SLAVERY UNDER LIBERAL CONSTITUTIONALISM: IMPERIAL BRAZIL'S OSTENSIBLE PARADOX

JEAN VILBERT[1]

ABSTRACT

Constitutions are the law of the land, the legal document that sets the framework for political life, defining the structure of a society. Under this construction, the current scholarship has debated how to explain the seeming paradox between the Brazilian Constitution of 1824, with its liberal framework and inalienable rights of the citizen, in contrast to Brazil's sustained a colossal slavery system during the period. This article argues that this contradiction is apparent only should the concept of constitution encompasses not only the text but also the context underlying sociopolitical reality: legal text and cultural context merge to form the *integral constitution*, which regulates life in a society and reveals the full character of the social pact at the time of the interpretation.

KEYWORDS: *Slavery, constitutional design, constitutional hermeneutics*

I. INTRODUCTION

In 1824, soon after declaring its independence from Portugal, the United Kingdom of Brazil followed the United States by elevating a set of rights to constitutional status,

1. University of Wisconsin–Madison

Constitutional Studies, Volume 9

rendering them inalienable. The South American newborn country, by that point destitute of legal-philosophical tradition, unexpectedly came to the vanguard of the legal-political world by writing a constitution with solidly Enlightenment-inspired foundations. Yet, much like the United States, Brazil was a slaveholding society, in proportions that dwarf the North American enslavement. Brazil "imported" twenty times more Africans than the United States, receiving half of all captives brought to the Americas (Slave Voyages 2022). As a result, the country has today the largest Black population outside Africa. There were about 133 million people of African descent in the Latin America region in 2015, with over 91 percent concentrated in Brazil (World Bank 2018, 56).

Common wisdom about this complex scenario suggests that the concerted efforts, from north to south, to produce legal documents meant to lay the basis for human freedom did not reach all humans and should be considered, at least in part, futile. In addition, the striking contrast between the legal provision that "all men are equal" and the condition of men who were slaves is often taken as irrefutable proof of the abyss between law and reality. Alluding to the North American case, Patterson (1987, 543) asserts that "behind the discreet curtains of this great union one immediately encounters some of most perverse paradoxes and unseemly contradiction modern history has to offer."

This essay acknowledges the striking contrast between the language printed in the legal documents of the period and what was observable under the sun. Nonetheless, I posit that much of the surprise in the seeming disparity between the legal framework and social practice arises from a simple misconception in the accounts of the socio-legal relationship—namely, that constitutional and sociopolitical orders are separate spheres, even if interconnected. As I argue here, slavery survived under the Brazilian liberal constitution just as it did under the US text because the servile regime was a cultural element of those societies. Moreover, while in extreme cases constitutions may not be part of a society's culture, culture is always part of a society's constitution, for the constitution is composed of two elements: a textual one, and a cultural one. The legal text and the sociopolitical domain (i.e., culture) then blend to form the *integral constitution*, regulating life in a society. I contend that should this broader concept of constitution be adopted, a *culturalist interpretation*, construing the legal text in combination with its full context, reveals the true character of the social pact at the time of the interpretation.

The existing scholarship addressing the topic along similar lines has focused either on the interaction between the constitution and the economic structure (Castro and Mezzaroba 2018; Patterson 1987; Brennan and Buchanan 1985) or on the inclusion of social aspects in the constitutional inquiry (Thornhill 2011; Giddens 1986; Lassalle 1942). This essay contributes by arguing that the consideration of

culture *within* the constitutional arrangement is not simply a matter of methodological approach. In fact, the intimate overlapping among social, economic, and political factors composes a concept of (integral) constitution, which explains social events, such as slavery in Imperial Brazil, and helps design developments of the legal structure so that institutional choices can be more fully informed.

To build this case, I have organized this essay into five sections. The first presents the background on how slavery advanced in colonial Brazil. The next examines the constitutional-writing process that produced the 1824 Brazilian Imperial Constitution. Then, the focus is slavery in Brazil during the period and the underlying sociopolitical order, given the existing legal structure. Last, taking into account the heated debate on the concepts of constitution, I introduce the integral conception, which uses a culturalist interpretation to explain the relationship between constitutional text and social life on the ground.

II. SLAVERY IN COLONIAL BRAZIL

At the beginning of the fifteenth century, Europe abandoned its provincial mindset to explore the oceans. In their quest for new routes of commerce to the east, Portuguese, English, Spanish, French, and Dutch navigators would stumble upon the Americas. At first, there was no intention to settle; the goal was commerce. The first Europeans to arrive in the Americas would frown on attempts to launch more entrenched endeavors, such as agriculture. Few activities deviated from the exchange of spontaneous products: wood, skins, and fishing. Only with the need for the expansion of the trading posts did the Portuguese, then followed by the Spanish and English, would start the first settlements (Hansen 1940).

Settlements that arose in tropical (southern) and temperate (northern) areas were very distinct. Surely, many of those who dared to face the risks imposed by the New World followed a once-in-a-lifetime opportunity for fortune. Yet, it is an almost uncontestable historical fact that temperate areas attracted numerous groups fleeing from oppression in Europe (e.g., Quakers and Puritans), people who were looking for a new home as similar as possible to their natural habitat so that they could develop frontiers (Prado 1991, 21–23). The firstcomer, as depicted by Marcus Hansen (1942, 63), was a "true frontiersman. His equipment was an ax, a rifle, a knife and a frying pan." But even the Yankee spirit seemed to falter in South America's hostile jungles, which had little appeal among those coming to settle.

Thus, areas that today are Canada and the United States experienced the same colonization patterns as Australia and New Zealand, for which historian Alfred Crosby coined the term *Neo-Europes* (1986, 2–3). Since the settlement was intended

to be permanent, British settlers brought European institutions with them, establishing property rights and government checks as they arrived. Portuguese and Spanish colonies, in contrast, became "extractive states," wherein colonists had no intention to stay permanently; they coped with the highly inhospitable environment, rife with tropical diseases, their firm purpose to transfer to the colonizer as much as possible of the colony's resources (Acemoglu et al. 2001, 1370–73).

Ironically, the very diversity in environmental conditions that had made the tropics unfavorable for settlement would make them profitable. The tropical climate offered the possibility of producing commodities wanting in Europe at the time, such as sugar, pepper, cotton, and tobacco. The problem was that these products demand an abundant labor force for their production, and the Portuguese were struggling with the *indigenous question*, "the most complex problem the colonization in the Atlantic had to deal with." The Portuguese saw indigenous peoples as potential workers and settlers; indeed, their incorporation into the colonization process was deemed critical, given the colony's gigantic territorial extension. With this goal in mind, first, Portugal entrusted the Catholic Church with the task of "bringing the natives out of the jungle." However, after little more than a century, it was already clear that "incorporated" natives became dependent on the missionaries and were unable to live a civil life outside the Jesuit communities. Incapable of persuading the Society of Jesus, the Jesuits, to change its strict religious regime, the crown revoked the privileges previously granted to evangelization in the colony. The colonists, in their turn, needing a reliable source of labor, were caught amid the struggle. For decades, they pressured the monarch to allow them extensive use of the indigenous peoples through force if necessary. The colonists would not succeed (Prado 1991).

In 1758, the Marquis of Pombal convinced King Dom José I to enact the Indigenous Statute, a groundbreaking law that bestowed emancipation on the indigenous populations. Under the statute, natives could not be coerced into the production model in Portuguese domains (Almeida 1997). The document, with a distinctly protective character for its time, drew a plan for the "civilization" of the indigenous peoples based on secular principles, relative political participation, and miscegenation (Coelho 2007, 30). Of course, this also meant that Portugal would insist on its project of integrating the natives into the European way of life, which would trigger the process of destruction of unique cultures. In any case, the statute was a serious blow to the colonists' ambitions to exploit the indigenous population as forced labor.

As Figure 1 illustrates, the indigenous question in Brazil had always made slaves an attractive alternative in the Portuguese colony. With the matter of using indigenous labor solved against the colonists' will, they leaned even more heavily toward another source of abundant labor, and the slave trade exploded. Since

about 1535, northwest barons were regularly buying slaves to support sugar cane production, the main economic activity until the rise of coffee in the 1850s. But after the so-called Pombal law put natives out of the colonists' reach, the inflow of African slaves soared. As the saying of the time goes, "The white man harnesses nature exploiting inferior races" (Prado 1991, 25).

