Responding to the Instrumentalization of the Past by Right-Wing Actors: Analyzing the Varieties of Law and Memory in Brazil and Germany

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Abstract: This article explores the varieties of law and memory in Brazil and Germany, aiming to understand how and to what extent each country juridified their past. In doing so, we strive to understand this phenomenon from a contemporary perspective and within different local contexts. We focus on the remembrance of two specific historical events: the Brazilian civil-military dictatorship and the German Nazi era. Despite their unique historical experiences and approaches to addressing them, both countries face similar challenges to some extent, most notably the instrumentalization of history, particularly by right-wing actors. The remembrance of the past remains a contested topic, raising important questions about what is remembered, why, and how. This prompts several interesting inquiries. The research is driven by whether certain approaches to dealing with the remembrance of past injustices yield significantly better results. Therefore, we initiate a comparative dialogue between the jurisdictions, reflecting on the promises and challenges of the varieties of law and memory in Brazil and Germany. Ultimately, we will reveal that there is no universal template for addressing the past.
Keywords: Memory Laws; Transitional Justice; Brazil; Germany

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A. Introduction

When we discuss a nation's past, we inevitably reflect on the nation's present self-understanding. One controversial topic is the "appropriate" remembrance of a nation's often less-than-glorious history. How a society remembers its past significantly shapes its politics and culture today.[1] The remembrance of "[..] history is an important means of legitimizing contemporary democracy by showing its origins, challenges that it had to face, and its place

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1 *Edgar Wolfrum*, Erinnerungskultur und Geschichtspolitik als Forschungsfelder. Konzepte – Methoden – Themen, in: Jan Scheunemann (ed.), Reformation und Bauernkrieg. Erinnerungskultur und Geschichtspolitik im geteilten Deutschland, Leipzig 2010, p. 15.

in the development of our societies".[2] One way to address and remember past injustices is through the implementation of transitional justice measures, which should facilitate dealing with historical crimes and aim to prevent their recurrence. Another approach to formalizing the remembrance of past injustices is the adoption of memory laws, which are often enacted long after atrocities have occurred, with the aim of preserving the memory of a more distant past. The avenue a state chooses when dealing with past atrocities is context dependent. While many comparative studies focus on how states have opted for similar approaches in addressing their past, we are more interested in the differences and the factors that lead to these differences.

Against this background, we will explore the varieties of law and memory within the Brazilian and German contexts. Analyzing different approaches to law and memory can offer profound insights into several important questions: Which historical events are considered significant to commemorate in both jurisdictions? How do their differing approaches to law and memory influence contemporary and future perceptions of the past? To what extent has each country juridified its history? Which actors are challenging the historical narratives, and how? To address these far-reaching questions, we will focus on two pivotal historical events that have purportedly had the greatest impact on contemporary affairs in both countries: the Brazilian civil-military dictatorship and German Nazism. Although the two historical contexts differ, both are marked by significant human rights violations. Despite the many differences between the two countries, some shared challenges can be identified, particularly regarding the instrumentalization of the past by right-wing actors. The underlying question in this article is whether one of the approaches to addressing the remembrance of past gross human rights violations, as chosen by Brazil and Germany, yields significantly better results. Therefore, the article proposes initiating a comparative dialogue between both jurisdictions to explore the varieties of law and memory and to reflect on the promises and challenges involved in dealing with the past. In doing so, we will reveal that there is no universal template for addressing the past.[3]

Despite our focus on the challenges posed predominantly by right-wing forces, we acknowledge that the official narrative of the past is contested by various other groups as well. The fundamental difference lies in the agenda behind this contestation: while right-wing actors often instrumentalize history to bolster their power and suppress opposition, other groups strive for the recognition of marginalized voices and their suffering, either as members of these groups or as supporters in their pursuit of justice.

Beyond the instrumentalization of the past by political actors, we are interested in exploring how these debates potentially affect the societal attitude towards the past. This analysis reveals that societal sentiments vary widely. Ultimately, the comparison seeks to

2 *Nikolay Koposov*, Memory Laws: Historical Evidence in Support of the "Slippery Slope" Argument, Verfassungsblog, 08.01.2018, https://verfassungsblog.de/memory-laws-historical-evidence-in-support-of-the-slippery-slope-argument/ (last accessed on 20 September 2024), DOI: 10.17176/20180108-150448.

3 *Lea David*, Against Standardization of Memory, Human Rights Quarterly 39 (2017), p. 296.

explore the implications of these challenges for current and future practices of commemorating past injustices in both countries.

B. Varieties of Law and Memory: A Theoretical Framework on Memory Laws and Transitional Justice

This section aims to introduce the varieties of law and memory, which serve as the theoretical framework for our comparative analysis between Brazil and Germany. We aim to focus on two categories, who overlap to a certain degree: memory laws and transitional justice. To begin with, we introduce the category of memory laws and then define what can be understood as transitional justice. This will help us to better understand each country's approach to govern the past, as the German case fits more neatly within the "traditional" framework of memory laws, whereas Brazil's situation is typically analyzed through the lens of transitional justice (TJ).

The term memory laws originates from France (fr. loi mémorielles) and has been ever since frequently used by various academic disciplines.[4] Broadly speaking, memory laws can be defined as any act that formally codifies state-determined interpretations of "crucial" historic events.[5] Memory laws intend to preserve and protect the so-called "objective official historical truth".[6] Put differently, memory laws juridify the historical past by creating one "official narrative".[7] Often, certain events hold greater societal significance than others in shaping the official interpretation of a nation's history.[8] With the adoption of memory

4 The said historians advocated for abolishing the "La loi du 23 février 2005" which stipulated that the alleged "positive aspects" of French colonialization in North Africa should be taught at school. Their abolishment request however ultimately succeeded. Prior to that they organized a petition called "Liberté pour l'histoire" where they stated "History is not a legal object. In a free state, it is neither the role of Parliament nor the judiciary to define historical truth. State policy, even when driven by the best intentions, is not the policy of history" (author's translation), see Libération, Liberté pour l'histoire, 13.12.2005, https://www.liberation.fr/societe/2005/12/13/liberte-pour-l-histoire_541669/ (last accessed on 13 June 2024), see also *Sébastien Ledoux*, Memory laws in Europe. What common horizons are we journeying towards?, EUROM, 11.03.2022, https://europeanmemories.net/magazine/memory-laws-in-europe-what-common-horizons-are-we-journeing-towards/ (last accessed on 5 February 2024).

5 *Uladzislau Belavusau / Aleksandra Gliszczyńska-Grabias*, Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice, Asser Institute Research Paper 3 (2017).

6 *Grażyna Baranowska / Aleksandra Gliszczyńska-Grabias*, "Right to Truth" and Memory Laws: General Rules and Practical Implications, Polish Political Science Yearbook 47 (2018), pp. 97–109.

7 *Vincent K. L. Chang,* China's Memory Laws: The Global Reach of Beijing's Push to Juridify Memory, Verfassungsblog, 02.05.2024, https://verfassungsblog.de/chinas-memory-laws/ (last accessed on 3 May 2024), DOI: 10.59704/1f87af2ed1d04d97; see also *Mirosław Michał Sadowski*, Collective Memory and Law Three Types of Institutions, in: Mirosław Michał Sadowski (ed.), Intersections of Law and Memory, Oxfordshire 2024, p. 141.

8 *Klaus Bachmann / Igor Lyubashenko / Christian Garuka / Grażyna Baranowska / Vjeran Pavlakovic*, The Puzzle of Punitive Memory Laws: New Insights into the Origins and Scope of Punitive Memory Laws, East European Politics and Societies and Cultures 4 (2021), p. 997.

laws, the respective states follow different agendas: they want either to counter historical denialist and/or revisionist attempts through the distortion, negation, and/or deliberate manipulation of historical facts, or advance a "heroic" narrative.[9] A valuable distinction can be made here between self-inculpatory memory laws, which target individuals or groups who deny a nation's involvement in past mass atrocities, and self-exculpatory memory laws, which seek to silence those who attempt to hold the nation accountable for serious human rights violations.[10] Memory laws can be evaluated by their intended influence on public perception, specifically whether it aims at safeguarding societal consensus on a historic event and/or banning dissenting viewpoints.[11] The study of memory laws is relatively new and lacks a settled definition, allowing researchers some flexibility in defining their understanding. Some rely on a narrow conceptualization, while others rely on a broad conceptualization of the term.[12] In its narrowest conceptualization, memory laws are of punitive nature, thus linking criminal sanctions to e.g. the negation of historic events. Punitive memory laws should always be considered as *ultima ratio* when regulating social relations.[13] Memory laws can be however of non-punitive character as well. The broader conceptualization of memory laws refers to any legal regulation containing historical references.[14]

The second concept discussed in this article is transitional justice (TJ). The category of transitional justice refers to "[..] the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[15] The TJ process can lay the foundation for establishing a shared understanding of the past, which facilitates the future adoption of memory laws. The creation of memory laws could be regarded as a manifestation of transitional justice, and is seen as an attempt to secure its achievements.[16] TJ instruments are often implemented in immediate post-conflict settings and should help

9 On the distinction between historical revisionism and denialism see *Emmanuela Fronza*, Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law, Heidelberg 2018; see also e.g. Article 67.1 (3) of the Russian constitution, stating that "the Russian Federation honors the memory of the defenders of the Fatherland and ensures the defense of historical truth. Diminishing the significance of the heroism of the people in defending the Fatherland shall not be permitted."

10 *Eric Heinze*, Should governments butt out of history?, Free Speech Debate, 12.03.2019, https://freespeechdebate.com/discuss/should-governments-butt-out-of-history/ (last accessed on 13 August 2024).

11 *Fronza*, note 9, p. 36.

