

Human Rights and Multiculturalism: The Debate on Indigenous Infanticide in Brazil

Guilherme Scotti*

ABSTRACT: The author presents and discusses the debate on indigenous infanticide in Brazil, an issue that has become the subject of several bills in the Brazilian Congress. Moreover, the analysis takes into account other cases regarding traditional practices that conflict with human rights, such as female genital mutilation. The comparison illustrates the possibility of realizing human rights within traditional communities in a dialogical, democratic and unconstrained way. Thus, both individual rights and the collective value of ethical identities are simultaneously protected. Finally, the argument clarifies, in theoretical and practical terms, the alleged impasse between universal human rights and cultural relativism so commonly raised in the public sphere.

KEYWORDS: Human rights; multiculturalism; infanticide; indigenous rights

SUMMARY: 1. Introduction – 2. The debate on infanticide in the Brazilian public sphere – 2.1. Draft bill no. 1,057/2007 – 2.2. The academic debate – 2.3. Comprehensive universalism – 2.4. Cultural relativism – 2.5. Political relativism – 3. Female genital mutilation and the experience of the NGO Tostan – 4. Conclusion.

1. Introduction

The debate on what is called indigenous infanticide currently provides the greatest evidence, in the Brazilian public sphere – from civil society to parliament, to academia –, of the issue of the relationship between fundamental rights and cultural traditions, in an already conflicting conjuncture of the growing struggle for the rights of indigenous peoples.

The tension between the ethical substrate of a specific social context and the universalizing pretensions of justice become particularly relevant in increasingly complex societies, in which multiculturalism establishes problems demanding the discussion and creation of non-exclusive ways of coexisting from political norms. In various regions of the planet, in both the “old” and the “new” worlds, the issue is becoming more present. The conservative reaction now perceived in coexistence or even in mere multicultural tolerance, demonstrated explicitly and violently with the attempts in Oslo, and also perceived in the hegemonic political discourses in Europe, only attests to the importance and the urgency of the issue. If multiculturalism has seemed almost commonplace in academic literature since the 1990s, this issue shows us that setbacks are always possible and that struggles for recognition are incessant.

* Professor at the University of Brasília (UnB) Law School. E-mail: gscotti@unb.br. A previous version of this article was first published in Portuguese as *Direitos Humanos e multiculturalismo: o debate sobre o infanticídio indígena no Brasil*. *Revista Jurídica da Presidência*, v. 15, 2013. The article was subject to a double blind peer review process.

Ethnic and ethical pluralities are at the root of Brazilian society¹. Multicultural “coexistence” historically occurred in a process formed by multiple modalities of violence. Acculturation and extermination of indigenous societies, dehumanization reifying blacks, and policies of whitening the population are perhaps the most obvious examples in our tradition².

Until recently, the political and legal paradigm in the treatment of indigenous issues was that of integration or acculturation. Only with the Constitution of 1988³ did cultural heritage come to be considered a right of indigenous populations and all of Brazilian society, not a transitory situation, a vestige of the past that must be overcome by modernization, but a guarantee of multiculturalism and a key element for national ethical self-understanding.

The Constitution's commitment to the effectiveness of human rights, manifested in the form of legally-established fundamental rights, imposes a further challenge: the interpretation of its universalist principles in the face of traditional practices that may violate them.

Today we know that constitutionalism requires the complex articulation of abstract and universalist aspects of norms of moral content with their consolidation in realities that are always permeated by unique particularities that cannot be repeated. The application of legal principles must seek justice in structurally indeterminate orders without falling upon mere arbitrary choice between preferential values. Thus, multicultural challenges always seem to lead us to extreme situations that put our capacity to make correct decisions in the face of an intense diversity of worldviews to the test. We believe it to be more critical than ever to explore the emancipatory potential still present on the horizon of late modernity. To be precise, confronting the problems debated puts us into the broad process of struggles for recognition of the rights of minorities – in this case, the right to conditions enabling self-esteem, or pride in belonging to an identity worthy of value, above all.

We depart from the reclaiming – and the revision – of the emancipatory character of political and legal principles enunciated in modern times. To begin, based on a re-reading of the idea of natural rights, understood as rational evidence, these principles were solidified with such force that they were capable of promoting the dissolution of the immovable and absolute foundations of society.

¹ The concept of ethics is being used in the meaning of the discursive theory of Habermas: use of practical reason destined towards reflection on that which is “good for us” as a group, as a whole, in the long term. It is distinguished from moral use, destined towards reflection on what is universally fair. J. HABERMAS, *Aclaraciones a la ética del discurso*, Madrid, 2000.

² See R. LACERDA, *Diferença não é incapacidade: gênese e trajetória histórica da concepção da incapacidade indígena e sua insustentabilidade nos marcos do protagonismo dos povos indígenas e do texto constitucional de 1988*, Brasília, 2007; D. AZEVEDO, *A justiça e as cores: a adequação constitucional das políticas públicas afirmativas voltadas para negros e indígenas no ensino superior a partir da teoria discursiva do direito*, Brasília, 2007.

³ Art. 216. Brazilian cultural heritage consists of material and immaterial natural goods, taken individually or as a set, that bear reference to identity, action, and memory of the various groups forming Brazilian society, including:

- I - forms of expression;
- II - modes of creating, making and living; [...]

Art. 231. The indigenous people are recognized as having their own social organization, customs, languages, beliefs and traditions, and the original rights over the lands they traditionally occupy, it being the task of the federal government to demarcate them and to protect and respect all of their goods. (BRASIL, *Constituição da República Federativa do Brasil*, de 05 de outubro de 1988, Brasília, 1988, emphasis mine)

Since then, with growing complexity, our uses, customs and traditions came to require daily examination in light of «an ethics that became reflexive, i.e., apt to permanently criticize itself”.⁴

We therefore think that the pluralist constitutional paradigm simultaneously favors internal connection between fundamental rights and the ethical reflexivity of ways of life. On one hand, if fundamental rights may be seen as *limitations* to traditional practices, they simultaneously operate as *conditions enabling* the existence and the preservation – as ethical self-understanding of our own history and of identity as memory – of traditional ways of life in a globalizing world that tends to level and assimilate differences. They act as elements capable of catalyzing, democratically, ethical reflexivity in a non-static anthropological understanding of culture.