Eltis and Richardson (2008, 1–2) discern that from recorded time, slavery had been widely known and accepted; no culture can claim to be immune from its legacy. From the margins of the Nile to ancient Greece, from imperial China to the Roman Empire, reaching pre-Colombian America, every culture has seen humans being sold and forced to work under dire conditions. Still, nothing compares in scale, organization, and duration to the transatlantic slave trade that buoyed the European maritime expansion in the fifteenth and sixteenth centuries—"the largest transoceanic migration in history." For 350 years, slaves were crowded in small ships and dispatched across oceans to work in plantations thousands of miles away, reshaping the demography of the world.

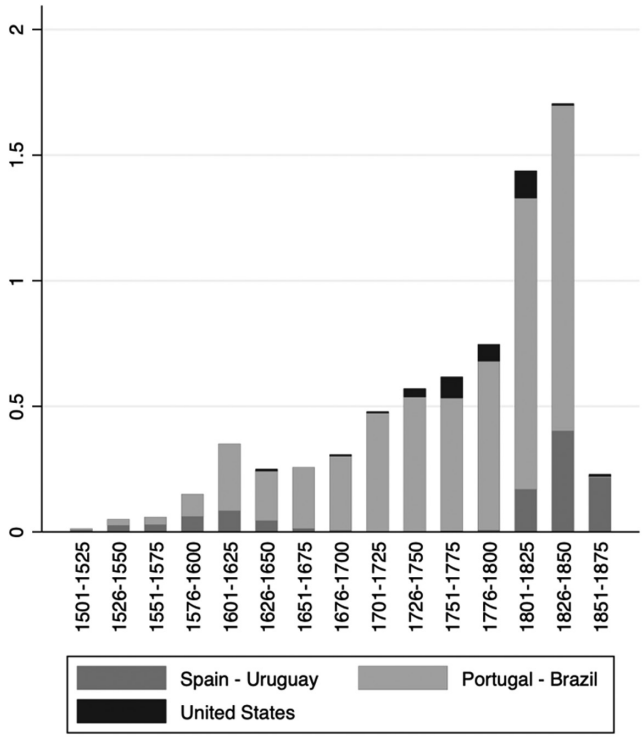

FIGURE 1. Transatlantic Slave Trade (1501–1866), selected countries
Source: Slave Voyages (2022).

In the heyday of the slave trade, the number of Africans arriving in Brazil's ports on a daily basis was so astonishing that at the disembarkation point, they were registered, not by the number of people but by linear measure and volume in tons, according to the regular height of an adult slave (1.75 m, or 5'9"): three "pieces," one ton; two children between 4 and 8 years old, one piece; three children from 8 to 15 years old, one piece, the same weight given to those already "old," between 35 and 40 years (Azevedo 1929, 77–78). Slavery was a constant throughout America in the nineteenth century, but Brazil's case is singular.

Acemoglu and Robinson (2012, 114–15) note that Argentina and Chile, with their smaller indigenous populations and not-so-rich natural resources, were mostly "neglected" by the Spaniards, while the lands occupied by the Aztec, Maya, and Incan civilizations (in current Mexico, Bolivia, Ecuador, and Peru), with their vast populations and metals, were exploited close to exhaustion—and their native peoples decimated in the process. Put differently, what made slaves "dispensable" in most of the Andean highlands, where the Spanish mostly settled, was the abundance of gold and silver, as well as dense and sedentary indigenous populations apt to serve as the labor force. In the Portuguese domains on the Atlantic coast, the crown's fortunate decision to spare indigenous peoples made Black slaves the second-best option at hand for the colonists, sealing the fate of millions of Africans.

From 1501 to 1875, Brazil received about 5.8 million captives, or 46.7 percent of all the Atlantic slave traffic, as once 12.5 million Africans are believed to have been boarded to the New World. These figures make Brazil's inflow 19.15 times greater than the US inflow (Slave Voyages 2022). To offer a glimpse into the magnitude of this human tragedy, Miller (1996, 148–49) estimates that 40–45 percent of the slaves died, not in their destination, but still in Africa, between their capture and their exposure to the elements on the coast. Another 10–15 percent would die in the month waiting to embark. On average, 10 percent perished during the dread trip and a further 5 percent died while already in the host country from being exposed in markets or during the trip to the worksite. Finally, an additional 15 percent would lose their lives in the first three years of captivity. Translating it into absolute numbers, in three centuries around 24 million Africans died directly as a result of the transatlantic slave trade.

III. A CONSTITUTION FOR THE NEWBORN COUNTRY

Historical facts, as described by Prado (2003, 13–14), when observed from a distance, detached from the maze of incidental events that evolve together, seem incomprehensible. Yet it is precisely in the web of secondary plots that we can find the guideline to capture the meaning of the grand scheme, to understand and

explain it. This normally requires researchers to step back in time to reconstitute the line of events that unfold the whole picture. Heeding this warning, in this section, I provide a brief exposition of the historical context that led up to the first Brazilian constitution.

Fleeing the French troops of Napoleon Bonaparte, which subjugated most of Europe in the early nineteenth century, the Portuguese royal family transferred the court to Brazil in 1808, putting it under English protection.[2] When peace was reinstalled in 1815, the South American colony was not the same: promoted to the United Kingdom of Portugal, Brazil, and the Algarves, now its population yearned for independence. King Dom John VI had returned to Europe but installed his son, Dom Pedro, as prince regent. In 1822, Portugal reluctantly accepted the consolidation of the new state, and Brazil paid for its freedom with gold, taking on Portugal's external debt with England (Salles 2019).

Acclaimed emperor of the United Kingdom of Brazil, Dom Pedro soon commissioned a constitutional assembly to write a constitution for the infant country. Those involved in the writing process were well aware of the nature of the project. In the language of the time, the document would set a new social contract—or social pact (Sousa 2016, 165). But the task was arduous, and from day one the committee struggled to find common ground. Two topics were particularly controversial: first, the nature and role of the monarchy; second, slavery.

Regarding the monarch, the group called *democrats*, composed of the most revolutionary segments within the Freemasonry, claimed the emperor could not invoke any divine or dynastic right to assert his authority, for the people are sovereign. As such, the monarch would be subject to the constitution as any other citizen. The *moderates* objected, maintaining that the emperor's authority was based on traditions and historical heritage regardless of any delegation of power (Gomes 2010). To rebuke the pleas for radical political change, slavery was used as an argument. In a pamphlet, José Antonio de Miranda roared:

> How is it possible to build a Republic in a country of gigantic dimensions, mostly unknown, filled with infinite forests, with *no free people,* no civilization, no arts, without necessary mutual relations, with conflicting interests, and *a multitude of slaves* without customs, education, neither civil nor religious, and with antisocial habits? (Dias 2005, 135–36)

2. Brazilian historian Oliveira Lima (2012, 141) maintains that by fleeing from Napoleon and transferring the royal court to Brazil, Portuguese king Dom John VI agglutinated the mosaic of cultures that had developed in each province and unintentionally founded Brazilian national identity.

Close to the end of its task, the nominated assembly presented its draft, quickly nicknamed the "Cassava's Constitution." As many perceived, the document directly intended to curtail the monarch's prerogatives, diverting power to the agrarian elite that dominated the House of Representatives (Oliveira 2012). Dom Pedro's response was swift and strong, demanding the text be rewritten. With the relationship between the emperor and the assembly worsening each passing day, the deputies attempted one last maneuver, vowing to remain in permanent session until the constitution was approved. On the night of November 11, 1823, the Imperial Army surrounded the assembly's building. Everyone stayed up all night, which went down in history as the "night of agony." On the following day, the emperor dissolved the assembly, accusing its members of having "perjured the solemn oath to save Brazil" (Gomes 2010).

In his message to the people, the emperor promised to give the country a constitution "twice as liberal" as the rejected draft. The question of whether he did so is still a matter of controversy. Historian Buarque de Holanda (2012, 21–30) notes that the authors of the Imperial Constitution were inspired much more by the French royal charter of 1814 than by the example of English parliamentarism, foreseeably concentrating powers in the hands of the monarch. Moreover, "the Europeanization façade should not hide the quite diverse conditions of Brazilian society and politics: the words may be the same, but the meaning and content they acquired in Brazil were very dissimilar." For instance, inspired by Benjamin Constant, the 1824 Brazilian Charter instituted the "neutral" or "imperial" power, then the so-called moderating power. But while in Constant's theory the neutral power found its scope as a nonactive mediator, in Brazil it became the "key of the whole organization," mixed with the executive function to grant the king the last say almost everything and thus causing the hypertrophy of the imperial power.

