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In search of the identity of the Brazilian constitutional order: a dormant issue on this side of the Atlantic

by

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Abstract

This article aims to construct a workable concept of “constitutional identity” applicable to contemporary Brazilian constitutionalism, a topic largely dormant in the Latin America. The study navigates the complexities of applying a notion developed in the Global North to a distinct Latin American context, marked by a unique historical trajectory and the absence of a strong supranational legal order. The research adopts a dual approach, combining analytical and normative dimensions, to argue that Brazilian constitutional identity is not a static core but a dynamic, dialogical process. It is continuously constructed through the tensions between past and future, consensus and dissent. The article identifies the structural pillars of this identity within the 1988 Federal Constitution, analyzing its Preamble, Fundamental Principles, the extensive catalog of Fundamental Rights and its openness to international law, and the Eternity Clauses. The findings indicate that Brazil’s constitutional identity is anchored in a deliberate break from its authoritarian past and a commitment to a democratic, pluralistic, and socially just future. This identity is defined by the centrality of human dignity, the establishment of a Democratic State under the Rule of Law, the defense of pluralism, the model of a Social State, and a unique dialogical relationship with the Inter-American Human Rights System. These elements form the normative and axiological essence of the Brazilian constitutional project.

Keywords

constitutional identity, Brazilian Constitution, Latin American constitutionalism, fundamental rights, eternity clauses

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1. Introduction

The present article aims to construct a robust concept of "constitutional identity" to serve as a foundation for its application in contemporary Brazilian constitutionalism.

This work involves at least two fundamental starting points. The first concerns understanding Brazilian constitutionalism as situated in a political space defined as "Latin American" and, thus, absorbing what from this space impacts nationally. The second is to understand the relationship of what was previously stated with a constitutional environment inaugurated, at least formally, with independence in 1822, when the bases of the state and its relationship with citizenship began to have national foundations.

This work cannot disregard a political environment surrounded, on one hand, by a plural reality in the ethnic sense, given that the foundations of the relationship between State and nation in the "New World" have little significance, due to the waves of migration that composed the Brazilian people. In this sense, understanding the regional political-constitutional context to understand the elements of Brazilian constitutionalism, and, from there, developing Brazilian constitutional identity, is a central task for the present research.

The article is structured as follows: a) it seeks to elaborate a concept of constitutional identity that serves its objectives, that is, to conceive a constitutional identity, coined by authors and institutions from the Global North; b) to present the bases of Latin American constitutionalism and situate Brazilian constitutionalism within it, with its own characteristics, derived from its singular constitutional history and its specific political and constitutional contexts; c) to understand, in the recent post-constituent reality (1987-1988) and in the development of the sedimentation of the 1988 Constitution, whether by its text or by its interpretation, what currently defines this constitutional identity.

This is an arduous task, given that the theme of constitutional identity, which develops in the European context, does not have the same meaning in Latin America and Brazil, where the reality of the relationship between regional International Law and Domestic Law presents weaker characteristics, especially if we consider this reality from the absence of a supranationality clause, as is the case with European Union Law.



The present work, therefore, navigates in less turbulent waters, in a normative sense, but, on the other hand, more unknown, given the little attention that the concept of constitutional identity receives in Latin America when compared to upon USA and Europe.

2. Constitutional Identity: In Search of an Operative Concept

When analyzing contemporary constitutionalism, it becomes clear that important transformations have affected it, since the liberal model, founded on the international individual, the national state, and the law (Barber, 2015), fundamentally transformed itself. Although it is not appropriate to think of a global or worldwide constitutionalism, given the various regional and national differences in terms of culture, morality, politics, law, among others, any notion of constitutionalism perceives that the struggle against the abuse of power founded on legal rules constitutes a minimum common denominator for the widespread use of the concept (Grimm, 2016).

It is meant that the concept of constitutional identity needs to be observed according to the dynamics of each national state (Polzin, 2017; Maes, 2024), although, as we will see, the international environment and international law are indispensable for conceptualizing it (Ragone, 2022).

It is true that literature on the theme of constitutional identity is also very varied and, indeed, regionalized. This can be seen, for example, by comparing the seminal works of Jacobsohn (2006) and Rosenfeld (1995), based on an analytical proposal, on the one hand, and the vast bibliography that can be explored, in the European context, focused mainly on the relationship between European law and the domestic law of national states, which has been developed from a Eurocentric background (Tushnet, 2010), more focused on a normative perspective.

For the proper development of the article, a comparison will be made of the concepts employed by two authors who try to establish an operative classification of the two "worlds," such as Rosenfeld and Jacobsohn. Furthermore, European law and the national and international jurisprudence of Europe must function, very importantly, in this process. To this end, based on the classification proposal below, the development of the work will follow



some necessary options to work with a theme that is outside the reference axis of the authors (Global North) to situate it in the Global South, more specifically in Latin America.

The first proposal for conceptual synthesis that interests us is that of Monica Polzin (2017), who elaborates five classifications (discourses) for the concept of constitutional identity. The first discourse emerges in the context of European law, centered on Article 4.2 of the Treaty on European Union. The main discussion is whether the "national identity" of Member States, understood as their constitutional identity, can serve as a justification for non-compliance with European Union Law. The second discourse, related to the first, addresses the interaction between constitutional identity and public international law. It questions whether fundamental constitutional values can legitimize the violation of international law and to what extent international bodies should consider these national norms and values, also discussing it as a theory of judicial self-restraint. The third discourse is composed of national debates, in which constitutional identity is seen as the identity of the constitution itself, a purely normative concept. This view is particularly prominent in Germany, where constitutional identity defines the immutable core of the constitution (eternity clauses), which cannot be suppressed by amendments, functioning as a last legal limit to constitutional reform and European integration. Finally, the fourth discourse understands constitutional identity as a special collective identity of a people or nation, which is expressed, determined, and shaped by its constitution, focusing on the relationship between national culture and the constitutional text, relating a fifth discourse to the theme of immigration.

In turn, Maes (2024) elaborates a more concise classification, in two parts. He divides the concepts of constitutional identity into analytical and normative senses.