This article aims to present and synthetically discuss the key arguments in the debate on indigenous infanticide in Brazil, which is the subject of legislation proposed and pending in the national Congress. By means of comparative and critical arguments, we further seek to identify paths to the theoretical and practical deconstruction of the supposed impasse between universal human rights and cultural relativism, which are commonly raised in the public sphere.

2. The debate on infanticide in the Brazilian public sphere

Both the Constitution of 1988 and international legal instruments began to reject the old paternalist and evolutionary concept of integration⁵. Article 8 of Convention 169 of the International Labor Organization (ILO), concerning Indigenous and Tribal Peoples, of 1989, declared in Brazil's Decree no. 5,051 of April 29, 2004, establishes:

1. When applying national legislation to the interested peoples, their customs or their customary law must be given due consideration.
2. These peoples must have the right to preserve their own customs and institutions, provided they are not incompatible with the fundamental rights defined by the national legal system or with internationally recognized human rights. Whenever it is necessary, procedures to resolve the conflicts that may emerge in the application of this principle must be established.
3. The application of paragraphs 1 and 2 of this Article must not prevent the members of these peoples from exercising the rights recognized for all citizens of the country and assuming the corresponding obligations⁶.

In the framework of the problematic issue of compatibility of traditional practices and human rights according to the terms of this provision, the discussion on indigenous infanticide⁷ began to receive more attention in the Brazilian public sphere in 2005 with the circulation of reports from different

⁴ M. CARVALHO NETTO, G. SCOTTI, *Os direitos fundamentais e a (in)certeza do direito: a produtividade das tensões principiológicas e a superação do sistema de regras*, Belo Horizonte, 2011.

⁵ Still present, for example, in Convention 107 of the International Labor Organization (ILO), of 1957.

⁶ BRASIL, *Decreto nº 5.051*, de 19 de abril de 2004, Brasília, 2004, emphasis mine).

⁷ The term is not being used in its technical legal meaning, as, in the terms of Art. 123 of the Criminal Code, infanticide consists exclusively in “killing, under the influence of the puerperal state, one's own child, during birth or shortly thereafter”. BRASIL, *Decreto-Lei nº 2.848*, de 7 de dezembro de 1940, Código Penal, Rio de Janeiro, 1940.

press agencies addressing cases of children removed from villages by missionaries so they could receive medical treatment⁸. The debate took hold among indigenous organizations and quickly infiltrated the public sphere, the political sphere specifically, the key forum for which was the Chamber of Representatives, and it led to legislative proposals.

2.1. Draft bill no. 1,057/2007

In the Chamber of Representatives in 2007⁹, Draft Bill no. 1,057/2007 was authored and submitted by Representative Henrique Afonso (affiliated, at that time, with the PT/AC [Worker's Party, State of Acre] and, currently, with the PV/AC [Green Party, State of Acre]), aiming to restrain practices incompatible with human rights and focused primarily on the infanticide supposedly practiced by some indigenous peoples like the Suruwahá, the Yanomami and the Tapirapé¹⁰. Infanticide would be performed for traditional reasons that would impede the recognition of some newborns as capable of being integrated into the community – most of the reports refer to the birth of twins, of children of single mothers, to apparent birth defects or to diseases that make the child's development difficult¹¹. In its original form, the draft bill expressly mentioned infanticide among other traditional practices, and proposed, as an extreme measure, the criminalization of everyone who might be aware of risk situations, in the following terms:

Art. 4. *It is the duty of all who are aware of risk situations, based on harmful traditions, to immediately notify the abovementioned authorities, under penalty of being made responsible for the crime of failing to help, in conformity with the prevailing criminal law, which establishes, in the event of noncompliance: Penalty - imprisonment of 1 (one) to 6 (six) months, or fine.*

Art. 5. The authorities described in Art. 3 respond equally for the crime of failing to help when they do not immediately adopt the appropriate measures¹².

The proposal added an element to the public discussion on the role of the State and the law with respect to traditional practices that violate fundamental rights. As it appears from the justification of the bill, the proposal derived from the pressure of religious groups, in particular the missionary association Jovens com uma Missão (Youth with a Mission, or Jocum) and the non-governmental organi-

⁸ See A. PINEZI, M. SUZUKI, *Infanticídio e direito de viver: um debate sobre infanticídio Suruwahá, recentes mudanças culturais e direitos humanos*, In: REUNIÃO BRASILEIRA DE ANTROPOLOGIA, 26, Porto Seguro, 2008; S. FEITOSA, *Pluralismo moral e direito à vida: apontamentos bioéticos sobre a prática do infanticídio em comunidades indígenas no Brasil*, Brasília, 2010.

⁹ In 2008, a Proposal to Amend the Constitution (PEC 303/08), authored by Representative Pompeo de Mattos (PDT/RS [Worker's Democratic Party, State of Rio Grande do Sul]), was presented in order to modify Art. 231. Since it had less impact on the public debate and due to the space constraints of this text, we will not discuss it.

¹⁰ See FOLHA DE BOA VISTA, Boa Vista, 10 mar. 2005; R. CARDOSO DE OLIVEIRA, *A questão étnica: qual a possibilidade de uma ética global?* in L. ARIZPE (ed.), *As dimensões culturais da transformação global: uma abordagem antropológica*, Brasília, 2001, p. 51-71.

¹¹ See M. HOLANDA, *Quem são os humanos dos direitos? Sobre a criminalização do infanticídio indígena*, Brasília, 2008.