Castro and Mezzaroba (2018) are also skeptical, maintaining that Brazil's constitutional structure was stuck in the "context of the transition between the military expansion of French hegemony and the economic expansion of mercantile forms of English hegemony." Nevertheless, they acknowledge that the British influence remained in the American colony after the movement for independence, as at least part of the tradition of English liberalism would be crystallized in the first Brazilian constitutional charter.

Thoughtfully analyzing the document, it is possible to see that the text of 1824 was, in many aspects, avant-garde. Although it declared an official religion, the Catholic Apostolic Roman Church, it also ensured religious freedom and its unimpeded domestic exercise (article 5). The charter made clear that all political powers (royal, executive, legislative, and judiciary) were delegations

from the nation, or the people (article 12). Despite drawing a monarchic structure, the text details a congress with a house of representatives and a senate (articles 13 to 51), as well as elections (articles 90 to 97). The judiciary was designed as independent (article 151), and judges could lose their positions only via judicial ruling (article 155).

All considered, Dom Pedro mostly fulfilled his promise. Macaulay (1986, 162) articulates that the emperor's constitution was indeed more liberal than the assembly's proposal in areas such as religion and basic rights of citizens, defining a higher number—twenty-four as opposed to only six—and more specific "inviolable personal and property rights." Although not perfect, the final product was "better than [the constitution of] any other Western Hemisphere nation during the time, with the possible exception of the United States." Moreover, while Brazil enjoyed institutional stability to grow as a country, its Latin American neighbors fragmented into multiple states, and "under innumerable constitutions different only in detail from the assembly draft, all fell victim to prolonged periods of dictatorship and arbitrary rule." Even considering Brazil's own history, the 1824 Constitution would become the longest-lasting, enduring for sixty-five years (Oliveira 2012), a remarkable longevity, given Brazil's prolific record of writing constitutional texts—seven thus far, or eight, depending on how one counts.[3]

IV. SLAVERY UNDER THE LIBERAL CONSTITUTION

In 1822, the year of its independence, Brazil had 4.4 million inhabitants (about 2 percent of its current population), which included 800,000 indigenous people, 1.1 million slaves, and only 2.5 million free men. That is, two out of three Brazilians were slaves, former slaves, or indigenous (NEHD 2001), none of them considered full citizens under the law in force at the time. José Nabuco (1949, 271), an important politician and most notable abolitionist of the country, highlighted why this was a serious matter: "[s]lavery prevents us from organizing as a people, and without people, institutions have no roots, opinion has no support, and society has no foundations."

3. In 1969, a provisional military junta widely amended the 1967 Military Constitution. Because the junta basically rewrote the document (Brasil 1969), to make it even more repressive, some scholars regard the 1969 amendment as an entirely new constitutional text.

José Bonifácio, who played a role in Brazil's independence tantamount to Thomas Jefferson's role in the United States,[4] believed that Brazil was not ready for a republican regime exactly because of its enormous population of slaves and those in poverty who had only enough to survive, as well as its high rate of illiteracy. To build a robust nation, he tried to address this question as a priority. Yet he badly miscalculated that after getting rid of the radicals that wanted a republic and ensuring the consolidation of the emperor's power, he would be able to advance the social reforms Brazil badly needed. The fact was that utterly dependent on slavery to run the economy, the Brazilian aristocracy would accept almost anything except a change in the country's social structure (Gomes 2010). In Bonifácio's rousing words:

> Without the total abolition of the infamous African slave trade, and without the succeeding manumission of the current captives, Brazil will never establish its national independence, and secure and defend its liberal Constitution; it will never enhance the existing races, and will never form, as it imperiously must, a valiant army, and a flourishing navy. Without individual freedom there can be neither civilization nor stable wealth; there cannot be morality, and justice; and without these blesses, there cannot be honor, strength, and power among the nations.

Bonifácio's *Representation about Slavery* (*Representação à Assembleia Geral Constituinte e Legislativa do Imperio do Brasil: sobre a escravatura* 1825) was intended to convince the assembly of the need to end slavery, but it never saw the light of day. Brazil was a slaveholding nation and would continue to be so for decades.

The Roman law defined slavery as "an institution of the law of nations by which . . . a person is subjected to the dominion of another" (Finkelman 2012, 106). In Brazil, no law was so categorical. Slavery in colonial and Imperial Brazil is a perfect illustration for the argument of this essay exactly because of its murky legal status, corroborating the thesis that only the amalgamation of text (legal factors) and context (sociopolitical factors) can reveal the character of the constitutional framework. Judge and politician Joaquim Ribeiro da Luz (cited by Moraes 1966,

4. Gomes (2010) highlights that the difference between Bonifácio and Jefferson is that the latter not only had slaves but also, as a good representant of Virginia, fought to his last breath for the slavery system it seems that "all men are created equal," as long as they are white. Bonifácio, in his turn, never had a single slave and wrote, "It is past time to end this barbarian and slaughterous practice. It is time to erase the last remains of slavery, without which we will never be free, responsible, and happy."

156–57), in a legislative speech in July 1883, pointed to the absence of legal origin for slavery in Brazil:

> It was not the law that instituted slavery. The country's history tells us that Africans were introduced to set the Indigenous peoples free, to replace them in captivity. I know of many laws that mention slavery and institute special provisions concerning the slave, but I do not know of any law that expressly institutes slavery among us. It was time and then regulatory laws that legitimated it.

Given its Enlightenment inspiration and proclaimed liberal spirit the Brazilian Constitution of 1824 never explicitly employed the words *slave* or *slavery*. But it did implicitly recognize the slaveholding character of Brazilian society when it subtly confessed the inequality among men. To some extent it had to, for the far-reaching consequences of the slave-master relationship were too important to be fully ignored. The solution the constituent found was to borrow categories from Roman law.[5] Article 6 of the Charta established that Brazilians were those born in Brazil, either *ingenuous* or *freed*. Ingenuous were those born free, while freed were those born slaves but manumitted (Ribas 1880, 49).

In ancient Rome, the distinction between *ingenui* and *libertini* was critical because the latter—also called *Latinus Iunianus* (Pound 2000, 286)—had inferior social status (Ulpiano 1967, XI:16, XXII:3). In imperial Brazil, because of the similarity in rights, the distinction was less relevant, although specific consequences still existed, the most significant being electoral. According to the Portuguese *Philippine Ordinations* of 1603 (*Ordenações Filipinas* 1603, 4: LXIII:7), in effect, given the absence of national laws in Brazil, masters could revoke a granted manumission in case of *ingratitude*. The risk of being considered ungrateful and thereby slipping back into slavery could explain why many former slaves denounced the abolitionist movement and voted for anti-abolitionist politicians. They were tied to their former masters by law and surname (slaves had no family name, so when emancipated they commonly adopted their master's name). The bond was perpetual (Miranda et al. 1988, 55–56). Only with enactment of Law 2.040 in 1871, a half century after the Constitution became law, was the possibility of revoking manumission extinguished.

As one can see, while the 1824 Constitution could timidly imply the existence of slavery, the infraconstitutional law had to be ashamedly explicit. Teixeira de

5. According to Justinian, "[T]he principal distinction in the law of persons is that all men are either free or slaves" (Finkelman 2012, 106).

Freitas (2003, XXXVII), perhaps the most renowned Brazilian jurist of the period and a convicted abolitionist, was charged with the task of "nationalizing" Portuguese private laws, which would remain in effect until the first genuine Brazilian Civil Code in 1916. The outcome of his task was the Consolidation of Civil Laws of 1857, whose introduction emphasizes:

> We should make it clear that there is not a single place in our text where slaves are addressed. We have slaves among us, it is true; but if this evil is an exception, which we regret, fated to be extinguished at a more or less remote time, let us also make an exception, a separate chapter, in the reform of our civil laws. Let us not besmirch our laws with disgraceful rules which cannot serve posterity: let liberty persists without its odious correlative. The laws concerning slavery (which are not many) will thus be classified separately and will form our *Black Code*.* This is how the Edict of 1685 was called, which regulated the fate of slaves in the French Colonies.

