

# SACRIFICE RITUALS AND CRUELTY TO ANIMALS: A CASE OF CULTURAL SUSTAINABILITY

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## ABSTRACT

Animal sacrifice in rituals is a problematic issue in the scope of the right to religious freedom, raising the ecological concern with the well-being of animals, since the Brazilian Constitution prohibits practices that subject animals to cruelty. The laws that prohibit animal sacrifice rituals affect, above all, the practices adopted by African religious communities, mainly composed of black people, which shows not only a religious but also a racial discrimination. The Federal Supreme Court verified the unconstitutionality of these laws through the Extraordinary Appeal 494.601/RS, using the criterion of proportionality in a multicultural and state secular context. The methodology used in this study consists of a concrete case study (jurisprudential analysis), based on an inductive approach and the theory of fundamental rights (bibliographic research), with reference to foreign experiences (comparative analysis). The result of the reflection points to the correctness of the balancing made by the Federal Supreme Court in validating the legislation that allows the ritualistic sacrifice of animals. We conclude that the protection of religious freedom may not disregard the constitutional prohibition of treating animals with cruelty.

**Keywords:** animal sacrifice rituals; balancing doctrine; cruelty; cultural sustainability; religious freedom.

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*SACRIFÍCIO RITUAL E CRUELDADE CONTRA ANIMAIS:  
UM CASO DE SUSTENTABILIDADE CULTURAL*

*RESUMO*

*O sacrifício de animais em rituais insere-se problematicamente no âmbito de proteção da liberdade religiosa, pois suscita a preocupação ecológica com o bem-estar dos animais, uma vez que a Constituição brasileira veda práticas que submetam os animais à crueldade. As leis que proíbem o sacrifício ritualístico de animais atingem, sobretudo, práticas adotadas por grupos religiosos de matriz africana, de forte composição negra, numa manifestação de discriminação não apenas religiosa, mas também racial. O Supremo Tribunal Federal verificou a inconstitucionalidade dessas leis por meio do Recurso Extraordinário 494.601/RS, tendo utilizado o critério da proporcionalidade, num contexto multicultural e de laicidade estatal. A metodologia utilizada neste artigo consiste no exame de caso concreto (análise jurisprudencial), a partir de uma abordagem indutiva, conduzida com base na teoria dos direitos fundamentais (pesquisa bibliográfica) e com referência em experiências estrangeiras (análise comparativa). O resultado da reflexão aponta para o acerto da ponderação realizada pelo Supremo Tribunal Federal ao validar a legislação que permite o sacrifício ritualístico de animais. Conclui-se que a proteção da liberdade religiosa não pode, contudo, desconsiderar a proibição constitucional de tratar animais com crueldade.*

***Palavras-chave:*** *crueldade; doutrina da ponderação; liberdade religiosa; sacrifício de animais; sustentabilidade cultural.*

## INTRODUCTION

The environmental discussions have an important objection to the ritual sacrifice of animals, which takes on constitutional grounds in view of the prohibition contained in art. 225, § 1, VII, of the Federal Constitution of 1988. Supported by this concern for the welfare of animals, laws are enacted that intend to prohibit sacrifice, as is the case of the State Code for the Protection of Animals in Rio Grande do Sul (State Law No. 11,915/2003, modified by Law No. 12,131/2004) and Law No. 1,960/2016 of the Municipality of Cotia (SP). The religious sacrifice of animals constitutes a form of manifestation of religious freedom and, thus, to what extent can such practice, inserted in the normative scope of religious freedom, be restricted due to the protection of animals?

In the current Brazilian context, another aspect still needs to be considered. The ritual slaughter of animals is practiced mainly by religions of African origin, which are historically persecuted by dominant groups, including traditional Christian religions. This religious prejudice has an undeniable component of ethnic discrimination: they are predominantly white religions that persecute predominantly black religions. Thus, constitutional conflict involves the issue of freedom and equality in a social environment marked by plurality.

After all, is animal sacrifice a form of liturgy protected by constitutionally guaranteed religious freedom? And, if the answer is positive, is it possible that such practice is regulated by the State?

This discussion reached the Federal Supreme Court in mid-2018, through the Extraordinary Appeal 494.601/RS, and presented a case of collision of constitutional rights confronted with the usual balancing technique (proportionality criterion). In the judgment of this appeal, discussing the validity of State Law no. 12,131/2004, the STF understood, by majority of votes, that the law of Rio Grande do Sul that allows the sacrifice of animals in religious rites is compatible with the Constitution. In weighing the various rights involved – from religious freedom to the prohibition of cruelty to animals – it is important to highlight the ban on racial or ethnic discrimination associated with Afro-Brazilian religious manifestations.

An inductive approach is used, based on a concrete case examination (jurisprudential analysis), in the context of the fundamental rights theory (bibliographic research) and compared to foreign experiences.

## 1 THE SUPREME BRAZILIAN FEDERAL COURT ADDRESSES THE ISSUE

The State Code for the Protection of Animals in Rio Grande do Sul (State Law No. 11,915/2003, as amended by Law No. 12,131/2004) provides that it is forbidden to cause suffering or abuse of animals, but that the free exercise of cults and liturgies of religions of African origin does not fit into the prohibitions (art. 2, sole paragraph).