Constitutional identity, in its analytical sense, is a tool for understanding the specificity of a constitution as a sociocultural and political document. It seeks to explain how a collectivity understands itself through its constitutional order. The focus here is on the dynamic relationship between a nation's culture and its constitution. It highlights the contributions of theorists such as Gary Jacobsohn and Michel Rosenfeld who argue that constitutional identity is shaped by how a society deals with multiple and, at times, conflicting interpretations of its constitutional principles over time, resulting in a continuous social and historical evolution (Jacobsohn) and, on the other hand, perceives identity as the result of the interaction between characteristics that remain constant (sameness) and those that evolve



without losing the essence of the entity (Rosenfeld). From this perspective, constitutional identity is an inherently dynamic concept, subject to constant contestations, dialogues, and compromises (Maes, 2024).

In contrast, constitutional identity as a normative concept has a binding force, capable of obliging or motivating the action of actors such as legislators, governments, and courts. This aspect is intimately linked to constitutionalism, which advocates limiting state power to protect individual liberties. The main normative application of constitutional identity is the imposition of substantive limits on constituted powers. It presupposes the existence of a "normative core" of the constitution that must be protected from the ordinary political process of changes based on majority rule. These immutable elements reflect the *raison d'être* or the "general spirit" of the constitution and are considered part of a substantive constitution that precedes any formal review. Consequently, any constitutional amendment must be consistent with this core; otherwise, it risks being deemed unconstitutional in the present. And any interpretation of the Constitution must preserve such meanings to the detriment of others that conflict with them. The other normative version concerns the relationship between national and international orders, in the European case, and is directed against the supranational level. In this sense, it both limits the domestic legislator in the transfer of powers to international institutions and limits these institutions in the interpretation and exercise of these transferred powers (Maes, 2024).

In the present work, when considering an operative concept of constitutional identity, the analytical and normative concepts must be complementary and not exclusive. This is because, on the one hand, to think about the person and their relationship with the State, one must take into account not only constitutional history, but also political, economic, among others, as something with a universal bias, but on the other hand, the dynamics with which the rule of law, democracy, and separation of powers present themselves in a given national state also directly impact the attempt to propose an operative concept of constitutional identity, i.e., a concept that serves the objectives of the present article. On the other hand, although the normative advances arising from European law, for example, in doctrinal, jurisprudential, and legislative senses, are central to thinking about a concept of constitutional identity in the Brazilian scenario, with themes such as the principle of supranationality of European law and its relationship with Article 4 of the Treaty on European Union, and with the multiplicity of specific decisions of European courts handling



the concept of constitutional identity, such a reality does not exist in the jurisprudential or even normative dynamics in Brazil, where the courts, especially the Supreme Federal Court(STF), do not use the concept of constitutional identity in their decisions and the doctrine is scarce.

Another important point is that it cannot be denied that other social sciences, such as politics, anthropology, economics, or sociology, also have their normative foundations, in the sense that certain elements must produce effects in the field of reality (people, markets, etc.). The use of the normative concept only for Law is something that greatly limits any conception of normativity (Bicchieri & Muldoon, 2017).

This does not mean that, as will be seen, even in a normative sense, there is no possibility of working with such a concept. This means that the construction and operability of such a concept depend almost exclusively on its creation from elements found in Brazilian constitutional identity, but which do not recognize the concept itself, and furthermore, that the concept of constitutional identity can also be constructed from the provision of Article 2 of the American Convention on Human Rights.

2.1. When the Normative and the Analytical Intersect: Some Lessons from Gary Jacobsohn and Michael Rosenfeld

In the present work, the task of finding constitutional identity initially requires knowing the role that the Constitution plays in this, whether written or not (Craig, 2019). The relationship of the constitution with itself is very complex, especially where written constitutions exist, given the multiplicity of meanings that can legitimately derive from it, which makes it always incomplete and, for this reason, other elements, such as constitutional interpretation, especially judicial, are fundamental in the search process (Rosenfeld, 1995).

Furthermore, we must analyze (a) constitutional history and (b) the objectives of the Constitution itself to discover its identity (Jacobsohn, 2006). This discovery, moreover, cannot be taken in a static sense, given that it occurs in a continuous dialogical process, in which the evolution of constitutional identity occurs interpretively and politically in courts, parliaments, and other public and private spaces (Jacobsohn, 2006).

Although there is a collective memory, in this sense, that forms a "cultural personality of a nation," a core of constitutional identity that develops over time from habits and political experiences (Jacobsohn, 2006), it is required, in such cases, to break with the past and build



a new political order as one of the means of forming a new constitutional identity, breaking with a previous collective identity, inclusive (Rosenfeld, 2010). This process also facilitates understanding what these objectives of the Constitution are, by comparing what it was to what it is from the constitutional transition.

The same can be seen with (c) constitutional reforms and their procedure. Reforms show in an asynchronous comparative perspective what is intended to be altered from what already exists at the constitutional level. This is also a good way to know about objectives. In addition to what is altered, there is also what is not allowed to be altered, that is, (d) the barriers instituted by the Constitution to its own reform (Jacobsohn, 2006), in clauses that prohibit changes (eternity clauses). They are also essential for inquiring about constitutional identity, which, in some cases, can be seen as an act of revolution and not a mere amendment to the Constitution.

Finally, (d) the interpretation of the constitution made by the Courts (Jacobsohn, 2006), which is also a fundamental piece for the formation of constitutional identity or for its change, although it cannot be considered the only actor that unilaterally promotes change (Jacobsohn, 2010).

The search for constitutional identity also points to the need to investigate the disharmony pointed out in constitutional texts, itself a facet of constitutionalism, as the incorporation of interests occurs partially in any Constitution, the result of the struggle of groups to capture its text and its interpretation. Past conflicts, for example, intertwine in the Constitution, even if the text indicates coherence, they are there, hidden (Rosenfeld, 2010).

The balance and continuity between past and future is decisive for the establishment of constitutional identity. Without a good equation between past and future, on the one hand, and without a potential for adaptation, on the other, the constitution tends to get lost in time, because flexibility is one of the main means of promoting the longevity of the Constitution (Jacobsohn 2010).