Although Teixeira de Freitas did indeed erase from the main text the chapters on "the state of slavery," he could not avoid the typology on specific topics throughout the document. To circumvent the problem, the renowned jurist placed all regulations concerning slaves in footnotes—the *Black Code in the margins*. For example, the first article of the Consolidation declares the concept of persons and says nothing about slaves, but its footnote is a reminder of the existence of the institution, since it allows manumission to be bestowed on a slave while still in the mother's womb (Freitas 2003, 1–2).[6]

As a legal institution, slavery requires a precise typology: men need to be categorized into those endowed with subjective will (persons) and those deprived of subjective will (things) so that the latter may be subject to ownership (Saez 1990, 101). The Consolidation of Civil Laws, in its article 42, made explicit what was implicit in the constitution—namely, that the goods are of three types: movable, immovable (real state), and demandable shares. The class of the movable comprises the self-propelled (livestock), which includes slaves, objects of ownership that should be considered things (Freitas 2003, 35).

---

6. Already mentioned Law 2.040 (Brasil 1871) came to be known as the law of "free birth," as the act freed children born of slave parents (Britannica). Before the law, children of slaves belonged to their masters as a consequence of *accession*, a means of acquiring property under the civil law (article 885; Freitas 2003, 525–26).

Newspaper announcements of the time seem to support this interpretation. Slaves were often included in the category of animals. An exemplificative ad reads, "Disappeared from the sight, an *old goat* that was herding a fox-colored cow." The old goat, in this case, was a slave. And slaves were often exchanged for other slaves, things, "goat-persons for goat-animals and vice versa." Like things, slaves were stolen and sold in illegal markets. There were gangs specialized in pilfering slaves (Freyre 1979, 46, 38).

Joaquim Ribas (1880, 50–53), well-regarded among the most eminent jurists of the period, disagrees, stating that slavery did not utterly depersonalize slaves: they were at the same time things and persons. Versed in Roman law, he pointed out that the Roman *dominica potestas*, unfolding its two elements, *dominium* and *potestas*, imposed on slaves a double subjection: regarding the domain, the slave was a thing (*res*); regarding power, the slave was a person (*personae*).

The debate had practical relevance. If slaves fled captivity, they could be pursued through the *reivindicatio*, an institute applied to movable goods. However, since they were persons as well, they could be charged with crimes. Were they just things, that would not be possible. Ulpiano's (1967) description synthesizes this condition: slaves are "human animals." Thus, as well as in the Roman law, subsidiarily applied in Imperial Brazil, the term *personae* was used as equivalent to *homo*, a biological condition, not a legal one—consequently, not every human could hold rights (Nóbrega 1961).[7] As Alan Watson (1987) notices, the legal culture grounded on Roman law facilitated the development of not only slaveholding but also "systems of slavery" in Spanish and Portuguese territories.

Perhaps the most striking illustration of the slave condition under the liberal Constitution of 1824 was the possibility of corporal punishment. The Imperial Charter had explicitly and forcefully banished cruel punishments in its article 179, XIX:

> The inviolability of the civil and political rights of Brazilian citizens, which are based on liberty, individual security, and property, is guaranteed by the Constitution of the Empire in the following manner: . . . XIX. From now on, whipping, torture, branding with a hot iron, and all other cruel punishments are abolished.

The debate was that the Criminal Code of the Empire (article 60) sanctioned scourging if the defendant was a slave. To solve the antinomy, the jurisprudence

7. Aristotle (1964, 79), in his *Politics* (bk. 3, chap. 1) had already warned that "a citizen is not a citizen because he lives in a certain place, for resident aliens and slaves share in the place; nor is he a citizen who has no legal right except that of suing and being sued."

construed that only *citizens* were protected under article 179. Now, given that slaves had lost their liberty status (*capitis iminution maxima*), they could not be citizens, and therefore the Constitution's protection was inapplicable to them (Moraes 1966, 175), for *citizen* refers to "a freeman of a city; not a foreigner; not a slave" (Johnson 2003, 109). The aforementioned article 6 of the 1824 Constitution, by listing only free men (either ingenuous or freed), had already implied that slaves were not Brazilian citizens. So punishments lived on, especially on farms in the countryside, far from the public eye, as the 1830 Criminal Code (article 14, § 6º) considered among the "justifiable crimes," exempt from penalty, the imposition of moderate punishment on slaves by their masters (Brasil 1830).

Since at least Aristotle (1964, especially bk. 3, chaps. 1 and 3), citizenship can be analyzed in light of constitutional norms, for it is a "legal status" (Kymlicka and Norman 1994, 353). "To be a citizen is to enjoy a legal status of duties, rights, and privileges constitutive of belonging to a city and to be taken by that city as having that status." This stands in contrast to persons who are legally outside the community or "legally at the will of another (as in a slave)" (Rogers 2015, 210). African slaves lived in Brazil under the Constitution of 1824, but if somehow and to what extent they benefited from the liberal text is a much more complex question, one that depends on the inclusion of the sociopolitical conjuncture in this analysis.

V. THE UNDERLYING SOCIOPOLITICAL REALITY

Brazil is often called the "unlikely country," and the sobriquet finds easy justification, as from the outset Brazil seemed doomed to fail. Until at least 1808, when the imperial family fled from Napoleon Bonaparte to South America, Portugal had kept its colony isolated and illiterate. Newspapers were prohibited and books were subject to three levels of censorship. Educational instruction was limited to the most basic levels and only to a very narrow minority. Indeed, the first census of the population, in 1818, found that only about 2.5 percent of the adult men could read and write.[8] Days before independence, a Brazilian deputy had traveled to Portugal, his mission to beg for education for the 70,000 inhabitants of his province: "They

8. In another of Brazil's paradoxes, even while absconding from Napoleon, King Dom John VI had the time and disposition to bring to Brazil his 60,000-volume library, one of the world's largest at the time and a white elephant in a country of illiterates. "Huge, gorgeous, enriched with the finest literary, scientific and philosophical works from the civilized nations, the imperial library is a perfect stranger among Brazilians," bemoaned the French traveler Jacques Arago (Oberacker 1973).

are 70,000 blinds who wish the light of public instruction" (Gomes 2010).[9] To make matters worse, after thirteen years enjoying the tropical climate, the imperial family returned to the old continent, but not before emptying Brazil's coffers: the new country was born bankrupt (Ezequiel 2014, 67).

Independence from Portugal represented a political rupture, but few intended a restructuration of the existing socioeconomic arrangement. The emperor, in his turn, had to contend with multiple challenges in a delicate balance. Not all aristocrats accepted the schism with Portugal, and some states tried staying equidistant from both Lisbon and Rio de Janeiro—maybe in a flirt with independence as well, drawing inspiration from the fragmentation happening in Spanish territories. Pernambuco, for instance, initially refused to send brazilwood to Rio de Janeiro to help pay Brazil's external debt with England. The stalemate was solved only when Dom Pedro promised the sugar cane aristocracy that he would not end slavery and would protect private property if "attacked by people of color" (Melo 2014).

In his inner being, Emperor Dom Pedro may have been an abolitionist, as documented in letters he authored, today displayed at the Imperial Museum of Petropolis. His taste for liberalism worried his wife, Princess Leopoldina, who in 1821 wrote to her father, Francis I, Emperor of Austria, perhaps after witnessing Dom Pedro reading Voltaire, "[M]y husband, God protect him, loves new ideas" (Sousa 2016, 129). The reformist inclination and the admiration for the ideals of the French Revolutionaries, nevertheless, were not enough to galvanize the emperor against slavery. After three centuries of slave trade, the Brazilian economy was totally dependent on captive labor.

The accounts of the time, by foreign eyewitnesses, are clear: "Slaves are the hands and feet of the mill lord, because, without them, nothing is done in Brazil; there is no farm, no mill" (Antonil 2011, 106). In 1640, from Recife, Adriann van der Dussen, adviser for the Dutch West India Company, wrote to his superiors in the Netherlands, "Without slaves, nothing can be cultivated here. No white man, no matter how willing he is, can stand the sort of work slaves do; it seems that the body, due to such an extreme climate change, loses its vigor" (Alencastro 2020, 211). The key might not be the climate, though. Irish writer Robert Walsh was chaplain to the British embassy and spent two hundred days traveling through

9. In Gomes's (2010) view, this situation sharply contrasts with what was happening in the United States. While the circulation of newspapers in the United States surpassed three million a year in 1776, Brazil would take two hundred years to reach this figure. While the United States had nine universities in the year of its independence, Brazil would receive its first only at the dawn of the twentieth century. While in the United States the Protestant culture fostered knowledge, Brazil plunged into ignorance.

