

# SEQÜÊNCIA

Publicação do  
Programa de Pós-Graduação  
em Direito da UFSC

VOLUME 46 ■ ANO 2025

Estudos  
jurídicos  
e políticos

SEQÜÊNCIA – ESTUDOS JURÍDICOS E POLÍTICOS é uma publicação temática e de periodicidade quadrimestral, editada pelo Programa de Pós-Graduação Stricto Sensu em Direito da Universidade Federal de Santa Catarina – UFSC.

SEQÜÊNCIA – ESTUDOS JURÍDICOS E POLÍTICOS is a thematic publication, printed every four months, edited by the Program in law of the Federal University of Santa Catarina – UFSC.

Versão eletrônica: <http://www.periodicos.ufsc.br/index.php/sequencia>

Editora-Chefe: Norma Sueli Padilha

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#### Ficha catalográfica

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Seqüência: Estudos jurídicos e políticos. Universidade Federal de Santa Catarina. Programa de Pós-Graduação em Direito. n.1 (janeiro 1980)-.

Florianópolis: Fundação José Boiteux. 1980-.

Publicação contínua

Resumo em português e inglês

Versão impressa ISSN 0101-9562


Versão on-line ISSN 2177-7055

1. Ciência jurídica. 2. Teoria política. 3. Filosofia do direito. 4. Periódicos. I. Universidade Federal de Santa Catarina. Programa de Pós-graduação em Direito

CDU 34(05)

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Catálogo na fonte por: João Oscar do Espírito Santo CRB 14/849

PUBLICAÇÃO		<b>SEQÜÊNCIA</b>	Publicação do Programa de Pós-Graduação em Direito da UFSC	Estudos jurídicos e políticos
				Ano XLIX Volume 46

# The Brazilian Constitution in crisis (2015-2022): a loss of normative substance and selective effectiveness

*A Constituição brasileira em crise (2015-2022): perda de substância normativa e eficácia seletiva*

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**ABSTRACT:** Our paper offers a constitutional reading of the institutional and economic crisis that started in Brazil in 2015. We analyze the constitutional and legislative reforms that took place under the Temer and Bolsonaro administrations and the application of the Constitution. This analysis shows that a political change began that caused the loss of normative substance in the “transformative” Brazilian Constitution of 1988 and made its selective social effectiveness more acute. Critics who announce the “death” of the 1988 transformative constitutional project capture the revisionist neoliberal practice in recent years, although their statement should not be considered in absolute terms. What in fact occurred was not the abandonment of the constitutional project, but the selective ineffectivity of constitutional norms and programs, which affected mainly social rights and restricted redistribution policies while ignoring the constitutional promises of social transformation. Liberalism with its institutional expression in the separation of powers was maintained, but the progressive essence of the transformative part of the Constitution was emptied.

**KEYWORDS:** Constitutional crisis. Democracy. Neoliberalism. Social change.

**RESUMO:** O artigo oferece uma leitura constitucional da crise institucional e econômica que se iniciou no Brasil em 2015. Analisamos as reformas constitucionais e legislativas ocorridas nos governos Temer e Bolsonaro e as formas de aplicação



da Constituição. Sustentamos que houve mudança política que causou a perda de substância normativa da Constituição transformadora de 1988 e agravou sua eficácia seletiva, sob uma política neoliberal. Os críticos que anunciam a “morte” do projeto constitucional transformador de 1988 captam a prática revisionista neoliberal dos últimos anos, embora sua afirmação não deva ser considerada em termos absolutos. O que de fato ocorreu não foi o abandono do projeto constitucional, mas a ineficácia seletiva das normas e programas constitucionais, que afetou principalmente os direitos sociais e restringiu as políticas de redistribuição, ignorando as promessas constitucionais de transformação social. O liberalismo, com sua expressão institucional na separação de poderes, foi mantido, mas a essência progressista da parte transformadora da Constituição foi esvaziada.

**PALAVRAS-CHAVE:** Crise constitucional. Democracia. Mudança social. Neoliberalismo.

## 1. INTRODUCTION

The aim of our text is to analyze the political and economic crisis that emerged in Brazil in 2015 and ended in 2022 with the election of the Lula government and the stabilization of the economy. The analysis is carried out using conceptual tools from *constitutional theory*. The central problem is the causal relationship between political and economic events and constitutional change.

To this end, the concept of social conditions that enable constitutional norms to be given meaning (*Bedingungen normativer Sinnerfüllung*) is employed. These social conditions are not regulated by law, but they must be met for the norm to be applied effectively (constitutional pre-conditions).<sup>1</sup> These elements rarely stem from constitutional norms and are therefore not the subject of legal analysis. However, they are part of constitutional theory, which examines the contexts in which norms are applied and explains how laws are formed and their effectiveness. In short, constitutional theory analyzes “the causalities that drive the Constitution” and this gives constitutional theory a teleological aspect

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<sup>1</sup> On this understanding of the object of constitutional theory, see Jestaedt. 2009, p. 57-64.

(Jestaedt, 2009, p. 60), which we believe is expressed through the use of sociological, political, and economic elements.

The most common approach is to examine which events of social relevance have caused changes in the constitutional structure of a country. This may be an explicit normative change, such as the adoption of stricter environmental protection rules following the electoral victory of environmentalist parties. It can also happen tacitly, by allowing part of the constitution to atrophy. For example, the dismantling of the welfare state in times of neo-liberal policies, without repealing the rules that guarantee social rights and define the corresponding duties of the state.

The second aspect of the causal analysis is to examine the impact of the normative change, whether explicit or tacit, on the social processes that took place after the change. For example, if a legal reform raises the minimum retirement age, the economic impact of this measure on the income of workers and pensioners should be examined, as well as any possible political repercussion (protests, political crisis, repeal of the reform...).

These causality models face methodological problems that can be summarized as the difficulty of isolating variables and establishing causal relationships in complex processes. If only a legal norm had changed, it is possible to analyze its impact. But because political and economic constellations change with it, we can't say which factor contributed to an outcome, in what way and with what intensity. For this reason, we adopt a model of *weak causality* that allows us to offer explanatory frameworks without making absolute statements about the relationships between legal norms and social context.