12 *Koposov*, note 2.

13 *Bachmann et al*., note 8, p. 997.

14 *Koposov*, note 2.

15 Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies (2004), S/2004/616.

16 *Uladzislau Belavusau* / *Aleksandra Gliszczyńska-Grabias*, Introduction, in: Uladzislau Belavusau / Aleksandra Gliszczyńska-Grabias (eds.), Law and Memory (2017), p. 2.

states in their democratic transition.[17] However, this does not necessarily mean that transitional justice mechanisms cannot be implemented years after the end of an authoritarian or totalitarian government, as exemplified by this statement: "By complicating what constitutes a 'transition', transitional justice scholarship is increasingly interrogating the temporal structures and assumptions within this field of theory and practice".[18] Following this, even if the time of the transition is not a constant anymore and, in countries like Brazil, it is possible to observe that such mechanisms could only be implemented – and even then, only partially – many years after redemocratization. Again, as highlighted by Aboueldahab, "[t]he experience of time is thus subjective and open to interpretation, thereby heavily impacting the shape that transitional justice processes take. Memory, collective memory, collective amnesia, and historical narratives all influence the politicisation, institutionalisation, and interpretation of time, transition, and justice".[19] Delaying the implementation of transitional justice may negatively impact the possibilities of action and meaningful change in society, but it does not prevent its implementation.[20] This may result in transitional justice being implemented long after the fall of an authoritarian regime, similar to the delayed adoption of memory laws, which aim to preserve the memory of a more distant past.

C. Varieties of Law and Memory: A Comparative Study of Brazil and Germany

Following the introduction of our theoretical framework, we intend to explore the varieties of law and memory in Brazil and Germany by conducting a comparison. Here, an initial question arises: why compare Brazil and Germany? At first glance, comparing Germany and Brazil might seem unusual. A key difference lies in the historical contexts: Germany's democratic transition occurred after the end of World War II, whereas Brazil's took place following the end of its civil-military dictatorship. These distinct starting points have profoundly influenced each country's approach to addressing their past. Due to our object of inquiry, we find it however interesting to explore how Germany addresses its Nazi past in the post-war context compared to how Brazil deals with its former repressive regime.

While the historical contexts and present-day challenges differ between the two countries, some common issues can be identified, particularly regarding contemporary struggles with remembering the past. Right-wing actors are increasingly challenging the remembrance of history by either making positive references to it – or its aesthetics – or downplaying its significance in their discourse. In doing so, they instrumentalize the past

17 *Ian Dunbar*, Consolidated democracies and the past: transitional justice in Spain and Canada, Federal Governance 8 (2011), pp. 15-28.

18 *Noha Aboueldahab*, The Politics of Time, Transition, and Justice in Transitional Justice, International Criminal Law Review 21 (2021), p. 810.

19 Ibid., p. 813.

20 See also *Maja Davidović*, Reconciling Complexities of Time in Criminal Justice and Transitional Justice, International Criminal Law Review 21 (2021), pp. 935-961.

for their own political gains. The driving force behind this instrumentalization is the goal of suppressing opposition and critical discussions of past injustice, while promoting their own historical narratives. These narratives often contain a more "romanticized" version of the past and distort historical reality. This study will provide an in-depth analysis of the strategies right-wing actors employ.

Comparing how Brazil and Germany juridfy their past is important. Understanding the paths each country has taken is crucial for better comprehending and addressing the risks presented by counter-narratives on historical gross human rights violations. Due to the limited scope of this article, we acknowledge that it is just possible to discuss selectively certain varieties of law and memory in both jurisdictions.

I. Between Memory Law and the Right to Memory in Brazil

In Brazil, a rare example of a punitive memory law was at issue in the Supreme Court's decision in the Ellwanger case from 2003.[21] Siegfried Ellwanger was a writer and publisher who owned a publishing house named "Revisão"[22]. He used to publish with revisionist historical narratives, including one in which he claimed that the Jewish people were not victims of the Holocaust during the Second World War.[23] As a result, he was prosecuted in 1996 for the crime of racism, which is imprescriptible and non-bailable under Brazilian Law.[24] After being convicted in the second instance, he presented a *habeas corpus* to the Supreme Court, where his conviction was reaffirmed. The Supreme Court denied Ellwanger's request for a *habeas corpus*, arguing that his works had an anti-Semitic character, which constituted the crime of racism and should be considered imprescriptible. The debate centered around the limits of the meaning of "racism" and the supposed collision of the freedom of expression and the dignity of a human being.[25]

Although the debate was not openly framed in terms of memory law, the main focus was on discussing the limits of the freedom of expression denying key historic events involving gross human rights violations, such as genocide. The understanding that there are limits for neglecting such historical events was settled and continues to prevail until now before the Brazilian Supreme Court. However, it is interesting to note that this case is not related to any authoritarian period Brazil has gone through and has not been used as a

21 It is important to note that Court decisions are not *per se* qualified as memory laws. However, they may have a similar effect of regulating the remembrance of the past. This is why this Supreme Court decision is discussed at this point.

22 English translation: Revision.

23 *Karoline Lins Câmara Marinho*, A Colisão entre Direitos Fundamentais e sua solução com o caso "Siegfried Ellwanger" Julgado pelo STF, Revista da Direito e Liberdade 7 (2007), p. 204.

24 Ibid.

25 *Clarissa Tassinari / Elias Jacob de Menezes Neto*, Liberdade de expressão e Hate Speeches: as influências da jurisprudência dos valores e as consequências da ponderação de princípios no julgamento do caso Ellwanger, Revista Brasileira de Direito 9 (2014), p. 25.

leading case for addressing the remembrance of local authoritarian regimes or gross human rights violations that were perpetrated within Brazil. Instead, the case is usually presented within the scope of the freedom of speech debate and its constitutional limitations.[26] This is the reason why the Ellwanger case will not be central to the discussions of this paper, as the goal here is to understand how the country deals with its own past.

1. Revisting Brazil's Transition Process

Considering Brazil's own authoritarian periods and the gross human rights violations that occurred during those periods, the last civil-military dictatorship (1964-1985) becomes relevant for this study. This is not just because it was the last authoritarian period Brazil faced, that ended with the current democracy –the longest one in the country's history – but also because it was the period that led to the development of key transitional justice policies, including those related to truth and memory, within what Huntington would call the "third wave of democratization".[27]

The last authoritarian period in Brazil, started with the military coup in 1964 and lasted until 1985, when the democratization process began with the election of a civilian, Tancredo Neves, for the presidency. The military took power in 1964 allegedly to avoid a communist takeover in the country. And during the more than twenty years that they remained in power, they were responsible for systematic human rights violations aiming to eliminate political opposition.[28] As recognized by the Inter-American Court of Human Rights (IACtHR), the dictatorship was responsible for cases of forced disappearance[29] and torture of members of resistance movements.[30]

The redemocratization followed intense demands by civil society, particularly embodied movements advocating for a broad, general and unrestricted amnesty and direct

26 *Diego Werneck Arguelhes*, Ellwanger e as transformações do Supremo Tribunal Federal: um novo começo?, Revista Direito e Práxis 13 (2022) pp. 1530-1584; *Clóvis Alberto Bertolini de Pinho*, A atualidade do caso Ellwanger para os julgamentos recentes do Supremo Tribunal Federal em matéria de liberdade de expressão. Revista Direito e Práxis 15 (2024) pp. 1-28.

27 *Samuel Huntington*, The Third Wave: Democratization in the Late Twentieth Century, Oklahoma 1991.

28 *Glenda Mazarobba*, Between reparations, half truths and impunity: the difficult break with the legacy of the dictatorship in Brazil, SUR-International Journal on Human Rights 7 (2010) p. 7.

29 *Bruno Galindo*, Transitional Justice in Brazil and the Jurisprudence of the Inter-American Court of Human Rights: a difficult dialogue with the Brazilian judiciary, Sequência 79 (2018), pp. 27–44.; *Emilio Peluso Neder Meyer*, Criminal Responsibility in Brazilian Transitional Justice: A Constitutional Interpretative Process under the Paradigm of International Human Rights Law, Indonesian Journal of International and Comparative Law 4 (2017), pp. 41-71.

30 *Carla Osmo*, Mobilization and Judicial Recognition of the Right to the Truth: The Inter-American Human Rights System and Brazil, in: Cristiano Paixão / Massimo Meccarelli (eds.), Comparing Transitions to Democracy. Law and Justice in South America and Europe, Berlin 2021, pp. 137-161.

elections. The "Movimento pela Anistia"[31] was headed by the mothers of the political exiles and demanded amnesty for all those involved in resistance movements against the dictatorship.[32] The "Diretas Já"[33] mobilized thousands of Brazilians in the streets during 1983-1984, who demanded direct elections for the President.[34] Although both movements were not successful – the amnesty approved in 1979 had nothing to do with the popular demands and the Constitutional Amendment for presidential direct elections in 1985 was not approved – they demonstrate the engagement of part of civil society advocating for the return of democracy.

Nonetheless, the Brazilian transition to democracy is considered by a great part of the doctrine as a "transition by transaction"[35], hence a rapid transition to democracy, which was led by the regime leaders in a consensual way.[36] This does not necessarily mean that civil society played no role in this process, but it indicates that there was no revolution or any sort of abrupt rupture with the dictatorship. One of the consequences of such a sort of transition is that the adoption of transitional justice measures in the country did not immediately follow the promulgation of the 1988 Constitution. On the contrary, the dictatorship made sure to pass a significantly comprehensive Amnesty Law before it ended. Law n. 6.683 from 1979 "was the first political act of president Figueiredo and covered all political crimes committed between September 2, 1961, and August 15, 1979, both by dissidents and by the military, excluding violent acts classified as assault, kidnapping or terrorism".[37] This means that while some political exiles could come back to Brazil, others could not return as they were accused of violent acts. On the other hand, all agents of the dictatorship were granted amnesty.[38] This law approved by the dictatorship is still considered to be valid according to the decision of the Brazilian Supreme Court in ADPF 153 (2010).[39] Even

31 English translation: movement for amnesty.

32 *Heloisa Amelia Greco*, Dimensões fundacionais da luta pela anistia, Belo Horizonte 2003.

