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Article

Self-Determination of Indigenous Peoples: Infanticide and the Right to Life

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ABSTRACT
The 1988 Federal Constitution recognizes the social organization, customs, and traditions of Indigenous peoples, while at the same time ensuring the inviolability of life and the comprehensive protection of children. The article analyzes the tension between these provisions in situations conventionally designated by the expression "Indigenous infanticide," without presupposing their uniform occurrence among the different peoples. It aims to understand the anthropological foundations associated with the practices described in the literature, to examine the applicable constitutional and international regime, and to establish legal parameters for the protection of children compatible with collective self-determination. It adopts bibliographic and documentary research, of a legal-dogmatic and hermeneutic nature, through the systematic interpretation of the Constitution, statutory legislation, international instruments, and anthropological and legal studies. The results indicate, first, that the expression used in public debate is not necessarily equivalent to the crime defined in Article 123 of the Penal Code, whose elements are specific. They also indicate that the international protection of cultural diversity coexists with express norms protecting life, preventing violence, and protecting the cultural identity of Indigenous children themselves. It is concluded that the state response must consider the concrete risks to life and integrity, the participation of communities, and the need for proportionate protective measures, accompanied by culturally appropriate social and health assistance. Self-determination does not constitute grounds for immunity from violations of individual rights, just as the protection of children does not legitimize assimilationist practices.
Keywords: fundamental rights; self-determination; Indigenous peoples; comprehensive protection of children; right to life.

Introduction

The 1988 Constitution of the Federative Republic of Brazil produced a significant shift in the legal treatment of Indigenous peoples. In contrast to the assimilationist paradigm that marked a substantial part of Brazilian constitutional history, oriented toward the progressive incorporation of the original peoples into the

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so-called "national communion," the constitutional order inaugurated in 1988 began to legally recognize cultural difference as a dimension deserving of protection.

Although previous Constitutions, especially from 1934 onward, incorporated provisions relating to Indigenous peoples and their lands, they remained linked, to different degrees, to the perspective of integrating these populations into the majority society. The current Constitution breaks, at least normatively, with this orientation by recognizing the permanence of their own forms of social and cultural organization, shifting the relationship between the State and Indigenous peoples from a predominantly integrationist logic to one founded on the recognition of diversity (Lopes, 2014; Oliveira; Teixeira, 2021).

This transformation finds expression especially in Article 231 of the Federal Constitution, according to which "Indians shall have their social organization, customs, languages, creeds, and traditions recognized," in addition to the original rights over the lands they traditionally occupy (Brasil, 1988). The constitutional provision is not limited to the protection of isolated cultural manifestations, since it recognizes the existence of their own forms of collective organization, belonging, meaning-making, and reproduction of community life. Article 232, in turn, recognizes the standing of Indigenous people, their communities, and their organizations to bring legal proceedings in defense of their rights and interests (Brasil, 1988). In this scenario, the 1988 Constitution ceases to conceive of Indigenous difference as a transitory situation destined to disappear through assimilation and begins to protect it legally as a component of Brazil's own social plurality (Oliveira; Teixeira, 2021).

At the international level, this process is reinforced by the consolidation of instruments aimed at overcoming assimilationist policies and affirming the autonomy of Indigenous peoples. The protection of cultural diversity comes to encompass not only the possibility of preserving customs, but also the right to participate in decisions that affect them and to preserve their own social, cultural, and political institutions. From this perspective, self-determination presents both political and cultural dimensions, involving, on the one hand, spaces of autonomy in the face of state intervention and, on the other, positive duties to protect the conditions necessary for the continuity of their own forms of collective existence (Alves, 2015). The United Nations Declaration on the Rights of Indigenous Peoples also places self-determination, cultural identity, and the preservation of their own institutions within the broader scope of the human rights recognized to original peoples (ONU, 2007).

The constitutional recognition of plurality, however, does not eliminate the problems arising from the coexistence, in the same legal space, of different conceptions of the person, the community, life, parenthood, responsibility, and socially accepted practices. It is precisely at this point that the controversy examined in this study arises. Certain practices recorded in Brazilian Indigenous communities have been characterized, especially in legal and political discourse, as "Indigenous infanticide." The use of this expression requires conceptual caution, since it does not necessarily correspond to the criminal offense of infanticide provided for in Article 123 of the Penal Code, whose configuration presupposes that the mother kills her own child, during or shortly after childbirth, under the influence of the puerperal state. In the anthropological context examined, the situations designated by the same expression have distinct cultural foundations and are related, in certain communities, to specific conceptions of social birth, personhood, belonging, corporeality, and kinship (Holanda, 2008; Santos-Granero, 2011).

Understanding this terminological difference is decisive to avoid two equally problematic reductionisms. The first consists of automatically transposing criminal categories constructed by state law onto cultural realities structured according to distinct frames of reference, disregarding the otherness and complexity of Indigenous cosmologies. The second consists of admitting that the invocation of tradition or collective autonomy is, by itself, sufficient to rule out any application of the fundamental rights recognized to the people who make up these communities. Anthropological criticism shows that apparently universal concepts, such as person, birth, family, and social life, may take on different contents among different collectivities, and warns of the risks of state intervention based exclusively on moral categories external to Indigenous communities (Holanda, 2008). This, however, does not settle the legal controversy, since self-determination itself is part of a constitutional and international order equally committed to the protection of human rights.

The tension becomes particularly sensitive when cultural autonomy is confronted with the protection of the life and physical integrity of children. Article 5, caput, of the Federal Constitution ensures the inviolability of the right to life, while Article 227 establishes a qualified duty of the family, society, and the State to ensure, with absolute priority, the rights of children and adolescents and to protect them from neglect, discrimination, exploitation, violence, cruelty, and oppression (Brasil, 1988). At the international level, the Convention on the Rights of the Child determines that States shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children (ONU, 1989). At the same time, the

international protection of Indigenous peoples prevents state intervention from being structured on assimilationist premises or on the presumption of the cultural superiority of the majority society. A constitutional question thus arises that cannot be adequately resolved either by simply denying cultural diversity or by absolutizing collective autonomy.

