The New Family Arrangements to Overcome Traditionalism: Pluralism and the Concretization of Fundamental Rights in Brazil

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Received: 2023-08-03            Revised: 2023-09-25       Accepted: 2023-11-18

Abstract

Traditionalism is an ideology that advocates for a government founded on principles surpassing mere human and individual aspects. In traditional symbolism, the supernatural principle is regarded as masculine and feminine. Traditionalism underscores the necessity for the family entity to acknowledge the metaphysical dyad distinguishing the masculine from the feminine, contending that the sole legitimate family form is constituted by the union of a man and a woman and their offspring. This paper examines the shift from traditionalism to constitutional pluralism within family entities. It aims to comprehend how constitutional pluralism acknowledges the diversity of family forms and facilitates societal changes in the concept of the family while circumventing state censorship and bolstering individual liberty. The approach utilized is one of normative juridical inquiry. The study reveals that new family structures, rooted in constitutional pluralism, foster the displacement of traditionalism, thereby establishing a new paradigm for interpreting the concept of the family as defined by the Constitution. Traditionalism, having historically occupied a dominant stance regarding the family, yields to pluralism. Realizing fundamental rights ensures the diversity of family entities, including the traditional family's rightful claim to existence. Viewed from the vantage point of a pluralistic family constitutional framework, traditionalism should not be perceived as antagonistic to pluralism but rather as one of its valid manifestations, a legitimate approach to experiencing life and perceiving the world.

Keywords: family; pluralism; traditionalism; fundamental rights
Introduction

The family plays a very important role in human societies. Considered the basis of society, it is in it that human beings find the means to survive. Without the care of the most restricted family nucleus, no newborn human being would be able to survive.\(^1\) In the family, the human being finds herself/himself inserted and develops her/his personality, as well as finds support and protection in her/his old age.\(^2\)

In view of this great importance for human societies, the family is a field of disputes. For religions, the family consists of a vital union, as it reinforces faith in the distinction between right and wrong, teaches how to love people, and creates assumptions for parents and children to face life's challenges.\(^3\) For the state, the family is an important organization of social control that shares the duty of education with it. The state protection of the family takes place in different ways, from the formal legal recognition of its existence through the guarantee of basic family income to the needy's protection of housing, small rural properties, and their agricultural activities, among others.\(^4\)

Even in the modern Western era, in which the separation between State and Church was recognized, the legally recognized family remained the traditional family, markedly influenced by conservative religious values. This situation, however, changed in the second half of the 20th century. The universal normativity of human rights and their constitutional recognition by national States as fundamental rights of the legal order created the legal conditions for political changes. The traditionalism of the family entity formally recognized by the state gave way to the pluralism of family entities.\(^5\) The normative force of fundamental human rights promoted the overcoming of traditionalism and the emergence of

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4 Pedersen.
new family arrangements. Constitutional pluralism, as the foundation of the constitutional order, began to support the recognition of new family entities.6

These transformations of the family entity have provoked reactions from conservative sectors of society, which understand that only the traditional family is legitimate. In this respect, there is a clash between traditionalism and pluralism. While the first defends the traditional family, the second defends several forms of family entities.

The article hypothesizes that new family arrangements, based on constitutional pluralism, promote overcoming traditionalism as a new paradigm for understanding the concept of family established by the Constitution. The current research analyzed several previous studies on traditionalism in the family, referring to their main authors, such as Julius Evola,7 and René Guénon.8

We also investigated the so-called Catholic traditionalism and its influence in Brazil, having Cassiano Cordi's9 thesis as the main bibliographic source. About the plurality of families in the Brazilian Constitution of 1988, we explore the concept of pluralism in the Constitution of 1988 from the perspective of the concepts of openness, cooperation, and integration of the constitutional order.10 In this topic, we also have as a bibliographic reference the new investigations in the field of civil law, in particular, the so-called constitutionalizing of civil law.11

Finally, we argue based on Peter Häberle's constitutional theory of pluralism,12 that constitutional pluralism recognizes the plurality of family entities, allowing society to experience transformations in the concept of family

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7 Julius Evola, Revolt Against the Modern World (United States: Inner Traditions, 1995), 1.
without state censorship and reinforcing individual freedom. Pluralism is a concept that permeates fundamental rights, giving them unity. The concretization of fundamental rights implies the comprehensive normative reference for pluralism, that is, both the objective validity of these new family entities and the constitutional recognition of the subjective validity of individual rights in the face of these entities.