33 English translation: or direct [elections] now.

34 *Timothy J. Power*, The Brazilian Military Regime of 1964-1985: Legacies for Contemporary Democracy, Iberoamericana: América Latina; España; Portugal 62 (2016) p. 23; *Lucy Earle*, Social Movements in Brazil: Democratization and Politicization, in: Lucy Early (ed.), Transgressive Citizenship and the Struggle for Social Justice: Studies of the Americas, London 2017.

35 *Donald Share* / *Scott Mainwaring*, Transitions through transaction: Democratization in Brazil and Spain. In. Wayne A Selcher, Political liberalization in Brazil: Dynamics, Dilemmas and Future Prospects, London 2019, pp. 175-215.

36 *Donald Share*, Transitions to Democracy and Transition through Transaction, Comparative Political Studies 19 (1987), p. 530.

37 *Iasmin Goes*, Between truth and Amnesia: State terrorism, human rights violations and transitional Justice in Brazil, European Review of Latin American and Caribbean Studies / Revista Europea de Estudios Latinoamericanos y del Caribe 94 (2013), p. 90.

38 *Cristiano Paixao*, Past and future of authoritarian regimes: constitution, transition to democracy and amnesty in Brazil and Chile, Giornale di storia costituzionale 30 (2015), pp. 89-106.

39 For further information see *Emilio Peluso Neder Meyer*, Ditadura e Responsabilização: Elementos para uma Justiça de Transição no Brasil, Belo Horizonte 2012.

with two condemnations before the Inter-American Court of Human Right[40], in which the Court expressly states that self-amnesty laws violate the American Convention on Human Rights[41], the Brazilian Supreme Court has not reviewed its understanding.[42]

2. The Legacy of the Amnesty Law

In this context, it is little surprising that there is no punitive memory law in Brazil regarding the civil-military dictatorship period. This means that there is no law specifically prohibiting the dissemination of different versions of the past, although there is an official report by the National Truth Commission.[43] The adoption of punitive memory laws has not been at the center of the transitional justice agenda of the country. A possible explanation for the lack of debate on the topic is the fact that Brazil still has to deal with its Amnesty Law. So, even if the direct responsible for gross human rights violations during the civil-military dictatorship[44] have not faced a criminal procedure – in the vast majority of cases –[45], it is hard to discuss the criminalization of an apologetic discourse related to the dictatorship. This is not to say that the meaning of the dictatorship is still in debate and different sectors

40 In 2010, a few months after the Brazilian Supreme Court decided on the Constitutionality of the Amnesty Law, the Inter-American Court on Human Rights condemned Brazil in the Gomes Lund (et. al) (Guerrilha do Araguaia) case, see https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf (last accessed on 20 September 2024). The Amnesty law was considered to violate the Pac of San Jose, Costa Rica, see Organization of American States , https://www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf (last accessed on 20 September 2020). After the IACtHR ruling, the Brazilian Supreme Court was asked to proceed the conventionality control upon the Amnesty Law, but the issue was not decided yet. In 2018, the Inter-American Court decided again a case against Brazil, involving its civil-military dictatorship, the Herzog (et. al) case, see https://www.corteidh.or.cr/docs/casos/articulos/seriec_353_ing.pdf (last accessed on 20 September 2020). Again, the unconventionality of Brazil's Amnesty Law was highlighted.

41 *Juan Pablo Perez-Leon-Acevedo*, The control of the Inter-American Court of Human Rights over amnesty laws and other exemption measures: Legitimacy assessment. Leiden Journal of International Law 33 (2020), p. 672.

42 Recently, Dias Tóffoli, working as a judge of the Brazilian Supreme Court, mentioned the need to discuss the pending cases related to the Amnesty Law. That was the only recent move in that direction, and it was welcomed by civil society organizations that deal with the issue of transitional justice in Brazil. For more information see *Agência Brasil*, Toffoli indica disposição de "desengavetar" revisão da Lei da Anistia, Info Money, 23.02.2024, https://www.infomoney.com.br/politica/toffoli-revisao-lei-da-anistia-stf-instituto-vladimir-herzog/ (last accessed on 20 September 2024), see also *Vladimir Herzog*, 10 anos depois, ADPF que trata da Lei da Anistia pode avançar no STF, 09.02.2024, https://vladimirherzog.org/10-anos-depois-adpf-lei-da-anistia-pode-avancar-no-stf/ (last accessed on 20 September 2024).

43 *Comissão Nacional da Verdade* (CNV), Relatório Final, http://cnv.memoriasreveladas.gov.br/ (last accessed on 19 September 2024).

44 The debate regarding transitional justice and its mechanisms in Brazil regards specifically the civil-military dictatorship from 1964 to 1985.

45 There was accountability in very few cases.

of the government have different perspectives on it[46], although the Brazilian National Truth Commission has published a final report detailing the gross human rights violations.[47] In this context, it is pertinent to cite the recent (2024) ruling by the Brazilian Supreme Court, which prohibits the use of public funds for acts of worship related to the dictatorship.[48] Although the Supreme Court does not rule on the constitutionality of the acts themselves, its initial approach towards restricting such activities is noteworthy.

Even though the Amnesty Law – which is still into force and blocks the criminal prosecution of those that perpetrated crimes against humanity, such as torture — would not hinder the creation of a punitive memory law, it indicates a lack of political conditions for the implementation of such law. In theory, the Amnesty Law addresses past events by extinguishing liability for crimes already committed, while memory laws aim to protect future values and contribute to the preservation of democracy. However, the continuation of the Amnesty Law already shows that there is not a minimal social-political agreement on the significance of the human rights violations that were perpetrated. Furthermore, the military has always been involved in Brazilian politics, even after the democratization.[49] At least some sectors of the Brazilian armed forces have never accepted that the civil-military dictatorship violated human rights. So, there has never been a political consensus on what would be the premise of having a memory law regarding that period.

There are, however, two legislative projects that aim to create a formal memory law in Brazil. Law Proposal n. 980/2015 in the Chamber of Deputies[50] and Law Proposal

46 *Duda Monteiro de Barros Leia*, Militares fazem evento em celebração aos 60 anos da ditadura, Veja, 08.05.2024, https://veja.abril.com.br/brasil/militares-fazem-evento-em-celebracao-aos-60-anos-da-ditadura (last accessed on 20 September 2024); *Lucas Schroeder*,"É preciso ter ódio e nojo da ditadura", diz Silvio Almeida nos 60 anos do golpe, CNN Brasil, 31.03.2024, https://www.cnnbrasil.com.br/politica/e-preciso-ter-odio-e-nojo-da-ditadura-diz-silvio-almeida-nos-60-anos-do-golpe/ (last accessed on 20 September 2024); Ministério dos Direitos Humanos pagou R$ 200 mil para ação dos 60 anos do Golpe Militar de 1964 que Lula cancelou, Intercept Brasil https://www.intercept.com.br/2024/04/01/ministerio-dos-direitos-humanos-pagou-r-200-mil-para-acao-dos-60-anos-do-golpe-militar-de-1964-que-lula-cancelou/ (last accessed on 20 September 2024).

47 See Comissão Nacional da Verdade, note 43.

48 *Suélen Pires*, Recursos públicos não podem ser utilizados para promover comemorações do golpe de 1964, decide STF, Supremo Tribunal Federal, https://noticias.stf.jus.br/postsnoticias/recursos-publicos-nao-podem-ser-utilizados-para-promover-comemoracoes-do-golpe-de-1964-decide-stf/ (last accessed on 15 October 2024). Further information on the case RE 1429329, https://portal.stf.jus.br/processos/detalhe.asp?incidente=6603045 (last accessed on 15 October 2024).

49 *Vinicius Mariano de Grimaldi / Anna Isabella Grimaldi*, Military in Politics in Brazil in critical terms - Editorial. BRASILIANA: Journal for Brazilian Studies 10 (2021). pp. 1-9. *Bruneau T.C. Tollefson*, S.C., Civil–Military Relations in Brazil: A Reassessment, Journal of Politics in Latin America 6 (2014), pp. 107–138.

50 Further information on the Law Proposal n. 980/2015, https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=1195489&fichaAmigavel=nao (last accessed on 20 September 2024).

n. 6304/2019 in the Senate[51] aim to criminalize calling for the return of the military dictatorship or preaching new institutional ruptures. However, the processing of these bills has been very slow, and they are still being analyzed in the committees of the Chamber of Deputies and the Senate. Nonetheless, there is no good reason to believe they would be soon approved, as the Brazilian Parliament is currently in one of its most conservative formations in the democratic history.[52] This again shows how disputed this topic is within Brazilian politics.

Moreover, it is worth questioning whether a punitive memory law would solve the issue of how Brazilian society remembers the civil-military dictatorship. As will be discussed in subsequent sections, even in societies where stringent memory laws are implemented, we observe a rise of right-wing groups attempting to reinterpret history. In any case, Brazil serves as an example where there has never been a consensus on the meaning of the dictatorship or of the gross human rights violations that were committed during this period. This lack of consensus poses a constant threat to Brazilian democracy.

Nevertheless, the absence of a clear punitive memory law does not imply that the issue of memory is not relevant for the Brazilian transition to democracy. In the sequence, it will be debated how the right to memory and truth was central for transitional justice in the country.

