literal and not systemic interpretation, it has been said that the proviso of the new Sole Paragraph would have legitimized acts of cruelty committed against animals during the liturgy of African-based religions.

In a second step, the governor of Rio Grande do Sul established, through Decree No. 43.252 of July 22, 2004, that the sacrifice practiced by African-based religions could only occur with animals intended for human consumption, not allowing the use of cruelty in the act of killing the animal (RIO GRANDE DO SUL, 2004b).

In light of these circumstances, the Attorney General of the Public Prosecution Service of Rio Grande do Sul (PGJ/RS) filed, before the Court of Justice of that state (TJ/RS), a Direct Unconstitutionality Action to achieve the aforementioned Sole Paragraph of Art. 2 of Law No. 11.915/2003-RS, added by Law No. 12.131/2004-RS. However, the TJ/RS decided for the

<sup>4</sup> “Art. 2 – [...] Sole paragraph – The free exercise of cults and liturgies of African-based religions is not included in this prohibition” (RIO GRANDE DO SUL, 2004a).

<sup>5</sup> This issue was well dealt with in the vote of Justice Alexandre de Moraes: “What the law meant by the Sole Paragraph was: ‘Look, the religions exercise freedom of worship here and do not practice this’. Only the wording was flawed, sounding like it would be allow any attitude” (BRAZIL, 2019, p. 42).

dismissal of the request, which is why the PGJ/RS filed the Extraordinary Appeal No. 494.601 before the STF (BRASIL, 2019).

In the appeal distributed to the reporting Justice Marco Aurélio, the PGJ/RS argued the formal and material unconstitutionality of the rule under attack.

Regarding the formal aspect, two unconstitutionality were pointed out: (a) as to the usurpation of the Union's exclusive criminal jurisdiction, as per Art. 19, I of the Federal Constitution of 1988; and (b) as to the State Law having legislated contrary to Art. 37 of the Federal Law of Environmental Crimes (Law n. 9.605/1998), which already makes criminal provisions as to the exclusion of illicitness of the crime of mistreatment of animals typified in Art. 32.

These formal issues have been overcome by the STF. The Justices, rightly, decided for the dismissal of the formal unconstitutionality claim, since the attacked State Law does not have a criminal nature, but an administrative one. However, one cannot speak of an offense to the environmental protection rules edited by the Union, because the federal law was omissive by not legislating on the subject of animal sacrifice in religious rituals, besides its provisions protecting only wild animals, with the states having the freedom to edit rules on the matter, according to § 3 of Art. 24 of CF/88 (BRASIL, 2019).

Thus, only the claim of material unconstitutionality of the Sole Paragraph of Art. 2 of Law No. 11.915/2003-RS, added by Law No. 12.131/2004-RS, which is why the interpretative arguments found in the reasoning of the PGJ/RS, the author of EA No. 494.601, the STF justices and, finally, the ementa of the decision will be analyzed, classifying them based on Neil MacCormick's linguistic, systemic and teleological criteria.

1. PGJ/RS interpretative arguments for the unconstitutionality of the State Law (BRASIL, 2019):

**a) Linguistic argument:** State Law 12.131/2004 RS is unconstitutional because, by exclusively protecting African-based religions, it violated the principle of isonomy guaranteed by Art. 5, *caput*, CF/88, as well as the principle of secularism of the State, as provided for in Art. 19, I, CF/88;

**b) Systemic argument:** by specifying the exception only for African-based origin, the State Law violated the principle of isonomy guaranteed by Art. 5, *caput*, CF/88 and, consequently, privileged these religions to the detriment of other religions, violating the secularism



of the State (Art. 19, I, CF/88);