There is a constant dynamic between past and future, and one must seek not only aspirations but also the compromises reached to better understand the transformations towards the future. The preamble of a constitution, for example, can indicate important elements for this, conditioning one generation with another, which can also occur from the constitutional text that, if altered within the limits established by the constitution itself, can



signify, in the process of developing constitutional identity, a legitimate change of identity itself, in its dynamic process of changes (Jacobsohn, 2011).

Furthermore, one must understand certain constitutional contexts, such as the proper analysis of a national state's constitutional history within its political, economic, or social dynamics, along with its struggles and transformations. In this process, seeking the objectives of the constitution to discover its identity becomes an arduous but necessary process (Jacobsohn, 2006).

This is because an identity cannot persist as hegemonic for long (Rosenfeld, 1994), even when based on terms such as "people," "citizen," or others, which tend to change their meaning over time, however abstract these concepts may be and regardless of the distinct interpretations they allow. Even so, new meanings and interpretations can emerge over time, displacing others that were already established.

Another important issue is that constitutional identity is not to be confused with other identities, such as national, religious, ethnic, or cultural identity, given that the element of pluralism is fundamental within it (Rosenfeld, 1995). However, this should not be understood as a denial of the importance of national or cultural identities, for example, in the conception of constitutional identity. That would be simply to detach it completely from its social context (Rosenfeld, 1995).

This identity is not made solely of agreements but essentially depends on dissonances regarding central themes, such as fundamental rights. In addition to being based on experience rather than a rooted desire that does not transform over time through the interpretation made by political institutions and society (Jacobsohn, 2011), different cultures observe fundamental rights in contrasting and, in some cases, contradictory ways (Rosenfeld, 2012).

Furthermore, for constitutional identity to be fulfilled with better quality, such differences should emphasize certain distinctions or stress various diverse identities; that is, despite the differences, choosing a more abstract option, such as "people," for example, instead of specific identities, can mean adding a greater degree of pluralism to the definition of constitutional identity (Rosenfeld, 1994). In the case of national identity, constitutional identity may be constructed against it or live in constant tension (Rosenfeld, 2012).

Interestingly, as elusive as the concept of constitutional identity may be, constitutional theorists must realize that there is a pressing need for quality argumentation to lead the



constitutional narrative to perceive the essentiality of a constitutional preference. This would not be a mere choice or whim but part of the very construction of the concept of "people," placing such a provision among the most protected constitutional issues in a given national state (Jacobsohn, 2006).

Thus, as an initial synthesis, it is worth saying that seeking constitutional identity demands an understanding that there is a set of essential normativities, both in the textual body of the Constitution and in the interpretive dynamics held by courts, parliaments, and other institutions, in addition, of course, to the doctrinal construction in this regard. On the other hand, there are normativities arising from human relations, which are not to be confused simply with the Law. This essential normativity plays a fundamental role in the constitutional order of a given national state, given that it occupies a key role in the dynamic, circulating, and transforming construction of what is understood as primary in that constitutional order. It depends, therefore, on jurisprudence, of course, but also on other decisions, such as political and social narratives, communication produced within the community of jurists, among others. It is perceived, thus, that it demands a high degree of pluralism and tolerance when thinking about constitutional identity for democratic states, although, on the other hand, one can indeed think about autocratic states and their constitutional identities.

2.2. Advancing Normative Aspects to Rech the Use of the Concept in Brazil

As a primarily European normative issue, the theme of constitutional identity gained relevance with the transformations of European law and the discussions regarding the failed European Constitution and, later, the approval of the Treaty on European Union, which, in its Article 4.2.

This represents an important deepening, in this case, of the model of relationship between European law and the domestic law of the member states and presents itself as an institutional effort to contain excessive advances of European law over the law of the member states within the international hegemony based on the supranationality clause derived from the European Union model.

Although the provision must be thought off the already configured supremacy of European law¹, it deserves to be seen as a new reference point that touches on the intersection between such legal orders, especially in the dialogue between courts, allowing



national courts to invoke the constitutional identity clause, in certain and limited circumstances, as limits to European Union law (Von Bogdandy and Schill, 2011), thus rewriting the very idea of the supranationality of this Law.

This is not intended to mean that this procedure arises as an ideological barrier against European law, as it must find legal limits and cannot serve to simply elude the application of European law, but rather as an element with positive potential for defining the separation of powers (Bogdandy and Schill, 2011). It can function as a renewed means of substantive analysis of the relationship between European law and domestic law, as a tool for a non-hierarchical constitutionalism within the European sphere (Ragone, 2022), and as a means of self-restraint for European institutions, especially the courts (CJEU and ECHR).

This causes the provision for the constitutional identity of states to coexist with another principle already previously provided for in the regional legal order (Fabbrini and Sajó, 2019), since the Maastricht Treaty, to protect the autonomy of states: the principle of subsidiarity, more specifically in its material aspect (Fabbrini, 2014), should function as a means for European institutions to perceive that certain themes should be handled by national states due to their better position.

The same will occur in the case of the system founded on the Council of Europe. The concept of constitutional identity gains momentum and is situated alongside other mechanisms for controlling the excess of the regional institution over national spaces: the national margin of appreciation^{II} (Cavallo et al. 2021). With this, even without being expressly declared, its meaning is preserved in decisions such as *A., B., & C. v. Ireland*, for example, or in *Lautsi v. Italy*, *S.A.S v France*, among others (Fabbrini and Sajó, 2019).

In the domestic sphere, the theme has been treated, albeit in diverse ways, by constitutional courts. The concept of constitutional identity has become a crucial tool for national courts to navigate the complex relationship with the legal order of the European Union. Although approaches vary, there is a common trend toward reinforcing judicial authority and ensuring that European integration does not override the fundamental values that define each Member State as a sovereign political community. The concept, therefore, should represent the recognition of a common standard of values, rather than deference to potentially divergent national traditions (Ragone, 2022).