Our analysis of the Brazilian constitutional crisis centers on the *ineffectiveness and violations of constitutional norms*. We emphasize the social context in which the constitution is—or is not—applied. The constitutional crisis is regarded as a partial impossibility of its application due to political and economic factors. This study aims to elucidate the underlying causes of this crisis of application.

## 2. THE BRAZILIAN POLITICAL AND SOCIAL CONTEXT (2015-2022)

The year 2015 was very important for what we can call *the crisis of democracy* in Brazil. On January 1, Dilma Rousseff took office in her second term as President of the Republic, with Michel Temer as Vice-President. A few months later, protests calling for political change, including the impeachment of President Rousseff, took millions of Brazilians out onto the streets. The protests were intense and persistent. Their central demand was the “end of corruption”, and they accused the government itself, which was then controlled by the *Partido dos Trabalhadores*, who were seen as the main source of corruption. On December 2, 2015, the House of Representatives initiated the impeachment process of President Rousseff, who was removed from office by the Senate on August 31, 2016. Vice President Michel Temer served as President until December 2018.

Between 2016 and 2019 the protests continued, now against President Temer. Temer had very low popularity points, but gained the support of Congress using the well-known compromise techniques of coalition presidential system (*presidencialismo de coalizão*).<sup>2</sup> In 2017 and 2018 popular dissatisfaction continued, with increased polarization between right and left groups, which manifested itself in clashes on social networks and the exponential growth of political hatred messages mixed with what *fake news*.

In 2018 three events occurred that were, at the same time, the result of political *polarization* and caused its paroxysm:

- The assassination of the left-wing politician Marielle Franco (March 2018) which remains unsolved. Most likely she

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<sup>2</sup> Abranches, 1988, p. 5-33; Abranches, 2018; Limongi, 2006. On the events of recent years, see the institutional approach in: Vieira, 2024; Souza Neto, 2020, p. 47-143. With emphasis on the economic aspects of the crisis, Saad-Filho, Morais, 2018.

was murdered by para-military groups that control poor neighborhoods in Rio de Janeiro.

- The arrest of former President Luiz Inácio Lula da Silva (April 2018), determined by federal judge at the time Sergio Moro, resulted in a long prison term. Lula da Silva could not run for President in October 2018 due to the legal proceedings brought against him, even though he was the unquestionable favorite in the 2018 elections: before it was decided that he could not run for election he had, in August 2018, twice as many intended votes as Bolsonaro.<sup>3</sup>
- The attempted assassination of then presidential candidate Jair Bolsonaro by a madman (September 2018) created a wave of sympathy for the candidate, inflaming the political climate. After his triumphant election as President of the Republic, Bolsonaro took office in January 2019 and appointed Sergio Moro, the main figure responsible for Lula da Silva's conviction, as Minister of Justice.

Since the 2018 election campaign, right-wing voters and politicians continued to protest against the Federal Supreme Court and the National Congress, which are perceived as obstacles to the implementation of President Bolsonaro's policy ("fight against the system"), calling for military intervention.

The right-wing activists, instigated by Bolsonaro's declarations, express what can be called, the *imperialist vision of the constitutional regime of the separation of powers*.<sup>4</sup> In this vision, a decisive role is attributed to the will of the Executive, personified by the President.

<sup>3</sup> Opinion polling in August 2018: Lula, 39%; Bolsonaro, 19% (<https://g1.globo.com/politica/eleicoes/2018/eleicao-em-numeros/noticia/2018/08/22/pesquisa-datafolha-lula-39-bolsonaro-19-marina-8-alcmin-6-ciro-5.ghtml>).

<sup>4</sup> This term is inspired by political science analyses of the Executive in the United States as a power that pretends to be "imperial". See Rudalevige, 2005.

<sup>5</sup> The other Powers are considered obstacles or adversaries who sacrifice the common good to spurious interests, and threats are made to violate the institutional order if the other Powers do not follow the President's decisions.<sup>6</sup>

This view was theoretically elaborated by right-wing US constitutionalists, claiming that the US President should have full control of the Executive in appointments, dismissals and political directions ("unified executive" theory, Skowronck, 2009; Driesen, 2020). The theory was radicalized by Eric Posner and Adrian Vermeule who decreed the end to the separation of powers with slogans such as "Executive without limits" and "Administrative State". In their theory, presidential power can only be limited by political parties and public opinion (Posner, Vermeule, 2011; Vermeule, 2016; Posner, 2020). This is not very distinct from what the most famous Nazi theorist Carl Schmitt maintained.<sup>7</sup>

In Brazil, left-wing citizens intensified their protests until the end of Bolsonaro's administration (December 2022), which many voters of Bolsonaro gradually joined, motivated by the irresponsible management of the Covid-19 health crisis and the resignation of Justice Minister Moro in 2020. Moro's resignation was considered a sign of abandoning the "anti-corruption" fight that was decisive for Bolsonaro's electoral victory.

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<sup>5</sup> There are many statements by President Bolsonaro on his role as protagonist: "I am the boss (Quem manda sou eu)" (29-4-2020; [gauchazh.clicrbs.com.br/politica/noticia/2020/04/quem-manda-sou-eu-diz-bolsonaro-ao-anunciar-recurso-contraveto-do-stf-a-ramagem-ck9lwt7zt011701o4tsdxxzoq.html](https://gauchazh.clicrbs.com.br/politica/noticia/2020/04/quem-manda-sou-eu-diz-bolsonaro-ao-anunciar-recurso-contraveto-do-stf-a-ramagem-ck9lwt7zt011701o4tsdxxzoq.html)); "I am the Constitution (Eu sou a Constituição)", 20-4-2020; <https://www.metropoles.com/brasil/politica-brasil/eu-sou-a-constituicao-diz-bolsonaro-apos-ato-pro-intervencao>).

<sup>6</sup> Reports on conflicts between Bolsonaro, the Legislative and the Judiciary: "Convocação de Bolsonaro para protestos irrita Congresso e STF", newspaper *Correio Brasiliense*, 8-3-2020. "Bolsonaro ignora crise do coronavírus, estimula e participa de ato pró-governo e contra Congresso e STF", newspaper *Folha de São Paulo*, 15-3-2020.