In view of this provision, the direct action of unconstitutionality no. 70010129690 (TJE) was proposed to the Justice Court of Rio Grande do Sul, and the demand was dismissed. From that decision, Extraordinary Appeal 494.601/RS (original rapporteur Min. Marco Aurélio and drafter of the judgment Min. Edson Fachin) was filed, which agitated the conflict between the fundamental right of religious freedom (Constitution of the Republic, art. 5, VI); equality, without any kind of discrimination (CR, art. 3, IV, and art. 5, *caput* and XLI); the fundamental right of cultural identity (CR, art. 215, § 1); the principle of the secularity of the State (CR, art. 19, I) and the prohibition of submitting animals to cruelty (CR, art. 225, § 1, VII).

The careful analysis of this case by the Rio Grande do Sul Court of Justice represents a valuable precedent (RIO GRANDE DO SUL, 2005). The genesis of local legislation (State Code for the Protection of Animals) reveals that, precisely because it is feared that the generic provision for prohibiting cruelty and abuse of animals, contained in the original version (Law 11,915/2003), would inhibit the rituals of Afro-Brazilian religions, a draft bill was presented (PL 282/2003) to allow ritualistic sacrifice, including then a single paragraph to art. 2nd. The project was approved by almost all state authorities (ORO; CARVALHO; SCURO, 2017). Therefore, under the principle of the Democratic Rule of Law, the corrective action of the Legislative Power itself in favor of the fundamental right of belief and the Afro-Brazilian cultural manifestation must be emphasized.

The Court of Justice of Rio Grande do Sul recognized the pertinence of the state law in rejecting the allegation of unconstitutionality, dismissing the arguments of invasion in criminal matters (of federal legislative competence), against the principle of equality and the secular character of the Brazilian State.

Without the legislative complementation that was contested (and that authorizes the ritual sacrifice of animals), the general legal prohibition,

instead of emphasizing the principle of religious freedom, produces “the perverse effect of leaving under suspicion the cult exercise of a sacrificial nature, regardless of its matrix” (BRASIL, 2007).

The Extraordinary Appeal (RE) 494.601/RS was judged on March 28, 2019 and, by the majority vote, the STF understood that the Rio Grande do Sul law that allows the sacrifice of animals in religious rites is compatible with the Constitution, having fixed the following thesis: “The animal protection law is constitutional, since this law, to safeguard religious freedom, allows the ritual sacrifice of animals during cults of African matrix religions” (BRASIL, 2019).

The established legal thesis should be applied<sup>3</sup>, for example, to Law no. 1,960/2016 of the Municipality of Cotia (SP), which generally banned the “use, mutilation and/or the sacrifice of animals in religious or any other kind of rituals,” without any device that except “the free exercise of religious services and liturgies of African matrix religions,” contrary to the Rio Grande do Sul state law (State Law No. 11,915/2003). In fact, the São Paulo Court of Justice, in line with its southern counterpart, has already ruled the municipal law unconstitutional by a large majority (SÃO PAULO, 2017).<sup>4</sup> The local Court, in the balancing it performed, accurately perceived the discrimination concerning Afro-Brazilian religions, for which the ritualistic sacrifice of animals is essential, in contrast to liturgical manifestations of powerful and eventually majoritarian religions. Here is the precise result of the balancing, according to the summary: “Prevalence of the protection of the free exercise of religious cults, since the use of animals in these circumstances would not have a sufficient proportion to jeopardize the balanced existence of the environment.” In view of this judgment, RE 1,096,915/SP (rapp. Min. Celso de Mello) was filed, but it was dismissed to await the judgment of RE 494.601/RS.<sup>5</sup>

3 See art. 987, § 2nd paragraph of the Civil Procedure Code (BRASIL, 2015): “Art. 987. The judgement on the merits of the incident will be subject to an extraordinary or special appeal, as the case may be [...] paragraph 2. Once the merit of the appeal has been assessed, the legal thesis adopted by the Supreme Federal Court or the Superior Court of Justice will be applied in national territory to all individual or collective processes that address the same legal issue.”

4 Let us also mention Law no. 4,977 of October 27, 2015, from the municipality of Tatuí, which also brings a generalized sacrifice prohibition, in the following terms: “Art. 1st In the municipality of Tatuí, the use, mutilation and/or sacrifice of animals in rituals or cults is prohibited, whether such cults are performed in closed establishments and/or public places, having a mystical, initiatic, esoteric or religious purpose, as well as in practice of sects, religions or congregations of any kind” (TATUÍ, 2015).

5 Although the judgment of RE 494.601/RS has already occurred with the respective setting of the aforementioned thesis, RE no. 1,096,915/SP has not yet been judged.

## 2 RELIGIOUS FREEDOM, MINORITIES AND DISCRIMINATION

As a subjective right, religious freedom allows self-determination to be guaranteed in the case of interference by the State and by other private actors, so as to enable formation and confessional practice within the scope of faith communities. The negative aspect of religious freedom affirms respect for intimate choices of belief in divinities or the supernatural and, consequently, the possibility of acting according to the corresponding principles and visions, which characterizes the external sphere of exercise of religious cults (OLIVEIRA, 2010). At this point, Jónatas Machado (1996) highlights that, although religious behaviors and practices involve greater problems than the mere beliefs, the comprehension of the right to religious freedom must make it correspond to “a unity between convictions and religious practices.”

Thus, there must be a distancing from the State that is considered secular (CR, art. 19, I). A result of this duty of abstention is the prohibition against discriminatory practices, to prevent the State’s action from penalizing or privileging any particular belief (MOREIRA, 2013). A basis of freedom and equality is established so that individuals and groups can live according to their religiosity.