Brazil to investigate the conditions of the slaves. He wrote: "The superiority of the coloured population is not greater in number than it is in physical powers. Some of the blacks and mulattos are the most vigorous and athletic-looking persons that it is possible to contemplate and who would be models for a Farnesian Hercules" (Walsh 1830, 2:331).

Another illustration of the importance of slavery at the time is the political landscape, including the international one. The first sovereigns to recognize Brazil's independence were two African kingdoms: obá Osenwede, do Daome (currently Benin) and ologum Ajan, de Lagos (today part of Nigeria). Both were massive exporters of slaves, and the former Portuguese colony, their biggest consumer. By the beginning of the nineteenth century, slavery was the engine of all important Brazilian economic activities, and virtually all free men in the country, including the poor, were slave owners (Gomes 2019).

In 1831, much as King Dom John VI had done, Dom Pedro I returned to Europe and named his son, Dom Pedro II, as prince regent. The second Brazilian emperor would maintain the same line as his father: no indication of personal affection for the nefarious institution, quite the opposite, but no courage to terminate it. An illustrative case shows the emperor's passive dislike for slavery. A gaucho,[10] or farmer, mortgaged three of his slaves, a widespread practice of the time. Later, already in default, he maliciously traveled along with his slaves to Uruguay, whose laws considered free any slave who enter the country. The creditor appealed to the Rio Grande do Sul, intending the slaves' extradition, for Uruguay had committed to returning slaves owned by Brazilians and who entered the country against the will of their masters. The president of the province ruled, "The slave takes no account of the transactions to which he is the object: he obeys his master. If the latter brings him to Uruguay, whatever the obligations or mortgages contracted, the slave acquires his freedom, and no country can deny this right." The State Council of the Empire ratified the opinion, but the emperor had the last say. Dom Pedro II confirmed the decision on March 28, 1859.

Of course, even if some slaves were freed here and there, life for those who were unable to gain their freedom remained hard. Gilberto Freyre (1979), among the most distinguished Brazilian historians, produced an impressive study in which he explored cultural, anthropological, and psychosomatic aspects of slavery through newspaper advertisements (selling and buying) and other announcements (disappeared and wanted), for "the history of Brazil's is in the newspapers." In the

10. The term *gaucho* expresses something similar to *cowboy* and is associated with the folk symbol of Uruguay, Argentina, Chilean Patagonia, and especially Rio Grande do Sul in Brazil.

nineteenth century, announcements related to slaves could be found in the most expensive sections of the newspaper and can reveal colorful details of the slaves' condition: "Caetano, 12 years old, scars on the center of the head due to carrying weight"; "Joaquim, lost his toes kneading whitewash"; "Luis, pricked fingers because his craft is to sew sandals"; "Pedro, calluses on the fingers from kneading bread"; "Maria, flat head from carrying weight" (30); "Germano, scars of punishment in the buttocks" (34); "Josefa, with a huge fire burn in the chest" (54). As is noticeable, no soul was spared: children, women, and the elderly, all of them would get their share of arduous work and/or inhuman treatment. Despite its brutality, however, slavery was not the main concern among the elites; the monarchy was.

José Nabuco tried to appeal to his comrades' senses, underscoring that "Brazil's biggest challenge is not the monarchy, but slavery" (1949, 271), yet to no avail. The Brazilian aristocracy kept throwing a tantrum, often in the form of editorials, lashing out at the monarchy while slavery was ignored. In 1840, the writers of *O Povo* (The People), a Rio Grande do Sul newspaper, vividly articulated that Brazil's monarchy was "an anomaly incompatible with the lights of the century." Then they proudly bragged that the "*gauchos*' vigorous hands had been chosen to deliver the last blow against this blind monstrous giant that hobbles and stumbles: the Empire of Dom Pedro II." In Freyre's (1979, 79) evaluation, none of the passionate *O Povo* writers seemed to conceive "an anomaly incompatible with the lights of the century" in the enslaved labor that unified Brazil from north to south and had helped Rio Grande do Sul farmers build their wealth on cattle ranches. "The monarchic institutions, even if liberals, are insufficient to the peoples," reads the newspaper on the same day it published announcements of wanted slaves, underwritten by the most opulent ranchers, nothing less than "little kings."

The monarchy fell in 1889, but slavery was sacked only when it had already begun to face increasing opposition in Brazilian society. Every year, the cost to replace a slave lost to manumission or death increased, and public opinion had also changed; whereas years before, buying a slave was no different from buying any other commodity (Eltis and Richardson 2008, 2), by the end of the nineteenth century, the Brazilian population was aware of the tendencies in the "civilized" world.

Likewise, the elites and rulers had grown concerned about the composition of Brazilian society. Some foreign visitors had revealed surprise by the country's demography. British chemist Charles Mansfield docked in Pernambuco (a state in the northwest) in 1853. He registered in his notes that the town could be made magnificent "simply by cleaning and tidying." But what called his attention the most was that "[t]wo-thirds of the population seem to be naked Negroes, in cotton

drawers. They are, generally, splendid specimens of muscular development, at least about the chest and arms, with skins shining like velvet; most of them are slaves" (Mansfield 1856, 20). Before 1820, for each white European that landed in the Americas, four Black Africans would disembark (Eltis and Richardson 2008, 2–4). Some provincial governments started to advocate "whitening" or "enlightened" policies, as described by Walsh (1830, 331), to "increase as much as possible the number of white inhabitants; to colonize the immense tracts of fertile land now lying waste, and cultivate the soil with the vigorous arms of freemen, bringing with them the lights and improvements of Europe, instead of enormous imports annually of blacks from Africa."

When Brazil finally took steps to formally abolish slavery, there was no one behind: the former Portuguese colony was the last American country to do so.[11] This does not mean that the act came with no drama. Princess Regent Isabel de Orléans e Bragança brought the debate on the abolition to the Parliament, presenting it as an "aspiration acclaimed by all classes." But the issue met some resistance. Complaining about the absence of reparations, the Baron of Cotegipe voiced, "So it is confessed that there is no property in this country, that everything can be destroyed by a law without regard either to acquired rights or to future inconveniences" (Moraes 1966, 277). Much through the efforts of José Nabuco, the bill advanced in Congress. On the historic day of May 13, 1888, the princess signed the act into law: "Slavery is declared abolished in Brazil from the date of this law" (Brasil 1888).

Holanda (2012, 19, 28) believes that the singularity of the Brazilian monarchy was that it claimed and tried to be a liberal regime, despite condoning enslavement for decades; amid some democratic formulations, a huge mass of slaves was totally excluded from any active participation in public affairs. In many ways, Brazil's empire illustrates a compromise between the old French regime, washed up by the Revolution, and some democratic formulas that the very Revolution had established. And it is precisely in the times soon before the Proclamation of the Republic—to happen in 1889—that the intrinsic ambiguities of the imperial political regime emerged more clearly: contrasts between formal liberalism and its practical nuances, between an imposed constitution and a nonwritten constitution.

---

11. Freyre (1979, 96) holds a controversial understanding that Brazil may have lagged to abolish slavery solemnly because, in contrast to what was observed in other slaveholding societies, Brazilian slavery was, in the eyes of bona fide foreign observers, "more benign." He cites Captain Richard Burton, who visited Brazil and expressed that even if not under written law, Brazilian slaves had more rights than free men elsewhere: "In the present day the Brazilian negro need not envy the starving liberty of the poor in most parts of [the] civilized world" (Burton 1869, 271).

The presence of some of these paradoxes, according to the historian, might not be a novelty, yet the unique component of Brazilian history is the fact that these elements somehow remained in place for almost three centuries.

The thesis of this essay is that the stated equilibrium of contrasting elements was sustained for so long because formal and informal institutions, written and cultural constitutions, and legal text and political context are facets of the same social phenomenon. Building on the foundation laid in the previous sections, this is the argument I explore in the closing section.

VI. WHAT IS A CONSTITUTION? TEXT AND CONTEXT

A constitution is the law of the land, the legal document that founds the framework for political life, defining the structure of a society. It sets the basis of the social contract and answers the fundamental questions of political science—Who shall rule and how shall they rule?—besides often defining the basic rights of those who are ruled. When Hans Kelsen (1999, 2911) developed his theory of systematic legitimacy of the law, to become one of the most influential legal philosophers of the twentieth century, he stressed that the constitution embodies the logical premise of the whole system, that every act of the government can (and must) be traced back to the constitution, without which no public action can be interpreted as legal.