<sup>7</sup> Schmitt is mentioned 109 times in Posner, Vermeule, 2011. We counted the occurrences, based on the e-book version of the publication.



During his presidential mandate, Bolsonaro has had no stable parliamentary base and negotiates endlessly with politicians in a scenario of fragmentation: there are 33 political parties, 27 States with local Assemblies and Governors and more than 5,000 municipalities.

The overlapping of power centers and structures in Brazil requires agreements and interest compositions, otherwise the Federal Executive will be isolated, been unable to pursue its program, as it is likely to be vetoed by Legislative (through the rejection of bills propositions, the federal budget and urgency decrees). To be effective, concessions of resources is required by political parties and representatives of the States in exchange for political support.<sup>8</sup> There is a permanent divide between those who want a more democratic and transparent political life, less vulnerable to corruption and less personalist, and those who want to preserve the system of “exchanges” that easily cross legal limits. This is favored by electoral rules that make it difficult to access politics for those who do not belong to the oligarchies that control bureaucratized and state-controlled political parties (Abranches, 1988, p. 12). Instability and a lack of democracy and transparency are inherent in this context of fragmentation (Abranches, 1988, p. 10).

The instability of the federal government sharpens political turmoil due to internal conflicts. In April 2020 this instability resulted in the dismissal of the two most popular ministers (Health and Justice). It is not surprising that the voices in favor of *impeachment* of President Bolsonaro increased in 2020 and 2021. Bolsonaro was able to avoid impeachment by gaining the support of the majority of Parliament with political deals (Mafei, 2021). But at the same time the constant conflict between state authorities during the period 2019–2022 is indicative of a serious crisis in the constitutional regime.

After the election of President Lula in 2022, right-wing protests continued, culminating in the invasion of the headquarters of the

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<sup>8</sup> Victor, 2015, p. 9. That is the central argument of the “coalition presidentialism” approach.

three branches of government in the city of Brasília by thousands of supporters of former President Bolsonaro on 8 January 2023. This invasion did not threaten the stability of the institutions or the political leadership of President Lula. We can say that this event closed a circle of eight years of continuous protests and institutional conflicts under the governments of Presidents Rousseff, Temer and Bolsonaro. The following is an analysis of this period of institutional crisis from a constitutional perspective, examining the social conditions that led to the implementation or non-implementation of parts of the constitutional program.

### **3. THE 1988 CONSTITUTION IN THE ECONOMIC CRISIS: LOSS OF NORMATIVE SUBSTANCE**

If institutional polarization and instability have been the key words since 2015, a *constitutional reading* of the political crisis may be of interest. What is the role of the constitutional norms that promised a government based on “harmony of powers” (art. 2 of the Brazilian Constitution) and “social justice” (art. 3)?

Our thesis is: from 2015 to 2022 a political change caused the loss of normative substance in the Brazilian Constitution of 1988 and made its selective social effectiveness more acute.

The 1988 Brazilian Constitution established a maximizing compromise that guaranteed fundamental rights and redistributive public policies in a plural manner. It sought to serve a large number of groups with conflicting claims. The Constitution had a transformative purpose, including norms that represent a plan for changes in society and the State with national development projects and goals for reducing social inequalities (Vieira et al., 2013; Vieira, Dimoulis, 2018; Arguelhes, Süssekind, 2022).

The legislative and constitutional changes enacted since 2015 have reduced these normative promises. This was possible without

breaking constitutional legality for two reasons. First, the resilient nature of the Brazilian political-constitutional system allowed for changes in alliances and political directions within the coalitionist institutional framework. Second, the relative ease of amending the Constitution with a decision by the National Congress allowed important changes that we will analyze below.

The financial crisis that began in Brazil in 2014 motivated several legal reforms. This process caused the *loss of normative substance in the Constitution*, including the withdrawal of an important part of its social transformation projects. From January 2015 to December 2022, 44 constitutional amendments have been approved. Among them are four amendments of greater relevance that aimed at preventing or limiting the implementation of constitutionally imposed social policies:

a. Since 2000, constitutional Amendments kept untied a portion of the Union's revenue from its use in financing constitutionally regulated social policies. Constitutional Amendment 93, approved in 2016, untied 30% of the Union's revenues until 2023. In addition, it established that the untied amounts would not be considered part of the Union revenue used as the basis for calculating transfers to states and municipalities. In this way, it restricted the transfers made by the Union for the benefit of regional and local entities and authorized the untying of a large part of the states and municipalities revenue.<sup>9</sup> This Amendment has been extended until 2032,<sup>10</sup> revealing itself to be everlasting.

b. The Temer government tried to contain public debt (partly generated by payments to banks and investors) by dismantling social

<sup>9</sup> Original text in: [https://www.planalto.gov.br/ccivil\\_03/constituicao/emendas/emc/emc93.htm](https://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc93.htm). Arguing for the unconstitutionality of the practice of suspending the application of transformative constitutional norms, Rubin, 2016.

<sup>10</sup> Original text in: [http://www.planalto.gov.br/ccivil\\_03/constituicao/Emendas/Emc/emc135.htm](http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc135.htm); [http://www.planalto.gov.br/ccivil\\_03/constituicao/Emendas/Emc/emc132.htm](http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc132.htm).

policies and reducing the state structure. This change became clear with the enactment of Constitutional Amendment 95, approved in 2016, which establishes a *ceiling for public spending* for 20 years, regardless of the real needs and political will of the governments.<sup>11</sup> This reduces the redistributive function of the State, affecting the implementation of constitutional forecasts on public policies and the objectives of fighting poverty and social inequality.<sup>12</sup>

c. Constitutional Amendment 103, approved in 2019, profoundly altered the *social security* system, increasing the age limits for retirement, and reducing the average duration of retirement and establishing multiple cuts in the amounts paid.<sup>13</sup>

d. Constitutional Amendment 109, approved in 2021, was issued during the Covid-19 crisis and changed 19 articles of the Constitution. This amendment institutionalizes a *trigger* that allows States and Municipalities to reduce their expenses with personnel and social policies or even stop complying with their financial obligations (“fiscal adjustment”) from the moment that expenses exceed 85% of revenues. In this way, the implementation of social rights is subordinated with the goal of reducing public debt (“debt sustainability”).<sup>14</sup>

In parallel, reforms of ordinary legislation have affected social rights.

a. The *labor law* was modified by Law n. 13.467 in 2017 and by subsequent statutes, in particular Law n. 13.874 in 2019. These rules limited the rights of workers guaranteed for decades by the *Consolidação das Leis do Trabalho* of 1943.

