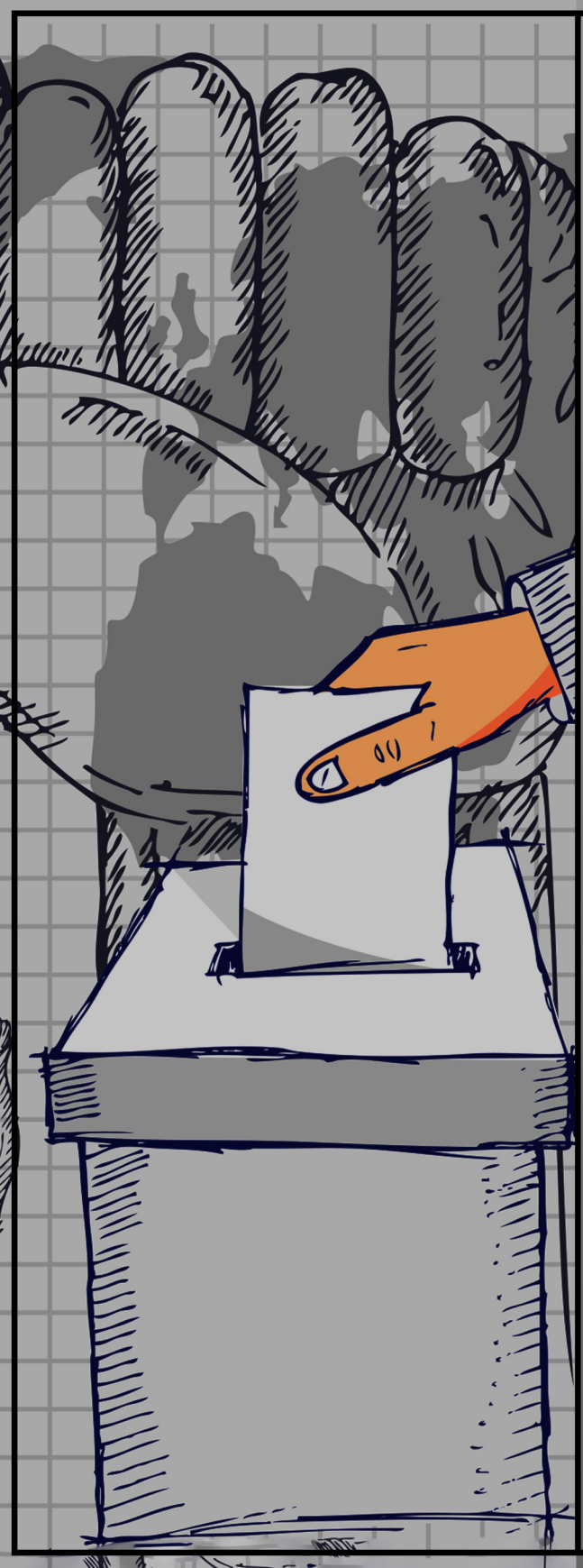

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ADAYLSON WAGNER SOUSA DE VASCONCELOS
(ORGANIZADOR)

Atena Editora
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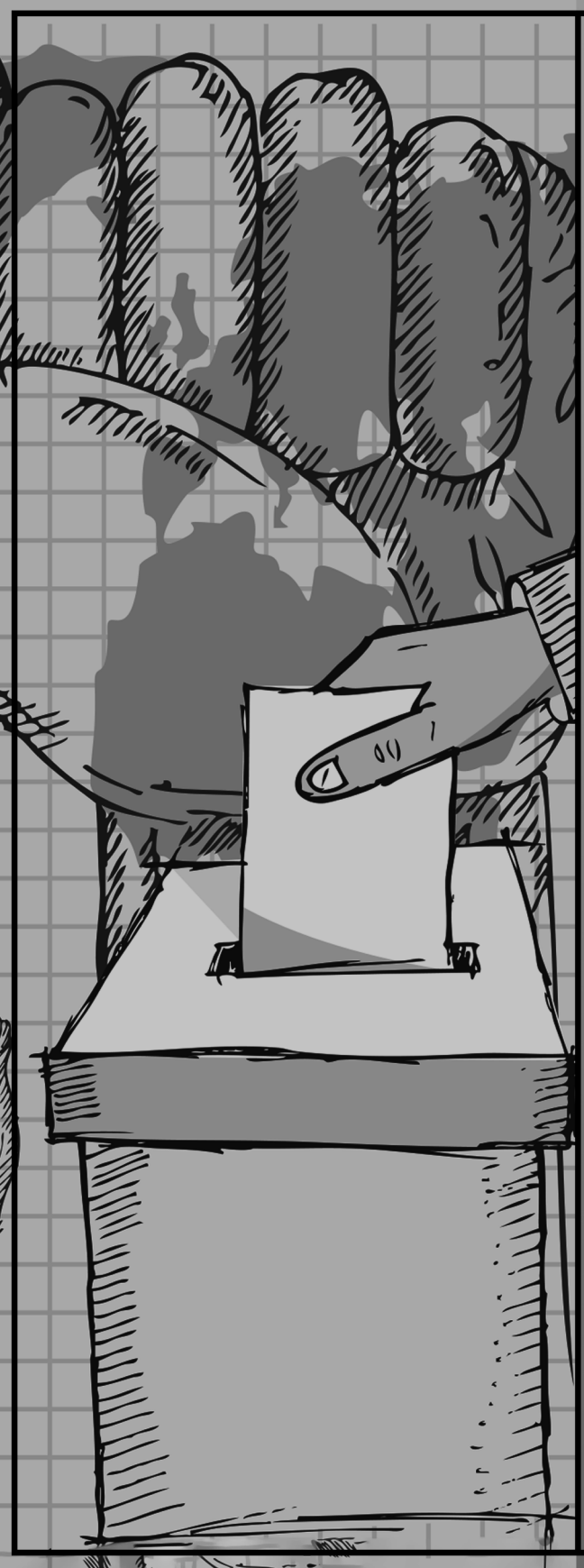

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Atena Editora
Ponta Grossa – Paraná – Brasil
Telefone: +55 (42) 3323-5493
www.atenaeditora.com.br
contato@atenaeditora.com.br

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APRESENTAÇÃO

Em **INSTITUIÇÕES DA DEMOCRACIA, DA CIDADANIA E DO ESTADO DE DIREITO – VOL. I**, coletânea de dezoito capítulos que une pesquisadores de diversas instituições, se faz presente discussões de temáticas que circundam a grande área do Direito a partir de uma ótica de cidadania que impacta na construção de um estado democrático de direito genuinamente inclusivo, diverso e de/para todos.