Research Method

This study constitutes a normative juridical inquiry, predominantly executed through an extensive examination of library resources. The legal resources employed herein are derived from primary and secondary legal sources. The primary legal materials encompass the 1988 Brazilian Constitution and Law No. 4,121, dated August 27, 1962. In contrast, the secondary legal materials comprise various books, scholarly journal articles, and relevant research findings pertinent to this investigation. The approach adopted for data analysis in this research is qualitative.

The Family From the Perspective of Traditionalism: The Brazilian Context

Traditionalism is an ideology that defends a government based on principles that transcend what is merely human and individual, with each domain being formed and ordered from top to bottom. In this sense, Traditionalism is essentially anti-modern, opposing humanism, rationalism, scientism, and the individualism of the modern age, understood as a source of "disorder." For Traditionalism, a "normal civilization" is "based on principles in the true sense of the term, and in which you know that everything is geographically ordered and arranged following them so that everything appears as the application and extension of a doctrine, intellectual or metaphysical in its essence."

In traditional symbolism, the supernatural principle is always considered "masculine," and that of nature is considered "feminine." Equivalent to this

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duality is the dyad Heaven and Earth, the polarity of the uranian principle and the tellurian or chthonic principle, cosmic-symbolic images of the eternal masculine and feminine. In traditional metaphysics, the eternal masculine and eternal feminine, in their most abstract expressions, present themselves as follows: the masculine is the form, and the feminine is the matter. "Form" signifies the power that determines and brings forth the principle of movement, development, and becoming. "Matter," on the other hand, signifies the material and instrumental cause of all development, pure and undetermined possibility, substance, or power that is nothing but, once activated and fertilized, can give rise to everything.16

The Warrior (Hero) and the Ascetic are the fundamental types of pure masculinity. In symmetry with them, two corresponding types of feminine nature exist. The woman realizes herself as such and elevates herself to the same level as the man as a Warrior and Ascetic, as she is a Lover and a mother. The man's gesture as Warrior and Ascetic (action and detachment) corresponds to the woman's gesture of giving herself completely to another being, both the beloved man (type of lover - Aphroditic woman) and the son (type of mother - demetric woman). In this gesture, the woman finds meaning, joy, and justification in her life. According to tradition, only indirectly, through her relationships with the other – with the man – can a woman enter the sacred hierarchical order.17

In this context, for Traditionalism, homosexuality, for example, as complete correspondence with normal sexual relations between men and women, is a deviation, not from a moralistic common standpoint, but from the standpoint of metaphysics of sex.18 From the Traditionalist perspective, in a society where egalitarianism prevails, where differences are contradicted, where promiscuity is favored, where the old ideal of "being true to oneself" no longer means anything, in a deteriorated and materialistic society, "it is evident that the phenomenon of regression, and with it homosexuality, are particularly favored."19 Thus, according to Traditionalism, the impressive increase in the "phenomenon of homosexuality

18 Evola, A Metafísica do Sexo, 75.
19 Evola, 77.
and the "third sex" in the current "democratic" era is not mere coincidence. The same is also happening with the sex changes that occur to an extent that seems to have no equivalence in previous eras. For Traditionalism, "man and woman present themselves as two types, and whoever is born a man has to fulfill himself as a man and whoever is born a woman has to do so as a woman, completely, surpassing all mixtures and promiscuities."  

The family, from the perspective of Traditionalism, is the traditional family, the only valid form of family. This unique model is based on the perpetuation of traditional gender roles that promote the submission of women and determine motherhood as natural and the homophobic structure that delegitimizes homosexual and transgender individuals "for not conforming to established hegemonic gender and sexuality patterns."  

Traditionalism is the ideology of the ultraconservative movement that started gaining political visibility in Brazil in 2013. This movement is part of the wave that led to the political resurgence of Traditionalism in other countries. It is possible to state that Traditionalism, with different characteristics, is currently a transnational phenomenon.  