¹² BRASIL, Câmara dos Deputados. *Projeto de Lei nº 1.057/2007*, Brasília, 2007.

zation (NGO) Atini - Voz pela Vida (Voice for Life), and it was submitted by a representative who was a member of the Evangelical camp.

In May 2011, a substitute was submitted for consideration by the Rapporteur of the Comissão de Direitos Humanos e Minorias (Human Rights and Minorities Commission, CDHM) project, Representative Janete Pietá (PT/SP), with significantly different content – refuting the discourse of criminalization in favor of a pedagogical perspective:

Art. 54-A. Respect for and promotion of traditional indigenous practices is reaffirmed, provided that these are in conformity with the fundamental rights established in the Federal Constitution and with the international treaties and conventions on human rights that the Federal Republic of Brazil is party to.

Sole paragraph. *The agencies responsible for indigenous policies are tasked with offering the indigenous peoples appropriate opportunities to acquire knowledge about the society around them when the following practices are verified by anthropological studies:*

I - infanticide;

II - violent attack on modesty or rape;

III - mistreatment;

IV - aggression upon the physical and psychological integrity of children and their parents.¹³

In her opinion in favor of approving the bill in its substitute form, the Rapporteur rejected the criminalizing route, which characterizes the construction of the conditions of the dialogue, as well as the indigenist work itself, as infeasible. She also states her concern about the implicit attribution of cruelty to the indigenous peoples, which would further harm the generally stereotyped image of the indigenous people that is predominant in society.

In the substitute version, the legislative changes were made within the Indigenous Statute itself, rather than constituting autonomous legislation as in the original draft bill. In addition to being more appropriate in terms of legislative technique, since it aimed to modify legislation on governance of indigenous communities that was already in effect but had become obsolete, the substitute version may be seen as an attempt to move the discussion into a broader context. There has been a deviation of political focus by the Evangelical camp, which considers the fight against infanticide to be its primary stance on the indigenous issue.

For the Representative, public policies creating awareness are appropriate:

[...] yes, initiatives geared towards awareness are necessary. Guaranteeing the right to life for indigenous children, women and families must be the consequence of the creation and implementation of public policies. Parallel to the valuation of the right to life, these initiatives should privilege the *agency of the indigenous woman*. The concepts set forth in Art. 231 of the Federal Constitution, which determine the protection of and respect for the material and cultural goods of the indigenous peoples, will also be a fundamental principle to guide us.

[...] we understand that an Indigenous National Council and an Indigenous Guardianship Council should be created. These agencies would have the power to address, respectively, the

¹³ BRASIL, Câmara dos Deputados. *Substitutivo ao projeto de lei nº 1.057/2007*, de 16 de maio de 2011, Brasília, 2011, emphasis mine.

discussion of the cultural issues of indigenous groups, preparing awareness campaigns aimed at promoting changes among these groups, and the promotion of measures for the well-being of indigenous children and adolescents. In this sense, we will be sending the indication for the creation of these agencies through the appropriate mechanisms¹⁴.

I believe that the Rapporteur's proposal approaches the positions that strive for the valuation of the agency of the indigenous peoples, respecting historic pluralism, and confers attention on the individual rights that I defend as essential for a constitutionally adequate treatment of the issue.

The dialogical version of the proposal didn't last long, though. In 2015 the Chamber of Representatives voted the draft bill and added amendments that restored the original criminalizing approach, especially due to the pressure of conservative groups. The approved draft bill was then submitted to the Senate, where it is still under discussion.

If, on one hand, the legislative proposals stem from the pressure of religious groups, with focuses that are often questionable for lay democratic constitutionalism, on the other hand it is undeniable that the issue was already in the public sphere, reaching a point of no return to the *status quo ante* and it began to demand a response from the political institutions. In addition, the constitutional relevance of the issue is also revealed in the demands, even if sporadic, of indigenous people who required support to confront their communities' traditional norms. Asserting the statistical or moral irrelevance of the problem, in its current state of visibility, would imply disrespecting the rights of those who dare to diverge from community practices that are widely prevalent. As the dissidence itself confirms, these practices began to be the subject of dispute, it not being possible to speak, in these cases, of a community whose naturalization of social norms is absolute or that revels in having implemented a reflexive ethics by itself.

Since 2005, the Chamber of Representatives has promoted the debate on the issue in public hearings. The most recent hearing occurred in July 2009. Led by the Evangelical camp, it gathered representatives from the Fundação Nacional do Índio (National Indian Foundation, FUNAI) and Fundação Nacional de Saúde (National Health Foundation, FUNASA), indigenous leaders, missionaries from Jocum and members of Atini, anthropologists, and researchers from other areas. These hearings provide valuable narratives for the discussion of the problem analyzed herein, as well as reflections that, while not reproduced in detail, are articulated with the academic discussions we address below.

2.2. The academic debate

Some Brazilian academics¹⁵, commonly tied to entities involved in the debate, have dedicated themselves to the study of indigenous infanticide and its political, ethical and legal implications. We will now move to looking synthetically at the primary current positions on the issue.

¹⁴ BRASIL, Câmara dos Deputados. *Substitutivo ao projeto de lei nº 1.057/2007*, cit., emphasis mine.