Temos, nesse primeiro volume, cinco grandes grupos de reflexões que explicitam essas interações. Neles estão debates que circundam constitucionalismo e neoconstitucionalismo; direito tributário e suas ressonâncias; direito à informação, proteção de dados, transparência e democracia; gênero, ações afirmativas e realidade indígena; além de refúgio e migração.

Constitucionalismo e neoconstitucionalismo traz análises relevantes como decisões sobre direito animal no panorama nacional e latino-americano, judicialização da geopolítica, a temática dos precedentes e do foro especial por prerrogativa de função.

Em direito tributário e suas ressonâncias são verificadas contribuições que versam sobre dedução das despesas educacionais, extrafiscalidade como mecanismo de redução de desigualdades e imunidade tributária.

No direito à informação, proteção de dados, transparência e democracia são encontradas questões sobre a informação como requisito de aperfeiçoamento do estado, proteção de dados, crítica ao utilitarismo em relação ao direito à informação e a transparência como elemento basilar para a democracia.

Gênero, ações afirmativas e realidade indígena contempla estudos sobre o questionar do paradigma binário, combate à discriminação no ambiente de trabalho, ações afirmativas a partir da realidade do Rio de Janeiro, políticas públicas de acesso para estudantes indígenas no ensino superior e multiculturalismo.

Refúgio e migração apresenta reflexões sobre proteção dos refugiados que pleiteiam refúgio e asilo político e a migração italiana ao Brasil.

Assim sendo, convidamos todos os leitores para exercitar diálogos com os estudos aqui contemplados.

Tenham proveitosas leituras!

Adaylson Wagner Sousa de Vasconcelos

SUMÁRIO

CAPÍTULO 1

A COMPARATIVE ANALYSIS OF THE EVOLUTION OF BRAZILIAN SUPREME COURT (STF) DECISIONS ON ANIMAL LAW AND THE CONSTITUTIONAL COURTS OF THE NEW LATIN AMERICAN CONSTITUTIONALISM COUNTRIES

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Jadson Correia de Oliveira
University of Coimbra. Pontifícia Universidade Católica de São Paulo - PUC/SP. Universidade Católica de Pernambuco - UNICAP. Escola Superior da Magistratura de Pernambuco – ESMAPE. Centro Universitário do Rio São Francisco – UNIRIOS. Universidade Católica do Salvador – UCSal.
http://lattes.cnpq.br/2155898544894802

Vanessa Estevam Alves
Faculdade Sete de Setembro – FASETE. Lawyer.
http://lattes.cnpq.br/7135949964635542

Raíssa Fernanda Cardoso Toledo
Faculdade Sete de Setembro – FASETE. Centro Universitário do Rio São Francisco – UNIRIOS.
http://lattes.cnpq.br/4670197430960040

ABSTRACT: This paper carries out a study on the evolution of the Brazilian Supreme Court's (STF) decisions on animal law concerning cockfights, *vaquejada*, and animal sacrifice in religious rituals, as well as analyzes it comparatively to the treatment of animals in the countries of the new Latin American constitutionalism. It is motivated by the need to demonstrate the growing change in the way animals are seen as sentient beings, and no longer as a thing. This study aims to answer the following question: What is the position of the Constitutional Courts of the countries that adhere to the New Latin American Constitutionalism in decisions that involve conflicts between fundamental rights and animal law? The dialectical approach was employed to carry out the paper, based on doctrinal research, studies related to the theme, and decisions of the Constitutional Courts. By analyzing the explicit prohibition of cruelty against animals in the Federal Constitution and the clear legislative intent to protect these living beings, it can be concluded that the STF places animal welfare above other constitutional rights, and declares unconstitutional violations of article 225 of the Constitution, with similar decisions by the Constitutional Court of Colombia.
KEYWORDS: Animal sacrifice, Religious rituals and Animal Law, STF's Decisions about Animal Law.

UMA ANÁLISE COMPARADA DA EVOLUÇÃO DAS DECISÕES DO STF ACERCA DO DIREITO ANIMAL COM AS CORTES CONSTITUCIONAIS DOS PAÍSES DO NOVO CONSTITUCIONALISMO LATINO-AMERICANO

RESUMO: O presente artigo realiza um estudo sobre a evolução das decisões do Supremo Tribunal Federal sobre direitos dos animais em relação as brigas de galo, vaquejada e sacrifício de animais em rituais religiosos, bem como, analisa-o, comparativamente, com o tratamento dispendido aos animais nos países do novo constitucionalismo latino-americano. Justifica-se pela necessidade de demonstrar a crescente

mudança no modo de ver os animais como seres sencientes, e não mais como coisa. Busca-se responder a seguinte indagação: Qual o posicionamento das Cortes Constitucionais dos países adeptos do Novo Constitucionalismo Latino-Americano em decisões que envolvem conflitos entre direitos fundamentais e o direito animal? Para realização do artigo foi utilizado o método dialético, tomando por base pesquisas doutrinarias, artigos relacionados ao tema e decisões das Cortes Constitucionais. Concluindo-se que, ante a explicita vedação a crueldade contra animais na Constituição brasileira e da clara intenção do legislador em proteger esses seres, o STF coloca o bem-estar animal acima de outros direitos constitucionais, declarando inconstitucionais violações ao artigo 225 da CRFB/88, existindo decisões semelhantes da Corte Constitucional da Colômbia.
PALAVRAS-CHAVE: Sacrifício de animais; Rituais religiosos e Direito Animal; Decisões do STF sobre Direito Animal.