- c) Teleological argument:** the intention of the State Law was to privilege African-based religions to the detriment of other religions.
2. Interpretative arguments of the rapporteur justice Marco Aurélio, for the partial granting of EA No. 494.601/2019 and interpretation in conformity with the Constitution (BRASIL, 2019):
- a) Linguistic argument:** in interpretation according to the constitution, Law No. 11.915/2003 of the state of Rio Grande do Sul is constitutional, considering that Art. 5, VI, of CF/88 establishes the inviolability of freedom of conscience and belief, ensuring the free exercise of religious practices and, therefore, their liturgy and places of exercise;
- b) Systemic arguments:**
- By the principle of isonomy and the secular state, the protection of religious freedom must be linear, and it is not possible to elevate the protection of a specific religion to the detriment of another, being necessary that the practice in question be extended to all religions;
  - The STF must ensure harmony between the exercise of a fundamental right and the protection of a relevant constitutional value, such as the protection of the environment. Thus, in the Democratic State of Law, the Constitution has the role of establishing the criteria for the protection of different groups, protecting the plural practices in the light of the value of dignity. In this sense, as a guarantee of freedom of belief, the sacrifice of animals in religious rituals is acceptable, as long as the meat is intended for human consumption.
- c) Teleological arguments:**
- The secular state does not promote contempt or the suppression of religious rituals, especially when it comes to minority religions with historical and social meaning;
  - The immolation of animals in religious rituals does not mean to remove the protection of animals guaranteed by Art. 225 of CF/88.
3. Interpretative arguments of justice Edson Fachin, vote accompanied by the majority, deciding for the total dismissal of EA No. 494.601/2019 (BRASIL, 2019):
- a) Linguistic arguments:**
- Art. 11.3 of Normative Instruction No. 3, of January 17, 2000, of the Ministry of Agriculture, Livestock and Supply, which governs the technical regulation of methods of stunning for the humane slaughter of meat-market animals, provides for the possibility of sacrificing

animals for religious purposes, provided that it is intended for consumption by the religious community or for international trade;

- Article 2, item 2, *c*, of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage establishes as “intangible cultural heritage” the ritualistic practice of animal sacrifice;
- Art. 215, § 1º, of CF/88 guarantees the full exercise of cultural rights.

**b) Systemic arguments:**

- The case law of the STF is in the sense of guaranteeing citizens the full exercise of cultural rights, provided that cruel treatment to animals is not employed, as decided in the case of the “Farra do Boi” – Extraordinary Appeal No. 153.531 (BRASIL, 1997), and in the cases of the popular traditions of cockfighting – Direct Action of Unconstitutionality No. 1856 (BRASIL, 2011), and of the “Vaquejada” – Direct Action of Unconstitutionality No. 4983 (BRASIL, 2016). However, the case of Extraordinary Appeal No. 494.601 presents a different solution, as there is uncertainty about the animal’s suffering, and the prohibition of sacrifice would deny the plurality of human beings and their cultural manifestations;
- The constitutional protection of religious freedom should be stronger for Afro-Brazilian culture, due to the structural prejudice that justifies special protection by the State, as already recognized in the judgment of the Declaratory Action of Constitutionality No. 41/2017 (BRASIL, 2017);
- The interpretation of the State Law in question does not hurt the equality provided for in the CF/88, but goes in its favor, since the stigmatization of Afro-Brazilian religions justifies special protection.

**c) Teleological argument:** the guideline for interpreting Art. 215, § 1º, of CF/88 comes from the Brazilian State’s obligation to ensure the cultural expressions of groups belonging to the national civilizing process.

4. Interpretive arguments of justice Alexandre de Moraes, vote seen for the partial granting of EA n. 494.601/2019 and interpretation in conformity with the constitution (BRASIL, 2019, p. 36-52):

**a) Linguistic arguments:**

- State law and Federal law do not prohibit killing animals;
- Art. 225, VII, of the CF/88 establishes only the prohibition of cruel treatment against animals, therefore, the Decision of the Court of Justice of the State of Rio Grande do Sul (TJ/RS) is in line with this prohibition.