This traditionalist ideology present in Brazil, which also includes broad evangelical segments that advocate for a conservative vision of society, historically originated from the so-called Catholic Traditionalism. Catholic Traditionalism played a fundamental role in Brazilian law's exclusive legal recognition of the traditional family. In this sense, for example, the testimony of Ernest Hambloch, then-British consul in Rio de Janeiro, about the role of religion
in the 1934 Brazilian Constitution is significant. Commenting on the phrase "putting our trust in God" in the preamble of the 1934 Constitution, Hambloch states that it is quite significant for a "country where domestic tragedies are frequent due to the absence of divorce laws."25

According to Cordi, Traditionalism is a relevant component of the study of Brazilian culture.26 Analyzing the topic during the period known as the Old Republic27 Cordi writes that Brazilian traditionalism from this period is only understandable if studied in its relationship with ultramontanism.28

Catholic Traditionalism originated in the late 18th century and the early 19th century in France as a reaction to the revolutionary events and to recover the overall order of society, which the revolution had shaken. Attacks on Enlightenment, considered the soul of the French Revolution of 1789, brought together intellectuals from various currents who attempted to underpin new positions that valued social bonds or other dimensions of social cohesion in opposition to the individualism of the Enlightenment thinkers. In this context, a group of Catholic thinkers emerged, whose greatest exponents were Louis-Gabriel-Ambroise, Viscount de Bonald (1754-1840), Count Joseph-Marie de Maistre (1753-1821), and Félicité Robert de Lamennais (1782-1854), who began to structure a set of ideas to oppose the revolutionary wave.29

Traditionalists propose a new worldview of reality, where proposals such as (i) tradition as a criterion of truth and (ii) moral order as the foundation of society are integrated into the importance of the social order to enable the growth of human dignity. In this aspect, in the traditionalist view, to guarantee the dignity of man, he cannot submit to a merely human authority. Individual freedom can only be guaranteed by the group that constitutes society, the competent guardian

27 The Old Republic is the name given to the first phase of the Brazilian Republic, which extended from the Proclamation of the Republic on November 15, 1889, until the Revolution of 1930, led by Getúlio Vargas.
28 Cordi, “O tradicionalismo na República Velha,” IX.
29 Cordi, 3.
of legal and private freedoms, thus promoting the dignity of man as a child of God.\(^{30}\)

The family plays an important role in Traditionalism, as it contains the moral and spiritual connotation that emphasizes the existential aspect of the traditionalists' conception of freedom, which, far from declared rights, is realized in the experience of the community. The modern state, in turn, is seen as "essentially pagan and revolutionary," having absorbed and annihilated "the natural energies of society," relegating the family in the name of individualism.\(^{31}\)

Brazilian Catholic Traditionalism found spiritual, social, and political expression in the Brazilian Society for the Defense of Tradition, Family, and Property - TFP, a civil organization founded in 1960 and based on Catholic tradition. It combats masonic, socialist, and communist ideas, reacting vigorously based on the love of Christian order and aversion to disorder. The TFP played an important role in affirming Brazilian Catholic Traditionalism, being a significant organization for the defence of the traditional family, for example, when it decisively acted in 1966 to prevent an attempt to implement divorce in the country.\(^{32}\)

Despite the conservative reaction to the social and political changes of the 1960s, the process of legal and political affirmation of human rights, which in the Brazilian case led to the end of the military dictatorship (1964-1985) and the promulgation of the Constitution of 1988, changed the Brazilian political and institutional environment. With the constitutional legitimacy of other family forms, the traditional model no longer has exclusivity, as it coexists with other family arrangements. From the perspective of constitutional pluralism, the traditional family arrangement is legitimate, as the traditional family is one of several existing family forms. This legitimacy is not hegemonic, as it is part of constitutional pluralism.

\(^{30}\) Cordi, 25.
\(^{31}\) Cordi, 8.
From a historical standpoint, on the other hand, the pluralism that supports the constitutional order of the family currently in force in the Federative Republic of Brazil implies overcoming the traditional model. That is, pluralism here opposes traditionalism. By asserting that the family is based on the principle of pluralism, the Brazilian constitutional order allows for a plurality of family arrangements. The description and analysis of the plural constitutional order of families in Brazilian law is the subject of the next topic of this article.

Plurality of Families in The Brazilian Constitution of 1988

The development of constitutionalism in the second half of the 20th century encompassed human rights. This meant that human rights, enshrined in national constitutions as fundamental rights, came to be understood as legal norms. As legal norms, fundamental rights established limits to the state's power and began to require public policies for their promotion.