But what happens in the private domain of each religion, guided by dogmatic precepts that can lead to the distinction between believers and infidels – after all, “[the] certainty of the truth itself has always put the truths of others at a disadvantage” (TEIXEIRA, 2015) – cannot be transposed to the public sphere. The State has duties of impartiality and neutrality that prevent it “from establishing public obligations of a religious nature” (MOREIRA, 2013, p. 644) and from making decisions based on religious dogmas.

In fact, the idea of religious freedom is linked to the recognition of pluralism (MOREIRA, 2013), inscribed in the 1988 Constitution in its preamble. This respect for the plurality of religious expressions, and also for those that reveal the absence of religious belief, finds constitutional support, for example, in the possibility of excusing the conscience (CR, art. 5, VIII) and in the duty of impersonality imposed on public administration (CR, art. 37, *caput*).

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the United

Nations General Assembly on November 25, 1981, recognizes the importance of respect for religious freedom for world peace and social justice, as well as for the elimination of the ideologies or practices of colonialism and racial discrimination. Then the Declaration determines that States shall make efforts to enact or rescind laws, as necessary, to prohibit all religious discrimination and to take all appropriate measures to combat intolerance for religious reasons (art. 4, paragraph 2). Thus, “the inclusion of followers of minority religions, more than generating religious sectarianism, will make them able to exercise their rights without giving up their religious convictions” (BREGA FILHO; ALVES, 2009, p. 91-92).

Despite these guidelines, Heiner Bielefeldt (2016), when presenting a report on freedom of religion to the United Nations, said that states (countries) usually claim that, like any fundamental right, freedom of religion is not absolute, which can become a pretext for, under the signs of “security,” “order” and “moral interests,” to curb religious criticism, discriminate against minorities, to tighten control over a religious community.<sup>6</sup>

The densification of religious freedom must consider the respect for religious minorities and their organizational structures and liturgical practices. Precisely in view of this associative and institutional protection, the German Federal Constitutional Court judged as justified, by majority, a constitutional complaint (BverFGE 93.1) to recognize the improper placement of a cross or crucifix in the public school classrooms of non-confessional compulsory education, having established that “freedom of belief guarantees, in special, the participation in liturgical acts that a belief prescribes or in which it finds expression. This corresponds, in the opposite sense, with the freedom not to participate in liturgical acts of unshared belief.”

In this line, Min. Ricardo Lewandowski, of the Supreme Federal Court, when voting for the dismissal of ADI 4.439 / DF (proposal with the objective of establishing that religious education, with optional enrollment, provided for in the Constitution, could not have a confessional character), he argued that religious education in public schools may indeed have a confessional and interfaith nature, and that the concept of secularism in

<sup>6</sup> *The Special Rapporteur has often heard statements by government representatives that freedom of religion or belief, like any other right, “cannot be absolute” and sometimes must be limited in its application. This is a truism and indeed a dangerous one, since the general invocation of limitations can easily become a pretext for imposing far-reaching or arbitrary restrictions. Many Governments actually refer to broad and unspecified “security,” “order” or “morality” interests in order to curb religious criticism, discriminate against minorities, tighten control over independent religious community life [...].*

Brazil is based on a “tripod of tolerance, equality and religious freedom. It is, above all, a constitutional principle aimed at protecting minorities who, thanks to the separation between the State and the Church, cannot be forced to submit to the precepts of the majority religion” (BRASIL, 2017).

However, the constitutional recognition of the plurality of religiosity manifestations “has still not finished the full unfolding of possibilities” (VIDA, 2007, p. 296). There is a discriminatory tradition against religions of African origin that goes back to the first records made when the enslaved Africans were brought to Brazil, with regulations that, since the beginning, banned drumming and liturgical practices of manifestations of spirituality and connection with the divine dimension (VIDA, 2007).

In Brazil, Afro-Brazilian religions still form a vulnerable and oppressed segment<sup>7</sup> in view of the hegemonic religions and qualify as deserving of protection and legal promotion, even more so in view of the growth of evangelical and neo-Pentecostal religious groups that have built a propagandist proselytism – undertaken “a true crusade,” in the expression of Teixeira (2015) – based on strongly derogatory messages from religions of African origin, presented as “the stronghold of demons and condemned.”

In addition to the general prediction of religious freedom, the Statute of Racial Equality (Law 12,288 / 2010), in its articles 23 to 26, brings protection to freedom of conscience and belief and to the free exercise of religious cults of African origin, including protection to their places of worship and their liturgies, the fight against religious intolerance practices, among other guarantees. “The Statute, therefore, goes beyond the constitutional text, as it offers specific protection to religions of African origin, which also results in the protection of the ethnic identity of this population” (COELHO; OLIVEIRA; LIMA, 2016, p. 56).

Among the set of Afro-religious worship practices, animal sacrifice stands out, also called immolation or sacralization. “Especially for religions of African origin, the ritual sacrifice of animals represents an ancient symbol of their beliefs, that is, a dogma essential to the practice of the worship of their Divinities” (COELHO; OLIVEIRA; LIMA, 2016, p. 60)

Discrimination on grounds of belief, in the case of Afro-Brazilian religions, is inextricably linked to ethnic discrimination, since the widespread perception of these religions, obviously related to their geographic origin and to the majority of their followers, is that it’s about “black

<sup>7</sup> According to the IBGE census, in 2010, there were: a) 588,797 people who said they were practicing umbanda and candomblé; b) 123,280,172 practitioners of Roman apostolic catholic; c) and 42,275,440 practitioners of evangelical religions (IBGE, 2010).



stuff,” “*macumbeiro*.” Prejudice against blacks in general is transferred and strengthened, who have their religious practice associated with the idea of primitive, archaic and witchcraft practices.