This complexity is also manifested in Article 4 of the Federal Constitution itself. In establishing the principles governing the international relations of the Federative Republic of Brazil, the constituent assembly enshrined, in item II, the "prevalence of human rights" and, in item III, the "self-determination of peoples" (Brasil, 1988). The simultaneous presence of these principles shows that the Brazilian constitutional order does not structure the protection of human rights and respect for self-determination as necessarily mutually exclusive values. On the contrary, both must be interpreted systematically, seeking to determine, in view of the concrete circumstances, the possibilities and limits of their harmonization. As Alves (2015) observes, the recognition of self-determination does not authorize its use as grounds for violating other dimensions of human rights. Correspondingly, the protection of fundamental rights should not function as an automatic justification for disregarding constitutionally protected cultural identities and institutions.

It is in this space of tension that the theory of principles takes on particular relevance. In Alexy's formulation (2012), the collision between principles is not resolved according to the logic of invalidity applicable to conflicts between rules, but by determining the concrete conditions under which one principle takes precedence over another. Balancing, therefore, does not presuppose establishing in the abstract a definitive hierarchy between the right to life and the self-determination of peoples. It requires, instead, identifying the scope of protection of the rights involved, the intensity of the interference produced in each of them, the relevant sociocultural circumstances, and the possibilities of protecting life that impose the least possible restriction on the autonomy and cultural identity of communities. The problem, therefore, is not to determine whether Indigenous culture is legally inferior to the right to life, but to establish whether, and under what conditions, a specific concrete cultural practice can be protected when it results in irreversible harm to a fundamental right held by a particularly vulnerable person.

The controversy acquires an additional dimension when analyzed through the opposition between the universalism of human rights and cultural relativism. While the universalist perspective upholds the existence of certain guarantees attributable to all human beings regardless of cultural belonging, the relativist approach warns that the concepts through which these guarantees are formulated are historically produced and may reflect value structures specific to the societies that developed them. In the debate on the practices traditionally characterized as Indigenous infanticide, this opposition is not merely theoretical. It directly interferes in defining the legitimacy and limits of state action. Holanda (2008) highlights the risks of criminalizing different ways of understanding personhood through exclusively Western categories, whereas Santos (2011) argues for the need to reconcile respect for cultural diversity with human rights protection parameters. The tension between these perspectives demonstrates the inadequacy of a priori answers and reinforces the need for dialogue between Law and Anthropology.

Based on this problem, the present study examines the legal limits of the self-determination and cultural preservation of Indigenous peoples in the face of practices traditionally associated with so-called infanticide, especially when their performance affects the protection of the life and physical integrity of children (Oliveira; Teixeira, 2021). The hypothesis examined is that cultural autonomy enjoys substantive constitutional and international protection and cannot be reduced by an assimilationist logic; however, its exercise finds limits when the concrete practice produces an irreversible violation of individual fundamental rights, especially in relation to subjects who are not in a position to consent to or oppose the conduct. This premise does not authorize indiscriminate state intervention, and the legal response must consider cultural diversity, intercultural mediation, and the construction of protective mechanisms that do not reproduce historical processes of violence, subordination, or erasure of Indigenous populations (Almeida et al., 2025).

The general objective of the research is, therefore, to analyze the relationship among the self-determination of Indigenous peoples, cultural preservation, and the protection of the right to life in the face of practices conventionally designated as Indigenous infanticide. As specific objectives, it seeks to understand the anthropological foundations attributed to these practices; to examine the constitutional and international regime for the protection of Indigenous peoples; to delimit the legal protection of life and the comprehensive protection of children; and to investigate the application of balancing and human rights as parameters for addressing possible collisions between collective autonomy and individual rights.

As for the methodological path, bibliographic and documentary research of a legal-dogmatic and hermeneutic nature is developed. The corpus comprises the provisions of the 1988 Federal Constitution relating to fundamental rights and Indigenous peoples, criminal and child protection legislation, international

instruments concerning human rights and Indigenous peoples, as well as legal works and anthropological studies directly related to the controversy. The selection of sources is guided by their relevance to the three analytical problems of the investigation: the conceptual delimitation of the practices, the scope of individual and collective guarantees, and the legal criteria for state action. The procedure combines systematic interpretation of normative texts, critical reconstruction of the arguments in the literature, and examination of the balancing of principles in Alexy's formulation (2012). Anthropological descriptions are used to contextualize the legal discussion, and not as evidence of the frequency, distribution, or generalization of conduct among communities. No fieldwork, interviews, or original statistical survey were carried out; consequently, the results consist of analytical-normative conclusions, and not empirical estimates of incidence.

The development of the study is structured around three interconnected axes. The first examines the historical and anthropological construction of the practices conventionally grouped under the expression "Indigenous infanticide," emphasizing the different conceptions of person, kinship, and social belonging present in certain communities. The second analyzes the right to life, the theory of fundamental rights, and the legal content of the self-determination of Indigenous peoples, seeking to delimit their respective scopes of constitutional and international protection. The third examines the manifestations of these practices in the Brazilian context and the possible effects of state intervention, in order, finally, to discuss the contribution of human rights, balancing, and intercultural mediation to the construction of legally adequate responses for the protection of children without disregarding the autonomy, identity, and diversity of original peoples.

Indigenous infanticide in anthropology

From a historical perspective, the term infanticide has been used to designate the death of a child, especially when committed by the parents; what has changed over time is the way in which different legal systems and societies have understood, tolerated, or criminalized this conduct. In the context of Indigenous communities, the analysis requires attention to specific cultural and social factors, which are indispensable to understanding the foundations attributed to the practice (Fernandes, 2014).

In the Greco-Roman period, the subject was already a matter of debate, although practices of abandonment and exposure of newborns were embedded in a certain conception of the social utility of the child and in the preference for male children. Abandonment, or exposure, drew criticism from philosophers of the time, who associated it, among other factors, with the avarice and greed of parents. Around the 5th century BC, infanticide was not treated, in certain contexts, as an offense subject to punishment. During the Roman Republic, the Law of the Twelve Tables, in addition to other norms, consolidated the authority of the paterfamilias over the family group (Madeira, 2015). In this context, the father was granted the power to decide on the life of a child born with deformities, based on the conceptions then in force regarding the child's legal capacity and social integration.