The Brazilian Constitution of 1988 emerged in this context of affirmation of human rights. It is a deeply humanistic Constitution, with the principle of human dignity as one of its main references. The Constitution incorporated the challenges of Brazilian society when Article 3 provides that the fundamental objectives of the Federative Republic of Brazil are (i) to build a free, just, and solidary society; (ii) to guarantee national development; (iii) to eradicate poverty and marginalization and reduce social and regional inequalities; (iv) to promote the well-being of all, without prejudice based on origin, race, gender, color, age, and any other form of discrimination.

In this context, the Brazilian Constitution of 1988 emphasizes pluralism as one of the foundations of the Brazilian Republic (Article 1, V). A closer analysis of the development of democratic constitutionalism and human rights demonstrates that pluralism is an intrinsic concept to this notion of constitutionalism. Except for the initial period of constitutional development, based on homogeneous social structures that sought to deny differences, current constitutionalism is essentially pluralistic. One could perhaps say that the notion

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of pluralism was already present in the initial moment of constitutionalism but as a fundamentally partisan pluralism based on the idea of divergent opinions in an environment of wide consensus. The bourgeois revolutions were essentially revolutions that altered the economic and social structures of the existing world without modifying the world of culture as an environment for the reproduction of a society still rooted in gender inequality, racial prejudice, the selective nature of legitimacy for the most capable (exclusion of the disabled), and the social role of the patriarchal family. The revolution of customs took place in the 20th century and is a reality of 21st-century constitutionalism. For this article, the pluralism being addressed here is the pluralism resulting from this Cultural Revolution, which is transforming the structures of a society that is still highly unequal from a social standpoint.

The interpretation of the principle of political pluralism, as stated in Article 1, V of the Brazilian Constitution of 1988, must be comprehensive because it "reaches today the various spheres of political and social life in the country." In constitutional law, the idea of pluralism is found in constitutional openness. The concept of openness, in addition to characterizing the constitutional order in the context of the internationalization of law and the existence, in fact, of a network of Constitutions committed to human rights, identifies the Constitutions of pluralistic societies. In this way, the Constitution opens itself inward to its society, recognizing the rights of a plural society.

The 1988 Brazilian Constitution welcomed the idea of an open, pluralistic, and inclusive society, which repudiates racial and gender discrimination and is concerned with the environmental cause and overcoming the country's profound social problems. The social and political movements of the 1960s, 1970s, and 1980s, which promoted the liberation of customs, denounced racial and gender discrimination, drew attention to the environmental cause, and called for better living conditions in developing countries, brought about a profound transformation in the direction of the constitutional movement that began after the end of World War II. Based on the universal normativity of human rights and

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their immense emancipatory potential, this renewed constitutional movement has transformed the understanding of institutions and their social role, including that of the family.

Contemporary Traditionalism is a reactive force to the pluralism that emerged from the new social movements, which renewed the understanding of social problems and initiated a new struggle against inequalities. If, since the French Revolution, the motto "all are equal before the law" became part of the grammar of constitutional law, the abstract Man of the great revolution was concretely realized in a very partial way, restricted to the figure of a male, white, heterosexual, and national person. This was the concrete Man to whom the Déclaration des Droits de l'Homme et du Citoyen was addressed.

In the name of the normativity of human rights, the post-World War II world experienced profound transformations. In this sense, for example, the reform in the Catholic Church through the Second Vatican Council "modernized" it. The Council changed the rituals of the masses, authorizing the use of the national languages of each country, and no longer Latin. Likewise, it modified the duties of each priest, not making the use of the cassock mandatory. Regarding religious freedom, the Council began to allow people to know God and Salvation through other religions. Finally, on the political front, the reform gave freedom to theologians to interpret the Bible. These profound transformations in the most "traditional" institution of the West were followed by unrest in the field of social and political movements of blacks, women, the environment, pacifism, and the absurdity of war to achieve political objectives.

Traditionally, a family has always been linked to marriage between a man and a woman. In Brazilian law, this was the only family entity recognized and protected by the state. For example, the Brazilian Civil Code of 1916 recognized legal effects only on marriage-related relationships. In this context, marriage was also influenced by religion, a sacramental element consisting of its indissolubility.