In summary, let us look at manifestations from some courts. This is the case with the German Federal Constitutional Court, which, in the Lisbon Case, reaffirms its commitment



to European integration but reserves the right to protect the fundamental principles of the Basic Law, among them the eternity clause of Article 79.3. Or the Constitutional Court of Italy, which, in the *Taricco* case, developed the doctrine of "controlimiti" (counter-limits), which establishes "supreme principles" of the constitutional order, such as legality in criminal matters, as an insurmountable limit for EU law and a component of national identity, illustrating the complex interaction between the primacy of EU law and internal constitutional protection. In a negative sense, the use of constitutional identity can serve simply to obstruct European values, such as pluralism, in an anti-democratic movement. Two cases can serve as examples. The Polish Constitutional Tribunal uses Article 90 of its Constitution to define a core of competencies that constitutes national identity, including the protection of human dignity, the rule of law, and democratic governance, and in 2021, adopted a confrontational stance toward the CJEU, defending sovereignty and constitutional identity against what it perceives as an expansion of EU law. The Hungarian CC has also used the concept of constitutional identity in a politically instrumentalized way (Ragone, 2022; Maes, 2025).

This international normative reality also affects national legal dynamics by requiring themes such as (a) meanings of the constitutional text, (b) constitutional reforms and (c) eternity clauses, (d) legal interpretation exercised by courts, (e) legal doctrine, among others, function as tools for defining the constitutional identity of a national state. Thinking of constitutional identity solely as a direct consequence of the values of the Constitution itself (Troper, 2010) denotes not only a mistaken normative perception but one that is self-referential regarding what regional constitutional identity is (Fabbrini and Sajó, 2019).

The constructions made by such courts (Germany, Italy, Hungary, and Poland), although very diverse and with opposite meanings regarding fundamental themes such as, for example, pluralism and integration, function as mechanisms for debate, with their consensus and dissent, regarding the role of institutions and the Constitution in the process of defining constitutional identity.



3. In Search for the Definition of Constitutional Identity of the Brazilian Constitutional Order

As seen, thinking about constitutional identity depends on an analytical perspective on one hand, and a normative one on the other, such that they reciprocally nourish each other to work with constitutional identity in a complete way.

The Brazilian Constitution, as a sociocultural and political document, essentially demands the use of a diachronic analysis to analyze the past in order to understand the present (Rosenfeld, 1995) and, beyond this, to understand it as part of what is conceived as Latin American constitutionalism, comparing it with regional movements of struggle against the abuse of power. This allows for thinking about this reality also from a synchronic perspective, in which constitutional history and other elements intersect in the current moment, so that it can be perceived how a society recognizes its social and historical evolution within the Constitution (Maes, 2024). Thus, past and present meet.

The relationship between Constitution and constitutionalism here seems fundamental and, to that end, the use of Latin American constitutionalism will allow for establishing the characteristics of the Brazilian Constitution based on the circulation of traits that place it as part of a movement arising from the end of civil and military dictatorships in Latin America, starting from the late 1970s and, in Brazil, in 1985 (Conci, 2023).

3.1. Latin American Constitutionalism and the Brazilian Constitution

The relationship between constitutionalism and constitutional identity has been understood as fundamental to providing operationality to the concept of identity. Thus, the regional context—given the insertion of the 1988 Brazilian Constitution into a broad movement called Latin American constitutionalism—becomes necessary for the subsequent development of the constitutional identity of the Brazilian Constitution.

3.1.1. *The Context: Brazilian Constitutionalism as Part of a Regional Movement*

The third wave of regional redemocratization (Lagos, 2018)—a process represented by various concomitant movements that produce a pattern regarding the protection of rights and the control of power—puts an end to a long process of dictatorships in the region. The



path to redemocratization in Latin America opened in the 1980s with the reestablishment of constitutional orders, either through the promulgation of new Constitutions, as occurred in Brazil (1988), Colombia (1991), Peru (1993), among others, or through reforms to existing historical Constitutions, as in Argentina (1994) and Mexico (since the late 1970s). In the political and constitutional fields, there are similarities in institutional crises, fundamental rights, systems of government (with models of strong presidentialism, or hyper-presidentialism), separation of powers, corruption of state agents, marked social and economic inequalities, among other themes (Gargarella,2015) .

In Brazil, Amendment 26/1985 convened the Constituent Assembly after 21 years of dictatorship. Thus, alongside more foundational constituent processes that were considered an open break with the past—such as the Paraguayan, Venezuelan, Ecuadorian, or Bolivian cases—the Brazilian case is inserted among those with transactional, adjustment, or consensus characteristics. This is because while it sought to correct defects in the existing institutional framework, it also valued many previous traditions and preserved parts of their elements, as also seems to have occurred in Argentina (1994) and Mexico, with the transition from a hegemonic party system to a multiparty system (Uprimny, 2011). In this sense, not only the Constitution itself, in Article 8 of the Transitory Provisions Act, but also the decision of the Supreme Federal Court in ADPF 153(STF,2010), recognized amnesty effects for the previous period as part of a clear strategy to ease political tensions between the political actors involved in the constitutional transition.

3.2. Structural Elements of the Constitutional Identity of the 1988 Brazilian Constitutional Order

The construction of the concept of constitutional identity of the Brazilian Constitution finds, as previously stated, some of its structural elements in the text itself (Polzin, 2017), but it does not dispense with its development through either jurisprudence or doctrine, as we will see.

Thus, to think about constitutional identity in the case of the Brazilian Constitution, the following structural elements of the constitutional text will be analyzed, which form the basis of principles and rules that provide essential legitimacy to the Brazilian constitutional order: a) preamble; b) fundamental principles; c) fundamental rights and relationship with Inter-



American law; and d) constitutional reform and eternity clauses, coordinating them with some of their contexts.

3.2.1. *Constitutional Preamble*

The constitutional preamble can perform a normative or merely declaratory function, devoid of legal force, and functions as a historical narrative of a people, nation, or State, establishing a constitutional identity (Orgad, 2010). However, in research on constitutional identity, as seen, the proposal of normativity cannot be limited solely to legal normativity but must explore other forms, such as economic, sociological, anthropological, political, among others. In the Brazilian case, the preamble indicates that the Brazilian people, through their representatives, institute a Democratic State, where the exercise of social and individual rights, equality, justice, among other values, are fundamental to the new constitutional order. And there is also the indication that openness to the international scenario would have a prominent function in the new Constitution.