**b) Systemic arguments:**

- In analyzing the case, the TJ/RS intended to avoid a prejudiced application of the law, as far as the case is not only about environmental protection and religious freedom and its limits, but also about the prejudiced treatment against African-based religions. What was forbidden by the State Law was cruel conduct, which is not practiced by African-based religions;
- The legislative history that led to the approval and insertion of the Sole Paragraph of Art. 2 of Law No. 11.915/2003-RS, added by Law No. 12.131/2004-RS, reveals that the health authorities were arbitrarily interdicting African-based religious houses (terreiros), using the argument that the liturgical act employed cruelty against animals;
- The text of the Sole Paragraph has doubtful applicability, leading to the interpretation that the practice of cruelty would be allowed for African-based religions, while these cults do not practice such a thing. The decision of the TJ/RS for the unconstitutionality of the State Law protected the constitutionality of the free exercise of African-based religions against the historical prejudice they suffered;
- It is not up to the State to agree with the various religions, but it must respect their dogmas and cults, as well as guarantee the protection of religious freedom, since it is a fundamental right;
- The sacralization of animals is inherent to the liturgy of the cult of the Orixás, so preventing this practice is denaturing such religion, and interfering with the freedom of worship of its members. Those who defend the prohibition of animal sacrifice in African-based religious practices under the allegation of animal mistreatment, are in fact referring to the practices of black magic, which is criminal plunder, which can occur in any religion;
- Considering that there are situations in which the meat of the offering is not used for human consumption, it is not possible to condition the sacrifice on the subsequent consumption of the meat;
- The liturgy of African-based religions is a historical tradition that predates the CF/88, which did not make any reservations about the practices of this religion;
- There is international jurisprudence that protects the right to sacrificial practice: the American case *'Church of the Lukumi Babalu Aye, Inc v. City of Hialeah (1993)*; the German case of BVR 1783/99, ruled by the Constitutional Court in 2002; the Austrian case B 3028/97,

ruled by the Constitutional Court in 1998; the K52/13 case, ruled in 2014 by the Constitutional Court of Poland; and the case ruled in 2015 by the Supreme Court of India;

**c) Teleological argument:** the consecration of the inviolability of religious belief determined by CF/88, means the full protection of the cult and its liturgies; The Sole Paragraph of Art. 2 of Law No. 11.915/2003-RS, added by Law 12.131/2004-RS, aimed to recognize that religions of African origin do not practice the acts designated in incs. I to VII of the aforementioned law, counting on full freedom of worship.

5. Interpretive arguments by justice Luís Roberto Barroso for the complete dismissal of EA No. 494.601/2019 (BRASIL, 2019):

**a) Systemic arguments:**

- Religious freedom consists of a person's fundamental right, relating to their intimate and essential choices. It is an existential choice in which the State should not interfere, not depending on political majorities, nor laws, for being a fundamental right. The secular state, therefore, must guarantee the right of people to profess or not profess their religions as they see fit;
- By only exempting African-based religions, the State Law of Rio Grande do Sul did not violate the principles of isonomy and equality, since it is not a matter of privileged treatment, but of protecting and guaranteeing the freedom of a religion victim of prejudice. Thus, it is true that the permissive is valid for every religion, but the emphasis made by the state legislator aimed at solving the problem faced by the African-based religions;
- Material equality ensures the recognition of minorities, and the law in question ensures the right to equality of a minority cult;
- The device did not hurt the secular state, but ensured the same rights to all religions, because protecting African-based religions is to extend the same protection to all others;
- African-based religions do not admit mistreatment of animals, nor do they waste food, besides the fact that the case in question is not similar to the precedents judged by the STF and dealt with cultural practices that employed cruelty to animals.

**b) Teleological argument:** secularism means separating Church from State, implying the neutrality of the State as to any religion, guaranteeing equal treatment to all, including minority ones.