1 | INTRODUCTION

Animal species were once seen as things and consequently were not rights holders, but today there is a growing endeavor for their de-objectification and the recognition of their sentience. Although many countries have not adopted this classification yet, some Constitutions already bring provisions to protect these defenseless beings. Therefore, given this new scenario, it is necessary to bring to light research on animal law in Latin America from the perspective of constitutional jurisdiction.

In Brazil, the decisions of the Brazilian Supreme Court (STF) on cockfights, *vaquejada* (a type of rodeo where two cowboys on horseback pursue and attempt to take down a bull by pulling on the animal's back body and tail in a marked area), and, recently, on the rituals of animal sacrifice in African-derived religions deserve attention. Such cases are highlighted because of the collision between animal law and cultural and religious manifestations, establishing the need for a judicial decision in a paradoxical scenario.

The STF's positions on animal law do not seem contradictory, even when in conflict with other rights and guarantees, considering they have placed animal welfare above customs and traditions so far, by prohibiting maltreatment and cruelty, especially those that occur in the form of spectacle or entertainment. It agrees with the decisions rendered in trials concerning cockfights and *vaquejada*, where it was emphasized several times by the ministers in their votes that the sacrifice of animals in religious rituals were performed without cruelty.

Thus, in the face of this STF position, the following question arises: What is the positioning of the Constitutional Courts of the new Latin American Constitutionalism countries in decisions that involve conflicts between fundamental rights and animal law?

In this regard, the choice of the countries that support such a movement did not occur randomly, but due to the fact that the main characteristics of this new Constitutionalism are: the Ecocentrism, the defense of cultural traditions, and the constitutionalization of

the indigenous cosmovision. Consequently, the agenda regarding the protection of the *Pachamama* and the good living is particularly relevant, and the Constitutional Courts of those countries must use such interpretative vectors at the time of the decision.

Furthermore, it is significant to highlight that, although there is strong doctrinal disagreement, this article adopted the indication presented by Ruben Martinez Dalmau, when stating that the countries of the new Latin American Constitutionalism are: Colombia, Venezuela, Bolivia, and Ecuador. (DALMAU, 2019).

The dialectical approach was employed to carry out the paper, based on doctrinal research, studies related to the theme, and Boolean Search on the decisions of the Constitutional Courts, reaching the conclusion that the Constitutional Court of Colombia faced very similar issues and sought the protection of animals, even with some difficulties. In contrast, no equivalent decisions were found in the Constitutional Courts of Venezuela, Ecuador, and Bolivia, even the last two countries being recognized for their Ecocentrism practices.

2 | HISTORICAL NOTES ON THE RELATIONSHIP BETWEEN HUMANS AND ANIMALS

First and foremost, it is necessary to clarify that the discussion on the relationship between human beings and animals is quite old. Philosophers like Pythagoras and Aristotle had already discussed and defended theses on this complicated relationship, as well as St. Augustine, St. Thomas Aquinas, St. Francis of Assisi, Descartes, Voltaire, and Montaigne (BARATELA, 2015) also left their opinions on the subject.

Baratela (2015, pp.18-19) recalls that in ancient Greece, the school of Pythagoras encouraged its disciples to treat animals with respect because the soul that inhabits the human body today could return inhabiting an animal or a plant. Thus, hurting an animal would be the same thing as hurting a human. Alcmeon, in his turn, presented himself as an opponent of this way of thinking, since he believed in man's superiority because of his ability to think, as the other creatures were only able to perceive. Aristotle, for his part, preached the existence of animals to serve man, as properties.

However, the thought of philosopher René Descartes (2006, p.57) is darker, as he claimed that animals would only be automatons. This thought served as a basis for experiments on animals, dissected while still alive; the cruelty against animals led to criticism, most notably the philosopher Montaigne (1972, p. 208) stood out when he said that "we owe justice to men and mercy and kindness to other creatures that may be capable of receiving it. There is some relationship between them and us, and some mutual obligation."

Animals were then objectified long ago, considered to be deprived of consciousness, irrational and soulless beings, which are some of the reasons used to justify their supposed inferiority to human beings and the cruelty directed at them.

But a growing wave emerges fighting for animals, alongside trends developed with the intention of de-objectification, the recognition of these beings as subjects of law and their sentience.

In this context, to consider that animals are sentient beings means to say that they possess the capacity to feel sensations such as pain, cold and warmth, and feelings (joy, fear, and anguish) in a conscious way. However, in many countries, they have still been considered things.

This view has been gradually modified so that the civil codification of some countries has changed in order to recognize the sentience of animals or merely to state that they are not things, as occurred in Portugal, France, and New Zealand. Moreover, although the Brazilian Civil Code still treats animals as things, they are already working on bills to amend them in this regard.

The concern about the rights of these sentient beings is becoming more and more evident, not only in the codes but also in the Constitutions themselves, highlighting here the recent inclusion in the Charters of Ecuador (2008) and Bolivia (2009) on the rights of nature, *Pachamama*, where animal rights are covered.

In fact, some Latin American countries are starting to take a fresh look at animals, a protective and guarantor vision, even when they do not consider them subjects of rights or when they still consider them as things, as is the case in Brazil.

Before this new perspective of animal law, it is worth introducing some of the discussions in the Brazilian Supreme Court that involved animal law in conflict with cultural traditions and other fundamental rights and, therefore, an object of great repercussion.