Despite the STF having affirmed the absence of normative force of the constitutional preamble, not serving as a paradigm for constitutional control (STF, 2003), it also stated that its values can serve constitutional interpretation and, even if not the central theme, can serve to express, help constitute, or influence national identity (Jackson, 2010), and can, in our view, do the same for constitutional identity (Corrias, 2016).

3.2.2. *Fundamental Principles*

Brazilian constitutional history saw the 1988 Constitution preceded by six Constitutions: 1824, 1891, 1934, 1937, 1946, and 1967. In none of them did the constitutional geography place fundamental rights and their regulation before the regulation of the State. And never before had the text opened with a specific title called "Fundamental Principles." Although we are not asserting a difference in the hierarchy of norms within the Constitution itself, there is a choice to establish materially central principles for its understanding.

The historical-constitutional cycle opened by redemocratization, aiming to overcome the preceding authoritarianism and accentuated inequalities, brought the affirmation of the Rule of Law and democracy as the supporting tripod of the new democratic order intended to be established after a cycle of autocratic civil and military regimes. The Constitution, by



stipulating its "fundamental principles" in Title I, gave meaning to the founding elements of its constitutional order.

The first of these defines that the Federative Republic constitutes a Democratic State of Law (*Estado Democrático de Direito*), that is, it abandons the formalistic reading of the legislative Rule of Law (Conci, 2023) to configure, as a founding principle of the new constitutional order, the requirement that legality be concomitant with legitimacy, which founds a democratic society and incorporates the people into decision-making processes (Da Silva, 2001). With it, as occurred in some other Latin American countries, mechanisms of direct democratic participation are affirmed (Uprimny, 2011), with an increase in tools for popular consultation and manifestation, including in budgetary matters, due to the need to reduce inequalities in a highly unequal society (Viciano & Martinez, 2010). The Democratic State of Law, inspired by the Basic Law of Bonn (1949) and repeated in the Constitutions of Portugal (1976) and Spain (1978), was inserted into the constitutional text as an option for overcoming an autocratic State that did not refrain from using Law in its favour, even if independent of any remnant of legitimacy.

Another fundamental provision is the principle of human dignity (Art. 1, III, of the CF), also without previous provision in Brazilian constitutional history, which denotes a new perspective regarding the person as the center and recipient of the legal-constitutional protection of fundamental rights, or as a source-value (Reale, 1963). This is particularly significant when analyzing a constitutional order established in the aftermath of a violent dictatorship. It is from this principle that the broad affirmation of old and new fundamental rights derives, whether through the constitutional text, original or reformed, or through the jurisprudence of the courts, especially the Supreme Federal Court (STF, 2010). It is also from here that this expansion of the catalog of fundamental rights involves those resulting from international treaties (Art. 5, §2 of the CF), as the human person cannot be relegated solely to the national state. This process cannot deny, on one hand, being a characteristic of regional constitutionalism, with its tendency to exalt constitutional texts—so characteristic of regional legal formalism—which is accompanied by the invocation of values proclaimed in the constitutional text (which) play a relevant symbolic role.

The defense of pluralism, also a characteristic of regional constitutionalism (Conci, 2023), has an express reference in its fundamental principles in the Brazilian Constitution (Art. 1, V, CF). The Brazilian Constitution inserts itself into a movement seeking to overcome merely



electoral democracies through the reinforcement of pluralism in its most varied presentations (political, ethnic, religious, legal). it intends to settle on existing conflicts and strengthen the existing diversities in each national state, which also means directly affecting Black and Indigenous populations, historically excluded, who gain space in Constitutions (Uprimny, 2011). From this principle, the STF has advanced hermeneutically, for example, not only in electoral (STF, 1996) and partisan matters (STF, 2007) but also in criminal matters, based on three historically constructed racial categories (white, black, and Asianeivil) to protect, by expanding the scope of the crime of racism, Jewish people (STF, 2004) and the LGBTQIA+ community (STF, 2019), in addition to confronting structural racism (STF, 2017).

Also, among the fundamental principles, but specifically among those concerning the objectives of the Republic, is the reduction of social and regional inequalities and the prohibition of any and all types of discrimination to build a free, just, and solidary society (Art. 3). The Social State, thus, becomes the adopted model, and its actions are based on the ideal of material equality, as well, with public actions and policies aimed at tackling one of the main challenges of Latin American societies, and Brazil consequently, which are the broad inequalities affecting such societies. The State becomes an important actor in building an environment where the protection of well-being is a fundamental objective with constitutional hierarchy and normative force to transform reality.

Still among the fundamental principles, the separation of Powers finds shelter among the founding elements of the constitutional order. But the provision is a transformation of the traditional liberal model of mere division of Powers with traditional attributions for the fulfilment of the objectives provided for in Guarantee-Constitutions. This means that, in addition to typical functions, the powers must also expand their atypical functions, since the final objective is to realize the fundamental rights positivized in contemporary Constitutions (Piçarra, 1989)—increasingly conflicting—and the laws produced by the legislator—increasingly less coherent—for the reasons explained above. This is the case with the Social State judge, or the "social judge" (Bonavides, 2000) who, increasingly attentive to the content of the law, must adapt their decision-making to reinforce the social function of the legal process over the means for its achievement. Given this, beyond sanctioning conflicting parties, it seeks to arbitrate it, strengthening schemes for seeking composition between litigating parties, even if one of them is the State itself. This is a true active subject of the political process (Ost, 1997) This composition must permeate both the pre-contentious and



the contentious moment of the process, enabling the judge also to be treated as a true "social engineer." More importance is attributed to effectiveness over the validity of the law, given that the judge's activity is one of creation and, more strictly, referred to the concrete case. With this, the possibility opens up for the Judiciary, which depends on provocation, to also enter the realm of realizing social, economic, and cultural fundamental rights. It should be emphasized: even though the Legislature maintains the preference in creating public policies to realize those rights that, a priori, should be implemented by the Executive, it is the Judiciary, at this moment, that also affirms its prerogative to implement these "social" rights.