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<sup>11</sup> Original text in: [https://www.planalto.gov.br/ccivil\\_03/constituicao/emendas/emc/emc95.htm](https://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc95.htm).

<sup>12</sup> On the economic consequences of the Amendment and possible unconstitutionality, see Vieira Junior, 2016; Vieira, Benevides, 2016; Paiva et al., 2016.

<sup>13</sup> Original text in: [https://www.planalto.gov.br/ccivil\\_03/constituicao/emendas/emc/emc103.htm](https://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc103.htm). Analysis of the Amendment and its possible unconstitutionality: IAPÉ, 2016; Alencar, 2020.

<sup>14</sup> Original text in: [https://www.planalto.gov.br/ccivil\\_03/constituicao/emendas/emc/emc109.htm](https://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc109.htm).

b. *Civil service staff and budgets* were reduced, with cuts reflecting on the quality and breadth of public services. In 2019, there was the largest decline in the number of federal civil servants in 20 years. Between 2019 and 2022 the number of active federal public employees decreases by 7,5%, returning in 2022 to the total number of 2011 employees,<sup>15</sup> despite the fact that the Brazilian population has increased by 7,5% in these 10 years.<sup>16</sup>

c. Public assets (natural resources and public business activities) were *privatized*.<sup>17</sup> The Bolsonaro government established an ambitious program to sell public companies and goods. The electoral promise was to sell assets worth 2 trillion reais. Between 2019 and 2022, the Union raised approx. 300 billion reais through privatizations. The volume of privatizations fell significantly below target, yet it nevertheless indicates a trend toward transferring public assets to private entities.<sup>18</sup>

d. *Tax reforms* have been carried out that ease the burden on businesses. We have as an example the cancellation of rural entrepreneurs' debts by federal statutes during Temer's government,<sup>19</sup> leaving the Union to collect 15 of the 17 billion Brazilian reais that farmers

<sup>15</sup> Press informations in: <https://g1.globo.com/economia/noticia/2020/02/14/governo-registra-em-2019-maior-reducao-no-numero-de-servidores-na-ativa-em-20-anos.ghtml>; <https://www.poder360.com.br/governo/bolsonaro-e-3o-entre-presidentes-que-mais-cortaram-funcionarios>; <https://www.metropoles.com/brasil/servidor-brasil/total-de-servidores-publicos-e-o-menor-em-14-anos-e-chega-a-569-mil>.

<sup>16</sup> [https://pt.wikipedia.org/wiki/Demografia\\_do\\_Brasil](https://pt.wikipedia.org/wiki/Demografia_do_Brasil).

<sup>17</sup> "In privatization, the government acts in the same way as in expropriation. Just as it expropriates private property, in privatization the government alienates public property. The problem is that the private owner can contest and has guarantees, the people cannot". Bercovici, 2019, p. 258.

<sup>18</sup> Press informations in: Quais empresas o governo federal quer privatizar em 2020, newspaper *Nexo*, 8-1-2020; Governo prevê nove privatizações em 2021, newspaper *Correio Braziliense*, 3-12-2020. Cf. also <https://www.poder360.com.br/economia/governo-arrecadou-r-227-bi-com-venda-de-estatais-e-acoes>; [www.gazetadopovo.com.br/economia/estatais-que-governo-bolsonaro-conseguiu-privatizar-eletobras](http://www.gazetadopovo.com.br/economia/estatais-que-governo-bolsonaro-conseguiu-privatizar-eletobras).

<sup>19</sup> Medidas provisórias (Federal executive decrees with force of law) n. 793 and 803 of 2017; Federal Laws n. 13.606, 13.630, 13.729 of 2018.

owed.<sup>20</sup> During Bolsonaro's government, Law 13.907 of 2019 removed almost two billion Brazilian reais from the unemployment insurance program ("Promotion of Decent Work and Solidarity Economy") to cover the financial loss caused by the cancellation of rural producers' debts. Since Brazil is one of the countries with the highest concentration of land ownership (fifth in the ranking of unequal access to land with 55.3% of private land occupied by large landowners – Glass, Santos, 2018), this type of exemption benefits a small portion of the population: the privileged one.

The result of such measures is the financial crisis of the government, which in turn justifies cuts in public policies and changes the composition of the tax burden, shifting the weight of state funding to the working classes that pay indirect (consumer) taxes and to higher-income wage earners who pay income tax with a payroll deduction.

e. State's regulation has been limited by the "*economic freedom*" legislation. Federal Law 13.874 granted more freedom to capital that can increase profits, without worrying about quality and legality controls exercised by public powers.<sup>21</sup>

f. The autonomy of the Central Bank was established by Complementary Federal Law 179 of 2021, with the bank's primary mission (art. 1) being to ensure price stability without political accountability.

g. Criminal repression has reached a paroxysm in recent years. This occurred in three ways:

- violent military police actions: with more than 6,000 deaths a year from police gunfire, where almost all victims are poor men and the majority (75%) are Black citizens;<sup>22</sup>

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<sup>20</sup> <https://exame.com/economia/ruralistas-podem-obter-anistia-de-divida-de-r-17-bilhoes>.