6. Interpretative arguments by justice Rosa Weber for the complete dismissal of EA No. 494.601/2019 (BRASIL, 2019):

**a) Linguistic arguments:**

- Incs. VI, VII, and VIII of Art. 5 of CF/88 ensure religious freedom as a fundamental right. In inc. VI of Art. 5 specifically establishes freedom of conscience and belief as an inviolable fundamental right;
- Art. 215 of the CF/88 assures everyone the exercise of cultural rights, and it is the State's duty to protect the manifestations of Afro-Brazilian cultures, among other groups;
- Art. 23 to 26 of the Racial Equality Statute (Law 12.288/2010) protect African places of worship and liturgies;
- Paragraph 7 of Art. 225 of CF/88, introduced by EC No. 96/2017, excludes, from the concept of cruelty to animals, the practices of cultural manifestations in accordance with § 1 of Art. 215 of CF/88.

**b) Systemic arguments:**

- Ritual sacrifice is a religious act present in several religions, such as Islamism, Hinduism, African American traditional religions. As for Islamism and Hinduism, they also prescribe that their followers may only consume meat through religious slaughter;
- By referring only to cults of African origin, the State Law did not violate the principle of isonomy or the secularism of the State, but made this specific proviso due to prejudice and intolerance towards these stigmatized religions;
- It will always be possible to safeguard the exercise of religious freedom, provided that the welfare of the animals involved is ensured as far as possible.

**c) Teleological arguments:**

- The freedom of conscience and belief provided for in inc. VI of Art. 5 of CF/88, consists of an inner dimension (religious conscience), and an outer dimension (manifestation of the belief);
- The Constitution, by protecting the free exercise of religious cults and liturgies, guarantees the legitimacy of animal sacrifice as a liturgical ritual.

7. Interpretative arguments by justice Ricardo Lewandowski for the complete dismissal of EA No. 494.601/2019 (BRASIL, 2019):

**a) Linguistic arguments:**

- Art. 5 of the Federal Constitution of 1988 guarantees the inviolability of freedom of conscience and belief, ensuring the free exercise of religious cults and their liturgies;

- Art. 225 of the CF/88 ensures the protection of the environment, besides inc. VII establishing the prohibition of cruel treatment of animals.
- b) Systemic arguments:**
- The sacrifice of animals in African-based religions is protected by the constitutional guarantee of free exercise of worship and liturgy, and the State Law is compatible with the FC/88;
  - The eventual abuses that may occur against animals are already duly protected by Federal Law No. 9.605/1998.
- c) Teleological argument:** State Law 11.915/03-RS has the purpose of protecting animals against cruel treatment, which does not occur in African-based religions.
8. Interpretative arguments by justice Luiz Fux for the complete dismissal of EA No. 494.601/2019 (BRASIL, 2019):
- a) Linguistic argument:** the European Convention on Human Rights and the San José de Costa Rica Pact, in addition to the lessons of the Bible itself, make provisions for the slaughter of animals as part of religious liturgy.
- b) Systemic arguments:**
- Freedom of religious manifestation is expressed in all transnational documents, and these documents mention the permissiveness of animal slaughter for religious liturgical purposes;
  - CF/88 guarantees the inviolability of everyone's right to practice the religion of their choice, and the liturgy inherent to religious cults is also guaranteed, consisting of a fundamental right;
  - When the practice of "Vaquejada" was discussed in ADI No. 4983 (BRASIL, 2016), the cruelty employed in the commercial slaughter of cattle was explicit, whose recipient corresponds to 90% of the Brazilian population, while religious slaughter is based on faith, and only 4% of the population practices it;
  - In the light of post-positivism, Law lives for man, and just as it was possible to reduce homophobia through the STF's jurisprudence, it will be possible to contribute to the end of violence against African-based religious houses, since there is no illegality in the cult and liturgy they practice.
9. Interpretive arguments by Justice Cármen Lúcia for the complete dismissal of EA No. 494.601/2019 (BRASIL, 2019):
- a) Linguistic argument:** Equality in dignity and rights is enshrined in the United Nations (UN) Declaration of Human Rights of 1948. Art.