¹⁵ Such as M. BARRETO, *Universalidade dos direitos humanos e da personalidade versus relativismo cultural*, in *Anais eletrônicos do 15º Congresso Nacional do CONPEDI*, Florianópolis, 2006; S. FEITOSA, *Pluralismo moral e direito à vida: apontamentos bioéticos sobre a prática do infanticídio em comunidades indígenas no Brasil*, Brasília, 2010; A. PINEZI, M. SUZUKI, *op. cit.*

For analytical purposes, the arguments may be classified according to the taxonomy proposed by Amy Gutmann¹⁶ for academic positions regarding multiculturalism: comprehensive universalism, cultural relativism and political relativism.¹⁷

2.3. Comprehensive universalism

In Gutmann's definition¹⁸, comprehensive universalism is, in general terms, the school for which universal moral principles, applicable indistinctly to all societies, exist independently of their cultural particularities. The lawyer and researcher Máira Barreto, counsel at Atini, defends arguments that we may consider to be representative of comprehensive universalism. Beyond her presentation at a public hearing of the Chamber of Representatives in 2007, Barreto has explained her arguments in more detail in academic articles. While she emphasizes the changeable aspect of culture and the possibility of dialogue between cultures, she defends the hierarchical relationships between universal rights and cultural practices: "culture is not the greater good to be preserved, but the human being is"¹⁹. The author criticizes the argument, which she attributes to cultural relativism, that human rights would admit different interpretations²⁰ in distinct cultural and religious traditions²¹ (BARRETO, 2006). In her reading, the universality of the rights set forth in international instruments would not therefore admit an interpretative opening for local particularities, which corroborates her affirmation that there is no legal divergence relevant to the debate on infanticide²²

2.4. Cultural relativism

Still following Gutmann's taxonomy, the positions of cultural relativism are situated at the other extreme.

Marianna Holanda seeks, in her own terms, to contrast the conceptions of life and humanity of the indigenous cosmologies and those of the "political/legal discourse of the Christian West", arguing that modern legal thought should supersede previous traditions. For her, the liberal perspective is the basis of the Brazilian Constitution, which ties the State to a legal system that understands fundamental rights as individual rights²³. The modern idea of equality presumes homogeneity, in a con-

¹⁶ A. GUTMANN, *The challenge of multiculturalism in political ethics*, in *Philosophy and Public Affairs*, Princeton, NJ, v. 22, n. 3, July 1993, p. 171-206.

¹⁷ Guttmann counterposes her own position, which she calls deliberative universalism, and which I will not address, to these three categories. Deliberative universalism may be defined as the attribution of a universal status to a minimal moral content, parallel to the understanding that there is a vast range of political and ethical issues subject to deliberation in diverse societies.

¹⁸ A. GUTMANN, *op. cit.*

¹⁹ M. BARRETO, *Os direitos humanos e a liberdade cultural*, in *Antropos*, Brasília, v. 1, n. 1, 2007, p. 75-76.

²⁰ The possibility of different "good-faith" interpretations of human rights in different contexts is defended by R. DWORKIN, *Is democracy possible here? Principles for a new political debate*, Princeton, 2006.

²¹ M. BARRETO, *Universalidade dos direitos humanos e da personalidade versus relativismo cultural*, *op. cit.*

²² The convergent position is defended by Pinezi and Suzuki (2008).

²³ M. HOLANDA, *Quem são os humanos dos direitos? Sobre a criminalização do infanticídio indígena*, *op. cit.*, p. 10.

text where there is no space for the affirmation of the rights of collective subjects. Equality would deny particularities. In addition, the projects of modernity and democracy would involve the imposition of inhumanity on minority groups, likely in the form of “humanitarian interventions”, which are one of the pillars of the conception of human rights. From this point of view, the indigenous representations of life, humanity, rights and duties, as well as practices prohibiting life could not be legitimately captured under a Western logic, since they are only justifiable in their social context.

While Saulo Feitosa et al. indicate the possibility of intercultural dialogue, they defend the merely conventional character of infanticide among the indigenous peoples. They adopt Peter Singer's argument²⁴ that there is no moral difference between abortion, broadly legalized in most of the world, and the death of newborns. However, they recognize that there are cases of the death of indigenous children that occur at a more advanced age, such as at age five. According to them:

Abortion and infanticide end up being equivalent to each other, since they are results from a decision by the community not to give the right to life, either to a fetus or to a newborn, for a wide variety of ethical reasons within the society in question. The right to life, in relation to both abortion and infanticide, is a social right.²⁵

2.5. Political relativism

For Amy Gutmann, political relativism rests on institutional political mechanisms to address internal dissent regarding the cultural meanings attributed to social goods. Instead of focusing on the naturalized meaning of social practices in a community, it calls upon the deliberative criteria shared by society.

Saulo Feitosa, who adopts arguments that approach political relativism, understands indigenous peoples as collective subjects of law, defending an *extracultural* bioethical intervention, i.e., a dialogue between collectivities, an exercise in interculturality. *Intracultural* actions are restricted to the individuals from a culture who would be the only holders of legitimacy for the internal promotion of changes. Feitosa does not discard the possibility of intervention by means of public policies, but only to guarantee the procedural conditions of deliberation:

[...] any perspective of bioethical intervention in the discussion on “indigenous infanticide” must recognize the possibility of there being space between the *topos* of human rights and the *topoi* of the American Indigenous cultures. But this will only be possible if there is persuasion from the external agent (individual or institutional) that the deliberation on what to do pertains exclusively to the people, leaving those “on the outside” to simply guarantee them the conditions to deliberate.²⁶

Feitosa reiterates the argument, made previously at a public hearing, for a new indigenist legislation guaranteeing an intervention of dialogue and information:

²⁴ P. SINGER, *Practical ethics*, New York, 1993.

²⁵ S. FEITOSA et al., *Bioethics, culture and infanticide in Brazilian indigenous communities: the Zuruahá case*, in *Cadernos de Saúde Pública*, Rio de Janeiro, v. 26, n. 5, maio 2010, p. 861.

²⁶ S. FEITOSA, *op. cit.*, p. 101, emphasis in the original.