The association is evident: not liking black people and banning the ritual sacrifice of animals, since this is a practice of beliefs professed by them. “So much true that the justifications of the bills that try to prohibit the religious sacrifice of animals are filled with conceptual categories that refer to judgments of a moral nature, such as primitive/civility, delay/progress/, evolution, malaise/, constraint/respect” (COELHO; OLIVEIRA; LIMA, 2006, p. 64).

Analyzed from this perspective, the ban on animal sacrifice reveals even more aggressive contours to fundamental rights and to the Brazilian Constitution, strongly committed to fighting racial prejudice (art. 3, IV) and the practice of racism (art. 5, LXII).

The environmentalist concern with the welfare of animals, supported normatively, in favor of a holistic (MACHADO, 2018) and solidaristic moral conception, ends up lending itself to cover up a feeling incompatible with the very idea of deep respect for the dignity of living beings (which encourages ecologists), to reveal the most nefarious things that human beings can present: indifference, rejection, exclusion due to skin color. After all, sustainable development does not preach that all species must be able to live and reproduce in harmony?

It is necessary to be attentive to a distorted discursive appropriation of the environmentalist concern with cruelty to animals, which associates sacrifice with a demonstration of backwardness and imbecility of black cultures. In the synthesis of Teixeira (2015): “Using the environmental and animal protection laws, the discourse of savagery and barbarism is added to the discourse of anti-hygienic and polluting practices.” This author points out other pretexts to outlaw practices of African-based religions, such as “supposed public health problems and the noise of drums” (TEIXEIRA, 2015), which thus become deafening, unbearable to hegemonic religious and cultural groups.

In the United States, the Supreme Court found, in the trial of the *Church of the Lukumi Babalu Aye, Inc. case. City of Hialeah (1993)*, that the Afro-Caribbean religion of Santeria, Florida, was having its religious freedom violated. The city of Hialeah had approved a set of rules aimed at preventing animal sacrifice, under the direct justification of ensuring health, public morality and the lives of animals, restricting slaughter only

for food purposes. Santeria supporters sought in the judiciary the protection of religious freedom guaranteed by the First Amendment to the American Constitution and claimed the laws were unconstitutional. The US Supreme Court found that city laws were hostile to the specific Santeria religion and used “concealment” in justifications to prohibit only animal sacrifice from that religious practice. The “selective prohibition of only certain types of killing showed an inadmissible orientation towards religious expression” (CASSUTO, 2015, p. 32).

The Court cited, for example, that in Regulation 87-71, there was a requirement for a primary consumption purpose, exempting the “Kosher killing” and condemning sacrifice in African religions that initially aim at offering to the orishas (PASSALACQUA, 2006). The Supreme Court also stated that, “if the purpose of a rule is to infringe or restrict conduct because of its religious motivation, the law is not neutral or of general applicability and, therefore, is incompatible with the Free Exercise Clause” (BRASIL, 2018, p. 13).

The exercise of balancing between partially conflicting constitutional rules must not fail to consider, on the one hand, the weight of constitutional norms that clearly turn against ethnic discrimination related to African-based cults and, on the other hand, that the same environmental protection which forbids animal cruelty cannot tolerate racial discrimination. It appears that one of the scale’s plates has an added weight, while the weight of the other one is reduced.

### **3 CULTURAL PRACTICES AND DIVERSITY**

Despite the secularity of the State and pluralism as a characteristic of Brazilian society, which should guide the acceptance of pluriconfessionality (PIRES, 2012), the fact is that there is a stigmatization of Afro-Brazilian beliefs. That is why the 1988 Constitution protected the manifestations of popular, indigenous and Afro-Brazilian cultures, and those of other groups participating in the national civilizing process (art. 215, § 1), as well as determined the democratization of access to cultural goods (art. 215, § 3, IV) and the enhancement of ethnic and regional diversity (art. 215, § 3, V).

It aims at mutual recognition and objective and intersubjective equal participation, as defended by Nancy Fraser (2010). Intersubjective parity participation “prohibits cultural patterns that systematically depreciate some categories of people and the qualities associated with them, either by

overloading them with an excessive ‘difference’ from others, or by failing to recognize their distinctiveness” (FRASER, 2010, p. 181).

The analysis of a possible conflict between religious freedom and the practice of animal cruelty cannot be based on an order of cultural values that gives Afro-Brazilian religions a despicable place and Eurocentric Christian religions the status of adequacy and correction. It results in the dismay of a state intervention to restrict a certain religion; the State can intervene only to safeguard all of them, because “[the] democratic perspective of pluralism may demand state intervention precisely to provide conditions of equality, when the Public Power must interfere, but precisely to ensure religious competition” (ROTHENBURG, 2014b, p. 44). In the expression of Luís Roberto Barroso (2012), “it means that the State should not choose sides when different reasonable conceptions of the good life are in conflict.”