18 of the same Declaration guarantees freedom of religion and its free expression (UN, 1948);

**b) Systemic arguments:**

- The reference in the State Law to African-based religions is justified by the traditional prejudice against them and goes beyond by revealing the historical prejudice against those who were brought and victimized by the European culture that colonized Brazil;
- It is more appropriate to use the word sacralization, as indicated by justice Alexandre de Moraes, because it is a sacred ritual of faith, and it is not appropriate to talk about aggression and sacrifice in rituals of this nature;
- There is no need to talk about lack of protection for animals, but for those who suffer prejudice and, above all, about the prejudice against those who have always been victims because of their essence, like the samba that was once targeted because of who sang it;
- The ritual is a manifestation of faith, and any religion should practice it in a free and dignified way.

**c) Teleological arguments:**

- Dignity means the condition of the human being to profess or not to profess their faith in the exercise of their reason and conscience;
- CF/88 established the principle of equality in Art. 1 and in the *caput* of Art. 5, leaving it explicit in inc. II that men and women are equal, and this need arose from the fact that women were discriminated against, and it was necessary to emphasize the equality between men and women. The State Law adopted the same reasoning in highlighting African-based religions.

10. Interpretative arguments of the Ementa for the complete dismissal of RE n. 494.601/2019 (BRASIL, 2019):

**a) Systemic arguments:**

- The sacrificial act of animal sacrifice practiced by several religious communities is an intangible cultural heritage;
- Due to the structural prejudice aimed at African-based religions, the State's special protection is justified, and the specific protection is compatible with the principle of equality.

**b) Teleological argument:** the secularism guaranteed in the CF/88 intends to remove from the public space the linking of religious motives for the imposition of obligations.

### 3 CRITICAL ANALYSIS IN LIGHT OF THE REQUIREMENTS OF UNIVERSALITY, CONSISTENCY AND COHERENCE

On page 74 of the Judgment handed down in EA No. 494.601/2019, justice Dias Toffoli, STF's president, recorded the confluence of all votes in the sense of allowing the sacralization of animals as a fundamental guarantee of religious freedom, understanding the constitutionality of the Sole Paragraph of Art. 2 of Law No. 11.915/2003-RS, added by Law 12.131/2004-RS, making note, however, that the divergences occurred only under the technical-formal aspect related to the interpretation in conformity with the constitution, from the dissenting votes of justices Marco Aurélio (rapporteur), Alexandre de Moraes and Gilmar Mendes (BRASIL, 2019).

Thus, based on the requirements established by Neil MacCormick to determine when a judicial decision can be considered correct, we will now analyze the arguments as a whole, focusing on the result that materialized in the Ementa and the thesis fixed, noting that, at times, the individual arguments of some justices will be highlighted.

#### 3.1 Universality

By the criterion of universality, the result of the decision fulfilled its purpose, because the guarantee of prevalence of the fundamental right to religious freedom, in its cultural dimension, can be extended to any religion that uses the liturgical ritual of sacralization of animals as an intrinsic manifestation of the exercise of freedom of worship and belief. This understanding became clear during the votes, especially because this permissive is already guaranteed constitutionally, besides being protected by several diplomas, very well highlighted by the linguistic arguments of justice Rosa Weber.

However, it is important to point out the fact that the exception expresses only for "African-based religions" was one of the systemic arguments brought by the PGJ/RS, for which this preference would be mitigating the guarantee of isonomy and, consequently, the secularism of the State. Furthermore, the teleological argument of the PGJ/RS highlighted that the intention of the State Law was to privilege African-based religions to the detriment of other religions. Following this reasoning, justices Marco Aurélio (rapporteur) and Alexandre de Moraes, whose votes were only partially unfavorable (together with justice Gilmar Mendes), emphasized



that the language of the law should expurgate the term “African-based religions”, encompassing all religions in a linear fashion, under penalty of offending the principle of equality.

In the opposite direction, the other justices noted the need for the state to give special protection to a minority religion that is stigmatized and the target of historical prejudice in Brazilian society, such as the systemic argument of justice Cármen Lúcia, highlighting that the marginalization of these religions is inherently linked to the prejudice against Black people.