This is, therefore, one of the oldest historical records of the legal treatment of the matter, set in a period marked by permissiveness or reduced state disapproval (Maggio, 2004). In reaction to this conception, the strengthening of religious sentiment and of new forms of social consciousness contributed to the development of a stage of greater protection of the life of the newborn, described by Vicente de Paula Rodrigues Maggio as a "reaction in favor of the child." In the Middle Ages, with the expansion of the Catholic Church and the influence of Christianity in the Roman world, infanticide came to be equated with homicide, subjecting those responsible to severe penalties, including death.

In the modern period, the legal treatment of infanticide entered a new phase, marked by more humanitarian conceptions and by the shift, in certain systems, from a qualified form of homicide to a privileged (mitigated) offense (Fernandes, 2014). Under the influence of medical-psychological explanations, differentiated criminal treatment was recognized when the conduct was committed by the mother in circumstances related to childbirth. In Brazilian law, infanticide remains classified among crimes against life. Article 123 of the Penal Code describes the conduct of killing, under the influence of the puerperal state, one's own child, during or shortly after childbirth (Brasil, 1940). For Damásio de Jesus (2004), the influence of the puerperal state constitutes a distinguishing element in relation to homicide, an aspect that highlights the difference between the Brazilian criminal offense and practices observed in certain Indigenous societies, whose motivations are described as unrelated to the puerperium.

With the legal recognition of self-determination, a policy of forced integration into the majority way of life was not adopted in relation to Indigenous communities. The reception of a legal model in a given social context presupposes, to some extent, acceptability and the possibility of appropriation by the subjects to whom it is addressed (Foucault, 2015). Hans Staden, in Two Voyages to Brazil, highlighted the capacity of Indigenous peoples to adapt to the environment, both in the construction of villages and in movements to obtain resources,

as well as their readiness for the conflicts waged against colonizers. From the anthropological perspective presented in the study, it is argued that the persistence of certain customs in more isolated communities may be related, in part, to historical survival strategies passed down through generations (Staden, 2008).

It is important to highlight that the expression infanticide, when used in the Indigenous context, does not fully correspond to the offense provided for in the Brazilian Penal Code. In the former case, the practice is described as arising from different reasons, generally related to the condition attributed to the child and not to the puerperal state of the mother. The distinction is legally relevant because it rules out the specific foundation that structures the criminal offense of Article 123 of the Penal Code. At the same time, the vulnerability of the newborn requires that the analysis consider their inability to understand or influence the reasons for which their integration into the community may be refused.

Pierre Clastres (2014), in Society Against the State, analyzes the relationships between State and power and highlights that the exercise of political authority does not present itself in the same way in all societies, especially Indigenous ones. The colonial description of the peoples then classified as "savages" was constructed from Western conceptions of power and politics, strongly marked by hierarchy and authority. Anthropology, from this perspective, seeks to demonstrate that Indigenous societies are not devoid of norms or belief systems, but are structured according to categories distinct from those developed by the Western political tradition. This understanding is close to cultural relativism, according to which there is no single cultural standard capable of serving, automatically, as a universal reference for comparison (Souza; Carvalho, 2019).

In this context, the question arises as to what extent state intervention in the way of life of peoples endowed with principles and customs pre-existing the national legal order is legitimate. What is the limit of cultural freedom in the face of the fundamental rights whose protection is the responsibility of the State? In contrast to cultural relativism, universalism upholds the existence of human rights with a universal claim, a perspective present in the Universal Declaration of Human Rights (Souza; Carvalho, 2019).

In this debate, Bill No. 1,057/2007, known as the "Muwaji Law," was introduced, proposing measures to protect Indigenous people from practices considered harmful. The justification of the bill referred to a mother of the Suruwahá people who had reportedly sought to preserve the life of her daughter with a disability. After approval by the Chamber of Deputies, the matter began to be processed in the Senate as Chamber Bill No. 119/2015. According to the official Senate record consulted in November 2026, the bill remains under consideration in the Committee on Constitution, Justice, and Citizenship, awaiting the appointment of a rapporteur; it is not, therefore, a law in force (Brasil, 2007; Brasil, 2015). The legislative debate makes it possible to observe the tension between the duty to protect life and the risk of measures formulated without the participation of the affected communities, but the existence of the bill does not, by itself, prove the frequency of the practices mentioned in its justification.

Criticisms of Bill No. 1,057/2007 (PLC No. 119/2015) and of state intervention focus, among other points, on the risk of interpreting the "right to life as a fundamental guarantee" exclusively from a single political and moral system, presuming that distinct social forms contain flaws to be corrected. Among different societies, there may be diverse conceptions of life, individual, crime, kinship, and social integration. In some communities, the constitution of the person and the development of kinship ties are described as social processes whose relevance goes beyond the simple biological event of birth. For Marianna Holanda (2008), criminalization formulated under an abstract justification of defending human rights may affect historically conquered rights and produce conflicts in the social and family relationships of the villages.

According to this perspective, a child not recognized by their family as part of the kinship network may encounter concrete difficulties of social and emotional integration (Holanda, 2008). External imposition of acceptance, considered in isolation, does not ensure community life, emotional bonds, or material conditions of care. This does not mean, however, that the protection of the human person should be set aside. State intervention, when necessary, must be accompanied by support policies capable of offering real alternatives to families, reconciling the protection of dignity, physical integrity, and cultural diversity, without presupposing that a specific practice constitutes the defining core of Indigenous identity.

The report Tradição indígena faz pais tirarem a vida de crianças com deficiência física (Indigenous tradition leads parents to take the lives of children with physical disabilities), broadcast by Fantástico and published on the network's portal in 2014, reports the case of Pituko Waiãpi, from the Waiãpi village, rescued by the National Foundation of Indigenous Peoples (Funai) after being born with infantile paralysis. According to the report, he returned to the village after seven years in the care of another person, to whom his mother had entrusted him in the belief that this alternative would provide him with better living conditions. His return revealed difficulties in adaptation and the lack of sufficient structure to meet the needs arising from his condition (Globo, 2014). The episode suggests that the protection of the child is not exhausted by a one-off intervention; it requires state

support capable of offering families material and institutional alternatives that make the preservation of life and continued care possible.