In view of this scenario, supporters of African-based religions emphasize that: a) the sacrifice or sacralization is respectful, performed only by a person chosen and prepared by the worshiped deity to perform such a task; b) there is a special care for the animals that will be sacralized, as the sacrifice must be performed without offering suffering to the animal, as it is considered sacred and must not suffer cruelty and negativity; c) the consecration reaches, in addition to the sacralized object, both the person in charge of the ceremony (the sacrificer), and the ‘sacrificant’ (faithful who provides the victim of the sacrifice), who can be an individual or a collectivity (COELHO; OLIVEIRA; LIMA, 2016; ORO; CARVALHO; SCURO, 2017).

Thus, the constitutional rule of respect and appreciation of cultural diversity militates in favor of the ritual sacrifice of animals by Afro-Brazilian religions, as the pluri-ethnic and multicultural character of Brazilian society is constitutionalized. It is necessary, therefore, both to protect non-hegemonic cultural forms and to promote coexistence between different cultural manifestations. This “cultural polyfacetism” must develop its different spheres “simultaneously in parallel, both with exchanges of the elements inherent in each form, as well as competing one culture with another,” notes Peter Häberle (2000, p. 31).

In Germany, in 2002, the Federal Constitutional Court stated that a Muslim butcher could slaughter animals in a ritual way, as the norms that ensured professional practice could be added to those inherent to religious freedom. The butcher had been accused of violating provisions of the German

Animal Protection Act, since, in his professional activity, he followed the Islamic religious precepts that determine the sacrifice of animals without previous desensitization. “According to the aforementioned Court, the sticking without previous stunning consisted of ‘a fundamentally religious attitude,’ which includes Muslim Sunni believers and obliges them to sacrifice animals as ordered by the rules of their religion” (COELHO; OLIVEIRA; LIMA, 2016, p. 65-66).

The European Court of Human Rights, when judging, on 06/27/2000, the *Cha'are Shalom Ve Tsedek v. France* case, stated that the right to religious expression, provided for in Article 9 of the European Convention on Human Rights, protects the practice of religious slaughter. However, he rejected the request submitted by the Jewish liturgical association *Cha'are Shalom Ve Tsedek* to obtain the necessary certification to practice the slaughter ritual according to the strict prescriptions required by his religion, under the justification that “[the] right to demonstrate does not imply the guarantee of personally participating in the execution of the slaughter or the subsequent certification process [...] as long as the followers of that religion are not prevented from obtaining meat in any other way, in accordance with the standards of their beliefs” (BRASIL, 2018, p. 4-6).

It is not ignored that the environmentalist concern also represents a relevant cultural fact of contemporary constitutionalism, that is, the ecological dimension is part of the idea of Constitution. Thus, the prohibition of submitting animals to cruelty meets a cultural expectation and makes up public morality. In this measure, the favorable weight of the cultural argument to the ritual practices of Afro-Brazilian religions diminishes, which are partially neutralized in their own sphere (culture × culture). However, while the environmental concern is general and corresponds to a broad cultural pattern, the ritual slaughter of animals is a manifestation of non-hegemonic culture, deserving special attention. Furthermore, it is necessary to verify to what extent this cultural practice of ritual animal sacrifice does not imply cruelty.

#### **4 RIGHT TO FOOD?**

The consumption of animals slaughtered ritualistically still requires the consideration of the fundamental social right to food, expressly provided for in art. 6 of the Brazilian Constitution, and may represent an additional weight in favor of this religious practice.

It is not just about body food, nor just human food, since there is still “the need for sustenance from the divinities themselves who would depend on these practices to remain powerful and benevolent” (TEIXEIRA, 2015). This evokes the cultural dimension present in the consumption of the sacrificed animals, and which is recognized by certain traditions. The consumption of slaughtered animals occurs, then, for religious and cultural reasons that incorporate the practice of sharing food between the community and their ancestors.

For religions of African origin, food is understood as food for the body and also for the spirit. Therefore, “the consumption of the flesh of an animal that was offered is seen as a form of communion with the gods,” clarify Coelho, Oliveira and Lima (2016, p. 61), since not all parts of the animal are offered to the deities, but only gizzard, liver, heart, feet, wings, head and blood. Thus, most of the meat is consumed by the faithful and visitors, with no waste. “The transformation of the sacrificed animal into food therefore represents a dynamic of solidarity between those involved in the ritual and everyone can enjoy the food.”

The idea of food consumption is expressed on two levels, because “the deities eat, they need to be fed. [...] When a spiritual entity is not fed, it dies, it ceases to exist” (VIDA, 2007, p. 298). There is consumption by spiritual entities and all those, initiated and not initiated, who are present and want to feed on the banquet that celebrates life (VIDA, 2007).

Even if consumption by the faithful does not occur, the ritual importance of slaughter remains, which remains entirely justified as an expression of religious freedom. In this sense, the conditioning made by Min. Marco Aurélio, reporter of RE 494,601 (BRASIL, 2018), of the constitutionality of animal sacrifice in religious rites of any nature to human consumption of meat seems to be reductionist. The requirement that ritual slaughter be linked to the consumption of meat seems to put the idea of the sacred in the background and the importance of immolation for the connection of the followers of these religions with the gods they venerate. Furthermore, it sounds like an approximation to Jewish (Kosher slaughter) and Islamic (Halal slaughter) practices, which require obedience to animal slaughter methods determined by religious precepts, for meat consumption.