3. Truth and Memory within Brazilian Transitional Justice

In Brazil, the issue of memory has been discussed mainly within the framework of the right to truth and memory, as framed by the Inter-American System of Human Rights.[53] Here, the right to truth and memory is considered to have two dimensions: (a) one related to the right of the victims and their families to know the truth about the human rights violations they were subject to; and (b) one related to the right of the society as a whole to know what human rights violations occurred in order to prevent their recurrence.[54]

51 Further information on the Law Proposal n. 6304/2019, https://www25.senado.leg.br/web/atividade/materias/-/materia/140077 (last accessed on 19 September 2024).

52 *Bruna Lima*, Congresso tem perfil conservador em 2023 e exige mais articulação do governo, R7 Brasilia, 01.02.2023, https://noticias.r7.com/brasilia/congresso-tem-perfil-conservador-em-2023-e-exige-mais-articulacao-do-governo-01022023/ (last accessed on 19 September 2024).

53 *Eduardo Ferrer Mac-Gregor*, The Right to the Truth as an autonomous right under the Inter-American Human Rights System, Mexican Law Review 9 (2016), pp. 121-139; *Maria Chiara Campisi*, From a duty to remember to an obligation to memory? Memory as reparation in the jurisprudence of the inter-american court of human rights, International Journal of Conflict and Violence 8 (2014), pp. 61-74; *Bruno Galindo* / *Juliana Passos de Castro*, The Rights to Memory and Truth in the Inter-American Paradigms of Transitional Justice: The Case of Brazil and Chile, Brazil Journal of International 15 (2018), pp. 308-323.

54 Inter-American Commission on Human Rights, Compendium of the Inter-American Commission on Human Rights on truth, memory, justice and reparation in transitional contexts, Washington 2021. pp. 74-75.

One of the possible reasons for the Brazilian focus on the right to truth and memory is the fact that criminal accountability for the agents responsible for grave human rights violations was not possible due to the Amnesty Law, as discussed above. While there are some civil cases that demand monetary compensation for the violence suffered, criminal cases are generally not admitted in the first instance, or are suspended because of the amnesty, even in cases of crimes against humanity.[55]

On the other hand, one of the central actors for the realization of transitional justice in Brazil was the Amnesty Commission, created in 2001 during the presidency of Fernando Henrique Cardoso. Its main purpose was to implement the reparation policies for politically persecuted people, giving effect to the provisions of art. 8 of the Transitional Constitutional Provisions Act (ADCT). Besides structuring the pecuniary reparations granted to the victims of the Brazilian civil-military dictatorship, the Amnesty Commission became the main entity promoting memorialization policies in Brazil. In this sense, the creation of the "Amnesty Caravans" project stands out, as it took the Commission's trial sessions to all regions of the country.[56] It is important to note that the name "Amnesty Commission" refers to the need to grant amnesty to the victims of the dictatorship who were criminally prosecuted during that period and lost their positions at Universities or their jobs. This understanding of amnesty differs from the one prohibited according to the understandings of the Inter-American Court of Human Rights.[57]

Another key element to the Brazilian transition was the institution of the National Truth Commission (CNV), through law n. 12.528/2011 which was established in May 2012. Only twenty-four years after the enactment of the 1988 Constitution, which restored the democratic regime in the country, a Commission was instituted whose purpose was to investigate "serious human rights violations that occurred between September 18, 1946, and October 5, 1988" (CNV). More than a quarter of a century has passed between the violations perpetrated by the dictatorship and the government's initiative to promote an in-depth study of that period. A peculiarity of the Brazilian case that illustrates how a significant portion of society actually sought space to expand investigations into the dictatorial period is the number of Truth Commissions that spread throughout the country. Besides the National Truth Commission, state Truth Commissions were instituted, such as COVEMG

55 Centro de Estudos sobre Justiça de Transição - UFMG. Projeto Ditadura e Responsabilização, https://cjt.ufmg.br/projetos/ditadura-e-responsabilizacao/ (last accessed on 18 July 2024).

56 *Paulo Abrão* / *Sueli Aparecida Bellato* / *Marcelo D. Torelly* / *Roberta Vieira Alvarenga*, Justiça de transição no Brasil: o papel da Comissão de Anistia do Ministério da Justiça, Revista Anistia Política e Justiça de Transição 1 (2009), pp. 17-18.

57 The IACtHR has systematically expressed the understanding that the so-called "self-amnesties" violate the American Convention on Human Rights. Self-amnesties are amnesty laws enacted by the dictatorships themselves in order to assure amnesty for the human rights violations they promoted. Such amnesties tend to be enacted when it is noticeable that the dictatorships are coming to an end and their agents want to avoid being prosecuted in the following governments, see Corte Interamericana de Derechos Humanos, Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 15: Justicia transicional, San José 2022. pp. 61-63.

in Minas Gerais and CEV/RS in Rio Grande do Sul; university commissions, such as the Anísio Teixeira Memory and Truth Commission of UNB and the Truth Commission of the Largo São Francisco Law School; as well as Commissions promoted by the Brazilian Bar Association, as in the case of Rio de Janeiro and São Paulo.

It becomes evident that the debate on memory within the Brazilian transitional justice was closely tied with the right to truth and memory, focusing on the positive perspective and fostering a specific memory of a remarkable period. This means that Brazil's memory policies tried to promote the narrative of the victims of the civil-military dictatorship and to create spaces where those narratives could be vocalized.

It is possible to relate the Brazilian need to give space to the narratives of the victims with the fact that their voices have been systematically silenced. During the civil-military dictatorship, it was a widespread claim that the actual victims were terrorists that intended to install a communist coup in the country. The transition through transaction did not help in creating a social awareness regarding the human rights violations perpetrated by the regime. As a result, a great part of the population — especially those with no connection to the resistance movements — continued to believe that the military avoided a sort of communist coup in 1964. That reinforces the importance of the work done by the Amnesty and the Truth Commission in creating spaces where the narratives of the victims could be made public.

II. The Why-Question: Revisiting the Adoption of Memory Laws related to Nazism in Germany

Compared to Brazil, Germany has taken a more restrictive approach to commemorating historical atrocities by implementing punitive memory laws, among others. This section will briefly revisit the emergence of memory laws related to Nazi-era injustices within Germany. This choice was made consciously, as the remembrance of the Nazi past is increasingly targeted by right-wing actors who seek to downplay the significance of Nazism in contemporary Germany.

1. Sociopolitical Context post-1945

Before turning to the analysis of the pertinent memory laws, brief remarks about the German context post-1945 are necessary. The German case exemplifies a significant shift in politics of memory during the 1980s, leading simultaneously to the adoption of several "explicit" memory laws. This shift towards active remembrance cannot be fully understood through a top-down approach alone; rather, it emerged from a long, grassroots process driven by the victims' demands for acknowledgment and remembrance of the injustices

they suffered.[58] The internal confrontation with the Nazi era took decades to unfold. The immediate post-war period was largely characterized by a "move on and forget" attitude. Despite some external efforts to "denazify" the country and hold major human rights violators accountable ('Nuremburg trials'), internal reckoning was minimal, with the notable exception of the Auschwitz trials.[59] One could plausibly argue that the great majority of German society transferred their responsibility and blame to a relatively small group of high-ranking Nazi officials.[60] Many Germans even perceived themselves as "victims of Hitler".[61] These sentiments further hindered the conditions necessary for deliberate societal engagement with the Nazi past.[62] This began to slowly change in the 1980s, culminating in the adoption of several memory laws. [63]

2. From Silence to Criminalization: Introducing Memory Laws related to Nazism

The adoption of "explicit" memory laws appears to have been motivated by concerns over the potential resurgence of Nazism. These institutionalized debates, however, only gained significant momentum relatively late. When addressing the rise of memory laws, we primarily refer to reunified Germany, although many of these debates began earlier in West Germany. The focus will be on "explicit" memory laws, which presumably play the most significant role in the German context.

Until today, Germany's central punitive memory law related to Nazism remains the hate speech provision § 130 of the German Criminal Code,[64] which was introduced in its current form in 1960, and has been revised and tightened multiple times.[65] The primary objective

58 *Mirjam Zadoff,* Empathie beruft sich nicht auf Erinnerung und Gegenwart in Zeiten von Covid19, October 2020, https://www.ev-akademie-tutzing.de/wp-content/uploads/2020/11/Kanzelrede.final-durchgesehen.pdf (last accessed on 20 March 2024), see also *Bachmann et al.*, note 8, p. 1003.

59 LEMO, Fritzbauer 1903-1986, https://www.hdg.de/lemo/biografie/fritz-bauer.html, see Real Fiction Filme, Fritz Bauers Erbe (2023), https://www.realfictionfilme.de/fritz-bauers-erbe-gerechtigkeit-verjaehrt-nicht.html (last accessed on 13 August 2024).

60 *Christian Mentel*, The presence of the past: On the significance of the Holocaust and the criminalisation of its negation in the Federal Republic of Germany, in: Paul Behrens / Olaf Jensen / Nicholas Terry (eds.), Holocaust and Genocide Denial: A Contextual Perspective, Milton Park 2017, p. 72.

61 See for further elaboration *Samuel Salzborn*, Kollektive Unschuld. Die Abwehr der Shoah im deutschen Erinnern, Leipzig 2020.

62 Ibid.

63 The term explicit memory laws has been coined by *Paula Rhein-Fischer / Simon Mensing*, Memory Laws in Germany: How Remembering National Socialism Is Governed through Law, Occasional Paper Series No. 14 (2022).