A recurring criticism of "forced" contact with Indigenous communities relates to the risk of loss of cultural identity. At the same time, several peoples maintain relationships with external practices, goods, and institutions, incorporating elements associated with well-being, comfort, and social integration. These processes of interaction do not, by themselves, eliminate traditional practices, manifestations of spirituality, religious rites, or ancestral ties. As Brazilian citizens, Indigenous people also hold the freedoms of access to other cultures and religious manifestations. Restricting these possibilities may equally compromise the freedom of choice and the legal protection afforded to other citizens. Along these lines, cultural interaction should not be confused with incompatibility between societies (Santos, 2011); as Foucault observes, social influence only becomes consolidated when it finds, in the context of reception, some degree of acceptability among the members of the community.

Thus, anthropology, as a science dedicated to the study of the human being in its multiple dimensions, contributes to grounding the preservation of cultural diversity and to assessing the impacts arising from intervention in Indigenous traditions. The discussion developed in this work, however, focuses on a specific practice considered harmful to the lives of children. An approach of intercultural collaboration is therefore proposed, in which dialogue between the State and communities makes it possible to preserve cultural diversity and, simultaneously, to ensure dignified living conditions and the protection of the human person (Foucault, 2015).

The exercise of the cultural freedom of Indigenous peoples may, in certain situations, come into tension with central norms of the national legal system. The question is how self-determination, conceived to protect the rights of Indigenous peoples themselves, should be interpreted when its exercise may restrict the individual rights of community members. If the Federal Constitution guarantees the right to life to all persons subject to the Brazilian legal order, it is necessary to examine what grounds could justify different treatment in relation to Indigenous children. These questions guide the analysis developed in the following sections.

For Holanda (2008), considering that certain Indigenous communities do not recognize the child, in their early stages, as a fully constituted person, criminal liability formulated from exclusively Western categories raises problems of legitimacy. Criminalizing the practice in these groups could mean, in this reading, condemning forms of humanity structured according to distinct assumptions. The anthropologist highlights that Western societies also have their "moral boundaries," socially accepted and legally regulated, and discusses the existence of a "false moral dilemma," arguing that the debate should consider the "multiplicity of ways of existing." From this perspective, the role of the State would be to guarantee and encourage internal processes of collective deliberation, respecting the diversity of moral and ethical values and recognizing the tensions produced by cultural pluralism (Holanda, 2008).

Holanda (2008) also recovers the historical process through which Amerindian peoples were stereotyped as immoral, savage, or pagan, a representation that contributed to placing Indigenous cultures in a position of inferiority before the references of the majority society. According to the author, the historical formation of Brazil under strong Catholic influence contributed to the consolidation of negative moral judgments about ancestral beliefs and to the interpretation of certain practices as threats to the social order. In this process, her study identifies the role of a "political-legal discourse of the Christian West" in constructing images of cruelty and social disorganization attributed to Indigenous communities (Holanda, 2008).

In this context, culture constitutes an important element in the formation of human identity and participates in the construction of values, principles, and ways of understanding social reality (Santos, 2011). Religion and spirituality likewise play a relevant role in this process. The recognition of religious diversity in a secular State, however, does not exclude the application of norms aimed at protecting the person. Practices that endanger the physical or psychological integrity of individuals and are grounded in beliefs or traditions must, therefore, be critically examined, so as to reconcile cultural pluralism with the protection of fundamental rights, among which is the right to life.

From another perspective, universality is traditionally recognized as a characteristic of human rights and constitutes one of the grounds invoked to support their application to all persons, regardless of the cultural context in which they find themselves. On this subject, Maíra de Paula Barreto states: "I am in favor of human rights as something universal, common to all peoples. I believe that when there is a clash with culture, what prevails are fundamental rights" (Barreto, 2006). From this perspective, the claim to universality operates as a parameter for containing practices considered incompatible with human dignity, preventing the invocation of tradition, considered in isolation, from being sufficient to set aside the protection of essential rights.

Also noteworthy is the principle of non-waivability, according to which fundamental rights cannot be freely abandoned by their holders or by third parties on their behalf. Along these lines, neither Indigenous communities nor the State could simply set aside the legal protection of the right to life of Indigenous children. Cultural freedom and self-determination require harmonization with individual rights. Although the social reasons presented by anthropology are indispensable to understanding the phenomenon, practices that threaten the lives of vulnerable persons demand rigorous legal analysis and public policies capable of reconciling protection, inclusion, and respect for cultural singularities (Santos, 2011).

Anthropology and cultural relativism offer relevant contributions to understanding the influence of Western thought on original cultures. In this sense, Natália de França Santos states that "[...] it is important to observe, however, that morality has its roots in culture, but not only in it. The fact is that the human soul escapes merely social or cultural explanations" (Santos, 2011, p. 21). The analysis of the topic therefore requires simultaneous attention to cultural plurality and to the protection of individual identity, so as to prevent either of these dimensions from being used as an automatic basis for violating fundamental guarantees.

Fundamental rights and self-determination of Indigenous peoples

The enactment of the 1988 Federal Constitution was a relevant milestone for Brazilian redemocratization after the authoritarian period. In this context, fundamental rights were reaffirmed as structuring elements of the Democratic Rule of Law, encompassing not only the protection of individual freedom, but also other essential values, and becoming established as "[...] the basic foundation of the Democratic Rule of Law" (Rocha, 1998, p. 1). Each person, by virtue of their inherent dignity, is recognized as the holder of rights intended for their protection. Rudolf von Ihering, in The Struggle for Law, describes law as a reality in permanent transformation and struggle, "[...] a direct part of its nature and a condition of its idea" (Ihering, 2004, p. 22).

Fundamental rights and the protection of life as a first-dimension right

The historical construction of fundamental rights reveals, in its first dimension, a strong link to the limitation of state power and the protection of individual freedoms. With the development of constitutionalism, the catalog of rights was progressively expanded to incorporate social benefits aimed at promoting material equality and improving living conditions. Bobbio (2004), when examining the Universal Declaration of Human Rights in The Age of Rights, argues that the rights of man have a historical character and reflect the priorities and values predominant in a given social context. The classification into dimensions or generations is, in this sense, a didactic resource aimed at understanding the process of expansion and historical transformation of these rights.