<sup>21</sup> See the arguments for the unconstitutionality of the law in Bercovici, 2019; Bercovici, 2020

<sup>22</sup> Press informations in: [folhape.com.br/noticias/noticias/violencia/2019/09/10/NWS,115925,70,679,noticias,2190-numero-assassinatos-brasil-cai-2018-mas-policias-matam-mais.aspx](http://folhape.com.br/noticias/noticias/violencia/2019/09/10/NWS,115925,70,679,noticias,2190-numero-assassinatos-brasil-cai-2018-mas-policias-matam-mais.aspx); [g1.globo.com/monitor-da-violencia/](http://g1.globo.com/monitor-da-violencia/)

- hardened criminal legislation such as the Bolsonaro government's "anti-crime package" (Federal Law 13.964 of 2019);
- harsh sentences that has made Brazil one of the countries with the highest number of prisoners. There were almost 830,000 prisoners in 2022 compared to 90,000 in 1990. The number has increased almost tenfold in three decades while the general population increased 40%.<sup>23</sup>

The Brazilian Federal Supreme Court has been asked by many actors, notably political parties and workers unions, to decide on the constitutionality of many of these measures to dismantle the welfare state. Deference has prevailed, with these norms being considered constitutional.<sup>24</sup> In particular, the Supreme Court played a crucial role in labor reform. Not only did it confirm the constitutionality of statutes reducing workers' rights, it also reversed the jurisprudence of labor courts and allowed outsourcing and hiring without legal guarantees.<sup>25</sup>

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[noticia/2019/04/19/numero-de-pessoas-mortas-pela-policia-no-brasil-cresce-em-2018-assassinatos-de-policiais-caem.ghtml](https://noticia/2019/04/19/numero-de-pessoas-mortas-pela-policia-no-brasil-cresce-em-2018-assassinatos-de-policiais-caem.ghtml); [artacapital.com.br/sociedade/racismo-institucional-leva-policia-do-brasil-e-dos-eua-a-matar-mais-negros-e-pobres](https://artacapital.com.br/sociedade/racismo-institucional-leva-policia-do-brasil-e-dos-eua-a-matar-mais-negros-e-pobres).

<sup>23</sup> Data for 2022: <https://www.gov.br/senappen/pt-br/assuntos/noticias/senappen-divulga-levantamento-de-informacoes-penitenciarias-referente-ao-segundo-semester-de-2022>. Press informations in: [g1.globo.com/politica/noticia/2019/07/17/cnj-registra-pelo-menos-812-mil-presos-no-pais-415percent-nao-tem-condenacao.ghtml](https://g1.globo.com/politica/noticia/2019/07/17/cnj-registra-pelo-menos-812-mil-presos-no-pais-415percent-nao-tem-condenacao.ghtml); [portalcorreo.com.br/aumento-numero-de-presos-brasil](https://portalcorreo.com.br/aumento-numero-de-presos-brasil); <https://g1.globo.com/monitor-da-violencia/noticia/2021/05/17/populacao-carceraria-diminui-mas-brasil-ainda-registra-superlotacao-nos-presidios-em-meio-a-pandemia.ghtml>.

<sup>24</sup> Ação direta de inconstitucionalidade (Direct unconstitutionality action) 6.696, decision of 26-8-2021. The Court confirmed the constitutionality of the autonomization of the Central Bank, despite the important arguments presented by opposition parties.

<sup>25</sup> Ação direta de inconstitucionalidade (Direct unconstitutionality action) 3.961, decision of 16-4-2020; 5.625, decision of 28-10-2021; 5.994, decision of 3-7-2023; 5.826 decision of 16-12-2024; Arguição de Descumprimento de Preceito Fundamental (Action for Infringement of Fundamental Principle) 324, decision of 30-8-2018, Recurso extraordinário (Extraordinary appeal) 958.252, decision of 3-8-2018; Recurso extraordinário com agravo (Internal appeal in extraordinary appeal) 1.121.633, decision

## 4. COMPLACENT CONSTITUTIONAL RIGIDITY AND THE DECONSTITUTIONALIZATION OF SOCIAL RIGHTS

These changes are related to a central characteristic of the 1988 Federal Constitution: *complacent rigidity*. Art. 60 requires a special majority for reform approval (60% of senators and deputies) and prohibits the abolition of fundamental norms. But it allows Parliament to amend the constitutional text with a fairly swift procedure. According to this article, the Amendments are adopted without the participation of the Executive, the States and without submission to a popular referendum. This “complacency” allows revisions of the political arrangements made in 1988, so that the Constitution would remain in force without a paralyzing crisis.<sup>26</sup>

From a democratic perspective, constitutional rigidity seeks to preserve fundamental rights and guarantees, as well as decision-making processes, even in times when political majorities seek to change them (Francisco, 2003, p. 22-58). The facilitation of the Amendment process has allowed its frequent use (more than 141 Amendments between 1992 and 2025), ensuring constitutional longevity through constant changes (Souza, 2008; Melo, 2013).

The political price paid for the ease of constitutional reform is the risk of not only changing secondary elements but of altering the

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of 2-6-2022. They are few decisions for the unconstitutionality of labor reform norms: Ação direta de inconstitucionalidade (Direct unconstitutionality action) 5.766, decision of 20-10-2021; 6.188, decision of 22-8-2023. Many requests for unconstitutionality of labor law reform rules have not been answered until July 2025.

<sup>26</sup> “The Brazilian constitutional text, although extensive and ambitious, is notably flexible, allowing minimally consistent coalitions to change constitutional norms without many difficulties. Textual flexibility finds its limits in the system of protection of fundamental principles of the Constitution [...]. The ease in reforming specific provisions of the text, ensuring the preservation of the basic principles of the constitutional architecture, allows the text to be updated without losing its identity. Comparing the version of the constitutional text of 1988 and that of 2012, we can see that the essence and the structure remain intact, even though extensive reforms have been carried out”. Vieira, 2013, p. 22.



identity of the Constitution's social organization projects. An original approach to the problem of constitutional reform identified the *one-off constituent power* (*poder constituinte pontual*) that is exercised to significantly alter key elements in a single revision (Francisco, 2003, p. 56, 95–97).

The 1988 Constitution has never been reformed on a massive scale, but the numerous amendments have gradually altered the constitutional identity. A comparison of the normative content of the Constitution in 1988 and in 2022 shows a *radical change*, which is similar to the hypothetical exercise of “one-off” constituent power. This is reminiscent of the paradox of an engine in which parts are gradually changed. After years of exchanging parts, the comparison shows two totally different engines, even though the transformation has occurred gradually and the changes were minor or even imperceptible.