64 Wissenschaftliche Dienste Deutscher Bundestag, Aktueller Begriff Volksverhetzung, 02.10.2009,https://www.bundestag.de/resource/blob/190798/a52bed78fd61296f7a3ea11e84e7c12e/volksverhetzung-data.pdf (last accessed on 11 June 2024).

65 Wissenschaftliche Dienste Deutscher Bundestag, Ausarbeitung Deutscher Bundestag, § 130 Abs. 5 StGB n.F. und die Meinungsfreiheit nach Art. 5 Abs. 1 Satz 1 GG, 21.12.2022, https://www.bundes

("Schutzgut") of the provision is the protection of public peace, while also upholding the human dignity of the affected victim groups.[66] Beginning in the 1980s, there were several attempts to introduce a separate criminal offense for cases of Holocaust denial.[67] Noting a drastic rise of right-wing activities triggered renewed discussions about a potential lacuna in criminal law. In the same period, the infamous "Historikerstreit 1.0" significantly influenced the quest for societal consensus on how to remember the past. The debate mainly centered around the interpretation of German history concerning the Nazi regime and the Holocaust. While some attempted to relativize history[68], others insisted on the "singularity of the Holocaust" referring to the industrialized systemic mass murder of European Jews.[69] After a series of heated debates, the "singularity" thesis ultimately prevailed. The potential introduction of a Holocaust denial ban was still met with skepticism.[70] Renewed attention has been given to the introduction of the denial ban following the controversies surrounding the failed criminal proceedings against an extreme right politician.[71] During the parliamentary debates, it was repeatedly argued that a Holocaust denial ban should counter the resurge of Nazism and affiliated ideologies.[72] Against this background, the specific offense

tag.de/resource/blob/963524/d1d9c1dad36502d52e260b1ad399eee6/WD-3-151-22-pdf-data.pdf (last accessed on 20 February 2024).

66 The provision's wording already hints at that the protection of public peace is the primary objective, see *Milosz Matuschek*, Erinnerungsstrafrecht Eine Neubegründung des Verbots der Holocaustleugnung auf rechtsvergleichender und sozialphilosophischer Grundlage, Berlin 2012, pp. 87 ff.; for a more detailed analysis consult *Florian Steding,* Rechtsgut „öffentlicher Friede"? Strafrechtlicher Friedensschutz im Lichte der Meinungsfreiheit (Art. 5 Abs. 1 S. 1 GG), Hamburg 2021.

67 Discussing a draft legislation to introduce the special offense, it was inter alia argued that "[t]his proposal[...] is [...] part of coming to terms with the past – coping with and addressing perhaps the darkest chapter in German history. [...]." Justice Minister Engelhard, Bundestag session 10/67, p. 4754, in reference to draft bill BT-Drs. 10/1286 dated April 11, 1984, Annex 3; see also *Benedikt Rohrßen*, Von der ´"Anreizung zum Klassenkampf" zur „Volksverhetzung" (§ 130 StGB), p. 195.

68 *Ernst Nolte*, Vergangenheit die nicht vergehen will, Frankfurter Allgemeine Zeitung,09.061986, using rhetorical questions to support his arguments "Did the 'Gulag Archipelago' not exist before Auschwitz?" "Was Bolshevik 'class murder' not the logical and factual predecessor to the Nazi 'racial murder'?" "Did Auschwitz not, perhaps, originate in a past that would not pass away?", see for translation, The New York Times, Ernst Nolte, Historian Whose Views on Hitler Caused an Uproar, Dies at 93, New York Times, 21.08.2016, https://www.nytimes.com/2016/08/21/world/europe/ernst-nolte-historian-whose-views-on-hitler-caused-an-uproar-dies-at-93.html (last accessed on 20 February 2024).

69 *Jürgen Habermas*, Eine Art Schadensabwicklung, https://www.zeit.de/1986/29/eine-art-schadensabwicklung (last accessed on 30 September 2024).

70 *Rohrßen*, note 67, p. 194.

71 The politician Deckert was originally sentenced for defamation and incitement to hatred (§ 130 StGB) but was exonerated by the Federal Court of Justice; see also *Sigrid Boysen*, Memory Laws. Parlamente, Gerichte und Verhandlungen als Institutionen der Aufarbeitung von Genoziden, Jahrbuch des öffentlichen Rechts der Gegenwart 69,Tübingen 2021, p. 6.

72 *Matuschek*, note 66, pp. 48-49.

of Holocaust denial was introduced in 1994 (§ 130 (3) of the Criminal Code), which stipulates that "whoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of Crimes against International Law in a manner suited to causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding five years or a fine." [73]

In 2005, the growing influence of right-wing extremists, along with a rise in large neo-Nazi protests in several German cities, heightened the urgency to counteract these movements.[74] To address such issues, § 130 (4) of the Criminal Code was introduced, which criminalizes any public endorsement or positive statements about the Nazi regime. In this context, it is important to recall the *Wunsiedel* decision by the Federal Constitutional Court (FCC), where the latter upheld the constitutionality of § 130 (4) of the Criminal Code.[75] In this watershed judgment, the Court departed from its ban on special legislation. As stipulated in Art. 5 (2) of the Basic Law the right to freedom of expression can be only limited by so-called general law.[76] § 130 (4) of the Criminal Code does however not qualify as a "general law" because it does not "protect victims of violence in general terms' and specifically targets statements related to National Socialism, rather than the approval, glorification, and justification of totalitarian regimes as a whole".[77] Irrespective of this, the Court established an exception to the "general law" requirement when it comes to provisions counteracting the "propagandistic affirmation" of the Nazi past. By acknowledging that the Nazis caused "immeasurable suffering" the FCC goes as far as stating that the German Basic law forms "the antithesis to the totalitarianism of the National Socialist regime".[78] The *Wunsiedel* decision portrays the entire constitutional endeavor as a reactive measure against Nazism. Consequently, the German Constitution provides built-in exemptions when it comes to Nazism.[79] The Basic Law's anti-Nazi stance forms subsequently the core of the country's constitutional identity. However, the Basic Law does not incorporate a broad anti-National Socialism principle, as free debate is still upheld as the most efficient means to counter

73 It is important that the wording of § 130 (3) StGB encompasses not only the denial of the genocide against the European Jews but also the genocide against the Sinti and Roma, see for example *Fronza*, note 9, p. 131, and see in particular Plenary Protocol 10/126 German Parliament 126th Session Bonn, 14 March 1985.

74 *Luke Harding,* Neo-Nazis upstage Dresden memorial, The Guardian, 14.02.2005, www.theguardian.com/world/2005/feb/14/secondworldwar.germany (last accessed on 19 March 2024), see also *Luke Harding,* Thousands join in rallies to hail wartime heroism, The Guardian, 09.05.2005, www.theguardian.com/uk/2005/may/09/world.secondworldwar (last accessed on 19 March 2024).

75 BVerfGE 124, 300.

76 The right to freedom of expression can only be limited by "provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor".

77 Ibid., para. 38.

78 Ibid., para. 42.

79 *Mehrdad Payandeh*, The Limits of Freedom of Expression in the Wunsiedel Decision of the German Federal Constitutional Court, German Law Journal 11 (2010), p. 939.

such totalitarian ideologies.[80] This becomes particularly important when considering that the right to freedom of expression is understood as the counter-concept to "Nazi censorship".[81] As a result, any restrictions on this right are always subject to heightened scrutiny.

The article will not delve deeply into the much-criticized 2022 reform of § 130 of the Criminal Code[82], as the article's focus is on explicit memory laws related to Nazism. However, it is noteworthy that this reform expands the scope of § 130 of the Criminal Code "beyond Holocaust denial to encompass denial of other international crimes across various historical or contemporary contexts".[83] As per official sources, it is still argued that the Holocaust denial ban maintains a special status in the German legal system. § 130 (3) of the Criminal Code criminalizes trivialization, and § 130 (5) of the Criminal Code only prohibits "gross trivialization". Any trivialization of international crimes needs thus to meet a higher threshold. Moreover, punishment for Holocaust denial remains more severe, especially with regard to the length of imprisonment. The reform is noteworthy because the entire amendment process was prompted by an EU Framework Decision that Germany had failed to implement, marking a shift from earlier amendments that were primarily driven by internal developments rather than external influences.[84]

Another "explicit" memory law is § 86 of the Criminal Code, which prohibits the dissemination of propaganda materials of unconstitutional and terrorist organizations, and mentions in § 86 (1) 4 of the Criminal Code explicitly as propaganda material anything that relates to Nazi organizations.[85] Interestingly, the introduction of § 86 of the Criminal Code was not primarily focused on countering the distribution of Nazi materials; instead, it was

80 Bundesverfassungsgericht, § 130.4 of the Criminal Code is compatible with Article 5.1 and 5.2 of the Basic Law Press Release No. 129/2009 of 17 November 2009, paras. 27, 44, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2009/bvg09-129.html (last accessed on 30 September 2024).

81 *Payandeh,* note 79, p. 940.

82 See for example *Paula Rhein-Fischer,* Regieren der Erinnerung durch Recht Die problematische Reform des Volksverhetzungstatbestandes nach § 130 (5) StGB n.F., Verfassungsblog, 31.10.2022, https://verfassungsblog.de/regieren-der-erinnerung-durch-recht/ (last accessed on 14 February 2024) DOI: 10.17176/20221031-220123-0; see also *Elisa Hoven*, Der neue § 130 ist eine Gefahr für die kritische Diskussion, Welt, 26.10.2022, https://www.welt.de/kultur/plus241798753/Volksverhetzung-Der-neue-130-ist-eine-Gefahr-fuer-die-kritische-Diskussion.html (last accessed on 14 February 2024).