Within the first dimension, civil and political liberties and the protection of the individual sphere against undue interference by public authorities stand out. At this level, the protection of life presents itself as an indispensable prerequisite for the exercise of other freedoms. Indigenous children, as persons subject to the legal protection of the State, are holders of rights that cannot be set aside by the decision of third parties. Public authorities are responsible for respecting cultural and religious freedoms and, simultaneously, ensuring minimum conditions for the realization of human dignity (Lovato; Dutra, 2015). From this perspective, the protection of life is a necessary condition for the exercise of other rights, including self-determination in its collective dimension (Bobbio, 2004).

At a later stage of this historical process, second-dimension rights were consolidated, related to material equality and to social benefits that require positive action by the State, contributing to the affirmation of the Social State model. The third dimension, in turn, is associated with fraternity or solidarity and encompasses interests of a collective or transindividual nature, the sphere in which the right to self-determination of peoples is usually placed. The so-called fourth dimension remains a subject of doctrinal disagreement and, depending on the classification adopted, may relate to the protection of human beings in the face of biotechnology, globalization, democracy, or pluralism (Lovato; Dutra, 2015).

Regardless of the systematization employed, the person remains the ultimate recipient of legal protection and of the legitimate forms of exercise of power (Rocha, 1998). The historicity of fundamental rights therefore requires a permanent capacity to adapt to social transformations, without departing from their purpose of promoting fairer, safer, and more dignified conditions of coexistence.

Along these lines, Bobbio (2004) states that there are no fundamental rights by nature, but rights historically constructed and subject to transformation as interests and social conditions change. The author observes that new declarations incorporate previously nonexistent social rights, which shows that the content of what is considered fundamental varies according to the era. This historicity does not eliminate the normative force of

recognized rights; rather, it indicates that the legal system needs to keep pace with relevant social changes and respond to the emergence of new legally protected interests.

Rudolf von Ihering highlights that the origin and transformation of law cannot be explained by a single source, as they result from continuous historical processes of conflict, adaptation, and renewal. The conception of law as progress is related to the social struggle for peace, security, well-being, and freedom in an organized legal order. The author summarizes this dynamic by stating that "[...] no renewal is possible for it without breaking with the past" (Ihering, 2004, p. 25).

Right to self-determination of Indigenous peoples and preservation of original customs

For a long period, the action of the Brazilian State in relation to Indigenous peoples was guided by assimilationist policies, based on the premise that their ways of life should be progressively integrated into national society. The 1934 Constitution expressly incorporated this orientation by granting the Union, in its Article 5, XIX, "m," competence to legislate on the "incorporation of forest dwellers into the national communion" (Brasil, 1934). The 1937 Constitution also regulated the protection of Indigenous lands, while the 1946 Constitution preserved a logic aimed at the gradual assimilation of these populations into the majority society (Lopes, 2014).

With the enactment of the 1988 Federal Constitution, this integrationist paradigm was substantially revised. Articles 231 and 232 came to recognize the social organization, customs, languages, beliefs, traditions, territorial rights, and procedural standing of Indigenous peoples, shifting legal protection from an assimilationist perspective to one founded on the recognition of the right to difference. In this new constitutional arrangement, self-determination is related to collective freedom and to the preservation of their own cultural, social, and political institutions, without this implying complete detachment from the state legal order (Oliveira; Teixeira, 2021).

From this standpoint, self-determination can be understood in political and cultural dimensions. On the one hand, it imposes on the State duties of abstention from undue interference; on the other, it requires positive measures aimed at preserving the conditions necessary for maintaining collective identity (Alves, 2015). International Labour Organization Convention No. 169 reinforces the overcoming of assimilationist policies and recognizes the right of Indigenous peoples to develop their own institutions. This protection, however, must be interpreted together with the individual rights of community members, since "dignity is the quality that defines the essence of the human person, or the value that confers humanity on the subject" (Ferreira et al. 2016, p. 28).

International Labour Organization Convention No. 169, incorporated in Brazil and currently consolidated in Decree No. 10,088/2019, makes this relationship explicit. Its Article 8, item 1, determines that due regard be given to the customs and customary law of the peoples concerned in applying national legislation. Item 2 recognizes the retention of their own customs and institutions where these are compatible with fundamental rights defined by the national legal system and with internationally recognized human rights, providing for the establishment of procedures to resolve conflicts. Thus, the conventional text authorizes neither the automatic elimination of community norms nor the complete exclusion of individual legal protection (OIT, 1989; Brasil, 2019).

The historical understanding of fundamental rights also helps situate law as an instrument in a permanent process of transformation. Ihering (2004) emphasizes that the realization of law depends on confronting the obstacles that hinder its effectiveness and that the protection of dignity requires continuous institutional action. From this perspective, legislation responds to the needs of each era and must be improved so as to prevent future violations. Formal equality, in turn, is not sufficient when detached from equity and from consideration of the concrete conditions of the protected groups. Admitting that the fundamental rights recognized to all persons do not extend to Indigenous peoples may, instead of promoting autonomy, reproduce historical mechanisms of exclusion.

Autonomy of original peoples and the right to life

Provided for in Article 5 of the 1988 Federal Constitution, the right to life constitutes a fundamental guarantee and a prerequisite for the exercise of several other legal positions. Its protection imposes on the State both duties of abstention and positive obligations of protection. The Statute of Children and Adolescents (ECA), in its Article 8, ensures pregnant women comprehensive prenatal, perinatal, and postnatal care within the Unified Health System (Brasil, 1990), placing the protection of childhood within a care policy that extends to the gestational and postpartum period.

At the statutory level, the same Statute establishes, in its preliminary provisions, duties assigned to the family, society, and the State aimed at realizing the fundamental rights of children and adolescents, among them life, health, education, dignity, respect, and freedom (Brasil, 1990). Based on this normative framework and on the 1988 Federal Constitution, Maíra de Paula Barreto argues that the State has a duty of comprehensive protection of children and must confront traditional practices that violate their physical integrity, while also considering the dynamic character of culture (Barreto, 2006).

The ECA itself offers an express example of articulation between child protection and respect for cultural difference. Article 28, Paragraph 6, determines that, in the placement of an Indigenous child or adolescent in a substitute family, their social and cultural identity, customs, and traditions be considered, provided they are compatible with fundamental rights; it also provides for priority placement within their community or with members of the same ethnic group and for the participation of representatives of Indigenous policy and anthropologists in monitoring the case (Brasil, 1990). The rule applies specifically to placement in a substitute family and cannot be converted into a generic authorization to remove children from their communities. It shows, however, that the protective system requires solutions sensitive to the child's cultural identity.