Finally, among the structural fundamental principles are those concerning the international relations of the Brazilian State.

3.2.3. Fundamental Rights and Relationship with Inter-American Law

Finally, an important characteristic of this process concerns international constitutionalism in Brazil. As in other Latin American countries, clauses of openness to International Human Rights Law were instituted. The continuity of this process relates to the advancement of reflection on the need to think of Law as a "constructive transversal network" (Neves, 2014) and, with it, to think of solutions to constitutional problems as depending on the interlacing of legal orders, implying an understanding of the limits of each of the orders.

As in the provisions of other Constitutions (Argentina, Art. 75.22; Venezuela, Art. 93; Colombia, Art. 93), a new cycle also began regarding the theme of human rights, which allows for a new international environment, especially in the Inter-American Human Rights System based in the Organization of American States, where Constitutions treat international human rights treaties generously in their constitutional texts.

After that, progress was made on the need for not only international texts but also international jurisprudence to be analyzed by jurists and judges, primarily. In some countries—Argentina, Chile, and Colombia—the issue advanced satisfactorily. In the cases of Brazil and Uruguay, the process followed more slowly. Regarding the latter, much was done in mistakenly working with International Law from the perspective of National Law—that is, from the strategy of giving an illusory interpretation to International Law (Ramos, 2005), such that the Judiciary also gave an interpretation based on domestic law to international treaties, disregarding international jurisprudence.



This has granted the bodies of the Inter-American System for the Protection of Human Rights—namely, both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (IACHR Court)—a legal and political prominence in the region, with transformative potential on one hand, and the potential to raise conflicts with national states seeking to contain them on the other. This is evidenced by the declaration made by Paraguay, Brazil, Argentina, Chile, and Colombia in 2020, seeking to curb the judicial expansion of the Inter-American Court (Paraguay, 2020).

In this sense, the IACHR Court asserts the need for a horizontal relationship with states, treating the human person, rather than the State-party, in a dialogical relationship, configuring the individual as the foundation and recipient of the entire domestic and international apparatus for human rights protection (McGregor, 2022), within a horizontal relationship between the state and the IACHR Court.

In the Brazilian case, a dialogue between legal systems and courts has been proposed (Conci, 2015), along the lines of what has been happening with the relationship between Italy and the EU, the cooperative relationship (Drinóczi, 2020), what has become known as the ‘Taricco Saga’ (Bonelli, 2018), as the best way to give legal force to Article 2 of the American Convention on Human Rights, which imposes the principle of subsidiarity as a means of interrelation between national and international legal systems at the regional level (Von Bogdandy and Schill, 2011).

This is a matter of great importance to constitutionalism because it restricts even the centrality of the constituent power on one hand, and of the Constitution itself on the other, since both are simultaneously conditioned by International Human Rights Law.

Historically, there has been an increase in judicial protection mechanisms for rights as a means to overcome the authoritarian reality that permeated the region in the previous period. During that time, certain social movements and human rights organizations in Latin America turned to international protection mechanisms for these rights, such as the Commission or the Inter-American Court, in order to obtain decisions or contribute to the formation of standards that they would later use internally, utilizing the strategic resource of international litigation as a means to fuel future processes at the domestic level. However, it is also possible to state that the intention was to go further, as it became clear that "constitutional processes had broader purposes, as they also sought to expand democracy and combat social, ethnic,



and gender exclusions and inequities" , which was pointed out both internally and internationally (Uprimny, 2011).

3.2.4. Constitutional Reforms and Eternity Clauses within the Brazilian Constitution

Another interesting aspect concerns the issue of constitutional reform and rigidity, including entrenched clauses (eternity clauses) in the text of the Brazilian Constitution. Although the regional scenario has brought some more powerful, albeit debatable, provisions for eternity, such as immutability clauses (Bolivia, art. 411/ Ecuador, art. 441), the Brazilian Constitution adopted a different procedure. A high quorum is required for reform (3/5 of the members of each of the two houses of the National Congress), with double approval in each house and a system whereby if the revising house alters the proposal previously sent and approved by the house initiating the constitutional reform process, the matter returns to the previous house for further analysis (art. 60 and paragraphs of the Federal Constitution).

Furthermore, it expanded the list of entrenched clauses (eternity clauses)^{III}, compared to what existed in the previous Constitution (Article 46, §1, of the 1967 Constitution), prohibiting the processing of amendments tending to abolish the Federation as a territorial model, direct, secret, universal and periodic suffrage, the separation of powers, and individual rights and guarantees. The abolition of the Republic ceased to be an entrenched clause (eternity clause) due to the 1993 plebiscite, which returned to the people the possibility of choosing between Republic and Monarchy and, in addition, Presidentialism and Parliamentarism.

The interpretation of the Constitution added, besides the explicit principles mentioned above, other implicit clauses, which, on a case-by-case basis, became parameters for the Constitutional Review of Amendments to the Constitution through a hermeneutical exercise to be carried out, in this case, by the Supreme Federal Court (STF,2003), expanding the eternity clauses provisions.

However, this is merely an old discussion about the democratic legitimacy of one generation limiting another in ideological terms, prohibiting changes or, on the other hand, maintaining the stipulating the relationship between the formal Constitution (legality) and the real Constitution. This means that the defense of adherence to the will of the constituent power as a means of preserving highly transformative decisions has its limitations in the field of democratic legitimacy.



In the European case, it was with the Treaty of Lisbon that the establishment of a direct relationship between constitutional identity and eternity clauses gained momentum (Drinóczi, 2020), which is perhaps the most tangible of the structuring elements of what can be called constitutional identity, given its reinforced normativity.

In the Brazilian case, since the STF has long established its legitimacy to review the constitutionality of amendments to the Constitution, it is clear that this normativity is further strengthened. Such amendments, in addition to affirming elements of the Brazilian constitutional identity, also have the power to alter that identity more significantly, especially if derived from constitutional reforms (Corbo, 2020).