In the Brazilian case, the multiplication of amendments expresses a project of *deconstitutionalization*, transforming quantity into quality. Complacent rigidity allowed the restriction of rights and guarantees in a unilateral way, gradually altering the social compromise established in 1988, denying the promise of transforming Brazilian society. This is what its *key article* proclaims:

“Article 3. The fundamental objectives of the Federative Republic of Brazil are [...]: II – to guarantee national development; III – to eradicate poverty and marginalization and to reduce social and regional inequalities; IV – to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination”.

Neoliberal ideology has been present in Brazilian politics since Fernando Henrique Cardoso's Presidency (1995–2002) (Saad Filho, Moraes, 2018, p. 43–56). Since 2016, Temer and Bolsonaro's administration used *economic justifications* for not implementing constitutional and/or legislative programs aiming to reduce inequalities between

classes and regions and fight discrimination (Lunardi, Dimoulis, 2018, p. 208–213).

- *Populism*. The state should abolish the “populist” benefits offered to seduce the masses and win their vote, making social benefits a new form of the “halter vote”<sup>27</sup>.
- *Irresponsible spending*. This crisis is considered the result of mismanagement by governments that have not shown “responsibility” with a consequence of increasing the public debt.<sup>28</sup>
- *Corruption*. Systemic political corruption allows for diversion of resources and compromises the proper function of state apparatuses and economic life in general.<sup>29</sup>

The neoliberal proposal *deconstitutionalizes* social relations and state competencies as it considers the law as an obstacle to capital action. Political decisions are made on the basis of *economic arguments*, the role of the Executive becomes fundamental, against an impotent Parliament and a silent Judiciary.<sup>30</sup> This is when jurists try to justify illegalities in the name of economic pragmatism by recommending avoiding decisions that contradict the government’s economic policy.

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<sup>27</sup> An example of pseudo-scientific discourse: Moura, 2007.

<sup>28</sup> See the statements of Jair Bolsonaro: [g1.globo.com/politica/república/eleicoes-2018/bolsonaro-culpa-da-crise-no-brasil-e-economistas-e-seus-planos-fracassados-6nyhdzv9i86wja1ss9j39jkh0](https://g1.globo.com/politica/república/eleicoes-2018/bolsonaro-culpa-da-crise-no-brasil-e-economistas-e-seus-planos-fracassados-6nyhdzv9i86wja1ss9j39jkh0).

<sup>29</sup> Example of moralizing discourse by the Supreme Federal Court Justice Barroso (2020): “few countries in the world have had the capacity to open their guts and expose atavistic excesses like Brazil (...); my belief in a moment of re-foundation of the country has no relation with the recent elections or this or that government – it is independent of ideologies. On the contrary, it is based on changes in civil society, which has stopped accepting the unacceptable and has developed an immense demand for integrity, idealism and patriotism. And that is the energy that changes paradigms and pushes history. So be it...”.

<sup>30</sup> Ruggeri, 2015. On the constitutional impact of the financial crisis on the European Union and the restrictions imposed on national sovereignty and democracy in indebted states, see Contiades (ed.), 2013; Adams et al. (eds.), 2014.

This theoretical option has two main features. First, it ignores the constraints of legal normativity, following the imperatives of the capitalist economy with statements such as: “the more serious the crisis [...] the greater the sacrifices considered acceptable”.<sup>31</sup> Are the judges and the official jurists the new oracle capitalist imperatives? Our rhetorical question was answered in the affirmative by Supreme Federal Court Justice Luiz Fux:

“Legal rules are not self-sufficient at this time of unprecedented crisis, which is why making the law more flexible does not mean surrendering the democratic rule of law [...]. Faced with the urgent needs, the cold letter of the law must cease”.<sup>32</sup>

One day later, a fellow Supreme Federal Court Justice and law professor, Gilmar Mendes, cited many constitutionalists since the beginning of the 20th century to reach the conclusion that the judge in periods of “crisis” must *ignore* legal constraints (2020).

Claiming a state of economic emergency (“crisis”), neoliberalism is summed up in three proposals. First, privatizations and dismantled social state institutions to reduce spending (*end of redistribution*). Second, reduced corporate taxes to increase the profitability of capital and decrease indirect wages (*intensification of economic exploitation*). Third, unification of markets, which removes incentives from national industry.<sup>33</sup>

Brazil has one of the worst inequality positions in the world *rankings*. Indicators such as the Gini make this clear, adding to the fact that 30% of Brazilians are living below the poverty line during the ‘constitutional crisis’.<sup>34</sup> The most relevant manifestation of inequality

<sup>31</sup> See generally Magalhães, 2017 (quote from p. 247).

<sup>32</sup> Fux, 2020. Criticism in Arguelhes, Recondo, 2020.

<sup>33</sup> Draibe, 2007; Pereira (ed.), 2010; Pereira et al., 2016; Saad Filho, 2023. In legal perspective: Bercovici, 2013; Bercovici, 2015.

<sup>34</sup> Brazil is among the ten most unequal countries in the world: [en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_income\\_equality](https://en.wikipedia.org/wiki/List_of_countries_by_income_equality). See also Morgan, 2017.

is the extreme concentration of wealth at the top. Recent studies combining sample surveys of household income and tax data show the persistence of inequality. From 1926 to 2013 50 to 60% of the national income belongs to 15% of the richest Brazilians. Within this group we also have extreme polarization, since 20% of the national income is appropriated by the richest 1%. From the beginning of the 1980's until 2020 the trend has been for a greater concentration of income (Medeiros et al., 2015; Souza, 2018). This happened, regardless of the political promises of the governments that have succeeded one another, from the last years of the military dictatorship to the present day, including the “popular-progressive” governments of Lula da Silva and Dilma Rousseff (2003–2016).