Brazilian family law transformed throughout the 20th century. With Law No. 4,121 of August 27, 1962, the Married Women's Statute, women gained the right to engage in a professional and profitable activity different from that of their
husbands, gained the ability to manage property acquired as a result of their work, and file a lawsuit without the permission of their spouse. With Constitutional Amendment No. 9 of June 28, 1977, legal recognition of divorce occurred. However, it was with the 1988 Constitution that the most significant transformation took place, laying the foundation for a new understanding of family organization. The new Constitution recognized a stable union between men and women as a family entity for State protection (article 226, paragraph 3). It also considered any community formed by either parent and their descendants as a family entity (article 226, paragraph 4). The Constitution established that men and women exercise equally the rights and duties related to the marital partnership (article 226, paragraph 5). The Charta also guaranteed, based on the principles of human dignity and responsible parenthood, family planning as the free decision of the couple, with the state providing educational and scientific resources for the exercise of this right, prohibiting any coercive form by official or private institutions. The Constitution assured assistance from the state to the family, in the person of each member, creating mechanisms to prevent violence within their relationships.

The broader concept of family recognized by the constitutional text allowed for a non-exclusive interpretation of the concept of stable union. In this regard, the Brazilian Supreme Court recognized the union between same-sex individuals as a family entity in the judgment of ADI 4277 and ADPF 132. According to the Court, the Constitution does not confer any orthodox meaning to "family," as a family is understood as a private institution voluntarily established among adult persons. For the Court, the 1988 Constitution recognizes pluralism as a socio-political-cultural category.

In the context of the transformations occurring in family law, it is important to understand the broader field of civil law, in which family law is included. The codification of civil law ensured the ideals of economic liberalism, meaning that the code became a statute that guaranteed the validity of contracts, the circulation of wealth, and the acquisition of property, consecrating individualism as its fundamental principle.

36 Dimas Messias de Carvalho, Direito das Familias (São Paulo: Saraiva, 2015), 46.
The promulgation of the *Code Civil* of 1804 was based on French common law from the 18th century and the transformations that occurred during the Revolution of 1789. According to van Caenegem:

"[...] the *Code Civil* now ensured the recognition of fundamental principles: religious tolerance; alleviation of territorial property, now exempt from fees imposed by the feudal system and by ecclesiastical tithe law; and freedom of contract, now much broader than the ancien régime. New ideas also emerged in certain specific areas, such as civil marriage, divorce, civil status, property transfer, and the abolition of the medieval prohibition of interest".37

Given this new legal and social context, it is possible to affirm that the family can be understood as a social group in which a cohesive bond is discovered among its members, a consciousness of unity, formerly known as the "consciousness of 'us.'" According to San Tiago Dantas, "The study of family law should begin with some notions of a sociological nature because, in this branch of civil law, one can perceive to what extent legal norms are shaped and determined by social content."38

The plurality of families in the 1988 Brazilian Constitution is identified by recognizing various family arrangements. In this sense, for example, ana-parental39, same-sex, mosaic, or pluri-parental40, eudemonistic41 families, among others. Article 226 of the 1988 Constitution is an inclusive legal norm that

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39 In this form of family, people who are related to each other or even non-relatives live together, and it is assumed that mutual coexistence has a common purpose, combining efforts to form a heritage. It is not about the existence of a sexual relationship between family members but only mutual coexistence and the reciprocal desire to form a family. According to Sérgio Rezende de Barros, *Direitos Humanos da Família* (São Paulo: Imago, 2003), 151.
40 Such families originate from a current love relationship but bring together all past relationships, that is, everyone living together with children from previous marriages and, sometimes, without children in common. These families are also referred to as reconstructed or recomposed families. According to Cecilia P. Grosman and Irene Martinez Alacorta, *Familias Ensambladas, nuevas uniones después del divorcio* (Buenos Aires: Editorial Universidad, 2000), 35.
41 The innovative aspect of the pluralism of family entities is the affection that unites its members in the communion of a full life, in solidarity, in love, in reciprocal responsibility, and the pursuit of happiness. This demonstrates that the person is emphasized as a subject of rights within the family and no longer the family as an end in itself (see art. 226, paragraph 8 of the 1988 Constitution).
demonstrates the instrumental role of family law, affirming the non-taxative plurality of family entities.

The recognition of new family entities is a social process. Thus, for example, polyamorous unions, consisting of a loving interaction among more than two people, are still not considered a family entity in Brazilian law. However, society has debated this family arrangement because it exists in reality despite its lack of legal recognition. From the perspective of the pluralistic paradigm of law, this situation implies the existence of an empirical law. There is indeed a law that regulates legal relations within the organization (material legal rationality) but is not recognized by the formal legal rationality of the state.