4. Some Conclusions: The Continuous Construction of Brazilian Constitutional Identity

The path taken in this article highlights the inherent complexity of applying the concept of constitutional identity to the Brazilian context. The notion, largely developed within the constitutionalism of the Global North, finds in Brazil and Latin America a terrain with distinct contours, marked by a unique historical trajectory and the absence of a supranational order with the same binding force as the European Union. The difficulty, therefore, lies not only in the scarcity of explicit treatment of the subject in national and regional doctrine and jurisprudence but also in the very need to forge an operative concept that is faithful to the dynamics of regional constitutionalism and the specificities of the formation of the Brazilian State.

This work has demonstrated that overcoming such a challenge requires an approach that transcends the mere importation of models and instead combines the analytical and normative dimensions of the concept. Brazilian constitutional identity does not reveal itself as a static and predefined core, but as a dialogical process in constant construction, nourished by the tensions between past and future, and by the consensuses and dissents that shape the nation's political and social life. It is an identity discovered less in abstract definitions and more in the analysis of its structural elements, which function as vectors of meaning for the constitutional order inaugurated in 1988.



In this sense, the main point that emerges from the analysis is that the identity of the Brazilian Constitution is anchored in a set of founding elements that represent a deliberate break with the authoritarian past and a commitment to a democratic, plural, and socially just future. The article has identified and explored these pillars, which, together, form the normative and axiological essence of the Brazilian constitutional project.

This essence necessarily encompasses the Fundamental Principles. The centrality of human dignity, the establishment of a Democratic State under the Rule of Law, the defense of pluralism, and the consecration of a Social State aimed at reducing inequalities are not mere rhetorical declarations. On the contrary, they constitute the foundation upon which the entire constitutional edifice is built, guiding the interpretation and application of all other norms.

A second key aspect is the centrality of Fundamental Rights and the openness to the international sphere. The 1988 Constitution innovated by positioning its extensive list of fundamental rights and guarantees as its epicenter, linking them to an opening clause for International Human Rights Law. This feature, set within the broader context of the new Latin American constitutionalism, establishes a permanent dialogue between the domestic and regional orders, notably with the Inter-American System, thereby redefining the boundaries of sovereignty in favor of individual protection.

Furthermore, the Eternity Clauses, based on constitutional rigidity and embodied in the immutability clauses of Article 60, §4, represent the most tangible dimension of constitutional identity. By protecting the federal form of the State, direct suffrage, the separation of powers, and individual rights and guarantees, the original constituent power demarcated the fundamental core of its identity, establishing insurmountable limits for future generations and for the reform process itself. The expansive interpretation of these limits by the Supreme Federal Court only reinforces the normativity and centrality of these foundational choices.

The constitutional preamble also deserved special attention, as it calls for a transition towards Democracy and the Rule of Law. Although the Supreme Federal Court has affirmed the preamble's lack of normative force for constitutional review, its political normativity is clear and allows for an understanding of the past, present, and future of Brazilian constitutionalism and its Constitution.



In summary, the arduous process of searching for Brazilian constitutional identity—given that this is a dormant issue in both national doctrine and jurisprudence—shows that, despite the difficulty of constructing meaning and conceptual operability, it is a topic that may, in the future, gain strength and space in the national and regional legal reality, circulating to the Global South and adapting to its context.

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^I For a jurisprudential discussion on the theme, see *Costa v. ENEL*, [1964]; *Simmenthal*, [1978], among others.

^{II} On the theme, see AGUILAR CAVALLO, Gonzalo et al.. *El control de convencionalidad: Ius Constitutionale Commune y diálogo judicial multinivel Latinoamericano*. 2021.(cap. 8).

^{III} Brasil. Art. 60, §4º: No proposed constitutional amendment shall be considered that is aimed at abolishing the following: I. the federalist form of the National Government; II. direct, secret, universal and periodic suffrage; III. separation of powers; IV. individual rights and guarantees.

References

- Aguilar Cavallo Gonzalo et al., 2021, *El control de convencionalidad: Ius Constitutionale Commune y diálogo judicial multinivel Latinoamericano*.
- Barber Nicholas, 2015, 'Constitutionalism: negative and positive', *Dublin University Law Journal*, 38: 249.
- Bicchieri Cristina and Muldoon Ryan, 2017, 'Social Norms', in Zalta Edward N. (ed.), *The Stanford Encyclopedia of Philosophy*.
- von Bogdandy Armin and Schill Stephan, 2011, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty', *Common Market Law Review*, 48.
- Bonavides Paulo, 2000, *Curso de Direito Constitucional*, Malheiros, São Paulo.
- Bonelli Matteo, 2018, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union: CJEU, C-105/ 14 Ivo Taricco and Others, ECLI:EU:C:2015:555; and C-42/ 17 M.A.S., M.B., ECLI:EU:C:2017:936 Italian Constitutional Court, Order No. 24/ 2017', *Maastricht Journal of European and Comparative Law* 25 , 357.
- Campilongo Celso Fernandes, 1998, *Governo representativo versus governo dos juízes: a autopoiese dos sistemas político e jurídico*, UFBA, Belém.
- Conci Luiz Guilherme Arcaro, 2015, 'Diálogo entre Cortes e o controle de convencionalidade—algumas reflexões sobre a relação entre o Supremo Tribunal Federal ea Corte Interamericana de Direitos Humanos', in Conci Luiz Guilherme Arcaro and Mezzetti Luca, *Diálogo Entre Cortes*, Externado de Colombia, Bogota, 117.
- Conci Luiz Guilherme Arcaro, 2023, *Democracia Constitucional e Populismos na América Latina:: entre fragilidades institucionais e proteção deficitária dos direitos fundamentais*, Contracorrente.
- Corbo Wallace de Almeida, 2020, *Identidade constitucional: conceito, (trans)formação e crise*, PhD Thesis , Universidade do Estado do Rio de Janeiro, Rio de Janeiro.
- Corrias Luigi, 2016, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity', *European Constitutional Law Review* 12 , 6-26.
- Craig Paul, 2019, 'Constitutional Identity in the UK: An Evolving Concept', in Calliess Christian and Van Der Schyff Gerhard (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge University Press, Cambridge.
- De Vega Pedro, 2007, *La reforma constitucional y la problemática del poder constituyente*, Tecnos, Madrid.