Between 2012 and 2018 (Rousseff and Temer governments), the total income of the richest 10% increased 8.5%, while 40% of the poorest suffered an income decrease of 14%.<sup>35</sup> By the end of the Bolsonaro administration, the top 10% of earners had an income 14 times higher than that of the bottom 40%.<sup>36</sup>

The abyssal income differences that have persisted for a century show that the overwhelming majority of the population does not have the political ability nor the material conditions and information that would allow them to participate actively in political life. In a more direct way, economic data indicate that regardless of the institutional arrangement and the legal forms that regulate politics the Brazilian democracy is strongly elitist and discriminatory. It does not meet the basic criterion required for the possibility of effective access to the processes of political decision-making.

<sup>35</sup> [portal.fgv.br/news/desigualdade-renda-brasil-bate-recorde-aponta-levantamento-fgv-ibre](https://portal.fgv.br/news/desigualdade-renda-brasil-bate-recorde-aponta-levantamento-fgv-ibre); [portal.fgv.br/noticias/poverty-equality-increased-ultime-4-years-brazil-revela-study?utm\\_source=portal-fgv&utm\\_medium=fgvnoticias&utm\\_campaign=fgvnoticias-2019-05-22](https://portal.fgv.br/noticias/poverty-equality-increased-ultime-4-years-brazil-revela-study?utm_source=portal-fgv&utm_medium=fgvnoticias&utm_campaign=fgvnoticias-2019-05-22).

<sup>36</sup> <https://agenciabrasil.ebc.com.br/economia/noticia/2024-04/renda-dos-10-mais-ricos-e-144-vezes-superior-dos-40-mais-pobres>.

The democratic promises of the Brazilian Constitution have been *distorted*. The legal system has made a (political) choice. In the conflicts between social rights and private property rights, the latter prevails. This began with constitutional and legislative reforms and is expressed in the Executive policy, confirmed almost entirely by the Judiciary under the Temer and Bolsonaro governments. As we said, the neoliberal constitutional and legal reforms have not been questioned by the Supreme Court.

All these normative and policy changes have important legal results. The *reversal* of the original transformative constitutional project occurred, to adapt the premonitory reference to an “inverted Constitution” (Bercovici, Massonetto, 2004; Bercovici, 2013-a). Radical concepts of economic liberalism were adopted in versions that make precarious working-class conditions by limiting the resources dedicated to social security, public education, and health systems.

## 5. CONSTITUTIONAL EROSION, AUTHORITARIAN (INFRA)LEGALISM OR SELECTIVE EFFECTIVENESS OF THE BRAZILIAN CONSTITUTION?

The situation we describe indicates, in political terms, a serious crisis that has – as its cause and effect – the intensification of political conflicts. Coordination between state authorities is compromised and there is a clear deficit in the legitimacy of successive governments. We can summarize this with the term *crisis of democracy* (Souza Neto, 2020).

a. A more difficult question is to know what is the repercussion of political crisis on the functioning of constitutional institutions. There are Brazilian jurists who refer to *constitutional erosion*. According this approach, the principles of the Constitution are progressively losing

normative force, and this has occurred since the end of the Dilma Rousseff government (2016).<sup>37</sup>

Erosion would be due to the increase in the political strength of the military and the paramilitary groups in large cities, both of which act against constitutional values and procedures and disarticulate the democratic regime.

This diagnosis seems exaggerated. If we were to perform a psychological and micropolitical approach, there were certainly statements and intentions of an authoritarian intervention based on the already described concentration of powers project in Bolsonaro's government. However, these intentions never even started to be implemented. The state authorities, both federal and state, functioned without hindrance in the years of the democratic crisis from 2015 onwards, laws and decrees indicative of an authoritarian turn were not approved and the decisions of the judiciary were always respected. In a word, the constitutional scheme of reciprocal controls between powers was kept in operation, despite criticism and threats of military coup.

b. Another reading proposes the diagnosis of illiberalism, illiberal legality or *authoritarian legalism*. It argues that forces fundamentally opposed to liberalism have assumed power in Brazil with Bolsonaro, as well as in other countries like the prominent example in Hungary, but that they have taken advantage of the mechanisms of political dispute in liberal democracy and are maintaining the appearances of legality (García, Frankenberg (eds.), 2021). In gaining political power, these forces wish to subvert the democratic-liberal regime by imposing an

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<sup>37</sup> Meyer, 2021; more sceptical Vieira, 2024, p. 70: "The changes did not transform the core structures of the 1988 Constitution. They, in fact, confirmed the resilient nature of the Brazilian Constitution, which has proven capable of absorbing immense pressure without rupturing. However, the fact that the constitution was not abandoned does not mean that a certain decline or erosion in constitutional standards—in how the game is played—did not occur. And in the aftermath of this period of stress, the democratic system became more vulnerable".

authoritarian style of decision-making that would eliminate procedures and instances of control.

In Brazil some authors understand the Bolsonaro government as an authoritarian regime that seeks to subvert the constitutional regime with measures decided by the Executive, using constitutional powers as a means to attack the democratic-liberal regime (Silva, 2020; Vieira, Glezer, 2020; Vieira, Glezer, Barbosa, 2020). During the 2019–2022 term, the Bolsonaro administration attempted to weaken the separation of powers rules and impose its will without openly disregarding the rules of the game (“power-grabbing tactics that operate through law” – Silva, 2020, p. 3).

“A phase of constitutional malaise, in which the standards by which the constitutional game was played deteriorated. The depth and duration of this cycle of political and institutional retaliations amplified distrust and resentment toward constitutional institutions, opening the space to institutional reforms and constitutional changes as well as the rise of forces hostile to the system” (Vieira, 2021, p. 207).

These changes did not transform the basic structures of the 1988 Constitution. On the contrary, they confirmed the resilient nature of the Brazilian Constitution.

This approach is free from the inaccuracy of the previous one, since it does not overestimate the military groups political movements. But it makes the same mistake as the psychological reading. Even if certain dignitaries have authoritarian values and intentions, what matters in a constitutional regime is the result in the functioning of the institutions.