At the international level as well, the protection of life finds a relevant normative basis. The American Convention on Human Rights, promulgated by Decree No. 678/1992, protects life in its Article 4. The Convention on the Rights of the Child, promulgated by Decree No. 99,710/1990, recognizes the inherent right to life and the duty to ensure the survival and development of the child (Art. 6); protects their cultural identity (Art. 30); and determines the adoption of effective and appropriate measures to abolish traditional practices prejudicial to their health (Art. 24, item 3). These provisions must be read together, avoiding both individual lack of protection and the indiscriminate suppression of cultural ties (ONU, 1989).

In parallel, the United Nations Declaration on the Rights of Indigenous Peoples reaffirms that Indigenous individuals have the right to life and to physical and mental integrity (Art. 7), recommends measures to protect women and children against violence in conjunction with the peoples themselves (Art. 22, item 2), and recognizes the maintenance of customs and institutions compatible with international human rights standards (Art. 34). It is an international declaration, whose legal nature is not to be confused with that of a treaty incorporated into Brazilian law (ONU, 2007). The Indian Statute, in turn, includes, in its Article 2, V, a guarantee of the voluntary permanence of Indigenous people in their habitat, forming part of a normative framework historically oriented toward state protection (Brasil, 1973). Cultural preservation, therefore, does not exclude access to health services, assistance, and child protection.

From the perspective of legal pluralism, the controversy also involves the relationship between Indigenous normativities and the state legal system. Ihering states that "[...] the State cannot succeed in maintaining legal order without continually fighting against the anarchy that attacks it" (Ihering, 2004, p. 24). The constitutional protection of Indigenous values, customs, and traditions, provided for in Articles 231 and 232 of the Federal Constitution, must be harmonized with the fundamental rights of the child, without the solution of a concrete case automatically implying the complete invalidation of the other principle in tension (Oliveira; Teixeira, 2021). Bioethics adds to this discussion the centrality of the individual as the holder of their own existence and of decisions related to their life project.

Furthermore, the political and social organization of Indigenous peoples is based, to a large extent, on their own traditions and customs, which shows the presence of normative forms not reducible to state legislation. Part of the doctrine attributes greater predictability and legal certainty to written law when compared to customary law (Curi, 2012). This comparison, however, requires caution, since customary norms acquire meaning in the social context in which they are historically produced, transmitted, and practiced. Resolving the conflict therefore requires dialogue between normative systems and mediation mechanisms capable of preserving cultural diversity without setting aside state protection when fundamental rights are at stake.

Infanticide in Indigenous communities in brazil

The plurality of peoples existing in Brazilian territory prevents the formulation of a single "Indigenous Law" capable of uniformly representing all communities. Languages, traditions, forms of religiosity, and normative structures vary significantly among peoples, forming their own cultural identities. For this reason, the general and exhaustive codification of norms on internal practices, including those called infanticide, runs the risk of ignoring the diversity of normative systems and social relations existing in Indigenous communities (Flores; Ribeiro, 2016).

Reasons attributed to the practice in certain Indigenous communities

Before examining the reasons associated with the death of children in certain Indigenous communities, it is necessary to reiterate that the concept used in this context does not coincide with the criminal offense of Article 123 of the Penal Code. In Brazilian criminal law, infanticide requires the killing of one's own child by the mother, during or shortly after childbirth, under the influence of the puerperal state. In the anthropological descriptions analyzed, the practice may result from decisions attributed to the parents or to other members of the group and from grounds unrelated to the puerperium (Brasil, 1940). Some studies describe the existence of a distinction between biological birth and so-called "social birth," the process by which the child comes to be recognized as a person within certain kinship relations and cosmologies (Santos-Granero, 2011).

According to Santos-Granero (2011), the cosmologies of some Amazonian Indigenous societies admit relationships between the physical world and spiritual entities. In certain narratives, children may be understood as the result of relationships with spirits or enchanted beings, and certain bodily signs are interpreted according to this cosmology. In these situations, the newborn may cease to be recognized as fully human or be perceived as a threat to the physical and spiritual integrity of the community. This is an interpretation internal to the symbolic system described by the author and cannot be automatically generalized to Brazilian Indigenous peoples.

There are also accounts of different meanings attributed to the birth of twins. In some communities, twinship may be associated with a rupture of the social order, bad luck, maternal transgressions, or non-human origin; in others, it does not take on this meaning. Interpretations vary among peoples and, therefore, any description must be understood in the specific cultural context to which it refers (Pereira; Sebastião Filho, 2022).

In certain cosmologies, the social recognition of the child depends on processes of insertion into kinship relations and on their progressive participation in community life. Some studies mention that difficulties in locomotion, speech, or development may influence the assessment of their capacity to take part in subsistence activities. The case of Hakani is cited in the literature as an example of controversy involving the preservation of the life of a child with a disability and the political mobilization that later became associated with the so-called Muwaji Bill (Santos-Granero, 2011).

The specialized literature also records situations in which the child's sex, twinship, certain health conditions, or other culturally relevant factors are associated with decisions about their permanence in the community. These accounts coexist, however, with manifestations of resistance within the groups themselves, including by parents who choose to preserve the lives of their children. According to Silva and Machado (2015), in certain contexts, the decision may fall to the mother at the time of birth or be subsequently shared by the family. This diversity of circumstances highlights the complexity of the phenomenon and prevents it from being understood as a homogeneous practice or one indiscriminately widespread among the different Indigenous peoples.

As for the ways in which these practices are described, the available records point to variations related to the community, the reasons culturally attributed to the decision, and the age of the child. The literature mentions situations of abandonment, burial, and the use of substances from traditional medicine. Obtaining reliable empirical data, however, presents considerable difficulties, especially in isolated communities, which results in fragmentary and quantitatively limited records. This documentary limitation recommends special caution both in the formulation of generalizing public policies and in making claims about the incidence, frequency, or extent of these practices among Brazilian Indigenous peoples (Pereira; Sebastião Filho, 2022).