3 | ANIMAL LAW IN DECISIONS RENDERED BY THE BRAZILIAN FEDERAL SUPREME COURT

History shows that the view on animal welfare has changed throughout time, according to the period, the region, and the animal. Nonetheless, animal treatment as something at the disposal of their owners, at the mercy of human beings, is also the rule.

But, as well as many parts of the world, animals have become a subject of concern by Brazilian legislators, who dedicated an item of Article 225 of the current Federal Constitution for animal protection, resulting in the prohibition against cruel treatment. As a consequence, they are processing bills that seek to amend the provision of the Brazilian Civil Code that still treats animals as a thing.

Therefore, on August 7, 2019, the Brazilian Senate approved Bill 27/2018, which determines that non-human animals have a sui generis legal nature, are subject to impersonal rights deserving of jurisdictional guardianship, and their treatment as a thing is forbidden, thereby reinforcing the constitutional text itself. However, this bill still needs to return to the Lower House of the National Congress of Brazil, due to the modifications

suffered. It is worth noting that Bill 351/2015, which deals with the issue, also got approval in the Senate and is still awaiting a vote in the Lower House.

The fact is that this new approach has brought discussions in the legal field, since the animals now have differentiated treatment, in addition to the constitutional prohibition against maltreatment and the protection guaranteed in article 32 of Federal Law 9.605/98. Moreover, being part of this new scenario of the relationship between humans and animals, the judiciary branch has now decided disputes over the custody of pets. The Superior Court of Justice (STJ) addressed the right to visit pets in the Special appeal (REsp) 1. 713.167-SP, judged on 06/19/2018, with the understanding that "in the dissolution of a family entity, it is possible to recognize the right to visit a pet acquired in a stable union, demonstrating the relationship of affection with the animal. (STJ, Case Law report, No. 634, 2018).

Despite that, it is worth mentioning the decisions of the Brazilian Supreme Court, which is the highest court on the constitutionality of laws and normative acts, involving allegations of violation of item VI, paragraph 1, of article 225 of the Federal Constitution. Therefore, such decisions deserve analysis to identify their evolution over the years and the criteria used in each decision-making.

3.1 The Direct Action of Unconstitutionality (ADI) 1856 and the consolidation of the understanding in the Brazilian Supreme Court (STF) that animals are sentient beings

The cockfights are common knowledge nationwide, and despite being prohibited, this practice is still usual in several regions of the country. Although it had not been regulated or forbidden for a long time, it is well known that the birds participating in what some call cultural manifestation or sport, win when the other bird dies or is exhausted to such an extent that it cannot even stand up. This practice in itself constitutes cruelty directed to the animal, which before the dispute was taken to processes that can be considered as torture sessions.

Despite the explicit cruelty against these sentient beings, state laws were enacted to regulate such competitions, such as the Rio Grande do Norte state law No. 7,380/98, examined in ADI 3776, Fluminense state law 2,895/98, and Santa Catarina state law 11,366/00. All decisions are relevant. However, there is a specific analysis of ADI 1856 for reaffirming the en banc position in ADI 2514 and ADI 3776, presenting some pertinent aspects that led to the validity and to the ratification of the unconstitutionality of the laws that aimed to regulate cockfights.

ADI 1856, in turn, was proposed by the Federal Attorney General in 1998 to question the legal-constitutional validity of the Fluminense state law no. 2.985/98 over the allegation of an offense to article 225, caput, combined with § 1, item VII, of the Federal Constitution.

The main arguments for invalidity of the claim formulated in the case include the allegations of the impossibility of producing evidence of cruelty in the abstract control of

constitutionality, non-inclusion of domestic and domesticated animals in the scope of the constitutional provision and not human interference since the cocks would fight by instinct.

It is important to note, in summary, that all the points listed above were reviewed and overcome, which is why the reasons that justified the validity of the action will be analyzed.

Justice Celso de Mello stated in his vote that "the prohibition of submitting animals to cruel practices covers all specimens of fauna, even when domesticated and in captivity." He also affirmed that the act involves "unquestionable cruelty against birds of the fighting breeds" in "competitions promoted by violators of the constitutional order and environmental legislation", and "to qualify the cockfight as a sporting activity or cultural practice is a pathetic attempt to defraud the application of the constitutional rule." (STF, ADI 1856, 2011).

The justice also cited the text of the manifestation in the record of Civil Appeal No. 479. 743/PE, Regional Federal Appellate Court (TRF) of the 5th Region. It is worth transcribing passages that leave no doubt about the cruel nature of the practice: "the animal has the feathers of its neck, thighs and under its wings cut (*pelinchado*)" - "it has its dewlap and eyelids operated" - "another procedure consists of pulling it by the tail, dragging it in the shape of an eight" - "it is bathed in cold water and placed in the sun until it opens its beak, so tired" - "the rooster spends his life imprisoned in a small cage" - they fight with "fake metal spurs and silver beaks." It is evident that the roosters do not act by instinct but by human interference. (STF, ADI 1856, 2011).

Justice Ayres Brito, on the occasion, stressed that "to spill blood and physically mutilate an animal is not even the intended goal"; the end is the death of one of them, and that the Supreme Court could not miss the opportunity to express its "repudiation, based on the Constitution, to this type of practice, which is neither a sport nor a manifestation of culture." As well, he stated that "from the torture of a rooster to the torture of a human being is only one small step. Justice Cezar Peluso, in the same sense, added that "regulation is not only prohibited by Article 225" - "the law also offends the dignity of the human person, because it implies, in a certain way, a stimulus to the most primitive and irrational impulses of the human being." (STF, ADI 1856, 2011).