In the seven years since the removal of the Dilma government there has been no real translation of any authoritarian project and the game of institutions has continued unchanged. In particular, the Executive was forced to seek the consensus of the other powers without which its measures cannot persist. Provisional measures were rejected

by Parliament, presidential vetoes overturned, and many acts of the President or laws promoted by him were declared unconstitutional. Bolsonaro has an authoritarian project. However, our observation of Brazil's institutions during his mandate (2019-2022) shows the regular functioning of the system of checks and balances, with no signs of paralysis or decay of democratic processes.

c. The explanation that seems plausible to us starts by observing the ways in which the Brazilian Federal Constitution has been applied as a result of the consensus of the three powers and not of some authoritarian project that the Executive has managed to implement. We are well aware that the core meaning and the central promise of transformative Constitutions is the guarantee of socio-economic rights as a mean of empowerment and emancipation, of social transformation in an egalitarian way. The most often cited example is the case of South Africa, in the political transition from a regime of oppression and social exclusion of the Black numerical majority to a liberal regime that seeks to repair past injustices and create conditions of social transformation.<sup>38</sup>

The thesis that the constitutional text can guarantee and demand a broad reconstruction of the state and society also inspired the Brazilian constituents.<sup>39</sup> In this approach, the Constitution must be an instrument of change, combating structures of exploitation and domination. The aforementioned Article 3 of the Constitution is the *symbol* of this constitutional model.

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<sup>38</sup> “We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land [...]. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights [...]; improve the quality of life of all citizens and free the potential of each person”. Constitution of the Republic of South Africa, 1996 – Preamble.

<sup>39</sup> Tavares, 2014, p. 114-116, quoting Sandra Liebenberg.



The implementation of the Brazilian Constitution of 1988 is characterized by *selective effectiveness*.

- We found the highest effectivity in the state organization norms, including the federal organization and freedom rights. All those norms are respected, even if there are conflicts and contestations.
- The Constitution of 1988 includes a comparatively high number of norms that regulate the economic activity of state authorities and corporations while further authorized state intervention in economic life (“economic Constitution”). In the last years we observe the retraction of state regulation in the context of neoliberal politics (relative atrophy of the economic part of the Constitution). The most relevant cases are mentioned in Chapter 3.
- Social rights aiming to reduce social and regional inequalities remain largely in writing but not in practice. An example is the social right to housing according to art. 6 of the 1988 Constitution and many constitutional and legal norms regulate its implementation (Andrade, 2019, p. 59-94). At the same time Brazil has a deficit of 7.7 million homes. The average annual federal investment for housing construction was 11 billion reais from 2009 to 2018, with a downward trend under the Temer government. In 2020 it fell to 2.5 billion and in 2021 and 2022 to 1 billion per year, and is likely to be abandoned in 2022.<sup>40</sup>

<sup>40</sup> <https://www.brasildefato.com.br/2021/02/17/triste-fim-do-minha-casa-minha-vida-como-bolsonaro-extinguiu-oprograma-sem-alarde>; <https://www.redebrasilatual.com.br/cidadania/2021/12/governo-bolsonaro-corta-98-do-orcamento-do-programa-casa-verde-e-amarela>; <https://www.gazetadopovo.com.br/economia/governo-esvazia-orcamento-do-programa-casa-verde-e-amarela>; <https://bancariosrio.org.br/index.php/noticias/item/9277-com-5-8-milhoes-sem-moradia-verba-do-casa-verde-e-amarela-e-a-menor-da-historia>.

## 6. CONCLUSION

Ignoring the transformative imperatives, neoliberal policy choices are dominant. Corporations invest large amounts in politics, legally or illegally, to influence state decisions. Legislation and electoral courts fail to combat this situation and ended up allowing as a form of the right to free speech companies the ability to use money to support campaigns and transform politics into an advertising struggle to seduce voters (Peixoto, 2016).

Popular sovereignty as a source of legitimacy and criterion for political decisions turned into hollow words. Political institutions act as an arm of economic forces and are monetarized and incorporated into market mechanisms. This is what Wendy Brown analyzed as *abandoning the promise of democratic deliberation*. Inequalities and exclusions intensify and society submits itself to the logic of “governance” that relies on the (political) decisions of economists (Brown, 2015, p. 72, 122-150).

The weakening of practices in the implementation of the Constitution, especially in the area of social rights, makes some theorists refer to the living or pragmatic Constitution, that tacitly modifies the written Constitution in order to meet economic and political needs (Pedra, 2018). This Constitution radically distances itself from the project of social transformation. These are the policies decided on the basis of the demands of capital, presented as the “desire of the market,” an abstract but powerful entity present in political life as a human figure who decides, reacts, gets irritated, and even needs to be calmed down.<sup>41</sup> The politicians are not the effective power holders, much less the real popular representatives. Surrounded and pressured

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<sup>41</sup> One example offers the headline of the newspaper Folha de São Paulo (18-5-2017): “The president of the Central Bank acts to calm the market” ([www1.folha.uol.com.br/mercado/2017/05/1885230-president-do-bc-tenta-almar-mercado-pos-dolar-avancar-8.shtml](http://www1.folha.uol.com.br/mercado/2017/05/1885230-president-do-bc-tenta-almar-mercado-pos-dolar-avancar-8.shtml)).

by lobbies and international financial organizations, the political parties are controlled by the capital that acts as true *master of puppets*.<sup>42</sup>

Critics who announce the “death” of the 1988 constitutional project (Bello et al., 2019) capture the revisionist neoliberal practice in recent years, although their statement should not be considered in absolute terms. What in fact occurred was not the abandonment of the constitutional project, but the selective ineffectivity of constitutional norms and programs, which affected mainly social rights (“the rights of the poor”) and restricted redistribution policies while ignoring the constitutional promises of social transformation. Liberalism with its institutional expression in the separation of powers was maintained, but the *progressive essence* of the transformative part of the Brazilian Constitution was emptied.

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<sup>42</sup> Lunardi, Dimoulis, 2018, p. 215–216. As Mario Tronti observed: “Western democracies are the most perfect dictatorships of money. The old dictatorships we identified in the figure of the dictator, an existential, personal figure that made them recognisable. Everyone knew they were living under a dictatorship. The dictatorship of money does not have a personified figure and therefore it is very difficult to be recognised as such; people live in the dictatorship of money convinced that they are living in a political democracy” (2017, p. 616).

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Received: 08/03/2025

Accepted: 08/05/2025



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