## **5 ANIMAL RIGHTS AND THE PROHIBITION ON CRUELTY**

Animal rights are enshrined in the Brazilian Constitution not only by expressly prohibiting cruelty, but also by virtue of the affirmative precept

of protection of fauna, contained in the same item VII of § 1 of art. 225. More broadly, though implicitly, the Constitution seems to enshrine the dignity of other living beings, since it adjusts the dignity of “the human person” in art. 1º, III (as the foundation of our republic), suggesting that it is not an exclusive attribute (ROTHENBURG, 2014a).

In this new context, which escapes the limitations imposed by an exclusively anthropocentric framework, there is the concept of dignity based on sentience, that is, on the characteristic that animals have of “thinking, perception of themselves and the world around them; presenting sensory senses, [...] as well as practical intelligence (practical autonomy) and other psychic qualities that allow an effective relationship with the outside world [...]” (VIOTTO, 2016, p. 45-46). Therefore, there is an attribution of “value for itself” to nature and the environment (BARRETO; MACHADO, 2016).

After all, as Judith Butler (2018, p. 120) points out, “we are, even though we are distinct, connected to each other and to living processes that go beyond the human form.” In fact, “the deepening of ecological awareness and the evolution of the law made it possible to conceptualize animals as ‘sensitive’ beings,” which gives them an “undeniable interest in not suffering,” asserts Paulo Affonso Leme Machado (2018, p. 176).

The Supreme Federal Court has affirmed the prohibition of subjecting animals to cruelty in cases of popular cultural practices, resolving the conflict of constitutional assets in favor of an ecologically balanced environment. There were at least three occasions when there was such a statement:

- a) extraordinary appeal 153.531-8/SC, by rapporteur Min. Marco Aurélio, tried on June 3, 1997. It discussed the ox party, traditional celebration of Azorean origin, similar to a bull race, held in Santa Catarina;
- b) direct actions of unconstitutionality 1,856/RJ and 2,514-7/SC, respectively, in view of laws of Rio de Janeiro and Santa Catarina States that authorized the cockfighting;
- c) direct action of unconstitutionality 4.983/CE in view of the Ceará State law that authorized the vaquejada, a traditional celebration similar to a rodeo.

The last case, of vaquejada, revealed the weight of the northeastern cultural tradition and implied an institutional clash between the Judiciary and Parliament, and the National Congress, to reverse the decision of the Supreme Federal Court, approved Constitutional Amendment 96/2017 that, in order to give “authentic interpretation” to art. 225, § 1, VII (in fact,

there was an express limitation to the scope of this device), a paragraph 7 was added to that article so as not to consider sports practices that use animals to be cruel, as long as they are cultural manifestations, according to § 1 of art. 215 of the Federal Constitution, and which are registered as an intangible asset that is part of the Brazilian cultural heritage, and must be regulated by specific law that ensures the welfare of the animals involved.

But, in Machado's sharp criticism (2018, p. 177): "Cruelty is not transformed into benignity only by the effect of a law, even if constitutional, because a law does not have the power to transform 'water into wine,' breaking the natural order of things. "In this example, instead of a constitutional dialogue, we have "a 'screaming war,' in which Parliament simply seeks to replace the constitutional judicial interpretation by the parliamentary one" (BRANDÃO, 2012, p. 304).

In none of these cases was there any conflict with religious freedom, although the consideration opposed other traditional cultural phenomena, but of a playful nature. It is likely that the social importance of religion is greater than that of these events in which animals are subjected to cruelty, which would militate in favor of the forbiddance.

However, the prohibition of submitting animals to cruelty is a constitutional value enshrined in an express constitutional rule and is close to a fundamental right, related to a dignity inherent to living beings in general. When weighing with other constitutional assets, including religious freedom and equality (non-discrimination), it will be necessary to take this prohibition into due consideration. The concrete situations are what will indicate the presence and intensity of the cruelty, which could, yes, lead to the restriction of other rules of the Constitution that may conflict. An exaggerated argument would claim that human ritual sacrifice in the name of religious freedom cannot be admitted. It is true that practices that inflict serious and immoderate suffering on animals should not be admitted, with the prevalence of the ecological perspective.

It so happens that the ritual sacrifice of animals, at least with regard to that carried out by the Jews (Kosher slaughter), by the Muslims (Halal slaughter) and by the followers of Afro-Brazilian religions, is characterized by a concern to avoid the suffering of animals, which calls into question the very existence of cruelty. For religions of African origin, it is necessary that the animal is offered to the deities (orixás) in the best possible condition, with a dogmatic reason to avoid suffering and pain. As in Judaism and Islam, the person in charge of the slaughter has an important liturgical

function and receives careful training, developing expertise precisely to avoid cruelty: “[these] practices are carried out by an initiate prepared ritualistically for this purpose, the axogum,” explains Teixeira (2015). Such concern reinforces – instead of denying – the constitutional ban. It is almost sacrilege (or irony) to accuse this practice as cruel. For the purposes of normative balancing, the cruelty argument itself is neutralized or significantly reduced, that is, the weight of the “accusation” of cruelty is minimized.

Also refuting the connection between animal sacrifice and the practice of cruelty, Samuel Santana Vida (2007, p. 297) states that “there is no place from the theological point of view, from a ritualistic point of view, in the matrix religions for the suffering of animals, the suffering for the suffering.” The author also explains that in the religious tradition of African origin there is no dimension of “atoning for sins,” as in the Christian tradition, nor of “replacing the sinner, killing the animal in his name,” as it occurs in the Jewish tradition. Fábio Carvalho Leite (2013, p. 174) points out that “the suffering of the animal that is the object of sacrifice is the same as that of the animal slaughtered for consumption, and this cannot be a valid argument for a legal questioning of the religious rite, except, of course, if cruel treatment and greater torture is demonstrated in the first case than in the second.”