83 *Michael Kubiciel*, Welcher Skandal? Anmerkungen zur eher symbolischen Änderung des § 130 StGB, Verfassungsblog, 27.10.2022, https://verfassungsblog.de/welcher-skandal/ (last accessed on 14 February 2024), DOI: 10.17176/20221027-230008-0.

84 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, https://germany.representation.ec.europa.eu/news/vertragsverletzungsverfahren-im-dezember-eu-kommission-stellt-verfahren-gegen-deutschland-wegen-ezb-2021-12-02_de (last accessed on 30 September 2024).

85 Examples for Nazi organizations are the NSDAP; the "Sturmabteilung", the "Schutzstaffel", the "Hitlerjugend" and the "Bund Deutscher Mädel", see *Roman Trips-Hebert,* Das strafbare Verwenden von Kennzeichen verfassungswidriger und terroristischer Organisationen § 86a StGB im Spiegel der Rechtsprechung, Wissenschaftliche Dienste Deutscher Bundestag, 10.11.2021, https://

more concerned with addressing propaganda originating from East Germany.[86] Furthermore, § 86a of the Criminal Code includes the so-called "ban on symbols". Symbols are not necessarily physical objects but can encompass e.g. slogans and/or forms of greetings (§ 86a (2) of the Criminal Code). §§ 86 and 86a Criminal Code were inter alia enacted to counter the potential resurge of certain ideologies, including Nazism.[87] The primary objective is to protect the public peace.[88]

Memory laws often serve arguably noble causes: they aim to preserve historical truth by outlawing the denial or distortion of widely accepted historical facts. In the German case, the suffering of the victims of Nazi injustices is acknowledged through e.g. laws that prohibit Holocaust denial. The denial of such atrocities would for example imply that the victims fabricated or exaggerated their suffering. Many of these laws were created during periods of heightened concern about the resurgence of Nazi or extremist ideologies that could threaten social cohesion. In that sense, people identifying with this ideology should be prevented from undermining the democratic order. This approach reflects the idea of "militant democracy", which should hinder enemies of democracy to abuse democratic means to abandon the system.[89] In that sense, the restriction of constitutional rights can be under specific circumstances justified, as states that grant individuals unlimited liberties may not necessarily empower marginalized groups, but rather their adversaries. Similarly, allowing unrestricted freedom of expression may not facilitate the pursuit of truth, but instead amplify the voices of those who make the most noise.[90]

3. Possible Backlash against Memory Laws?

The previous analysis could lead to the conclusion that the German approach is a "story of success". One could however adopt a more critical stance on the reliance on predominantly punitive memory laws in the German case. Recent developments exemplify this, as there appears to be a backlash against these memory laws. Right-wing actors increasingly target provisions that criminalize the distortion or glorification of the Nazi period. A salient example of this development are the recent controversies about two convictions of politician Björn Höcke from the extreme-right party "Alternative für Deutschland" (AfD). The politi-

www.bundestag.de/resource/blob/869290/c8bd5f14ef172eb76e41484886611030/Das-strafbare-Verw-von-Kennzeichen-data.pdf (last accessed 20 September 2020).

86 *Rhein-Fischer / Mensig*, note 63, p. 25.

87 *Trips-Hebert*, note 85.

88 *Rhein-Fischer / Mensig*, note 63, p. 26.

89 *Max Söllner*, Verrechtlichung von Geschichte Parlamentarische Debatten um die gesetzlichen Bestimmungen gegen Holocaustleugnung in der Bundesrepublik Deutschland und in Österreich, Frankfurt a.M 2015.

90 *Paul Behrens*, Why not the law? Options for dealing with genocide and Holocaust denial, in: Paul Behrens / Olaf Jensen / Nicholas Terry (eds.), Holocaust and Genocide Denial: A Contextual Perspective, Milton Park 2017, p. 235.

cian has been condemned twice for using the criminalized Nazi slogan "Everything for Germany" which is prohibited according to § 86a of the Criminal Code.[91] The question centered around whether the slogan was intentionally used, which was finally proven by the respective court. Unsurprisingly, Höcke's lawyers however plan to appeal the judgments.[92] The politician strategically used this opportunity to portray himself as an "innocent victim of [the] [German] justice [system]".[93] The politician is a master of "self-staging" who is typically claiming that the "elite" and the "mainstream" is attacking him and the AfD more generally.[94] Höcke, a history teacher by profession, claimed ignorance about the meaning of the slogan –an assertion that raises credible doubts given his background. Instead, he described the slogan on the social media platform X as a common expression of patriotism.[95] In his closing remarks, Höcke referred to § 86a of the Criminal Code as a "muzzle" provision, claiming it hinders his performance as an opposition politician.[96] As expected, the convicted individual describes the proceedings as "arbitrary" and claims that supporters of "freedom" and "democracy" would not tolerate such actions.[97] In the same vein, while addressing his second conviction, AfD party leader Tino Chrupalla claimed, "[c]onsidering the extensive effort put into this process and the nature of the statements being made, it is hard to see this as anything other than a show trial".[98] Therefore, the verdicts were decried as yet "another assault" on freedom of expression.[99] Such proceedings can be hence intentionally misused to, for instance, discredit courts and judges, which are seen to form a part

91 "Everything for Germany" was inscribed in every service dagger used by the SA. That the phrase consists a forbidden SA-slogan was first confirmed in a judgment by the higher regional court of Hamm in 2006, OLG Hamm, 01.02.2006 - 1 Ss 432/05, see for recent judgments LG Halle, 14.05.2024 - 5 KLs 6/23, MDR Sachsen-Anhalt, Höcke zu Geldstrafe verurteilt: Verteidiger legen erneut Revision ein, 03.07.2024, https://www.mdr.de/nachrichten/sachsen-anhalt/halle/halle/hoecke-urteil-nazi-parole-revision-100.html (last accessed on 19 September 2024).

92 LTO, Höcke legt Revision ein, 16.05.2024, https://www.lto.de/recht/nachrichten/n/hoecke-anwalt-revision-bgh-lg-halle-sa-parole-verurteilung-geldstrafe/ (last accessed on 11 June 2024).

93 *Daniel Heymann,* Geschichtslehrer Höcke dirigiert seinen Chor, ZDF, 01.07.2024, https://www.zdf.de/nachrichten/politik/deutschland/hoecke-afd-geldstrafe-parole-100.html (last accessed on 20 September 2024).

94 Deutschlandfunk, Urteil gegen AfD-Politiker Höcke erwartet, 14.05.2024, https://www.deutschlandfunk.de/urteil-gegen-afd-politiker-hoecke-erwartet-102.html (last accessed on 30 September 2024).

95 Björn Höcke on X, https://x.com/BjoernHoecke/status/1735385852983865781 (last accessed on 19 September 2024).

96 Deutschlandfunk, AfD-Chef Höcke erneut wegen NS-Parole verurteilt, 01.07.2024, https://www.deutschlandfunk.de/bjoern-hoecke-afd-prozess-wahlrecht-100.html (last accessed on 19 September 2024).

97 Statement on Facebook page of Börn Höcke, https://www.facebook.com/Bjoern.Hoecke.AfD/videos/762533369290075?locale=de_DE (last accessed on 19 September 2024).

98 *Heymann*, note 93.

99 Björn Höcke on X, https://x.com/BjoernHoecke/status/1790460328540602539 (last accessed on 20 September 2024).

of the "corrupt elite" (non-conformist/anti-establishment claim).[100] As right-wing parties consolidate more power, they may exploit these "incidents" as a future pretext to reshape the judiciary, employing tactics such as court-packing with their political allies.[101]

The discussed criminal convictions are of course not meaningless, especially when considering the potential consequences of criminal convictions on the political career.[102] Ultimately, actors like Höcke still aim to either abandon or at least amend the laws discussed above.[103] While such a project is unlikely to be realized soon and may not yet garner the necessary support, it does highlight that these laws are seen as a "thorn in the side". Until then, under the guise of championing freedom of expression, they may oppose these memory laws, as illustrated above. Now as ever, AfD politicians defended notorious Holocaust deniers such as Ursula Haverbeck by arguing that imprisonment for opinion-based offenses is overstated. This is a blatant attempt to downplay the severity of these crimes by suggesting that Holocaust denial is merely an "opinion", rather than a dangerous distortion of historical truth.[104] Similarly, Höcke frequently criticizes the incitement to hatred provision (§ 130 of the Criminal Code), arguing that recent amendments have overly broadened its scope, leading to the unjust criminalization of "mere" expressions and satire.[105] The politician further contends that "[w]hat is referred to as patriotism in other countries is often called incitement to hatred in Germany".[106] This tactic, which can be described as a "defenders of free speech" maneuver, is often used by right-wing and increasingly conservative

100 See e.g. Article 19, 'Hate Speech', Explained A Toolkit, 23.12.2019, https://www.article19.org/data/files/medialibrary/38231/Hate_speech_report-ID-files--final.pdf (last accessed 20 January 2025).

101 This fits neatly within the AfD's alleged "depoliticization of the judiciary"-strategy, see Alternative für Deutschland, AfD Grundsatzprogramm für Deutschland, Beschlossen auf dem Bundesparteitag in Stuttgart am 30.04./01.05.2016, https://www.afd.de/grundsatzprogramm/ (last accessed on 20 September 2024).

102 *Florian Slognast,* No reintegration without representation: Der Wahlrechtsverlust infolge strafrechtlicher Verurteilung, Verfassungsblog, 14.01.2024, https://verfassungsblog.de/no-reintegration-without-representation/ (last accessed on 14 June 2024), DOI: 10.59704/5b3736b5b4f51d63.

103 MDR Thüringen, Nachrichten des Tages am 08.01.2025, at 00.46-01.30min https://www.mdr.de/mdr-thueringen/podcast/tag/audio-nachrichten-des-tages-mittwoch164.html (last accessed on 8 January 2025).