In the face of these last arguments, it is appropriate to highlight a phrase capable of showing that the concern of the justices is truly justifiable: "After they had accustomed themselves at Rome to the spectacles of the slaughter of animals, they proceeded to those of the slaughter of men, to the gladiators." (MONTAINE, 1972, p. 2017).

3.2 Trial of the Direct Action of Unconstitutionality (ADI) 4983 and the unconstitutionality of the *vaquejada*

The purpose of ADI 4983 was State Law 15.299/2013 of Ceará, which regulated the *vaquejada*. The Federal Attorney General, the plaintiff of the lawsuit, said that the law in question would not have constitutional backing because it violated the provisions of article 225, § 1, VII of the Federal Constitution, and in case of conflict between it and art.215 of the same constitution, that deserved higher authority.

The Federal Attorney General pointed out that during the vaquejada "a duo of cowboys, mounted on different horses, pursues to take down a bull by pulling its tail in a marked area," the tail is "twisted until the animal falls with its four legs up", demonstrating the brutal character of the practice. Moreover, he also said that it originally was a necessity to gather the cattle, but became a "highly profitable sports spectacle" and that the animals started to be caged, whipped, and instigated.

A technical report signed by Dr. Irvênia Luíza de Santis Prada and attached to the file concluded that "there were traumatic injuries to the runaway animals, including chances of ripped-off tails and the consequent involvement of the nerves and spinal cord, causing physical pain and mental suffering." Likewise, a study carried out by the Federal University of Campina Grande corroborates the report and reveals "irreparable damage also suffered by the horses used in the activity, considering the relevant percentage of occurrence of tendonitis, tenosynovitis, exostosis, focal and exertional myopathies, fractures and, distal tarsal osteoarthritis." (STF, ADI 4983, 2016).

The State Government of Ceará defended the constitutionality of the law before the "historical importance" of the practice, also affirming that the regulation of the "sport" would protect the constitutional assets referred to as violated. It was because the law obliged the adoption of measures aimed at protecting the physical integrity and health of the animals and that the *vaquejada* would have been recognized as a "rodeo event" by Federal Law no. 10,220/2001, and the practitioners, professional athletes supported by article 215 of the Constitution, as a cultural right, pointing out the relevance of the "sport" to the local economy.

Moreover, the State Government claimed that the sport is part of the culture of the region, recognized as the historical heritage of the northeastern people and that it is a fundamental collective right provided for in Article 216 of the Constitution. Additionally, it claimed that the defense of the environment to the detriment of culture should take place under the facts of the case and that it should not be compared to cockfights and Festivals of the Oxen, since, there is no cruelty against animals as occurred in the cases mentioned. (STF, ADI 4983, 2016).

Among the votes that asked for the validity of the claim formulated in the lawsuit, the words of Justice Marco Aurélio are worth mentioning, when he affirms that "there is not the slightest possibility that the animal does not suffer physical and mental violence when submitted to this treatment"; as well as those of Justice Roberto Barroso, when he states that "cultural manifestations with entertainment characteristics that submit animals to cruelty are incompatible with Article 225, § 1, VII, of the Federal Constitution, when its regulation is impossible enough to avoid cruel practices, without the activity itself being uncharacterized"; Finally, the positioning of Justice Rosa Weber, that "the State does not encourage or guarantee cultural manifestations in which cruel practices against animals are adopted, and in my opinion, the good protected in item VII, paragraph 1 of article 225 of the

Federal Constitution has a biocentric nature, given that the Constitution also gives intrinsic value to non-human forms of life, in this case, sentient beings." (STF, ADI 4983, 2016).

However, it was not the understanding of all the justices, since some voted against the validity of the claim. In this context, Justice Edson Fachin stated that "in our view, there is no reason to prohibit the event and the competition, which reproduce and technically evaluate the capturing skills of cowboys, developed in the rural area of this great country." Justice Gilmar Mendes added that "the unconstitutionality would result in the illegality of thousands of people who engage in this activity both on an amateur and professional level, as well as people who gather to see this type of spectacle. That is to say, to withdraw from these communities the minimum amount of entertainment they can sometimes enjoy." (STF, ADI 4983, 2016).

After close voting, the Brazilian Supreme Court (STF) Justices decided to grant the validity of the claim and declared the unconstitutionality of the Law.

Nevertheless, the discussion carried out in the Court did not prevent the practice of vaquejada, since its regulation occurred through Constitutional Amendment (EC) 96/2017. A paragraph was added to article 215 of the Constitution to say that sports with animals registered as cultural manifestation are not considered maltreatment, provided that regulated by a specific law that ensures the welfare of animals involved, the reason why on August 19, 2019, bill 8240/2017 passed. This bill aims to promote changes in Law No. 13. 364/2016, and includes the implementation of a program that ensures the protection of animal welfare in the *vaquejadas*, which must proceed to presidential approval.

It is relevant to point out that the STF will once again address the abovementioned discussed and already deliberated issue when considering the ADI's 5728 and 5772 filed regarding EC 96/2017. However, it is hard to speculate on a result, even after the decision of ADI 4983, since it came down by a narrow majority.

3.3 The Brazilian Supreme Court (STF) and the animal sacrifice in religious manifestations

In the most recent case involving animal law, the STF, when ruling on Extraordinary Appeal No. 494.601, had to consider the constitutionality of the State Law of the Brazilian state of Rio Grande do Sul No. 12.131/2004, which allows the sacrifice of animals in rituals of African-derived religions. The controversial topic made newspaper headlines and the decision of the Court was both applauded and criticized.

Partially, this combination of feelings that brought about negative criticism is based on the expectations generated by the previous decisions of the STF, which had placed animal rights above cultural manifestations.