It can be seen, therefore, that the balancing exercise proposed here, offered by the ritual slaughter of animals by Afro-Brazilian religions, never neglects the important constitutional mandate that prohibits subjecting animals to cruelty.

## **6 BALANCING: HOW FAR RELIGIOUS FREEDOM CAN GO**

The complexity of contemporary societies and the strong pluri-ethnic accent of the Brazilian population generate concrete possibilities for conflict between constitutionally protected assets, many of them formulated as fundamental rights. Thus, it is necessary to start from the premise – radically democratic – that there are no absolute fundamental rights, which are immune from the influence of other fundamental rights (and other constitutionally protected assets). In this context, Alexandre de Moraes (2016, p. 50) states that: “Obviously, like other public freedoms, religious freedom does not reach an absolute level, therefore, any religion or cult is not allowed to act against the dignity of the human person, under penalty of civil and criminal liability.”



The Constitution of the Republic emphasizes religious freedom, in a multicultural and state secular context, but it also expressly provides, within the scope of ecological protection, that cruelty to animals is prohibited (art. 225, § 1, VII). Therefore, there is no way to fail to take this constitutional provision into account when balancing in view of the present normative conflict, which involves the ritualistic sacrifice of animals. Acts that subject animals to intense and unjustified degrees of suffering, characterizing cruelty, go beyond the constitutional limit of the exercise of rights and justify state intervention.

However, the religious practices in question, components of the liturgy of Afro-Brazilian religions, like the practices of other religions such as Judaism (slaughter Kosher or Kasher) and Islam (Halal slaughter), are particularly concerned with avoiding the suffering of animals. There are people especially in charge of sacrifice and methods for making death acceptable. Thus, in the religions of African origin, the least reasonable achievement of the constitutional asset in conflict is verified, one of the requirements of the rigorous application of the criterion of proportionality. Another limit, for example, would be the risk of extinction of the sacrificed animals. But, as explained by Flávio Carvalho Leite (2016, p. 173), studies find that “the sacrifices made in the cults of religions of African origin do not involve endangered species or those that enjoy special protection by the Public Power – hypotheses that would render practices illegitimate, even if religiously motivated.”

Animal sacrifice is an essential aspect of Afro-Brazilian religions, which, just as in relation to communities of faith in general, are composed of an unending whole of convictions (beliefs) and practices (behaviors), these being manifestations concretizing those. Jayme Weingartner Neto (2018, p. 272) highlights that “the conduct under consideration assumes structural relevance for such confessions, so its suppression would mean erosion of the essential content of the professed religion, with reflections on the content in human dignity.” Prohibiting the ritualistic sacrifice of animals means, in practice, making the practice of Afro-Brazilian cults unfeasible and, thus, banning such religions. The degree of affectation of the right to religion, in this specific case, seems unbearable, which should be avoided when handling the proportionality criterion.

By the way, the considerations of Jónatas Machado (1996, p. 223) fit perfectly: “religious freedom must protect religious conduct, freedom to act and self-conformity according to one’s own convictions, to a wide extent,

as much as allowed by a constitutionally healthy balancing of goods.”

When the Federal Supreme Court affirmed the prohibition of cruelty to animals (farra do boi<sup>8</sup>, roosters<sup>9</sup> and vaquejada<sup>10</sup>), religious freedom was not at stake, which in the present case constitutes a ponderous fundamental right to be taken into consideration. Indeed, with due respect for the other rights and assets involved, the ritualistic sacrifice of animals, as an essential practice of Afro-Brazilian religions, cannot be compared with traditional popular parties and events or gambling. In addition, while the sacrifice of animals in cults and liturgies of religions of African origin is done with a special concern to avoid cruelty, the binge of the ox, the cockfighting and the wailing cause intense suffering to the animals.

Law no. 11,915 / 2003 of the State of Rio Grande do Sul (with amendments to Law No. 12,131 / 2004) has a double and contradictory religious influence. By widely establishing the prohibition against the suffering and sacrifice of animals, it meets the perception of determined and influential religions that dogmatically reject Afro-Brazilian rituals. And, by establishing the exceptional permission of “free exercise of the cults and liturgies of religions of African origin,” the legislative change starts to contemplate these conceptions (historically discriminated). It can be seen that, by leaning towards the predominant religions – such as the law of the Municipality of Cotia (SP), referred to above – the gaúcho legislation, in its original version, stifled the practice of Afro-Brazilian religions (“minority”), while, with the exception of their services and liturgies, the norm does not interfere in the practices of those predominant religions.

What contradicts the fundamental right of religious freedom, in this case – as well as the principles of isonomy and state secularism, as well as the right to cultural manifestation -, is the restriction represented by the generalized prohibition against animal sacrifice. Jónatas Machado (1996, p. 231) has a precise lesson about this problem of restriction of fundamental rights: “The invocation of the right to religious freedom would only be justified in cases where the religious nature of the restriction’s grounds was suspected, namely, when this went beyond what would be reasonable to expect in light of weighing those rights with other constitutionally protected assets.”

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8 Extraordinary Appeal 153.531/SC, rapporteur for the judgment in Min. Marco Aurélio, judgment on June 3, 1997.