104 NDR, AfD-Politiker Höcke unterstützt Haverbeck, https://www.ndr.de/fernsehen/sendungen/panorama/AfD-Politiker-Hoecke-unterstuetzt-Haverbeck,videoimport17482.html (last accessed on 14 June 2024); LTO, 95-jährige Holocaustleugnerin erneut vor Gericht, 16.02.2024, https://www.lto.de/recht/nachrichten/n/holocaustleugnung-volksverhetzung-ursula-haverbeck-rechtsextremismus/ (last accessed on 12 June 2024).

105 Statement on Facebook Page of Björn Höcke, https://www.facebook.com/Bjoern.Hoecke.AfD/?locale=de_DE (last accessed on 19 September 2024).

106 *Iris Mayer,* Die Grenzen des Sagbaren, 16.04.2024, https://www.sueddeutsche.de/projekte/artikel/politik/hoecke-afd-sa-parole-gericht-e886210/ (last accessed on 19 September 2024).

figures to push the limits of "acceptable discourse".[107] As with other issues, the AfD seeks to shape the discourse on history to foster dissatisfaction for their own political gain. Their broader aim is to challenge and break "taboos".[108] Some further argue that historical debates receive more attention than other topics due to their significant role in societal discourse, making them an ideal target for the discourse strategies of right-wing actors.[109]

These debates show that even the existence of stringent punitive memory laws does not necessarily guarantee that "hardliners" will be deterred from promoting their misleading historical narratives. Punitive memory laws are by no means a "silver bullet" against the resurge of extremist views.[110] This raises concerns about whether memory laws, even in their most restrictive forms, can effectively combat the distortion of the past. Can we hence invoke the "slippery slope"-argument?[111] As outlined quite aptly by Emanuela Fronza "[c]riminal prosecution of denialism [or related offenses] risks becoming a false solution or a shortcut that could ironically follow the same path of the wrong it seeks to counter, with the added danger of turning deniers into martyrs of freedom of expression and leading to renewed propagation of their falsehoods".[112] In the end, the debate returns to the foundational questions: Can punitive memory laws combat intolerance, or can we cast doubt on their capacity to ensure societal cohesion?[113] There is perhaps no definite answer. Debates surrounding memory laws have, however, always been shadowed by concerns about introducing state-sponsored historical interpretations. Critics caution that the practice of "historical fact-finding" falls outside legal purview, emphasizing instead the societal responsibility to uphold and search for the "historical truth".[114] Additionally, the practical

107 Friedrich-Ebert-Stiftung, Die Grenzen des Sagbaren – FEShistory Impuls #2, February 2024, https://www.fes.de/archiv-der-sozialen-demokratie/artikelseite-adsd/default-99bb15b5db72ccf0f971ae8d42260f42 (last accessed on 19 September 2024).

108 Ibid.

109 Ibid.

110 *Fronza*, note 9, p. 161.

111 *Koposov*, note 2.

112 *Fronza*, note 9, p. 170.

113 *Erik Bleich*, The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies, Journal of Ethnic and Migration Studies 37 (2011), p. 927.

114 There has always been disagreement among states as well; see, for instance, "Whithaker report", United Nations Economic and Social Council, Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker, E/CN.4/Sub.2/1985/6 July 1985, "Regarding attempts to falsify the historical truth about genocide, it has already been noted [..] that [..] Germany has pledged official action to prosecute any person who seeks to deny or minimize the truth about the Nazi crimes. Many Governments on the other hand believe strongly that there should be no constraint either on legitimate historical debate or upon freedom of expression. In certain other States however no such freedom of expression or scholarship is permitted. Sincere differences of opinion exist as to whether this problem is best dealt with by education and constant vigilance or by the influence of legislation" (para. 49).

efficiency of memory laws is another issue; even well-intentioned laws may not produce the desired effects or may even have unintended consequences.

Regardless of the final stance adopted, the law – whether criminal or otherwise – may not necessarily be the sole or most effective means to "[halt] or reverse a societal erosion process like the one we are currently experiencing".[115] This will be exemplified by the section below, where we elaborate on contemporary challenges to the prevailing narratives of the past.

III. Key Observations

The analysis of the varieties of law and memory in Brazil and Germany shows that both countries approached their respective pasts in distinct ways. Brazil continues to grapple with the legacy of its Amnesty Law, while Germany addressed the Nazi injustice in a more restrictive manner. One notable observation is the temporal dimension. Germany did not immediately confront its horrendous past; instead, several decades passed before "explicit" memory laws were adopted. In the German post-war period, there was for a long time no deliberate engagement with the past within society. Explicit references to Nazism in legal provisions were only introduced relatively late. Transitional justice measures were not immediately introduced after the end of the dictatorship in Brazil either. The National Truth Commission was established just twenty-four years after the process of redemocratization. Even thirty-six years after the enactment of the Brazilian Constitution, it is still impossible to demand criminal liability of those involved in gross human rights violations during the dictatorship. Another observation is that even punitive memory laws cannot necessarily halt the rise of right-wing ideology and can be manipulated for different purposes. Being aware of these contextual elements is important in order to better understand the contemporary developments of the disputes around the remembrance of the past in both countries.

D. The Instrumentalization of the Past by Right-Wing Forces

After analyzing the varieties of law and memory in Germany and Brazil, this section explores contemporary challenges in remembering the past in both countries. In doing so, we return to the core assumption introduced at the beginning of the paper: both countries are confronting similar challenges related to the growing instrumentalization of the past. This part will contrast the strategies employed by right-wing forces in Brazil and Germany. This evaluation will reveal the extent to which the strategies overlap. In the last section, we aim to demonstrate the impact these disputes have on society at large and to identify measures that should be taken to halt the populist capture of the discourse.

115 *Oliver Tolmein,* Kommunikatives Tabu ohne Zukunft? § 86a StGB und das Höcke-Urteil des Landgerichts Halle, Verfassungsblog, 31.05.2024, https://verfassungsblog.de/kommunikatives-tabu-ohne-zukunft/ (last accessed on 20 September 2024), DOI: 10.59704/3a7f489640fb7797.

I. Disputes around the Memory of the Brazilian Dictatorship

The limits of the narrative regarding the memory of the dictatorship in Brazil has been constantly disputed. The issue of freedom of speech and parliamentary immunity in a case of gross violation of human rights was brought to public attention when the then congressman Jair Bolsonaro held a speech during the impeachment process against ex-president Dilma Rousseff, in 2016.[116] He dedicated his vote to the military officer and known torturer Carlos Alberto Brilhante Ustra, who was the head of the infamous military intelligence unit DOI-CODI during the dictatorship and responsible for torturing Dilma Rouseff. Ustra is one of the main torturers expressly named in the National Truth Commission final report and was recognized in 2014 by the Superior Court of Justice as a torturer.[117] Nonetheless, neither the courts nor the Public Prosecutor's Office[118] acted in the sense of recognizing any breach of the law, even though apology for crime is punishable. Moreover, the ethics council of the Chamber of Deputies dismissed the case of breach of parliamentary decorum.[119] No institution really started a procedure for the apologetic discourse for a well-known torturer. And the notion of protection by parliamentary immunity here was never challenged.

Following these patterns, during his mandate as President, Bolsonaro intended to celebrate the 1964 coup as being a revolution in several years, and this was always brought to court. There were decisions in both directions: allowing the celebrations and prohibiting them.[120] In the cases when he was prohibited from celebrating the coup, the justice recognized that this was not in accordance with the democratic order. Yet other decisions alleged there was no offense to democracy. This, again, indicates a lack of consensus on what can

116 *Jessica Holl,* Bolsonaro and Transitional Justice Verfassungsblog, 27.09.2022*,* https://verfassungsblog.de/bolsonaro-and-transitional-justice/ (last accessed on 19 September 2024), DOI: 10.17176/20220927-230730-0.

117 Jusbrasil, STJ reconhece responsabilidade civil do Coronel Ustra por torturas praticadas na ditadura militar, https://www.jusbrasil.com.br/noticias/stj-reconhece-responsabilidade-civil-do-coronel-ustra-por-torturas-praticadas-na-ditadura-militar/156580775 (last accessed on 17 August 2024), See also: *Pádua Fernandes*, Ilícito Absoluto: A família Almeida Teles, o coronel C.A. Brilhante Ustra e a tortura. São Paulo 2023.

118 For the proceedings that were archived, see: Supremo Tribunal Federal, PET 6131, https://portal.stf.jus.br/processos/detalhe.asp?incidente=4979168 (last accessed on 20 September 2024); and Supremo Tribunal Federal, HC 234266, https://portal.stf.jus.br/processos/detalhe.asp?incidente=4973336 (last accessed on 20 September 2024).

119 *Daniel Silveira,* OAB-RJ vai ao STF pedir a cassação do mandato de Jair Bolsonaro, G1 Globo, 19.04.2016,
https://g1.globo.com/rio-de-janeiro/noticia/2016/04/oab-rj-vai-ao-stf-pedir-cassacao-do-mandato-de-jair-bolsonaro.html (last accessed on 20 September 2024).

120 BBC, Brazil: Bolsonaro's coup celebration barred by judge, 30.03.2019, https://www.bbc.com/news/world-latin-america-47757616 (last accessed on 19 September 2024); see also *Mauricio Savares / Diane Jeantet*, 'Strength and honour': Bolsonaro government celebrates military coup anniversary, The Sydney Morning Herald, 01.04.2021, https://www.smh.com.au/world/south-america/strength-and-honour-bolsonaro-government-celebrates-military-coup-anniversary-20210401-p57fuj.html (last accessed on 19 September 2024).

or should be celebrated in relation to the dictatorship. And Bolsonaro used this lack of consensus to spread the version that the dictatorship was necessary to prevent a communist takeover in the country.