Against this background, if slavery is prevailing in a given society, one should be able to trace it back to the society's constitution. Slavery, like any other important institution in that society, should be part of the *fundamental political decision* that defines the real constitution, as described by German philosopher Carl Schmitt (2008). Indeed, a "[c]onstitution specifies the rules of the game, fair or unfair" (Greenstone 198, 432). Under this premise, it is logically inconsistent to state that slavery was not in either the Brazilian or the US Constitution. It must have been. The question then becomes what is, in a deeper sense, a constitution.

For example, adopting an exclusively normative stance, according to which the concept of constitution comprises only the legal document, makes it challenging to explain how slavery could coexist with a liberal constitution. It is opportune to remember that the 1824 Brazilian Charter deemed the *political and individual rights* of the citizens so important as to consider them materially constitutional, along with limits, attributions, and prerogatives of the political powers, while all other issues were infraconstitutional (article 178). Amid the writing process of the rejected draft, Bonifácio (1998, 24) questioned, "[B]ut how can there be a durable liberal

constitution in a country continuously inhabited by a multitude of slaves? Let us begin this work by the expiation of our crimes and old sins."

Ferdinand Lassalle (1942) shows no surprise when the formal constitution is buried by factual processes. Realists like him believe "[i]t makes no difference what is written on a piece of paper so long as it contradicts the real state of things, the real relation of forces." Within this mindset, the real constitution is the spectrum of relationships through which a society organizes its power, regardless of the written text; a constitution is a social fact determined by the dominant social forces.

In other words, according to Lassalle's *¿Qué es una Constitución?* (2012), there are within a state two constitutions: the real one (effective), which is the sum of the forces that rule a society (e.g., aristocracies and politicians); and the written constitution, which has no choice but to dance along social reality, or to be rendered useless. The effective constitution, therefore, is not the legal text but the one established by social forces: the written constitution is nothing more than a "sheet of paper."[12] To Lassalle, constitutional problems are problems of political order (of power), not legal issues.

The importance of this train of thought is twofold: first, it points to the ingenuousness of believing that the constitutional text can magically build and rebuilt social reality; second, it indicates that the cultural dimension itself constitutes a constitution. In this sense, all countries have a constitution, a set of fundamental norms that rule social life, even if they lack a formal document with the classic characteristics of a constitution—in common language, what constitutes. Another way to see this is to consider that if the constitution were to be exclusively a legal document to regulate specific aspects of political life, the scope of its concept could be narrower. Still, given that constitutions formalize the political contract itself, they need to include the most significant sociopolitical combination of forces; that is, they attract to its inland the cultural elements outside the realm of law.

Lassalle's ideas do support the thesis advanced in this essay. However, the flaw in his theoretical approach is that it splits social reality into legal and cultural aspects to subject the legal world to the cultural world. The effect of this assumption is to deny the legal text any ability to change social reality. In contraposition, Konrad Hesse (1959) observes that even though constitutional texts may succumb to social factors on some occasions, doing so does not undermine their normative force: legal constitutions can shape reality over time as long as a "will of constitution" is present and not only a "will of power." Hence, cultural constitution and written constitution display a relationship of coordination, mutually conditioning each other.

---

12. "Just as mathematicians treat geometrical figures as abstracted from material objects, so I have conceived of law in the absence of all particular circumstances" (Grotius 1957, bk. 3).

Hesse's view is an improvement, but it still falls prey to that strict division between socio and legal realms, an artificial distinction that is important to evaluate specific features of both spheres, but which fails to serve as a basis for a constitutional theory. As a parallel, one can think of the indivisibility of sovereignty despite the division of powers: "sovereignty over the same territory cannot reside simultaneously in two different authorities, that is, sovereignty is indivisible" (Morgenthau 1948, 350). The same applies to social reality: it can be structured and studied in different "branches," but it cannot be divided without ceasing its proper qualities.

Addressing this last objection, an integrative position is the *culturalist conception* of constitution. The textual constitution becomes a set of fundamental norms working together with culture, conditioned by social factors and, simultaneously, conditioning them. In this line of work, Rudolf Smend (2001) gives great relevance to the sociological element underlying the text once every constitution is born and grows immersed in a system of social values. The role of the constitutional text is to integrate politics, laws, and society under the spirit of the time in which it is written.

Peter Haberle (1997, 33) argues that given that the constitution sets the boundaries not only for the state *strictu sensu* but also for the public sphere (*Offentlichkeit*), organizing society as a whole and even private life, the legal text cannot treat social and private forces as mere objects; the constitution must actively integrate these forces as subjects—which may be a step further. The essential issue here is to qualify Lassalle's assertion on the alleged contraposition between the living reality and its intangible constitutional formalization. Such a notion induces an insuperable dichotomy between social and normative elements, when they are dimensions of a unique reality. To understand the nature of the socio-legal relationship, it is necessary to address the constitution in its entirety, with all its ambivalences, both organic (social) and ideal (textual) structures (Smend 2001).

The culturalist approach this essay espouses acknowledges the existence of a dialectic between normativity and normality so that the textual constitution is only part of the total constitution (Heller 1968). As Friedrich Müller (2005) maintains, norms encompass not only texts but also a *piece of social reality*—thus the total norm lies in the relationship between text and reality. In this light, as more than a methodological or interpretative choice among available hermeneutic pathways, the culturalist mindset is mandatory. First, the culturalist view explains the concept of historical or organic constitutions—that is, those that are grown organically, without a single codified text, the best example being the English tradition so fiercely defended by Edmund Burke as the wisdom of the reflection over time (Burke 1984, 28). Second, and most important, it reveals the prevalent character of the social pact at the time of the interpretation.

For instance, the Brazilian Constitution of 1824 did not declare—at least, did not spell out—the existence of slavery but ensured the right to freedom (article 179, I, VII). If we accept that the written constitution exhausts the concept and, as stated before, that all relevant institutions must be traced back to the constitution, then there would be no reason to conceive that slavery could possibly survive under the Imperial Constitution. Now the observer can follow one of two directions: the first path is to contend that the written constitution is of little value and can be summarily ignored; the second is to admit that there is more under the sun and that therefore the concept of constitution must be enlarged.

The first path may seem tempting. But it is exactly the intended "asepsis" of the legal technique that leads many well-intentioned social researchers to perplexingly see a detachment between what is declared by the law and what is practiced through it. The error in this interpretation became clear after the functionalist revelations, inspired by Niklas Luhmann's general theory of systems—namely, that the law is a "structure of a social system that is based on the congruent generalization of normative behavioral expectations" (Luhmann 1983, 121). Put differently, there is no "good" law and "bad" practice: practice is the result of the social function directed by the law (Castro and Freitas 2013, 251).

Now, a compelling way to build a case for the second path may be to argue that constitutional doctrine and Supreme Court of Justice precedents are part of the Brazilian Constitution of 1824 , for the courts say what the constitution says. Regardless of whether the statement is correct from a technical point of view, for jurisprudence is fluid, it raises the key point regarding the impact that landmark decisions have in the constitutional order. In the case of Brazil's empire, on July 5, 1832, the Supreme Court of Justice issued its own *Dred Scott v. Sandford*. When slavery was questioned, the Brazilian judiciary answered that freedom could not be granted to slaves against their masters' property rights (Almeida 1870, 790). The justices did not ignore the constitutional text; they integrated it with social beliefs and the economic environment of the time. The product of this construction compounded the integral constitution, one that admitted slavery. From a normative perspective (what should be), this realization does not make the decision more acceptable; but from an objective point of view (what is), it does make the ruling understandable, and understanding is a premise for change.

An important distinction to be made is that organic constitutions oftentimes will naturally be part of the culture, built over a lengthy period of time, purportedly from social elements. Dogmatic constitutions, written in a moment in time by a group (e.g., a constitutional assembly), may differ more or less from established social values. It is in this context that Greenstone (1988, 428) argues that the "constitution can truly

shape a community's politics only if it expresses that community's culture—that is, its most fundamental ideas and practices." This conclusion could be problematized, but the lesson here is that the textual constitution may be (or not) part of the culture, but the culture is *always* part of the integral constitution.