Effects of state intervention inside and outside the villages

Within Indigenous communities, ancestral and traditional norms may perform concrete functions of social organization, conflict prevention, and restoration of community order. Flores and Ribeiro (2016) identify the existence of sanctioning and restorative mechanisms that, although not to be confused with the state penal system, reveal their own forms of legality and accountability. This finding reinforces the need for intercultural responses capable of considering the internal normative structures of communities, especially when the limits of self-determination and the recognition of customary law are under discussion.

At the international level, the International Covenant on Civil and Political Rights recognizes the right of peoples to self-determination and to freely pursue their political, economic, social, and cultural development. State interventions that entirely disregard the autonomy of Indigenous communities may reproduce assimilationist practices and ethnocentric perspectives historically directed at original peoples (Lopes; Castro, 2023). Along these lines, Marianna Holanda highlights the need to understand certain practices from the

perspective of the communities themselves and of Indigenous mothers, including considering the material challenges related to caring for children with physical limitations in contexts marked by limited public assistance (Holanda, 2008).

From the perspective of the concrete effects of state intervention, it becomes necessary to consider the differences in values, purposes, and forms of accountability present in the normative systems in contact. When examining the sanctions existing in Indigenous communities, Flores and Ribeiro observe that they may take on functions "[...] restorative of the state of things as they were before the conduct considered wrong [...]" (Flores; Ribeiro, 2016, p. 11). This logic is not necessarily identified with the functions attributed to punishment in the state penal system and raises questions about the effectiveness of simply transposing sanctions provided for in the national legal system to community contexts endowed with their own structures of accountability and social restoration.

Equally, the self-determination of peoples is not absolute and must coexist with other principles recognized by international law, among them state sovereignty and the protection of human rights. The duty to respect cultural freedom does not, consequently, authorize the automatic setting aside of equally protected individual rights. The legal challenge consists of constructing a contextualized application of self-determination, capable of preserving cultural diversity without allowing its invocation to become grounds for violations of internationally recognized individual rights (Lopes; Castro, 2023).

Finally, practices linked to religiosity, ritual, and their own cosmologies may play a relevant role in the symbolic organization of the communities in which they are embedded. The controversy emerges when these internal references come into tension with constitutional and international parameters for the protection of the person. In these cases, the solution is not exhausted by the abstract balancing of principles and may require intercultural mediation mechanisms capable of promoting institutional and community dialogue. This approach makes it possible to seek the protection of life and individual integrity without disregarding the cultural preservation and collective autonomy of Indigenous peoples (Almeida et al., 2025).

Human rights as a guideline in the collision between fundamental rights

In situations of collision between principles, Robert Alexy (2012) argues that one of them may have to "yield" in view of the circumstances of the concrete case, without this implying its abstract invalidation. At the Brazilian constitutional level, Article 4 enshrines both the prevalence of human rights and the self-determination of peoples among the principles governing the international relations of the Federative Republic of Brazil (Brasil, 1988). The coexistence of these provisions rules out simplifying solutions and requires an interpretation capable of considering the weight assumed by each principle in light of the circumstances analyzed.

In this scenario, the theory of weighing, or balancing, offers an adequate instrument for addressing collisions between fundamental principles. Alexy's formulation is especially pertinent because it recognizes that the relationship of precedence is not established in a fixed or abstract manner. As the author argues, "[...] one of the principles takes precedence over the other under certain conditions. Under other conditions, the question of precedence may be resolved in the opposite way" (Alexy, 2012, p. 93). The legal solution therefore depends on the concrete conditions in which the tension between the rights involved manifests itself.

Among legally protected interests, the right to life occupies a central position in the protection of the person and constitutes a factual prerequisite for the exercise of several other legal positions. The prevalence of human rights, established in Article 4, II, of the Federal Constitution, acts as an interpretive guideline for international relations and reaffirms the commitment of the Brazilian State to the protection of human dignity (Brasil, 1988). This recognition, however, does not authorize the automatic construction of an abstract and absolute hierarchy among fundamental rights, although it offers an especially relevant parameter when the concrete situation involves a risk of suppression of life.

From a different perspective, Norberto Bobbio's theory of the legal order contributes to understanding the unity and normative stratification of the legal system. For the author, reference to a fundamental norm makes it possible to explain the unity of the legal order and the validity of the norms that compose it (Bobbio, 2006). Such a construction, however, is not to be confused with the establishment of a fixed material hierarchy among principles situated on the same constitutional level, whose relationship must be examined in light of the specificities of each conflict.

Within this normative framework, the cultural preservation of Indigenous peoples and other ethnic groups is not, in itself, incompatible with the application of legal limits on practices that affect human rights. Article 5 of the Federal Constitution ensures the inviolability of life, liberty, equality, security, and property, while Articles

231 and 232 confer specific protection on the rights of Indigenous peoples (Brasil, 1988). The constitutional problem lies precisely in the need to reconcile these guarantees, avoiding, on the one hand, the reproduction of assimilationist policies and, on the other, the lack of protection for individuals subjected to situations of special vulnerability.

Normative protection of the right to life is also found at different levels of the legal order, both in the Constitution and in international human rights treaties. The hierarchical position of these instruments varies according to the incorporation procedure: those approved according to the procedure of Article 5, Paragraph 3, of the Constitution are equivalent to constitutional amendments, while other human rights treaties receive, according to the applicable case-law orientation, supra-legal status. This normative architecture reinforces the protection of the person, without allowing the conclusion that the right to life constitutes, in any case, a "supreme norm" formally superior to other fundamental rights.

Of special importance in this context is Article 227 of the Federal Constitution, which establishes reinforced protection for children and adolescents. The provision imposes on the family, society, and the State the duty to ensure, with absolute priority, rights such as life, health, dignity, and family and community life, in addition to protecting them against neglect, discrimination, exploitation, violence, cruelty, and oppression. It is a particularly relevant normative parameter for examining practices capable of endangering Indigenous children (Silva; Machado, 2015).

In view of this normative framework, it is possible to recognize, in concrete situations, a conditional precedence of one principle over another, according to the circumstances and the intensity of the restriction imposed on each right in conflict. Alexy (2012) rejects the existence of abstract and absolute relations of precedence between principles and assigns human dignity a particular structure in his theory. Applied to the object of this study, balancing requires the simultaneous consideration of the intensity of the restriction on collective self-determination and the severity of the threat to the life and integrity of the child, lest balancing be turned into a mere rhetorical device intended to justify a previously established conclusion.