9 Direct Action of Unconstitutionality 1,856/RJ, rapporteur Min. Celso de Mello, judgment on 05/26/2011.

10 Direct Action of Unconstitutionality 4.983/CE, rapporteur Min. Marco Aurélio, judgment on October 6, 2016. The National Congress would overcome this understanding by approving Constitutional Amendment 96/2017, which adds § 7 to art. 225 of the Constitution.

It is plausible that there is no cruelty to animals in the practice of ritualistic sacrifice in the “cults and liturgies of religions of African origin.” Let us admit, however and to argue, that there is an impact in the scope of protection of art. 225, § 1, VII, of the Constitution. Then, analyzing the proportionality of this limitation to the spectrum of incidence of the standard, the analytical application of the criterion demonstrates that its various aspects or requirements are fulfilled. The permission for Afro-Brazilian religions to perform the ritualistic sacrifice of animals, considered as a restriction on the constitutional determination that animals do not suffer cruelty, in the traditional way the sacrifice is performed, is an appropriate measure, as it has the ensure religious practice; it is a necessary medium, because there is no other way (and it should be as appropriate as) to make religious practice viable; it is a proportional measure in the strict sense, since the sensitivity of animals is reasonably preserved, in comparison with the total unfeasibility that the prohibition of animal sacrifice means for the exercise of Afro-Brazilian religions.

Therefore, only if a practice that constitutes cruelty is unequivocally demonstrated, will it be up to the State to intervene in religious freedom to contain ritualistic sacrifice.

On the other hand, allowing the enactment of laws that more or less unconditionally prohibit the sacrifice of animals, as done by the Municipality of Cotia (SP), is to support the State to use one of its most incisive manifestations of power, which is lawmaking, to directly and disproportionately reach Afro-Brazilian religions, for which ritual slaughter is indispensable, linked to tradition and ancestry. Under the guise of general legislation, the State ends up constraining and penalizing certain beliefs using a legal-constitutional discourse to operationalize old forms of religious coercion and discrimination in the face of minority religions that compete with the predominant religions in Brazil (Christian).

It is not surprising, therefore, that, symptomatically, the application of prohibitive laws does not seem to be claimed in other situations of animal sacrifice according to religious precepts, which do not concern religions of African origin. This is what happens with the animal meat trade for Jewish and Muslim markets, according to Teixeira (2015): “Brazilian agribusinesses focusing on the foreign consumer market are specializing in carrying out religious slaughter, to win over people in whom faith also rules eating habits. “It is clear how discriminatory the edition and application (selective) of laws that prohibit the ritual sacrifice of animals in Brazil. So,

“if slaughter in slaughterhouses differs from slaughterhouses, it is simply because it is quantitatively larger and qualitatively less respectful” (ORO; CARVALHO; SCURO, 2017, p. 247).

It is constitutionally legitimate to allow the sacralization of animals for religious purposes, insofar as the sacrificial ways of killing animals for food purposes (*Halal* and *Kosher* slaughter), non-sacrificial methods of killing animals for food purposes in general and, in certain cases, are allowed. cases, for medical and cosmetic research, as well as the use of animals for entertainment and work purposes. In none of these situations, however, are animals allowed to be subjected to cruelty and there is a state duty to protect animals against cruel treatment.

## FINAL CONSIDERATIONS

The analysis, by the Brazilian Supreme Court, of the unconstitutionality of the legislation that prohibits the ritualistic sacrifice of animals revealed an adequate weighting of constitutionally protected assets.

The right to belief and religious expression, provided for in art. 5, VI, of the Brazilian Constitution, since the prohibition of ritualistic sacrifice of animals makes the exercise of religions of African origin unfeasible.

The equality with which all persons must be treated also weighs in favor of permission, without discrimination of a religious nature (art. 5 of the Constitution). The widespread prohibition of animal sacrifice directly and disproportionately strikes adherents of Afro-Brazilian religions, especially Afro-descendants, causing odious discrimination.

The principle of secularity of the Brazilian State weighs in favor of the permission (Constitution, art. 19, I), which must give special protection to historically marginalized religions. In effect, the legal prohibition of ritualistic animal sacrifice disposes of state repression devices against Afro-Brazilian religions, unduly weakening them in the face of other more powerful religions.

The fundamental right of cultural identity also weighs in favor of permission, since religious belief and practice are cultural manifestations constituting the identity of people and groups. Religions of African origin are essential expressions of the cultural identity of a significant contingent of the Brazilian population, and the State is charged with protecting the manifestations of Afro-Brazilian cultures, in the express terms of art. 215, § 1, of the Constitution, with a view to establishing an environment of

coexistence between the various religious expressions. In this context, the rich cultural experience captured by the legislation of Rio Grande do Sul (and whose validity was affirmed by the Supreme Federal Court), by allowing the “free exercise of cults and liturgies of religions of African origin,” must be valued in the context of Brazilian federation.

In addition, there is no cruelty in the ritualistic sacrifice of animals in African religions, which weighs in favor of permission, given the care not to cause suffering to the animals as an objective of sacralization. To that extent, animal sacrifice must be considered a protected religious behavior and both the laws and the administrative and judicial decisions that affect the exercise of religious freedom are undue restrictions.

The balancing performed by the Supreme Federal Court in the judgment of the Extraordinary Appeal (RE) 494.601/RS, when deciding for the constitutional validity of the ritualistic sacrifice of animals, proved to be correct and does not disregard the prohibition of subjecting the animals to practices that subject them to cruelty.

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