By this point, after so much talk about culture, to not fall into excessive abstractionism, it is important to define culture, which is a laborious task. In twenty-seven pages of his chapter on the concept, Kluckhohn (1949, 17–44) eclectically defines it in twelve different, yet sometimes overlapping, ways: (1) "the total way of life of a people"; (2) "the social legacy the individual acquires from his group"; (3) "the past experience of other men"; (4) "a way of thinking, feeling, and believing"; (5) a theory about human and social behavior; (6) "a storehouse of the pooled learning of the group"; (7) "standardized orientations toward the deeper problems"; (8) "learned behavior" shared with others "as the result of belonging to some particular group"; (9) "formulas" of behavior that make individuals' acts "almost as automatic and unthinking as if it were instinctive"; (10) "a set of techniques for adjusting both to the external environment and to other men"; (11) "a precipitate of history"; (12) "like a map, . . . an abstract description of trends toward uniformity in the words, deeds, and artifacts of a human group."

Some of the listed definitions are already useful because they indicate that culture plays a normative role in social and individual behavior. In other words, including cultural aspects *within* the constitution (the thesis of this essay) is different from using cultural aspects to study constitutions. The later research attitude is limited to recognizing how social factors shed light on legal questions, whereas the former statement stresses that cultural traits are normative; that is, they shape social behavior the same way the law does. Nevertheless, it is with Clifford Geertz's (1973, 5) approach that the vital importance of the integral concept of constitution, to include culture in its inner core, becomes clearer, for individuals and societies find meanings for their actions and reactions only within culture. Geertz builds his semiotic definition "believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun." Culture is precisely those webs. Cultural systems intertwine beliefs, cognitive categories, attitudes, and prescriptions for action in ways that allow members of a political community to find meaning and react purposefully even when unexpected events happen.

It is no wonder that informal institutions at times can trump formal institutions (Rodrik et al. 2002, 24). Again, people will trust "beliefs, cognitive categories, attitudes, and prescriptions for action" that make sense and in which they find meaning. If informal institutions better reflect these webs, they will prevail aside or even against the law. Of course, the insistence in declaring that *it is not all about the text, but the*

context as well, cannot be interpreted as a disregard for the written norm. By qualifying the acceptance of the realist stance (illustrated in Lassalle), my argument takes as a premise that the textual constitution matters. There is no better example of that than David Walker's famous 1830 "Appeal to the Colored Citizens of the World," when he launched a furious call against the evil of slavery but acknowledged the written constitution as part of the framework that could help produce change.

This point raises a final important question. One could wonder whether a broader concept of constitution would not reinforce detrimental elements of the social order. In other words, can a culturalist concept of constitution allow a transformation of socially detrimental structures? By recognizing the culture's normative power within the constitutional order, political science could validate the dominant social dynamics and narratives. This is a relevant concern, but the opposite is more likely to happen. By completing the symbiosis between culture and legal norms, the conception proposed in this essay recognizes mutability and allows the integral constitution to become a living text, meant to change as the components of the social environment progress. By melding text and context, the integral definition of constitution does not prevent social change; it unveils the full meaning of the constitution continuously at the time of the interpretation, and such an ethos is not perennial but expected to change over time.

VII. CONCLUSION

The 1824 Constitution of the United Kingdom of Brazil was advanced for its time. Inspired by French and English Enlightenment ideals, it recorded a long of list "inalienable rights," among them personal freedom. Nonetheless, Brazil remained a slaveholding society under its watch, receiving half of all Black captives brought from Africa to the Americas. Such an ostensible paradox has challenged political science and public law studies. This essay claims that the contradiction is merely apparent should the concept of constitution encompasses not only the text but also the underlying sociopolitical reality.

At the time of Brazil's independence in 1822, every important economic activity in Brazil relied on captive labor. And despite important abolitionist voices, slavery was widely accepted as an institution, for almost every free Brazilian had slaves. Hence, even were both emperors of the period, Dom Pedro I and Dom Pedro II, personally against such a regime, the sociopolitical environment harbored slavery. The 1824 Constitution itself vacillated on whether to grant captives the status of citizens. The prevailing doctrinal accounts are, in this sense, not entirely wrong to see a contradiction between liberal text and social practice. The mistake rests on limiting the concept of constitution to its textual part, which opens an abyss between the law and reality.

The culturalist interpretation of the 1824 Constitution addresses this flaw in previous interpretations by embracing those elements within which members of the political society build meaning—that is, culture. This broader concept amalgamates text and context to compose the *integral constitution*, which normalizes life in a society and exposes the full character of the constitution at the time of the interpretation. Written constitution and sociopolitical substrates are not isolated layers of the social reality, they are parts of a unity that produces normative outcomes in its own fashion. The only way to make sense of them is to account for the whole picture, not only to understand past social events but also to design developments for the future once choices among institutions become more fully informed.

REFERENCES

Acemoglu, D., S. Johnson, and J. A. Robinson. 2001. "The Colonial Origins of Comparative Development: An Empirical Investigation." *American Economic Review* 91 (5): 1369–1401.

Acemoglu, D., & Robinson, J. (2012). *Why Nations Fail.* New York: Crown.

Acemoglu, D., Johnson, S., & Robinson, J. A. (2001). The Colonial Origins of Comparative Development: An Empirical Investigation. *The American Economic Review, Vol. 91, No. 5.*, p. 1369-1401.

Alencastro, L. F. (2020). *O trato dos viventes: Formação do Brasil no Atlântico Sul.* São Paulo: Companhia das Letras.

Almeida, C. M. (1870). *Codigo Philippino, ou, Ordenações e leis do Reino de Portugal: recopiladas por mandado d'El-Rey D. Philippe I.* Rio de Janeiro: Instituto Philomathico.

Almeida, R. H. (1997). *O diretório dos índios: um projeto de "civilização" no Brasil do século XVIII.* Brasília: Editora UnB.

Antonil, A. J. (2011). *Cultura e opulência do Brasil por suas drogas e minas.* Brasilia: Senado Federal.

Aristotle. (1964). *Politics and Poetics.* New York: Heritage Press.

Azevedo, J. L. (1929). *Épocas de Portugal Económico.* Lisboa: Livraria Classica Editora.

Bonifácio, J. (1825). *Representação à Assembleia Geral Constituinte e Legislativa do Imperio do Brasil: sobre a escravatura.* Paris: Typographia de Firmin Didot.

Bonifácio, J. (1998). *Projetos para o Brasil.* São Paulo: Pub Folha.

Brasil. (1830, December 16). *Código Criminal do Império do Brazil.* Retrieved from Planalto: http://www.planalto.gov.br/ccivil_03/leis/lim/LIM-16-12-1830.htm

Brasil. (1871, September 28). *Lei 2040, de 28 de Setembro de 1871.* Retrieved from Planalto: http://www.planalto.gov.br/ccivil_03/leis/lim/lim2040.htm

Brasil. (1888, May 13). *Lei 3.353.* Retrieved from Planalto: http://www.planalto.gov.br/ccivil_03/leis/lim/lim3353.htm

Brasil. (1969, October 16). *Constituição da República Federativa do Brasil de 1967 - EC n. 1.* Retrieved from Planalto: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao67emc69.htm

Brennan, G., & Buchanan, J. M. (1985). *The reason of rules: Constitutional political economy.* Cambridge: Cambridge University Press.

Britannica. (n.d.). *Rio Branco Law.* Retrieved from https://www.britannica.com/event/Rio-Branco-Law

Burke, E. (1984). *Reflections on the Revolution in France.* London: Penguin Books.

Burton, R. (1869). *Explorations of the Highlands of the Brazil: With a Full Account of the Gold and Diamond Mines.* London: Tinsley Brothers.

Castro, M. F., & Freitas, R. S. (2013). A natureza da interpretação jurídica e a textura aberta das normas de direitos fundamentais em meio às relações privadas. In R. Alexy, *Níveis de efetivação dos direitos fundamentais civis e sociais: um diálogo Brasil e Alemanha.* Joaçaba: Editora Unoesc.

Castro, M. F., & Mezzaroba, O. (2018, April). *History of Brazilian Constitutional Law: 1824's Constitution of the Empire of Brasil and the Private Slavery System.* Retrieved from Sequência: https://doi.org/10.5007/2177-7055.2018v39n78p11

Coelho, M. C. (2007). A construção de uma lei: O Diretório dos Índios. *Revista do Instituto. Histórico Geográfico Brasileiro. 168 (437)*, p. 29-48.

Crosby, A. W. (1986). *Ecological imperialism: the biological expansion of Europe, 900-1900.* Cambridge: Cambridge University Press.

Dias, M. O. (2005). *A Interiorização da metrópole e outros estudos.* São Paulo: Alameda.