In consonance, justice Barroso’s systemic argument defended that the maintenance of the term “African-based religions” does not elevate this religious segment to the *status* of superiority or even reflect a protection to the detriment of the others, but guarantees them, on the contrary, the possibility of an isonomic treatment.

In fact, African-based religious minorities are the target of a structural prejudice cultivated since the colonial period and, as Bohn (2013) teaches, despite the major transformations that have occurred throughout Brazilian constitutions, the protection of different religions has always been asymmetric in Brazil. Although the existence of religious minorities has been recognized since the Constitution of 1824, African-based religions were not even admitted as such, and there was an official policy of persecution of this segment. More specifically, the Penal Code of 1890 (BRASIL, 1890), in Art. 157 and 158, treated African cults as a crime, stigmatizing them as “a possession threatening public health”. The author also explains that it was only with the Statute of Racial Equality of 2010 (BRASIL, 2010) that the Brazilian State recognized the legitimacy of African cults.

Considering the interdependence between the principles of liberty and equality, which indicates that the guarantee of liberty for all religions can only be effective if the protective treatment given to them is similar, the majority reasoning of the STF followed the path of the need for special protection, since African-based religions are stigmatized and subject to greater prejudice when compared to others. However, the following consideration is in order: when claiming rights, do African-based religions intend a special treatment, or are they just claiming what is already constitutionally guaranteed to each and every Brazilian citizen, to each and every religious group (?). It is understood that the STF’s decision merely reaffirmed what is already expressly guaranteed by CF/88, confirming a guarantee that is already present in the normative text and that, however, is disrespected on a regular basis by those who seek legislative subterfuges

to perpetuate the discriminatory treatment against these minority religions and, above all, against Black people.

On this point, the decision's argument could have been more technical, using the multiculturalist doctrine for the protection of religious minorities. As an example, one could have mentioned what Levy (1997) teaches, when he elaborates on which cultural rights claims of minorities should or should not be accepted, explaining that the recognition of religious freedom, as a manifestation of a community's culture, is not special welfarism, but the concretization of the constitutional norm itself. In the case in question, the sacralization is acceptable, because what is wanted is the affirmation of a right already constitutionally guaranteed to the individual (freedom of worship), and for this it would not be necessary to use special protection.

Another alternative would be to follow the thought of Kymlicka (1996), who defends the provision of three special rights to guarantee the protection of members of cultural minorities: (a) the right of self-government, consisting in the recognition of the autonomy of these groups, in order to guarantee their self-determination; (b) the right of representation, for the purpose of ensuring the participation of minorities in formal spaces of political power and (c) the polyethnic rights, aimed at protecting cultural rights and integrating minorities into society, ensuring that these groups can express their cultural manifestations without representing an obstacle to the dominant groups.

### 3.2 Consistency

By the criterion of consistency, it is possible to affirm that, in general, the votes of the justices did not present contradictions with their own fundamentals, hence the decision under analysis fulfilled the requirement of consistency.

However, we must point out a point of inconsistency in the vote of justice Edson Fachin, by stating that the case law of the STF has guaranteed citizens the full exercise of their cultural rights, provided they do not employ cruel treatment to animals, substantiating his vote with several citations of arguments presented by *amici curiae*, which stated that there is no mistreatment in the sacramental act of African cults.

However, on pages 26 and 28, the minister expressed "doubts" and "uncertainties" as to the animal's suffering in the act of immolation,

preferring to protect the plural dimension of cultural manifestations even in the face of these uncertainties. At this particular point, one can see the inconsistency of the argument, not only because it contradicts the whole argumentative construction of the vote, but because the doubt would be enough to not legitimize the decision for the constitutionality of the law, since there is an express prohibition of mistreatment.

### 3.3 Coherence

According to the coherence criterion, in general, the result of the decision fulfilled its purpose, because all the arguments reached a rational connection among themselves, in light of the Brazilian legal system and also in compliance with the various international diplomas ratified by Brazil. It was also coherent with the jurisprudential tendency of several cases in foreign jurisdictions, such as those cited by justice Alexandre de Moraes.