[...] only an intervention that has come to dialogue, collaborate on and improve their own systems for protecting indigenous children and adolescents would be admitted; the substitution of these by external mechanisms, instruments of legal persecution or any arbitrary form of alleged regulation would never be admitted. Therefore, we are in agreement with the treatment given to this issue in the proposal “New Statute for Indigenous Peoples” submitted to the national Congress by the National Indigenist Policy Commission in June 2009. The proposal was constructed with the participation of the country's indigenous peoples and organizations. It contains a specific paragraph on the rights of indigenous children and adolescents. The text recognizes the importance of government and non-governmental organizations collaborating for the promotion of these rights through permanent dialogues with the communities, even those where the practices “prohibiting life” may be found, provided that their autonomy is respected.²⁷

In various texts, Rita Laura Segato expands on the arguments that she presented in her presentation in the Chamber of Representatives, which I understand as also revealing a modality of political relativism, although more open to a review of the role of law. She emphasizes that the tension between traditional customs and human rights is not restricted to “simple” or “original” peoples, but also occurs in the heart of “Western” societies, as in cases of patriarchal customs or those of racial oppression. Referring to a meeting with indigenous women, the author relates the concern they express about the possibility of modification of the customs that harm them – those regarding gender relations – without putting the culture as a whole at risk:

[...] what was presented as a great challenge for cultures weakened by contact with the West was the need to implement strategies of transformation of some customs, preserving the context of cultural continuity. This is not a simple task, above all if we take into account the fact that in societies in which the domestic economy is key to survival, the narrow complementation between the roles and positions of the two genders is not only confused with the culture itself but becomes inseparable from the self-image on which identity is solidified, as it also has a crucial role in the material reproduction of the group. In this case, it is difficult to change the rights of one of the genders without consequences for the survival and continuity of the entire group as a political and economic unit.²⁸

Segato presents what she considers to be a contradiction inherent to the universality of human rights, particularly where women are concerned. The attribution of value of law to the custom would recognize the full autonomy of the original peoples; however, it would distance us from the internationally-recognized guarantees to women and children. In contrast, the denial of value of law to the custom would keep us “confined to the legal paradigm of the democratic State”²⁹.

²⁷ S. FEITOSA, *op. cit.*, p. 104.

²⁸ R. SEGATO, *Antropologia e direitos humanos: alteridade e ética no movimento de expansão dos direitos universais*, in *Mana*, Rio de Janeiro, abr. 2006, v. 12, n. 1, p. 210.

²⁹ R. SEGATO, *Antropologia e direitos humanos: alteridade e ética no movimento de expansão dos direitos universais, cit.*, p. 211.

In discourse on the importance of the difference between morality – understood as values shared by moral communities – and law, especially when the law opposes or should oppose oppressive customs rooted in the social life of the peoples, both “traditional” and “Western”, Segato ponders the perils of assimilating native customs and law:

In fact, in the West, the law also turns against the habits and the custom because the status – the fixed stratification of social groups with indelible marks that determine their exclusion – must be foreign to modern, egalitarian legal language, to be treated as an infiltration of a prior regime that is certainly very resistant to attempts to change and modernization.³⁰

With a position critical of the primordialist conceptions of the nation, Segato highlights the differentiation between ethnic identity and national design, required by the rationality of the law. A contractualist view of the nation, in which the law plays the role of mediator between diverse moral communities, would be more appropriate. With a perspective endowed with hermeneutic complexity in the face of the problems legitimizing modern law, Segato analyzes the relationship between original will and the construction of meanings in law:

Despite originating in an act of force by which the dominant ethnicity imposes its code on the dominated ethnicities, the law thus imposed comes to behave, from the time it is issued, as an arena of multiple sources of strife and tense interlocutions. [...] its legitimacy and the symbolic capital that it represents for the class that ratifies and administers it depends on its capacity, once implemented, to begin to contemplate, from its platform, a diverse landscape in which context the capacity for mediation is preserved. [...] the text of the law is a key narrative of the nation, and from this derives the struggle to inscribe a position in the law and to obtain legitimacy and audibility within this narrative. This involves true and important symbolic struggles.³¹

The *struggles for interpretative positions* – which Segato calls symbolic struggles to inscribe positions in the law – within the legal system are clearly demonstrated in the claims of social movements representing political minorities.

Segato enunciates a great challenge imposed on contemporary anthropology: to address the diversity of cultures and concepts of good at a historical moment when societies need to dialogue and negotiate on their rights in institutional fora – which makes mediation between the relativist and universality principles necessary in the domain of the discipline itself. She suggests to anthropologists that they review the way in which they understand relativism, often defined simplistically, reminding them that the world views of the peoples should not be captured as unitary totalities, as there are fissures inside the supposed consensus of values. Even within a small village, there will always be conflicts of perspective and interest. It is in these spaces that human rights may acquire meaning, echoing the aspirations of a determined group.

An idea equivalent to what we understand as *reflexive ethics*³² is also present in Segato's reflection, under the concept of ethical drive or ethical impulse:

³⁰ R. SEGATO, *Antropologia e direitos humanos: alteridade e ética no movimento de expansão dos direitos universais*, cit., p. 211.

³¹ R. SEGATO, *Antropologia e direitos humanos: alteridade e ética no movimento de expansão dos direitos universais*, cit., p. 212.

³² M. CARVALHO NETTO, G. SCOTTI, *op. cit.*

I am referring here to the impulse or desire that allows us to contest the law and turn reflexively on the moral codes that govern us, to feel that these moral codes are strange, inadequate and unacceptable, whether we live in villages or cities. The ethical impulse is that which allows us to critically address the law and morality and consider them to be inadequate. The ethical drive allows us not only to contest and modify the laws that regulate the authoritative “contract” on which the nation is founded, but also to distance ourselves from the cultural landscapes we were born into and transform the customs of the moral communities we are a part of.³³

The ethical impulse of critical dissatisfaction would be a phenomenon common, to a greater or lesser degree, to all societies, acting as a catalyst of historic developments and transformations of rights. As an attitude, it would therefore be *universal*. Its object, however, is variable, does not have content that can be listed.