Contemporary society has a decentralized, democratic, egalitarian, and demarriage family model. "The main purpose of the family becomes social solidarity and the necessary conditions for the improvement and progress of individuals, guiding the family nucleus through affection, as the driving force."43

The home is defined as a place of affection and respect. In the current conception of family, what matters most is the feeling of belonging and integration, sharing hopes and values, and allowing each individual to fulfill their personal happiness project.

The Pluralism of Family Entities and The Concretization of Fundamental Rights

The pluralism of family entities is a facet of the broader concept of pluralism, which structures the constitutional order. When writing about the concept of pluralism for constitutional law, Peter Häberle distinguishes four fields in the spectrum of pluralism: (i) the political field in a broad sense, (ii) the scientific and cultural field, (iii) the economic field and (vi) the state field, in the strict sense. All these fields are interconnected and have their common origin in the pluralism of freedom, which appears as the "law" of pluralism in the Constitution.44

42 In this sense, for example, the many reports that portray the stories and daily life of these forms of life: https://www.terra.com.br/nos/amor-que-soma-trisais-falam-sobre-relacionamento-poliamoroso,7e8ad00e76b08529e2ae9685942682b66fzhyc7q2.htm Acessado em 24.06.2023
As a framework order, the Constitution constitutes and is constituted by pluralism. This framework order enables autonomous social and state integration, the participation of groups, associations, and churches, for example, in the sphere of society, and the federation, states, and municipalities in the state field.45

Häberle points out some elements of the Constitutional Theory of Pluralism, already present in the constitutional understanding: (i) the possibilities of an alternative plural thinking; (ii) the plural structure of constituent power, also in the cultural field; (iii) the fundamental sovereign aspect of pluralism and freedom; (iv) the pluralist component of freedom of thought, of the plural understanding of the media; (v) pluralistic separation-of-powers thinking, which demands equality and freedom of pluralistic forces and self-limitation; (vi) the new social question, in which society is no longer simply the field of free action of social forces; (vii) the opposition and cooperation between groups as interaction in a political community, which brings the difficult problem of cooperation and coordination and equally prevents the misunderstanding of selfish understanding of groups; (viii) identifying and remedying the political participation deficit not at cost but in the interests of representative democracy; (ix) a pluralist theory of constitutional jurisdiction and its process; (x) the possibilities and limits of a pluralist jurisdiction (of trade unions, associations, churches) as opposed to state jurisdiction; (xi) the abandonment of Schmitian (Carl Schmitt) friend/enemy ideology as a theory of politics; (xii) the pluralization of law.46

Häberle's description provides a comprehensive view of pluralism in constitutional theory and underscores the importance of constitutional order for the autonomous spheres of pluralism. In this sense, he argues that pluralism should not be discredited as a danger to sovereignty since sovereignty, as a material and legally limited concept, necessitates pluralism. In a free community, pluralism is the foundation of sovereignty. Unions, associations, and other plural

45 Häberle, 141–42.
46 Häberle, 147–49.
groups sustain the whole: "On pluralism, part of the formation of unity that characterizes sovereignty occurs in the multiplicity of social reality."\textsuperscript{47}

The possibilities of a comprehensive understanding of the theme of Constitution and Pluralism lie in the transition from a "constituted State" to a "constituted Society" in the sense that the Constitution is no longer just a State Constitution but also a Constitution of Society.\textsuperscript{48}

Pluralism, therefore, is mediated by the constitutional order, which is not limited to the organization of state power and the recognition of fundamental rights but also seeks to understand pluralism within the scope of the Constitution. In this sense, it is possible to recognize fundamental rights in the face of non-state social powers, as well as the invalidation of non-state legal orders that violate constitutional norms.

Considering this description of constitutional pluralism, the pluralism of family entities implies the objective recognition of the diversity of family orders, in which new arrangements arise and develop spontaneously in society.

The objective recognition of the existence of several family entities is only possible due to the recognition of pluralism as the foundation of the constitutional order. This objective recognition implicitly recognizes the autonomy of these family entities, which arise and develop in society. They are not entities created by the state. In this sense, the concept of "autonomy" differs from "private autonomy" because autonomy is understood as the concept developed by the German doctrine of civil law of the 19th century, which saw in organizations the ability to create law without state intervention.\textsuperscript{49} Autonomy, as defined by Otto von Gierke, "creates objective law. It is the source of law and is clearly distinguished from subjective right.\textsuperscript{50}


\textsuperscript{49} Justus Friedrich Runde, Grundsätze des gemeinen deutschen Privatrechts (Göttingen: Dieterich, 1817), 2.