The Extraordinary Appeal was filed against a decision rendered by the Court of Justice of the State of Rio Grande do Sul, after the denial to the request for a declaration of unconstitutionality of the abovementioned State Law which had inserted a provision in the State Code for Animal Protection, to exclude the prohibition of cruel treatment in the case of

sacrifice of animals in religious rituals and in cults and liturgies of African-derived religions. (STF. STF News, 2019)

The discussion involved confrontations concerning religious freedom, isonomy, secularity, the administrative or penal character of the exception inserted, and the existence of cruelty against animals. It should be emphasized that there were no disagreements among the justices regarding the constitutionality of the law.

Nevertheless, some votes were aimed at granting the law the interpretation in accordance with the Constitution, encompassing other religious rituals, forbidding the practice of maltreatment and conditioning the sacrifice to the consumption of the meat, as in the vote of the rapporteur, Justice Marco Aurélio.

In this regard, the Justice stated in his reasoning that "allowing the practice of immolation in religious rituals of all faiths, under the principle of isonomy, does not mean to remove the protection of animals embodied in Article 225 of the Federal Constitution." He also added that "the sacrifice of animals is acceptable if, once the maltreatment at slaughter is prevented, the meat is destined for human consumption because by doing so, the level of protection granted to animals by the Federal Constitution is preserved without the complete suppression of the exercise of religious freedom." Hence, the vote of the Justice was for not granting the Extraordinary Appeal. (STF, Extraordinary Appeal No. 494.601, 2019).

Subsequently, giving early notice of his vote, Justice Edson Fachin acknowledged the full validity of the legal text and voted for not granting the Extraordinary Appeal. For him, the specific mention of African-derived religions is not unconstitutional, once the use of animals is, in fact, intrinsic to these cults and they should be given even stronger legal protection, since they are the object of stigmatization and structural prejudice from society. (STF, Extraordinary Appeal No. 494.601, 2019).

It is also worth highlighting the vote of Justice Luís Roberto Barroso, when he stated that "according to the belief, only when animal life is sacrificed without suffering, can the communication between the sacred and temporal worlds be established," as well as, that "it is not a sacrifice for entertainment purposes, but for the exercise of a fundamental right which is religious freedom." Undoubtedly making a comparison with the case law based on the trials of the *Farra do Boi* ("Festival of the Oxen," a bloodsport that consists of beating a bull to exhaustion), *vaquejada*, cockfights, and dog fighting.

In terms of social participation, the explanations of the *amici curiae Oxê* Social Institute; the Charitable, Cultural and Religious Association *Ilê Axé Oxalá Talabi*; and the Temple of Umbanda and Charity Institution *Caboclo Flecheiro D'Ararobá*, pointed out that the purpose of using the animals in religious practices is to energize that being, so it can be consumed by the participants. They also emphasized that it is not allowed to use practices that injure the animal, because this would desecrate its vital energy; similarly, the Afro-Umbandista (from Afro-Brazilian religion *Umbanda*) and Spiritualist Federation of Rio Grande do Sul stated that "while the animal remains living in the *Casa de Santo* (the

temple), it cannot be maltreated, because it is considered to be sacred since it will serve as an offering to the *Orixá*." (STF, Extraordinary Appeal No. 494.601, 2019). The animal that will be sacrificed and will serve as an offering is, by no means, maltreated, as a matter of fact, it is taken care of until the moment of the slaughter, which is performed, in the same manner, by several other people who slaughter the animal specifically for consumption. (STF, Extraordinary Appeal No. 494.601, 2019).

Justices Ricardo Lewandowski, Rosa Weber, and Luiz Fux also considered the law constitutional. The last stated that, with this example of case law, the STF would be putting an end to the ongoing violence and the attacks to temples of African-derived cults - due to the prejudice that persists in Brazil, even though this country is rich in cultural diversity, and plural in its essence. Along the same lines, Justice Cármen Lúcia considered that "the specific reference to African-derived religions aims to confront the prejudice that exists in society, which does not only occur with religions but also to people of African descent." (STF, STF News, 2019).

Therefore, the Extraordinary Appeal was unanimously voted to be dismissed, considering that the inexistence of cruelty in African-derived religious rituals, for the sake of the preservation of the offering, was a factor of great relevance for the decision making. Even though the focus had been on religious freedom, secularity, and isonomy, the justices demonstrated that the inexistence of cruelty in the aforementioned rituals made them compatible with Article 225 of the Federal Constitution.

4 I ANIMAL LAW AND THE NEW LATIN AMERICAN CONSTITUTIONALISM

Colombia, Venezuela, Ecuador, and Bolivia are frequently mentioned countries in studies dedicated to the New Latin American Constitutionalism, and despite the disagreements regarding the inclusion of the Constitution of Colombia as part of the abovementioned constitutional movement, it was possible to verify a greater concern in decisions of their Constitutional Court about the protection of the life and the dignity of animals. Moreover, except for Colombia, the other supporting countries of this constitutionalist movement - including Brazil, a country of European cultural tradition – continue to perceive animals as things. However, some peculiarities must be observed.

In this scenario, the Constitutions of Ecuador and Bolivia have broken off with the anthropocentric character and put the nature as the subject of rights, the *Pachamama* (Mother Earth). Brandão (2013, pp. 46-47) recalls that a paradigmatic shift has taken place in the New Latin American Pluralist Constitutionalism, in which the human being is considered part of *Pachamama*, in a biocentric model that aims to achieve harmony between men and nature.

However, Machado Júnior (2016, p. 3) remarks that "despite the constitutional conception, the Ecuadorian Civil Code does not provide for any legal treatment to animals that is different from the one addressed to things and objects." Furthermore, María Belén

Hernández Bustos and Verónica María Fuentes Terán (2018, p. 108) have stated that "currently, there is no Animal Protection Law in Ecuador, although it exists in neighboring countries, such as Colombia and Peru." In Ecuador, there has only been a draft Organic Law for Animal Welfare, since 2014, known as "LOBA", which aims to reform article 585 of the Civil Code. In addition, no ruling of the Constitutional Court was found in situations similar to those faced by the STF.