At this point it is important to note that the core of EA No. 494.601/2019 confronted two rights protected by the legal system, namely: the fundamental right of freedom of expression in the free exercise of religious freedom (Art. 5, VI, of CF/88) and the protection of the environment, ensured by Art. 225 of CF/88, with a specific rule prohibiting cruel treatment of animals (BRASIL, 1988).

There is a critical trend, especially among environmental protection doctrine, to question the decision of this Extraordinary Appeal in the sense that the STF missed the opportunity to maintain the coherence of this judgment in line with other judgments that applied environmental protection norms to the detriment of cultural rights. These are: the “Farra do Boi” – Extraordinary Appeal No. 153.531 (BRASIL, 1997), the “Briga de Galos” – Direct Action of Unconstitutionality No. 1856 (BRASIL, 2011), the “Vaquejada” – Direct Action of Unconstitutionality No. 4983 (BRASIL, 2016). However, unlike the mistreatment employed in the cited cases that made the STF raise the protection of fauna, because those cultural practices, even if historical, confronted the CF/88, the same does not occur with the case under analysis.

In the judgment of EA No. 494.601/2019, it was demonstrated that African-based religions do not practice mistreatment in the act of sacralization, as can be seen in the detailed vote of Justice Alexandre de Moraes, who explained the reasons for the cults to Orixás, the types of animals slaughtered, the rite obeyed in the sacramental act and the deep respect for the

process of energy transmutation of connection with the divine, reinforcing the linguistic argument that both the State Law and the federal legislation do not prohibit killing animals, but cruel treatment. And, in the same sense, justice Lewandowski pointed out that Federal Law 9.605/1998 already duly protect possible abuses.

Another important argument, which reinforces the distinction between this case and those cited in this topic, can be seen in the systemic argument of justice Barroso, who pointed out that religious freedom, being a fundamental right of a person, is an existential right. Along these lines, justice Rosa Weber affirmed that freedom of conscience and belief provided for in inc. VI of Art. 5 of CF/88, constitutes an inner dimension of the person.

Another issue that deserves to be highlighted, consists in the fact that this existential perspective of religious freedom was not expressed in the Judgment, having only been highlighted, by the redactor justice Edson Fachin, the protection of the cultural rights of the religious minority group (BRASIL, 2019). In this aspect, it would be possible to point out a certain specific incoherence between the text of the Decision's ementa and the several arguments of the justices that stressed the essentiality of this fundamental right for the free development of each individual's personality, and not only to protect the religious minority group.<sup>6</sup>

However, beyond the criticism raised in the previous paragraph, it is possible to affirm that the decision, by protecting the right of the minority group, is in line with what is proposed by Ketscher (2007), in the sense of recognizing the need to rethink religion as a cultural manifestation and not as an individual right, so that minority religious groups may achieve greater protection.<sup>7</sup>

In summary, it is possible to realize that the decision of EA No. 494.601/2019 for the constitutionality of the Sole Paragraph of Art. 2 of Law No. 11.915/2003-RS, added by Law no. 12.131/2004-RS, reinforced the protection of cultural diversity and the importance of multiculturalism by guaranteeing the legitimate coexistence of different religions in the same social space.

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6 Will Kymlicka, a proponent of liberal multiculturalism, argues that the protection of minorities by the state should also include safeguarding members of that minority, even against the group to which they belong, in case of arbitrariness (KYMLICKA, 2007).

7 The author also points out that the right to religion, in comparison with cultural rights, has had, throughout history, greater recognition and protection from the State. However, after the terrorist attack of September 11, 2001, minority religions have been treated as a secondary manifestation. To overcome this downgrading, the way out would be to include religion as a manifestation of cultural rights (KETSCHER, 2007).

However, according to Lopes (2012), the tolerance that ensures coexistence among different people is only a first step, and it is necessary to promote a dialogue between the various groups to enable mutual recognition and respect and, thus, as a second step, to connect the members of the same society in a true sense of coexistence.