Eltis, D., & Richardson, D. (2008). *Extending the Frontiers: Essays on the New Transatlantic Slave Trade Database.* New Haven: Yale University Press.

Ezequiel, M. (2014). *Receita Federal: história da administração tributária no Brasil.* Brasília: Receita Federal do Brasil.

Finkelman, P. (2012). Slavery in the United States: Persons or Property? In J. Allain, *The Legal Understanding of Slavery: From the Historical to the Contemporary.* Oxford: Oxford University Press.

Freitas, A. T. (2003). *Consolidação das Leis Civis.* Retrieved from Senado Federal: https://www2.senado.leg.br/bdsf/item/id/496206

Freyre, G. (1979). *Os escravos nos anúncios de jornais brasileiros do século XIX.* São Paulo: Editora Nacional.

Geertz, C. (1973). *The interpretation of cultures.* New York: Basic Books.

Giddens, A. (1986). Action, Subjectivity, and the Constitution of Meaning. *Social Research, vol. 53, no. 3*, p. 529-545. http://www.jstor.org/stable/40970430.

Gomes, L. (2010). *"1822".* Rio de Janeiro: Nova Fronteira.

Gomes, L. (2019). *Escravidão.* Rio de Janeiro: Globo Livros.

Greenstone, J. D. (1988). Against Simplicity: The Cultural Dimensions of the Constitution. *The University of Chicago Law Review, Vol. 55, No. 2*, p. 428-449. https://www.jstor.org/stable/1599811.

Grotius, H. (1957). *Prolegomena to the Law of War and Peace.* Indianapolis: Bobbs-Merrill Company.

Haberle, P. (1997). *Hermenêutica constitucional: a sociedade aberta dos intérpretes da Constituição: contribuição para a interpretação pluralista e "procedimental" da Constituição.* Porto Alegre: Sérgio Antônio Fabris.

Hansen, M. L. (1940). *The Atlantic migration, 1607-1860; a history of the continuing settlement of the United States.* Cambridge: Harvard University Press.

Hansen, M. L. (1942). *The Immigrant In American History.* Cambridge: Harvard University Press.

Heller, H. (1968). *Teoria do estado.* São Paulo: Mestre Jou.

Hesse, K. (1959). *Normative Kraft der Verfassung.* Tübingen: Mohr Siebeck Verlag.

Holanda, S. B. (2012). *O Homem Cordial.* São Paulo: Companhia das Letras.

Johnson, S. (2003). *Samuel Johnson's dictionary: selections from the 1755 work that defined the English language.* New York: Walker & Co.

Kelsen, H. (1999). *General Theory of Law and State.* Cambridge: Harvard University Press.

Kluckhohn, C. (1949). *Mirror for man the relation of Anthropology to modern life.* New York: Whittlesey House.

Kymlicka, W., & Norman, W. (1994). Return of the Citizen: A Survey of Recent Work on Citizenship Theory. *Ethics, vol. 104, no. 2*, 352–381. http://www.jstor.org/stable/2381582.

Lassalle, F. (1942, January, vol. 3 no.1 pp. 25-31). *On the Essence of Constitutions Fourth International.* Retrieved from Marxists.org: https://www.marxists.org/history/etol/newspape/fi/vol03/no01/lassalle.htm

Lassalle, F. (2012). *¿Qué es una Constitución?* Barcelona: Editorial Ariel.

Lima, M. d. (2012). *Formação Histórica da Nacionalidade Brasileira.* Brasilia: Senado.

Luhmann, N. (1983). *Sociologia do Direito I.* Rio de Janeiro: Tempo Brasileiro.

Macaulay, N. (1986). *Dom Pedro: the struggle for liberty in Brazil and Portugal, 1798-1834.* Durham: Duke University Press.

Mansfield, C. B. (1856). *Paraguay, Brazil, and the Plate.* Cambridge: Macmillan.

Melo, E. C. (2014). *A outra Independência.* São Paulo: Editora 34.

Miller, J. (1996). *Way of Death: Merchant Capitalism and the Angolan Slave Trade.* Madison: University of Wisconsin Press.

Miranda, M. d., Bandeira, A., Freitas, D., & Souza, J. A. (1988). *A Cidadania no Brasil (O Índio e o Escravo Negro).* Brasília: Ministério do Interior - Fundação Projeto Rondon.

Moraes, E. (1966). *A Campanha Abolicionista (1879-1888).* Brasília: Universidade de Brasília.

Morgenthau. (1948). The Problem of Sovereignty Reconsidered. *Columbia Law Review 48, no. 3*, p. 341-365. https://doi.org/10.2307/1118308.

Müller, F. (2005). *Métodos de Trabalho do Direito Constitucional.* Rio de Janeiro: Renovar.

Nabuco, J. (1949). *O Abolicionista.* São Paulo: Instituto Progresso Editorial.

NEHD. (2001). *Brasil - Estimativa da População (1550 - 2000).* Retrieved from Nucleo de Estudos em História Demográfica: http://historia_demografica.tripod.com/pop.pdf

Nóbrega, V. L. (1961). *História e Sistema do Direito Privado Romano.* Rio de Janeiro: Freitas Bastos.

Oberacker Jr, C. H. (1973). *A Imperatriz Leopoldina: sua vida e sua época - ensaio de uma biografia.* Rio de Janeiro: Conselho Federal de Cultura.

Oliveira, J. C. (2012). As motivações e o contexto jurídico-político da independência política do Brasil e o processo constitucional brasileiro. *Athenas*, v. 1, n. 1, jan-jun, 71-98.

Ordenações Filipinas. (1603). *Ordenações Filipinas, vols. 1 a 5.* Retrieved from Cândido Mendes de Almeida, Rio de Janeiro (1870): http://www1.ci.uc.pt/ihti/proj/filipinas/l4p865.htm

Patterson, O. (1987). The Unholy Trinity: Freedom, Slavery, and the American Constitution. *Social Research, vol. 54, no. 3*, p. 543–77. http://www.jstor.org/stable/40970472.

Pound, R. (2000). *Jurisprudence.* New Jersey: The Lawbook Exchange.

Prado Jr., C. (1991). *Formação do Brasil Contemporâneo.* São Paulo: Brasiliense.

Ribas, A. J. (1880). *Curso de direito civil brasileiro, Tomo II.* Rio de Janeiro: Garnier.

Rodrik, D., Subramanian, A., & Trebbi, F. (2002). *Institutions rule: the primacy of institutions over integration and geography in economic development.* International Monetary Fund.

Rogers, M. L. (2015). David Walker and the Political Power of the Appeal. *Political Theory, 43.2*, p. 208-233. https://doi.org/10.1177/0090591714523623.

Saez, D. (1990). *A formação do Estado burguês no Brasil (1888-1891)*. Rio de Janeiro: Paz e Terra.

Salles, I. (2019). *O Coração do Rei.* Rio de Janeiro: Planeta.

Slave Voyages. (2022). *Trans-Atlantic Slave Trade—Estimates.* Retrieved from https://www.slavevoyages.org/assessment/estimates

Smend, R. (2001). Constitution and Constitutional Law. In A. Jacobson, & B. Schlink, *A Jurisprudence of Crisis* (pp. pp. 213-248. https://doi.org/10.1525/9780520929685-023). Berkeley: University of California Press.

Sousa, O. T. (2016). *História dos Fundadores do Império do Brasil: A vida de Dom Pedro I, Tomo I.* Brasilia: Senado Federal.

Thornhill, C. (2011). *A sociology of constitutions: constitutions and state legitimacy in historical-sociological perspective.* . Cambridge: Cambridge University Press.

Ulpiano, D. (1967, p. 414-449). *Tituli XXVIII Ex Corpore.* Retrieved from In: P. F. Girard & F. Senn, Textes de droit romain, I, Paris, n. 13: https://droitromain.univ-grenoble-alpes.fr/Responsa/uipian.htm

Walker, D. (1830). *Appeal in Four Articles.* Boston.

Walsh, R. (1830). *Notices of Brazil in 1828 and 1829. v. 2.* London: Frederick Westley and A.H. Davis.

Walsh, R. (1830). *Notices of Brazil in 1828 and 1829. v.1.* London: Frederick Westley and A.H. Davis.

Watson, A. (1987). *Roman slave law.* Baltimore: Johns Hopkins University Press.

World Bank. (2018). *Afro-descendants in Latin America Toward a Framework of Inclusion.* Washington.