Concerning the Bolivian experience, in 2015 a law was passed to protect animals against acts of cruelty and maltreatment, being noteworthy the exception brought in the final provisions that provide for this: "The use of animals in the activities practiced in traditional medicine – as well as in the rituals that are conducted according to the culture and traditions of indigenous nations and peoples – are exempt from the application of this law, and should be carried out avoiding unnecessary suffering and prolonged agony to them" (BOLIVIA, Law 700/2015). It is undeniable that the abovementioned exception reflects two of the most outstanding characteristics of the *nuevo* (new) constitutionalist movement, namely, plurinationalism and legal pluralism. Moreover, the law under consideration is severely criticized because it does not address the cruelty against wild animals, it merely states that a specific rule will be issued about them.

The Constitution of Venezuela does not make any specific mention of animal law, but there is a reference to the competence of the National Public Power to maintain animal and plant health, with respect to disease prevention. Furthermore, Carolina Pincheira Sepúlveda (2016, p. 100) states that Law No. 39.33815/2010, which regulates the Protection of Free and Captive Domestic Fauna, is the most relevant one in animal matters since its purpose is to establish the protection, control, and welfare of domestic animals, regulating their ownership, possession, management, use, and trading, achieving the so-called "Optimal Animal".

It should be clarified that the Constitution of Colombia does not allude to the protection of animals, however it is, currently, the only country that acknowledges animals as sentient beings – after the approval of Law 1774/2016 – "which is the reason for them to receive special protection against the suffering and pain caused by humans, defining as punishable behaviors in this respect and modifying the Civil Code" (SEPÚLVEDA, 2016, p. 103).

Furthermore, considering the problem posed by this research, three decisions of the Constitutional Court have been located; they specifically address animal rights and also demonstrate the evolution of the case law of the aforementioned Court, namely: judgment C-666/10, judgment C-283/2014 and judgment C-041/17, which are explained below.

On December 14, 2009, the Court accepted the request of the Colombian citizen Carlos Andrés Echeverry Restrepo to declare unconstitutional, among others, bullfights and cockfights, since they were incompatible with constitutional principles.

One of the author's arguments for the elaboration of the plea was that these cultural manifestations perpetuate a system of beliefs and values based on the maltreatment of

beings that are in a hierarchically inferior and helpless position. He also claimed that these practices contradicted the very social function of the animals, which according to him is represented in their exemplary or educational function, that is, "in the dissemination of values that our society insistently demands: respect for life, dignity in handling, compassion for the unfortunate, etc." (COLOMBIA, CONSTITUTIONAL COURT, C-666/10).

In 2010 the Constitutional Court, taking into consideration the reflections on religious freedom, eating habits of human beings, medical research and experimentation, and the protection of cultural diversity and its forms of expression, concluded in judgment C-666/10 that "it would be possible the undertaking of activities related to bullfights and cockfights that consisted of existing cultural manifestations", but the decision prevented the creation of new expressions of these activities. (STF. International Case Law Research, No. 7, 2018). Hence, it is possible to notice that the Court has created a limitation to religious freedom and cultural manifestations that may arise after the decision, aiming to prevent the creation of new practices that result in the suffering of animals, under the cloak of constitutional protection to religious or cultural freedom.

The final part of the abovementioned decision deserves to be highlighted because, while it partly accepts the request for animal protection, motivated by the need to defend the social interest manifested in the cultural traditions, it also limits this same freedom of manifestation of the citizens by not admitting the creation of other ones after the publication of the decision.

In 2014 the Colombian Constitutional Court rendered another decision with great social and cultural impact, a decision that placed animal rights, animal welfare, above the right to cultural manifestation, as it considered constitutional a law that definitively prohibited the use of wild, native or exotic animals in fixed or itinerant circuses.

Judgment C-283/2014 concluded that the traditions and customs that were established in time could not constitute a reasonable basis for perpetuating practices that are currently seen by society as incorrect and undesirable. Also, similar to the thinking of the author of the previous lawsuit, the judgment adds that cultural manifestations should help educate society about the importance of respecting the rights of living beings that share the planet with humans, as well as that animal abuse, in many cases, precedes an attitude of extreme cruelty, merely for fun or lack of compassion. (STF. International Case Law Research, No. 7, 2018).

It should be noted that even though it was a cultural manifestation, a tradition that has followed generations, the welfare of the animals was placed above it, and in this specific case there was no time delimitation, and the decision was valid for both existing circuses and for those that would still be created because tradition and culture would not justify the cruelty or maltreatment of animals.

The third decision of the Court was rendered in 2017, resolving to declare the expression "*menoscaben gravemente*" enforceable, provided for in Article 5 of Law

1774/2016, which added Article 339A to the Colombian Penal Code; and also declaring unenforceable paragraph 3 of Article 5 of the aforementioned law, which added Article 339B to the Penal Code, establishing a time limit of two years, from the notification of the decision, for the Congress of the Republic to adapt the legislation to the constitutional case law[1]. However, the declaration of unconstitutionality of the provision that exempted the application of the punishment provided for the crime of maltreatment of animals in the Penal Code, i.e. paragraph 3 of Article 5 of Law 1774 of 2016, made reference to Article 7 of Law 84 of 1989, which was the object of decision C-666/2010.

What seemed to be another step forward in the field of animal law, culminated as a setback, given that Daniel Fernando Gutiérrez Hurtado and Juan Pablo Osorio Marín requested the nullity of the abovementioned judgment for the following reasons:

> (i) infringement of the guarantee of the natural judge; (ii) infringement of the constitutional judgement rendered unappealable by non-compliance with the precedent established in the judgements C-666 of 2010, C-889 of 2012 and Notice 025 of 2015; (iii) infringement of the guarantee of constitutional judgment, by extending in case law a passive crime of a conduct that is not contemplated by the legislator; (iv) failure to observe the fullness of the appropriate manners of each attempt. (COLÔMBIA, C-041/2017).