The contribution of anthropology and ethnography to law would consist of the ethical challenge to the moral and legal presuppositions, summoning us and challenging us by means of collective and changeable representations of the other:

There's no other reason why travelers or ethnographers have always come across, time and again, reports of norms and practices already in disuse in the cultures called “primitive” or in the “people with no history”, as some authors consider them. The first ethnographers heard talk of many customs without being able to observe them. That is, the people with no history never existed, and the supposed inertia of other cultures is no more than a product of the culturalist episteme of an anthropology that is unacceptable today. Neither dissatisfaction nor ethical dissidence are the heritage of particular people, but minority attitudes in the majority of societies.³⁴

Based on this reflection, for Rita Segato the relativity typically cultivated by anthropology should not be taken as antagonistic to the process of expansion of human rights. The differences within moral communities, described by ethnographic research, historically drive values and support the ethical impulse of denaturalization of customary rules.

In the sequence of this argumentation, Segato defends the guarantee of collective deliberative autonomy to the indigenous communities and observes that the State has the duty to ensure deliberation, even against internal oppressive forces, without applying the notion of individual rights, but adopting the conception of *historic pluralism*:

[...] in the face of state domination and the construction of the United Nations' universal discourse of human rights, it becomes strategically inviable to defend autonomy in terms of cultural relativism. To defend autonomy, it will therefore be necessary to abandon relativist arguments and those of the right to difference and to replace them with an argument supported on what I suggest defining as historical pluralism. The collective subjects of that plurality of histories are the peoples, with deliberative autonomy to produce their historic process.³⁵

³³ R. SEGATO, *Antropologia e direitos humanos: alteridade e ética no movimento de expansão dos direitos universais*, cit., p. 221-222.

³⁴ R. SEGATO, *Antropologia e direitos humanos: alteridade e ética no movimento de expansão dos direitos universais*, cit., p. 225.

³⁵ R. SEGATO, *Género y colonialidad: en busca de claves de lectura y de un vocabulario estratégico descolonial*. In: A. QUIJANO, J. NAVARRETE (ed.), *La cuestión descolonial*. Lima, 2010.

Each group should be perceived as a “*project of being a history*”, i.e., as a historical vector in a state of permanent change by its own mechanisms, not as the bearer of a stable, substantive heritage. Consequently, Segato proposes that the State play the role of guaranteeing internal deliberation, re-instituting the community forum and returning the capacity to develop their own historical projects to the peoples.

By proposing historic pluralism, as opposed to cultural relativism, the author seeks to expunge what she judges to be the fundamentalist tendency of all kinds of culturalism. In the intercultural dialogism, the modern discourse of equality may play a role in the restitution of what was taken by a colonizing State in processes that even aggravated gender hierarchies where there had previously been a relatively harmonious inequality:

A role for the State would then be, as we said, that of returning the internal forum and the plot of their history, expropriated in the colonial process and by order of the colony/modernity, to the peoples, simultaneously promoting the circulation of the egalitarian discourse of modernity in community life. It would thus contribute to the healing of the community tissue torn by colonialism, and to the re-establishment of collectivist forms with hierarchies and powers less authoritarian and perverse than those that resulted from the hybridization of the order that was first colonial and then republican.³⁶

3. Female genital mutilation and the experience of the non-government organization Tostan

Female genital mutilation (FGM) offers us a relevant parallel for reflection on indigenous infanticide in Brazil. One of the recurrent examples in the literature on the relationship between multiculturalism and human rights, FGM is frequently cited as a typical case of a traditional practice violating rights, generating innumerable discussions that allow us to analyze the mechanisms employed in confronting it³⁷.

Gerry Mackie³⁸ notes that FGM expanded with modernization, coming to affect 100 million women, especially, but not exclusively, in the Islamic northeast. Nevertheless, while it was disseminated in dozens of African countries, it is not a practice directly related to Islam; it is not described in the Qur'an and is not even found in the majority of Muslim countries. However, the adoption of FGM was intensified due to the influence of the Islamic codes of family honor, chastity, fidelity and confinement.

Mackie addresses FGM as a tacit self-enforcing convention, based on beliefs that are also self-enforcing. A self-enforcing belief cannot be reviewed by the individual affected, as the subjective

³⁶ R. SEGATO, *Género y colonialidad: en busca de claves de lectura y de un vocabulario estratégico descolonial*, cit.

³⁷ The possibility of transformation of FGM into a merely symbolic ritual practice is explored by A. GALEOTTI, *Relativism, universalism, and applied ethics: the case of female circumcision*, in *Constellations*, New York, v. 14, n. 1, Mar. 2007, p. 91-111.

³⁸ G. MACKIE, *Ending footbinding and infibulation: a convention account*, in *American Sociological Review*, Washington, DC, v. 61, n. 6, Dec. 1996, p. 999-1017.

cost of testing the review, stemming from social stigmatization, is too high³⁹. Consequently, even individuals who disagree tend to continue observing the custom. The transformation of this modality of belief requires collective decision-making, which eliminates or attenuates the individual risk to be assumed when abandoning a self-enforcing custom. One example is what happened with the practice of footbinding in imperial China.

Despite the official prohibition in effect since the 17th century, footbinding, begun during the Sung dynasty (960-1279), persisted until the beginning of the 20th century. It is estimated that the practice affected between 50% and 80% of Chinese women in 1835, depending on the region. Around 1874, the first associations to fight footbinding emerged, seeking to promote the collective abandonment of the practice by commitments from families to refuse marriages with women with bound feet. The meaning of the custom was thus reversed, as what it perpetuated was precisely the value of bound feet on the marriage market. The strategy of collective commitments had quick effects, extinguishing a tradition that had lasted nearly a thousand years in a few decades.⁴⁰

The work against footbinding had three aspects: first, a pedagogical campaign demonstrating the absence of the practice in other regions of the world; second, the discussion of the advantages of natural feet and the problems arising from bound feet; and, finally, the formation of associations whose members promised not to bind their daughters' feet and not to allow their sons to marry women with bound feet. Mackie suggests that the same procedures could be successfully adopted against FGM, emphasizing that the informative aspect is indispensable but not sufficient due to the possibility of a self-enforcing convention. A coordinated moment of collective commitment would also be necessary.