The implications of this recognition are diverse, as it allows society to experience social transformations without state censorship, reinforces individual freedom not only before the state but also before social organizations, understands society not only as a set of individuals but as a set of associations, which interact with each other.

In this way, pluralism is a concept that permeates fundamental rights, giving them unity. The concretization of fundamental rights in a context of transition from a "constituted State" to a "constituted Society," in which the constitutional order is more comprehensive since it also includes social organizations as an autonomous source of law, will imply the recognition of the autonomy of social organizations and their legal production.

The concretization of fundamental rights, in particular the general right of freedom and the general right of equality, as a synthesis of the constitutional order, implies a comprehensive normative reference for pluralism. The normative legal rationality of fundamental human rights, which marks the validity of formal state law (statute) and the material law of pluralism (autonomous legal production of social organizations), is based on the open catalog of fundamental rights of the Constitution.51

Concretizing fundamental rights in the context of pluralism of family entities requires understanding the law in these three levels of rationality. Fundamental rights serve as a comprehensive normative reference for recognizing the validity of new forms of family entities, both for the constitutional recognition of the objective validity of these new entities and for the constitutional recognition of the subjective validity of rights of individuals in the face of these entities. The scope of protection of fundamental rights is twofold; it encompasses the recognition of new entities and the protection of individual rights in the face of these entities.

In the pluralism of family entities, concretizing fundamental rights requires understanding the law in these three levels of rationality. Fundamental rights serve as a comprehensive normative reference for recognizing the validity

51 On the planes of legal rationality, see Marcos Augusto Maliska, Pluralismo Jurídico e Direito Moderno. Notas para Pensar a Racionalidade Jurídica (Curitiba: Juruá, 2022), 1.
of new forms of family entities, both for the constitutional recognition of the objective validity of these new entities and for the constitutional recognition of the subjective validity of individual rights in the face of these entities. The scope of protection of fundamental rights is twofold; it encompasses the recognition of new entities and the protection of individual rights in the face of these entities.

As an example of the first case, one could suggest the hypothesis of family entities based on marriage involving kids. In the name of the fundamental rights of children, the constitutional order will not consider family entities with these characteristics as legally valid. In this case, the concretization of fundamental rights serves as an instrument of defense and protection of children. As an example of the second case, one could suggest the hypothesis of family entities recognized by the constitutional order, that is, in their organizational structure there are no impediments to their creation and functioning. Still, individuals who are part of these entities can rely on the constitutional order to enforce their fundamental rights against these organizations. Imagine the hypothesis of dissolution of the family entity without equal sharing of assets building together. Even the occurrence of domestic violence. In these situations, the constitutional order of fundamental rights may intervene within the family entity, whether directly or through civil and criminal state legislation.

In addition to these cases of defense of fundamental rights, the concretization of fundamental rights is also present within the pluralism of family entities in an affirmative sense. In this case, it is possible to say that the possibility of new family entities results from the concretization of fundamental rights.

The autonomy of social organizations stems from the recognition, by the constitutional order, of the fundamental rights of the individuals who are part of these organizations. They are the holders of this right of organizational autonomy. The new family entities are only possible because there is a constitutional recognition that individuals have fundamental rights, and these rights even allow the creation of new family entities.

According to art. 226 of the 1988 Brazilian Constitution, the family is the basis of society and has special protection from the state. The paragraphs of art. Two hundred twenty-six refers to civil marriage, religious marriage, divorce,
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stable union, single-parent family, and gender equality in the family. The Constitution does not provide a definition of what a family is, which allows the interpretation of the Brazilian constitutional text in the sense that the concept of family is open. This opening of the concept of family is in line with the understanding of the pluralism of the constitutional order. Pluralism, as the foundation of the Federative Republic of Brazil (art. 1, V of the 1988 Constitution), also reaches family entities.