Finally, it is worth mentioning Cartoga's (2010) reflection, for whom the positive effects of pluralism will arise from the self-criticism of each group, providing the recognition of the various faces of faith, because they are not rivals, but complement each other. In other words, the true meaning of mutual recognition indicates that the human being only presents this condition when living in society and, for this, it is necessary to live with plurality.

## CONCLUSION

This article analyzed the decision rendered, in 2019, by the Federal Supreme Court (STF) in Extraordinary Appeal No. 494.601 of Rio Grande do Sul, which set the thesis, with general repercussion, for the constitutionality of the animal protection law that, with the purpose of safeguarding religious freedom as a cultural right of African-based religious groups, allowed the sacralization of animals in the liturgical act.

Considering that the action demanded from the Supreme Court an interpretation of fundamental norms protected by the Federal Constitution of 1988, being on one side the fundamental right to the free exercise of religious freedom (Art. 5, VI), the principle of secularism of the State (Art. 19), and the protection of fundamental cultural rights (Art. 215), and on the other side the fundamental right to an ecologically balanced environment (Art. 225), in what concerns the prohibition of cruel treatment of animals (Art. 225, § 1º, VII), it is evident that this is a *hard case*, in which the traditional syllogistic formula of resolution by mere subsumption of the fact to the rule is insufficient.

For this reason, since the decision is not a mere act of the judge's will, but an act of rationality, in which the judge needs to justify and demonstrate the argumentative path that culminated in the decision rule, the analysis proposed in this article adopted the argumentative theory of the Scottish legal philosopher Neil MacCormick proposes universality, coherence and consistency as objective criteria to determine when a judicial decision can be considered correct in a Democratic State of Law.

Thus, given the fulfillment of these criteria, it was concluded that the STF's decision in the judgment of EA No. 494.601/2019 was correct, as it was universal, consistent and coherent.

However, this analysis did not intend to pass judgment on the moral issues surrounding the slaughter of animals for religious ritualistic purposes, as it is understood that this issue is something that depends on the cultural transformation of society. Our study is not about subjective judgments on these topics.

As for the protection of animals, the judgment of EA No. 494.601/2019 met, as far as possible, the constitutional provision of environmental protection, because it expressly prohibited animal mistreatment. And, at this point, it should be noted that the core of this case differed from others already judged by the STF, in which environmental protection took precedence over cultural rights. However, one cannot accuse the STF of having decided in contradiction, because in those decisions ("Farra do Boi"; "Briga de Galos"; "Vaquejada"), once confirmed the use of mistreatment in the cultural practices in question, the application of the constitutional prohibition of mistreatment prevailed. On the other hand, in the case of the liturgy employed by African-based religions, it has been proven that there is no animal mistreatment involved, consisting in a ritual of faith, in which specific care is taken to promote a painless slaughter of the animal.

In relation to the special protection granted by the STF to African-based religions, it is important to emphasize that the judgment did not seek to place these groups in a situation of superiority over other groups, nor did it even harm the secular state and the guarantee of isonomy. Rather, it considered the need for special protection due to the historical stigmatization suffered by these groups in Brazilian society, which is strongly impregnated with racist values. This discriminatory treatment against Afro-Brazilian religions can be seen, above all, from the late legal recognition of these cults as religious, and it is certain that the practitioners of African-based religions have suffered – since the beginning of colonization – with state intervention.

However, the criticism consists in the fact that the STF has missed the opportunity to use the various contributions of the multiculturalist doctrine for the protection of minority religious groups, because these African religions do not claim special treatment, but only request that they be assured the guarantees of the fundamental rights already expressly provided for in the constitutional text.

In short, the legal-social importance of the judgment of EA No. 494.601/2019, in view of having recognized the religious diversity existing in Brazil and protected a historically discriminated religious minority, is its contribution to overcoming one of the strong prejudices that, unfortunately, still permeates our society.

Finally, the need to harmonize the rights of dominant and minority groups in a society is highlighted, for the effective protection of the dignity of all individuals, so that they can be exactly what they are and want to be.

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