Diane Gillespie and Molly Melching⁴¹ describe how the work of the NGO Tostan, focused on training women in the Senegalese countryside, was transformed into an act of efficacy without precedent in the elimination of FGM by means of the participatory modification of their pedagogical curriculum.

With an approach inspired by the pedagogy of the Brazilian educator Paulo Freire⁴² and the participation of women who had less access to schools than men did, Tostan expanded the basic literacy and health curriculum it offered in the 1980s, including modules on human rights and democracy in 1995. The intercultural teams perceived that these issues had a sensitive impact on the discussions on women's health, acting as "generative issues", in Freire's terminology, emerging from daily praxis.

The pedagogical practices employed by Tostan were planned in opposition to the French authoritarian educational model dominant in the former colonies. Called facilitators, the professors generally belonged to the same ethnicity as the students (participants). They lived in the village and shared in its resources, and a number of them were former participants who received specific training in order to deconstruct hierarchical educational stereotypes⁴³.

³⁹ In the case in question, the stigma for dissidents entailed the impossibility of contracting a marriage, a very significant act in patriarchal communities where the social status of the woman depends on marriage.

⁴⁰ G. MACKIE, *op. cit.*

⁴¹ D. GILLESPIE, M. MELCHING, *The transformative power of democracy and human rights in nonformal education: the case of Tostan*, in *Adult Education Quarterly*, Thousand Oaks, CA, v. 60, n. 5, Nov. 2010, p. 477-498.

⁴² P. FREIRE, *Pedagogy of the Oppressed*, New York, 2007. Originally published in Portuguese in 1968 and in English in 1970.

⁴³ D. GILLESPIE, M. MELCHING, *op. cit.*

The teams sought to incentive participants to express their own readings of their life situations in a pedagogical approach involving narratives, approximation and interdependence. This involved promoting the active engagement of the women in the debate on the future of their communities. With the gradual emergence of the topics of human rights and democracy, terms heard often on the radio, popular media in the villages⁴⁴, the possibility that the women would articulate their views in public *fora* gradually opened up.

However, the women's positions created resistance on the part of some men – as well as some families, regarding children's rights –, which led Tostan to re-examine its strategy in order to expand the issues discussed and the participation of community members. The involvement of men reinforced the process of abandoning harmful practices and the need for a specific space for discussion for them, both young and adult men, where they could debate their new roles in the social relations modified by the notions of human rights and democracy.

The participation of men in the workshops strengthened the process of empathy, as they were able to discuss the multiplicity of roles assumed in the relations of power and oppression. As victims of discrimination on account of belonging to an ethnic minority, they practiced the act of putting themselves in someone else's place, perceiving the gender oppression that they practiced and the frustrations experienced by the women. The exercise brought to light discussions on the complexity of social roles.

It is relevant that Tostan's work involved the unveiling of democratic practices that already existed in the communities. In many communities, for example, it was the custom of the chiefs to listen to the opinion of all of the members and to seek the building of a consensus. In general, the public meetings were restricted to men, but private consultation with women was also indispensable in the formation of political decisions⁴⁵. At the same time, problematic power relations became visible and came to be de-naturalized from the participants' point of view, thanks to the broadening of horizons promoted by the courses.

The perception that the challenges faced by the communities found parallels in other struggles around the world created the idea that the participants were not isolated – beginning to feel like they were interlocutors in a much broader dialogue –, giving them more enthusiasm to pursue the improvement of life in the villages.

From the nexus between studies of human rights, democracy, participation, hygiene and health emerged the social mobilization to end FGM. The most relevant movement occurred in 1997, in a town where 35 mothers who had studied the new curriculum decided to put an end to the practice, to the horror and revolt of many neighboring communities.

Gerry Mackie⁴⁶, who at that time was studying the issue of FGM, got in touch with Tostan and described the similarity between the NGO's activities and the process of eliminating footbinding in Chi-

⁴⁴ In the case in question, the stigma for dissidents entailed the impossibility of contracting a marriage, a very significant act in patriarchal communities where the social status of the woman depends on marriage.

⁴⁵ Rita Laura Segato also mentions the practice of private consultation with women in indigenous communities in South America, warning, however, of the deterioration of the custom, by force of the upsurge in the asymmetry of gender relations in the postcolonial period. See R. SEGATO, *Antropologia e direitos humanos: alteridade e ética no movimento de expansão dos direitos universais*, cit.

⁴⁶ G. MACKIE, *op. cit.*

na, contributing to the teams perceiving the importance of the the collective declarations on the extinction of harmful practices. The diffusion of the collective abandonment of FGM also counted on the work of African linguists translating and refining the vocabulary of human rights so it would make sense to different ethnic groups.

In all the participating communities, members were incentivized to express their conceptions of human rights during the exercises of drafting their aspirations for the future of the villages, which enabled these aspirations to be articulated as broader conceptions and issues of human rights. The opening of a space between that which is and that which could be allowed for the discussions undertaken by the participants to move from concrete issues – like the problems of children's health –, to intermediary issues – immediate means for the solution of a problem –, to a general and abstract perspective on moral problems – like the issue of the universality of the right to health:

As a dimension of discursive practice, then, *human rights served not as a set of disembodied abstractions imposed from without but as ideas and practices that were connected to thinking about local circumstances*. The availability of a larger discursive community emboldened community members to share their new understandings with friends, family members, and neighbors. Learning about human rights and democratic processes *reinforced the importance of a cohesive community, an underlying African fundamental value*, and helped participants recognize that they have the right to engage meaningfully in private and public dialogues as they make decisions about their future.⁴⁷

Addressing unacceptable practices like FGM through the lens of human rights offers promising paths, but also has risks to be confronted, Bettina Shell-Duncan warns⁴⁸. Initially seen by international organizations as a health problem, FGM was the target of educational campaigns on the risks and side effects of the practice. It was presumed that the custom would be abandoned based on knowledge. However, these campaigns were ineffective in the attainment of large-scale behavioral changes. Shell-Duncan argues that, in the communities where FGM was common, people were often aware of the risks and side effects, but they believed they should be assumed given the cultural value attributed to the practice.