For balancing not to be reduced to an abstract formula, its application requires, first of all, verifying whether there is a concrete and verifiable situation of threat or harm to life, distinguishing facts, media reports, and ethnographic interpretations. Once the situation is identified, representatives and directly affected members of the community, including family members responsible for the child, should be heard, whenever possible and in a culturally appropriate manner. The protective measure chosen must be suitable to remove the danger, necessary in light of the available alternatives, and proportionate in terms of its impact on family and community life. Intercultural dialogue guides the design and implementation of the measures, but does not replace urgent action when the immediate protection of life is at risk. Any applicable forms of accountability require individualized examination of the facts and the applicable guarantees, without a collective presumption of guilt.

As for self-determination, its entitlement is directed to "peoples" and is linked to the existence of a shared collective identity, without necessarily depending on the constitution of a state of their own. Its function is to protect the continuity of the institutions, values, practices, and forms of organization of historically constituted groups. In the Brazilian context, this guarantee acquires special relevance due to the participation of Indigenous peoples in the historical and cultural formation of the country, and must be understood as an instrument for preserving collective identities, and not as a generic authorization to set aside individual rights held by the members of these communities themselves (Lopes; Castro, 2023).

Finally, cultural identity must be understood as the result of a historical, gradual, and plural process, constituted by the participation of the different groups that make up society. The Brazilian constitutional order simultaneously protects equality, human dignity, fundamental rights, and cultural diversity. Luís Roberto Barroso states that "from the intrinsic value of each person derive the fundamental rights to life, equality, and physical and psychological integrity" (Barroso, 2016, p. 113-114). Applying this premise to the problem examined requires recognizing each member of the Indigenous community as a subject of rights, without dissolving their individuality into the collective dimension or disregarding the cultural ties that take part in the formation of their identity.

Summary of results and criteria for intercultural protection

Three results emerge from the legal-dogmatic analysis and the dialogue with the anthropological literature. The first is terminological: the use of the expression "Indigenous infanticide" in reports and public disputes does not imply that the conduct falls under Article 123 of the Penal Code. The application of this offense requires the identification of its specific elements; their absence, however, does not mean that the intentional killing of a child is, by definition, beyond the reach of Criminal Law. The legal assessment depends on the

individualized description of the facts, the analysis of the relevant criminal offenses, and the guarantees applicable to the case.

The second result is normative. The Constitution simultaneously recognizes the protection of life and childhood and the collective rights of social and cultural organization of Indigenous peoples. ILO Convention No. 169, especially its Article 8, and the United Nations Declaration on the Rights of Indigenous Peoples do not present collective autonomy as immunity from human rights. The Convention on the Rights of the Child, in turn, protects both the life and health and the cultural identity of the Indigenous child. The joint interpretation of these instruments shows that individual protection and respect for community belonging are complementary legal requirements, although they may generate tensions in specific circumstances.

The third result concerns state action. The legal response is not sufficient when limited to formal prohibition or to criminal law, without prevention, access to health services, assistance to families, and community participation. The compatibility of the measure with fundamental rights requires a concrete diagnosis of the risk, consideration of local knowledge and institutions, choice of the least restrictive effective measure, and monitoring of the protection offered. In situations of imminent threat, urgent safeguarding measures may be indispensable; their adoption, however, does not legitimize the generalizing characterization of Indigenous peoples as practitioners of infanticide, nor automatic family separation.

These results have analytical and normative scope. Due to the method employed, the study does not establish how many communities adopt the practices referred to, their incidence, or their historical changes, nor does it measure the effectiveness of specific public policies. The contribution lies in the conceptual differentiation of the problem and in the proposal of interpretive criteria for decisions involving the protection of life and respect for cultural rights.

Conclusion

This work examined the legal tension between the self-determination of Indigenous peoples, constitutionally protected in their social and cultural organization, and the protection of the life and physical integrity of children. The individual rights provided for in Articles 5 and 227 of the Constitution, the collective rights recognized in Article 231, and the international protection parameters must be understood systematically. Balancing does not consist of granting abstract license to harmful practices, but of justifying, in light of concrete facts, effective protective measures that impose the least legitimate restriction on cultural autonomy.

The historical and anthropological analysis showed that the expression "Indigenous infanticide," as used in public debate, does not necessarily correspond to the offense provided for in Article 123 of the Penal Code. The latter requires the influence of the puerperal state and the conduct of the mother, during or shortly after childbirth. The phenomena described in the anthropological literature refer to distinct grounds, related to cosmology, kinship, and the social recognition of the child. The distinction avoids the automatic transposition of the criminal offense, without excluding the possibility of the legal classification of concrete conduct under other legal provisions, through individualized analysis.

The effectiveness of the protection of life requires knowledge of the family and community structures on which the measures will act. Formal prohibition or isolated accountability, unaccompanied by maternal and child health policies, disability care, social assistance, and family support, may prove insufficient. The culturally appropriate character of the protection must be assessed by the real possibility of preserving the child and their family and community ties, subject to the urgent measures necessary in the face of concrete risk.

The normative examination indicates that collective self-determination and individual protection cannot be treated as necessarily mutually exclusive alternatives. Article 8 of ILO Convention No. 169, Articles 7, 22, and 34 of the United Nations Declaration on the Rights of Indigenous Peoples, and the rules of comprehensive child protection offer complementary references for resolving controversies. State action must articulate concrete protection of life, listening to communities, prevention, and assistance, without relapsing into assimilationist policies. Article 28, Paragraph 6, of the ECA, within its specific scope of application, confirms the legal relevance of the child's cultural identity also in protective decisions.

The defense of culture does not set aside the protection of human rights, just as the protection of individual rights does not authorize the denial of the collective identity of Indigenous peoples. In concrete threats to life, the severity and irreversibility of the harm require effective protective measures, observing necessity, proportionality, and intercultural participation to the extent possible. As this is bibliographic and documentary research, no prevalence data or generalizable empirical conclusions about Brazilian Indigenous peoples are presented. Future investigations may examine, with field methods and the participation of the communities themselves, the effectiveness of care strategies. The legal challenge remains that of protecting each Indigenous

person as a holder of rights without dissolving their individuality into the group or delegitimizing the cultural ties that make up their identity.

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