Accepting the allegation of infringement of the constitutional judgement rendered unappealable, the nullity of the second numeral of Judgment C-041 of 2017 was declared; for the infringement of the constitutional power, ruled with the judgement in C-666/2010 and C-889/2012.

Nonetheless, despite finding these three decisions of the Colombian Constitutional Court that bear some resemblance to the discussions faced by the STF regarding the right to cultural and religious manifestations in conflict with animal law, no similar discussion was found among the Constitutional Courts of Venezuela, Ecuador and Bolivia, after a case law search was carried out on the website of their respective Constitutional Courts using the following phrases: a) *derecho de los animales*; b) *derecho animal*; c) *ley animal*; d) "*gallo de pelea*"; e) "*sacrificio de animales*" and; f) "*tauromaquia*".

1. **ARTICLE 5**. The following title is added to the Penal Code: TITLE XI-A: ON CRIMES AGAINST ANIMALS. SOLE CHAPTER. Crimes against the life and the physical and emotional integrity of animals. **Article 339A.** Anyone who, by any means or procedure, maltreats a pet, a tamed animal, a vertebrate wild animal, or an exotic vertebrate, causing it death or injury that seriously harm their health or physical integrity, will incur a prison sentence from twelve (12) to thirty six (36) months, and a special disqualification of one (1) to three (3) years from exercising any profession, trade, business or ownership related with animals and a fine ranging from five (5) to sixty (60) legally minimum monthly salaries. **Article 339B**. Punitive aggravating circumstances. The punishments established in the previous article will be increased by one half to three quarters, if the behavior is committed: a) With excessive cruelty; b) When one or various of the cited behaviors are perpetrated on a public thoroughfare or in a public place; c) When employing those deemed legally incompetent or underage minors or in the presence of these individuals; d) When sexual acts are committed with the animals; e) When one of the crimes established in the previous articles are committed by a public servant or someone who exercises public functions. **Paragraph 3**. Those who carry out the behaviors described in Article 7 of Law 84 of 1989 will not be guilty of the crimes established in this Law". (COLOMBIA, CONSTITUTIONAL COURT, C-041/2017).

5 | CONCLUSION

According to the analysis carried out, the animals, which used to be seen as inferior beings to humans, have gradually gained some recognized qualities. If they were once considered to be irrational and soulless beings, incapable of feeling pain or any other feeling, nowadays some countries have been recognizing their sentience, many of them advocating the recognition of these beings as subjects of rights.

This debate is also present in Latin American countries, including Brazil, and especially in those whose constitutions are considered as part of the New Latin American Constitutionalism, namely Colombia, Venezuela, Bolivia, and Ecuador. The representativeness of such countries in this research is relevant because this movement has constitutionalized cultural manifestations. Thus, in a possible conflict between cultural manifestations and animal law, what would be the most socially and constitutionally appropriate solution? For this reason, this investigative study analyzed the subject in the light of Brazilian constitutionalism as well as of the abovementioned countries, which come from different origins, in order to find similarities and distinctions among the interpretations presented by the respective Constitutional Courts.

In Brazil, even though the sentience of animals has not been explicitly recognized, the Constitution sets forth their protection, and the STF, by means of its decisions, has been reinforcing the understanding that cruelty against animals is prohibited, in respect to article 225 of the Federal Constitution of 1988 (CRFB/88), keeping as a criterion the existence or not of cruelty, whether in cultural or religious manifestations, to consider constitutional or not the rule that is the purpose of the lawsuits.

In Colombia, although there is no Constitutional article on the subject, the country has already recognized animals as sentient, and the decisions of their Constitutional Court show that the Courts have tried to protect these beings.

Hence, the Court initially recognized the cruelty perpetrated against animals in bullfights and cockfights, but only prohibited the creation of new manifestations of the activity, allowing the existing ones. Subsequently, the Court ruled in favor of the animals and this time made a point of emphasizing that its understanding would also apply to existing circuses. However, at the final judgment, although the Court declared unconstitutional the provision that excluded the application of punishment provided for the crime of maltreatment of animals in rodeo, bullfights, and cockfights, the decision was declared null for achieving the constitutional res judicata. Thus, even with the nullity of part of the decision, the Constitutional Court of Colombia has been trying to protect animals from cruel treatment, along the same lines as the STF.

Concerning the other countries that are part of the New Latin American Constitutionalism, it was demonstrated that although they resemble Brazil in terms of still considering animals as things, no decisions of the Courts were found on similar matters,

and they do not seem to have evolved with regard to animal law, especially in Ecuador, where there is not even a law that regulates any protection whatsoever.

Even though the existence of some progress in the field of animal law is acknowledged within the STF, the decision on the constitutionality of the *vaquejada* was quite heated – on the one hand because the "shows" generate jobs and, on the other hand, because they involve a lot of money – turning the decision into null after the Constitutional Amendment 96/2017, thus being necessary to wait for the position of the Supreme Court in the judgment of the Direct Actions of Unconstitutionality concerning the constitutionality of the aforementioned amendment, to verify whether the criterion of cruelty against animals will once again define the decision, reaffirming the position of the justices.

On the other hand, with regard to the subject of animal sacrifices in religious manifestations, the STF, despite having taken animal law into consideration, was concerned to guide the decision on the aspect of religious freedom, apparently leaving the subject that would be the main one to secondary importance.

Finally, it can be concluded from the comparative analysis of the decisions collected in this study that, even though animal law has been acknowledged as a social and constitutional principle, it is still not used as the main interpretative vector of the Constitutions when in conflict with cultural manifestations, being at various times relegated to the nonconstitutional level or conditioned to the fulfillment of certain requirements.

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ÍNDICE REMISSIVO

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