The acknowledgment of new family entities as a social process raises the question of constitutional hermeneutics as concretization. As guardians of the constitutional order, the state judge will face demands from this social construction of new family entities. The non-state norms that regulate these new entities will require the State judge to participate actively in creating the norm that will regulate the case. The sources to be used, in the context of the pluralist paradigm that contemplates non-state sources of law, place the magistrate in the role of the true creator of the norm since the hermeneutic process here will not be one of subsuming the case to the norm, but of concretizing the Constitution to and from the concrete case. Thus, it is not just a matter of seeking the content of the right to be applied in the constitutional norm. The elements of the case and, in this sense, inclusive state and non-state legal norms related to the case must be considered. The normativity of the Constitution extends the binary code of validity of the law (legal/illegal) to the question of constitutionality/unconstitutionality, considering the state norm as one of the several legal sources to be analyzed.

The possibility of new family entities as a result of the constitutional principle of pluralism has implications in the field of law, as it allows the recognition of the existence of legal pluralism, that is, the production of legal norms outside the state sphere. This empirical, material law, which arises and develops outside the state, produces effects only within the organization. If these norms violate normative rationality based on fundamental human rights, they will not be conferred the condition, properly, of law. In this hypothesis, all organizations based on violence and arbitrariness enforce their norms, as criminal organizations do. However, suppose this empirical law does not have the
recognition of the formal legal rationality of the state but finds legitimacy in the normative legal rationality of fundamental human rights. In that case, there is a space of material, concrete legal validity for it. In this situation are the family entities under construction, which do not manifestly violate the normative legal rationality of fundamental human rights but have not yet found recognition in the formal legal rationality of the state, either through the state legislative process or through a court decision in the scope of constitutional jurisdiction.

The concretization of the fundamental rights of the people who are part of these new family entities is a process of legal, political, and social recognition. The active participation of civil society in debating these new entities, which already exist but still do not enjoy legal recognition, is essential. Legal recognition needs social and political recognition, which depends on the debate in the public sphere, in which the various segments of society manifest themselves about the new social organization. The constitutional order of pluralism, as an open and democratic order, depends on this interaction of civil society, as rights are only consolidated when there is legitimacy. Although legitimacy depends on the foundation of normative validity of fundamental human rights, it also requires social and political support, which only the effective interaction of civil society in the public arena can provide.

**Conclusion**

As a movement that defends a government based on principles that transcend what is only human and individual, traditionalism emphasizes that the family entity should not ignore the metaphysical dyad that distinguishes males from females. This understanding of the family entity holds that there is only one form of family, which is formed by the marriage between a man and a woman and their children.

In contrast to this definition of family, there is the pluralism of family entities. In Brazilian law, this pluralism is recognized by the 1988 Constitution and implies overcoming traditionalism as the basis for interpreting the concept of family. The broader concept of family entity, recognized by the Brazilian constitutional text, allows a non-exclusive interpretation of the concept of a stable
union between man and woman. In this perspective, the Federal Supreme Court recognized the union between people of the same sex as a family entity.

The pluralism of family entities is part of the broader concept of constitutional pluralism. As a framework order, the Constitution constitutes and is constituted by pluralism. Pluralism, therefore, is a concept mediated by the constitutional order, which both recognizes fundamental rights in the face of non-state social powers and provides for the invalidity of non-state legal orders that violate constitutional norms.

The concretization of fundamental rights expresses an affirmative sense of recognition of the possibility of the existence of new family entities. The emergence of new family entities as a social process poses the issue of constitutional hermeneutics as concretization. As guardians of the constitutional order, the state judge will face demands from this social construction of new family entities. The elements of the case must be considered since the normativity of the Constitution expands the binary code of validity of the law (legal/illegal) to also contemplate this insurgent normativity of the new dynamics of development of the concept of family. The concretization of the fundamental rights of the people who are part of these new family entities is a process of legal, political, and social recognition. The active participation of civil society in debating these new entities, which already exist but still do not enjoy legal recognition, is essential.

In conclusion, this research demonstrated that the new family arrangements, based on constitutional pluralism, promote overcoming traditionalism through the concretization of fundamental rights. The democratic constitutional order should not only guarantee the existence of a single form of family but also exclude other possibilities of family entities. This understanding is contrary to human rights and democracy. The democratic constitutional order must guarantee the pluralism of family entities, which also includes the legitimate right of existence of the traditional family. Traditionalism takes place in constitutional pluralism, not in a hegemonic position, but as a legitimate expression of living life and seeing the world.
Authors’ Contributions

M.A.M., as the main author of this article, was responsible for the research activities, such as the data collection, presentation, and writing of the report and manuscript. M.M.J. is a co-author of this article. They contributed to this research by collecting data and writing the report with the main author.

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