- Drinóczi Tímea, 2020, 'Constitutional identity in Europe: The identity of the constitution. A regional approach'. *German Law Journal*, 21(2), 105.
- Fabbrini Federico, 2014, 'The Principle of bogdaarity', in Schütze Robert and Tridimas Takis (eds), *Oxford Principles of European Union Law*, Oxford University Press, Oxford.
- Fabbrini Federico and Pollicino Oreste, 2020, 'Constitutional Identity in Italy: Institutional Disagreements at a Time of Political Change', in Calliess and van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge University Press, 201, Cambridge.
- Fabbrini Federico and Sajó András, 2019, 'The dangers of constitutional identity', *European Law Journal*, 25 (4): 457-473.
- Gargarella Roberto, 2015, *La sala de máquinas de la Constitución: dos siglos de constitucionalismo en América Latina (1810-2010)*, Katz, Buenos Aires.
- Grimm Dieter, 2016, *Constitutionalism: past, present, and future*, Oxford University Press, Oxford.
- Jackson Vicki C., 2010, 'Methodological Challenges in Comparative Constitutional Law', *Penn State International Law Review* 28, 319.
- Jacobsohn Gary Jeffrey, 2006, 'Constitutional Identity', *The Review of Politics*, 68: 361–397.
- Jacobsohn Gary J., 2010, *Constitutional Identity*, Harvard University Press, Cambridge (MA).
- Lagos Marta, 2018, 'El fin de la tercera ola de democracias', Informe Latinobarómetro.
- Lopes José Reinaldo de Lima, 1997, 'A função política do Poder Judiciário', in Faria José Eduardo (ed.), *Direito e justiça: a função social do Judiciário*, Ática, São Paulo, 140.
- Mac-Gregor Eduardo Ferrer, 2022, 'El control difuso de convencionalidad en el Estado Constitucional', *Biblioteca Virtual del Instituto de Investigaciones Jurídicas de la UNAM*.
- Maes Christophe, 2024, 'The notion of constitutional identity and its role in European integration', *The notion of constitutional identity and its role in European integration*, 1-91.
- Neves Marcelo, 2014, 'Do diálogo entre as Cortes Supremas e a Corte Interamericana de Direitos Humanos ao transconstitucionalismo na América Latina', *Revista Informação Legislativa*, 51 (201): 198-211.
- Orgad Liav, 2010, 'The preamble in constitutional interpretation', *International Journal of Constitutional Law*, 8 (4): 714-738.
- Ost François, 1997, *A natureza à margem da lei: a ecologia à prova do direito*, Instituto Piaget, Lisboa.
- Otero Paulo, 2007, *Instituições políticas e constitucionais*, Almedina, Coimbra.
- Piçarra Nuno, 1989, *A separação dos poderes como doutrina e princípio constitucional*, Coimbra Editora, Coimbra.
- Piovesan Flávia, 2016, 'Direitos humanos e constitucionalismo regional transformador: o impacto do Sistema Interamericano', *Cadernos de Pós-Graduação em Direito da USP*, 36 (1): 10.
- Polzin Monika, *Constitutional Identity as a Constructed Reality and a Restless Soul*, *German Law Journal* 18/7 (2017), 1595-1616.
- Ragne Sabrina, 2022, 'Constitutional identities and traditions: a conundrum for comparative lawyers', *A&C. Revista de Direito Administrativo & Constitucional*, 22 (89): 11-36.
- Ramos André de Carvalho, 2005, 'Responsabilidade internacional do Estado por violação de direitos humanos', *Revista CEJ*, 9 (29): 53.
- Reale Miguel, 1963, *Pluralismo e Liberdade*, Saraiva, São Paulo.
- Rosenfeld Michel, 1994, *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*, Duke University Press, Durham.
- Rosenfeld Michel, 1995, 'The Identity of the Constitutional Subject', *Cardozo Law Review*, 16.
- Rosenfeld Michel, 2012, *Constitutional Identity*, Oxford University Press, Oxford.
- Sáiz Arnaiz Alejandro and Alcoberro Llivina Carina (Dir.), 2013, *National constitutional identity and European integration*, Cambridge, Intersentia.
- Silva José Afonso da, 2001, *Curso de direito constitucional positivo*, Malheiros, São Paulo.
- **STF**, ADI 1.355-MC, Rel. Min. Ilmar Galvão, 23 Nov. 1995.
- **STF**, ADPF 153, Rel. Min. Eros Grau, 29 Apr. 2010.
- **STF**, ADC 41, Rel. Min. Roberto Barroso, 8 Jun. 2017.
- **STF**, ADI 2.076, Rel. Min. Carlos Velloso, 15 Aug. 2002.



-
- **STF**, HC 82.424, Rel. Min. Maurício Corrêa, 17 Sept. 2003.
 - **STF**, ADI 1.351, Rel. Min. Marco Aurélio, 7 Dec. 2006.
 - **STF**, ADPF 33 MC, Rel. Min. Gilmar Mendes, 2003.
 - **STF**, ADO 26, Rel. Min. Edson Fachin, 2019.
 - **STF**, MI 4.733, Rel. Min. Edson Fachin, 2019.
 - Troper Michel, 2010, 'Behind the Constitution? The Principle of Constitutional Identity in France', in Sajó András and Uitz Renáta (eds), *Constitutional topography, values and Constitutions*, Eleven International Publishing, Utrecht, 187.
 - Tushnet Mark, 2010, 'How do constitutions constitute constitutional identity', *International Journal of Constitutional Law*, New York, v. 8, n. 3, 674.
 - Uprimny Rodrigo, 2011, 'Las transformaciones constitucionales recientes en América Latina: tendencias y desafíos', in Garavito César Roberto (ed.), *El derecho en América Latina: un mapa para el pensamiento jurídico del siglo XXI*, Siglo Veintiuno, Buenos Aires, 127.
 - Viciano Roberto and Martínez Rubén, 2010, 'Aspectos generales del nuevo constitucionalismo latinoamericano', Corte Constitucional de Ecuador, Quito.