FGM came to be perceived through a new focus with the general change in the approach to violence against women on the international scene in the 1990s. This new perception occurred due to the problem having ceased to be a merely private and domestic issue, becoming a public issue and an object of human rights, and due to the recognition, long claimed by activists, that human rights violations, women's rights violations included, may also be caused by the action of private agents, not only by State power.

In addition, understanding FGM as a form of violence against women, in the terms of the 1981 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), it would fall to the States to “modify the social and cultural patterns of conduct of men and women, with a view to

⁴⁷ D. GILLESPIE, M. MELCHING, *op. cit.*, p. 17, emphasis mine.

⁴⁸ B. SHELL-DUNCAN, *From health to human rights: female genital cutting and the politics of intervention*, in *American Anthropologist*, Arlington, VA, v. 110, n. 2, 2008, p. 225-236.

achieving the elimination of prejudices and customary and all other practices which are based on the idea of [gender inequality]”.⁴⁹

Addressing the issue with emphasis on human rights does not necessarily involve the employment of legal sanctions and jurisdictional mechanisms by the States. As Tostan's work demonstrates, educational strategies can be effective tools in the implementation of human rights. Special caution is necessary when intending to restrain traditional practices with legislative measures, however. In opposition to the excessive confidence in legislation, Shell-Duncan questions its effectiveness, as the risk that the practices will be hidden instead of eliminated or reduced, or that they will be transformed into symbols of cultural resistance, is ever present. This excess of confidence may also make more elaborate pedagogical strategies infeasible. Taking participatory initiatives like the one undertaken by Tostan seriously, it is possible to move away from the simplistic stigma that reputes the human rights agenda as “Western”, which, normally associated with a static reading of the struggles for rights, fails to consider its historical evolution and the increasing flexibility of its role.

Tostan's strategy also has the merit of separating women from a vulgar image of powerless victims, Shell-Duncan ponders – a risk present in the international agenda of combating violence against women –, in that it justly promotes their empowerment, giving them the capacity to act for the promotion of improvements in their communities.

Shell-Duncan concludes that, while it is problematic to deny African women the autonomy over their own bodies guaranteed to “Western” women – as in the case of cosmetic surgeries –, there are serious situations in which adopting a tactic of non-interference would be as antithetical as a cultural imperialist approach.

For William Talbott⁵⁰, Tostan's educational modules contain an “epistemically modest” view of human rights, in that they seek to empower women to elaborate and exercise their own judgments regarding how to improve life in their communities, rather than simply imposing a closed understanding of the meanings of these rights.

4. Conclusion

The trajectory of arguments we have reviewed allows us to draw conclusions about the alternatives for confronting the problem of indigenous infanticide.

I argue that the State has the duty to act to promote and safeguard individual rights inside the villages, above all in the case of women, as possible dissidents in a position of vulnerability, and of children. This posture must, to some degree, be configured as an intervention, which should be guided by dialogue and by horizontal dissemination of information⁵¹. The failure of the state to do this leaves a vacuum of lay public policies, opening space for potentially proselytizing actions. The dialog-

⁴⁹ B. SHELL-DUNCAN, *op. cit.*, p. 228.

⁵⁰ W. TALBOTT, *Which rights should be universal?*, New York, 2005, p. 110.

⁵¹ The State's duty to conduct free, previous and informed consultations is established both in the 169 ILO convention and in the United Nations' Declaration on the Rights of Indigenous Peoples. See: C. RODRÍGUEZ GARAVITO, *Etnicidad.gov: Los recursos naturales, los pueblos indígenas y el derecho a la consulta previa en los campos sociales minados*, Bogotá, 2012.

ic route does not, however, eliminate the duty to support those who, in extreme situations, claim specific protections against intragroup pressures⁵².

Collective political autonomy, even if relative, needs to be guaranteed as a corollary of the international and constitutional requirements. However, neither consultative representation in legislative and administrative decisions nor the promotion of internal deliberative fora excludes mechanisms for guaranteeing individual autonomy, a reciprocal condition enabling full public autonomy; on the contrary, these mechanisms are required.

The rejection of the original version of Draft Bill no. 1,057 could have been an important step in developing an adequate treatment of the problem, which could do justice to both the protection of individual fundamental rights and respect for Constitutionally-safeguarded cultural difference. That path could further enable the regulation of pedagogical dialogue, which is compatible with the Brazilian legal framework that previously established the State's duty to provide formal education inside of indigenous communities⁵³.

The criminalizing route, while not affecting the community members directly, will, if approved, potentially hamper the task of those who work with the indigenous peoples in circumstances that are already precarious. The European backlash with respect to multiculturalism offers us a live example of how intolerant policies and laws may increase the social marginalization of minorities, denying them the right to the conditions enabling self-esteem. In addition, such policies may have an effect that is the opposite of what was desired: the transformation of oppressive practices into symbols of cultural identity by the most conservative members of minority groups.

⁵² Like the "realist" rights of exit, in Susan Okin's terms (*op. cit.*, p. 205).

⁵³ The duty of educational assistance, if purified of the assimilationist perspective, remains in our order in the terms of the Statute of the Indian. See BRASIL, Lei nº 6.001, de 19 de dezembro de 1973, Estatuto do Índio, Brasília, 1973.