Even during the current Lula government, the issue of celebrating the date of the coup or remembering it as a problematic event in Brazilian history remains controversial. In 2024, the year that marked sixty years from the Coup, no event related to it was allowed within the government, being it a celebration of the alleged "revolution" or an event to remember the human rights violations perpetrated during the dictatorship.[121] This led to the government ministers issuing personal speeches on the day[122], but even events that were already planned by the Ministries had to be canceled.[123] The main movements to remember the victims of the dictatorship happened within Universities, while in Military Clubs, such as the one in Rio de Janeiro, there was a lunch to celebrate the so-called "revolution".[124]

A different case involves Brazil's largest Bank, Itaú. The Bank distributed to its clients a calendar for the year of 2014, in which March the 31st was presented as the day of the revolution of 1964 – the day of the military coup that led to more than 20 years of dictatorship. Here the case did not go to court because the Public Prosecutor's Office signed with the Bank a TAC – conduct adjustment term or "termo de ajustamento de conduta" in Portuguese – in which the Bank agreed to compensate the social damage it caused.[125]

Based on those cases, it is possible to note that even without a specific memory law, there is an ongoing legal debate in Brazil about the limits of the freedom of expression regarding the events surrounding the civil-military dictatorship. On the one hand, there is an attempt of conservative and military-friendly groups to push for a narrative that ignores the human rights violations perpetrated during the dictatorship. And, on the other side, civil

121 *Débora Bergamasco*, Governo quer que aniversário de 60 anos do golpe militar passe em branco, 07.03.2024, https://www.cnnbrasil.com.br/blogs/debora-bergamasco/politica/governo-quer-que-aniversario-de-60-anos-do-golpe-militar-passe-em-branco/ (last accessed on 19 September 2024).

122 G1, Com veto de Lula a cerimônias, ministros se manifestam sobre os 60 anos do golpe militar de 1964, 31.03.2024, https://g1.globo.com/politica/noticia/2024/03/31/com-veto-de-lula-a-cerimonias-sete-dos-38-ministros-se-manifestam-sobre-os-60-anos-do-golpe-militar-de-1964.ghtml (last accessed on 19 September 2024).

123 *Paulo Motoryn,* Ministério dos Direitos Humanos pagou R$ 200 mil para acao dos 60 anos do golpe militar de 1964 que Lula cancelou, Intercept, 01.04.2024, https://www.intercept.com.br/2024/04/01/ministerio-dos-direitos-humanos-pagou-r-200-mil-para-acao-dos-60-anos-do-golpe-militar-de-1964-que-lula-cancelou/ (last accessed on 20 September 2024).

124 *Duda Monteiro de Barros*, Militares fazem evento em celebração aos 60 anos da ditadura, Veja, 08.05.2024, https://veja.abril.com.br/brasil/militares-fazem-evento-em-celebracao-aos-60-anos-da-ditadura (last accessed on 20 September 2024).

125 Ministério Público Federal, Decisão nº 7, de 19 de janeiro de 2016, Diário do Ministério Público Federal Eletrônico 2016, p. 3, http://bibliotecadigital.mpf.mp.br/bdmpf/bitstream/handle/11549/78228/DMPF_EXTRAJUD_20160204.pdf (last accessed on 20 September 2024); and Sindicato dos Bancários,
https://spbancarios.com.br/02/2014/agenda-do-itau-chama-golpe-de-revolucao (last accessed on 20 September 2024).

society groups, members of the Public Prosecutor's Office and politicians that are engaged with human rights topics try to foster the understanding that narratives that ignore the gross human rights violations perpetrated during the dictatorship violate by themselves the human rights.

Nonetheless, it is also interesting to note that the same debate, which presents freedom of speech as an element that safeguards all kinds of discourse – even those apologetic to human rights violations – and which was dismissed by the Brazilian Supreme Court in 2003 with the Ellwanger case, continues to surface when the memory of the dictatorship is debated in Brazil. And here, there is no mention of the Ellwanger case. The fact that the case was not expressly mentioned may be related to the argument that antisemitism should be considered as a form of racism under Brazilian law. Thus, the main debate in the case was not about the possibility of worshiping Nazi Germany or any authoritarian regime. In this sense, it would be difficult to claim that the arguments leading to the decision in the Ellwanger case could be directly applied to discussions on the limits of freedom of expression with regard to the Brazilian dictatorship. Nevertheless, it could be recognized that freedom of expression may be limited in certain cases, namely to prevent the glorification of authoritarian governments.

Beyond this, the Brazilian transition to democracy is usually criticized by being insufficient and the still existing Amnesty Law is considered to be the main factor that limits the reach of the transitional justice policies that managed to be implemented.[126] This also leads to one of the main problems Brazil has to face has to do with the image a great part of the population has of the dictatorship. Although the final report of the National Truth Commission clearly outlines the commitment of torture and forced disappearance by agents of the dictatorship, until today for eighteen percent of the Brazilian population it does not matter if there is a dictatorship or a democracy and seven percent actually prefer a dictatorship.[127] Moreover, the Armed Forces are the most trusted institution in Brazil despite falling confidence on them.[128] Exactly this positive image of the military and the frequent disregard to democratic institutions can facilitate the assimilation by the population of political speeches praising the dictatorship.

However, this is not the only constellation that may favor the outbreak of an extreme right nostalgia for authoritarian governments. This may even happen in countries that adopted memory laws in their most stringent form. Following this, the challenges posed

126 *José Carlos Moreira da Silva Filho*, A ambiguidade da anistia no Brasil: memória e esquecimento na transição inacabada (2011).

127 *Artur Nicoceli*, Datafolha: 71% dos brasileiros acreditam que a democracia é a melhor forma de governo; 7% preferem a ditadura, G1 Globo, 30.03.2024, https://g1.globo.com/politica/noticia/2024/03/30/datafolha-forma-de-governo-sabado-30-de-marco.ghtml (last accessed on 20 September 2024).

128 G1, Datafolha: confiança nos militares atinge pior índice desde 2017, 15.09.2023, https://g1.globo.com/politica/noticia/2023/09/15/datafolha-confianca-nos-militares-atinge-pior-indice-desde-2017.ghtml (last accessed on 20 September 2024).

to the German remembrance culture will be examined. Despite the notable differences between both countries, we can identify some similarities concerning the misuse of memory in the speeches of far-right parties.

II. The Times They Are Changing in Germany?

The German case illustrates that there is perhaps no definitive consensus on how to "appropriately" remember the past, as recent developments demonstrate. Official narratives are increasingly being challenged by right-wing groups, which has led to a broader societal debate on what aspects of history should be remembered and how they should be commemorated. This growing tension suggests that new strategies may be necessary to address the threats posed by right-wing actors.

1. The "Enough is Enough"-Narrative

The German remembrance of the Nazi atrocities does not remain unchallenged. While, for example, outright Holocaust denial is relatively rare within German society, other strategies are employed by right-wing politicians. In doing so, these actors have one goal: to downplay the significance of Nazi injustice. The AfD for example strategically promotes an "enough is enough"-narrative, framing current approaches to remembrance of Nazism as overly exaggerated. In contrast, they advocate for an "expansion" of the culture of remembrance ("Erinnerungskultur")[129], urging a greater emphasis on the "positive aspects of German history".[130] More drastically Björn Höcke claimed that we need "a 180-degree turn in terms of memory politics".[131] The politician further criticizes that "[i]nstead of introducing the next generation to the great benefactors, the well-known, world-changing philosophers, the musicians, the brilliant explorers and inventors that we have so many of [...] German history is being made to look bad and ridiculous".[132] Moreover, the AfD's foundational program reflects a strong emphasis on a "heroic" commemoration approach, where it is stated that "[t]he current tendency to narrow German memory culture exclusively to the era of National Socialism must be overcome, in favor of embracing a broader perspective of history. Such an approach should encompass the positive and identity-forming aspects

129 The term "Erinnerungskultur" or culture remembrance became popular in the 1990s and means broadly speaking specific ways how a community deals with its past, see e.g. *Hans Henning Hahn / Heidi Hein-Kircher / Anna Kochanowska-Nieborak*, Erinnerungskultur und Versöhnungskitsch, Marburg 2008.

130 *Tina Handel*, Streit um die Zukunft des Erinnerns, ARD, 10.08.2024, https://www.tagesschau.de/inland/innenpolitik/gedenkstaetten-konzept-bundesregierung-100.html (last accessed on 20 September 2024).

131 Author's own translation, ZEIT Online, Die Höcke-Rede von Dresden in Wortlaut-Auszügen, 18.01.2017, https://www.zeit.de/news/2017-01/18/parteien-die-hoecke-rede-von-dresden-in-wortlaut-auszuegen-18171207 (last accessed on 5 February 2024).

132 Ibid.

of German history as well".[133] Alexander Gauland has further argued that Germany's Nazi past amounts to nothing more than "bird droppings" in a thousand years of "glorious" German history.[134] Nazism is therefore viewed as just another chapter in history and should no longer remain the central pillar of the German remembrance practices. Additionally, the politician argues that "[w]e no longer need to be reminded of those twelve years. They no longer affect our identity today. [...] If the French are rightly proud of their emperor and the British of Nelson and Churchill, we have the right to be proud of the achievements of German soldiers in both World Wars".[135] This closely aligns with the AfD's call to revive "Nationalstolz", advocating for a renewed sense of national pride that celebrates, rather than condemns, Germany's past.[136] The party suggests that the current focus on the nation's horrific past amounts however to an obstacle.[137] In that sense, the AfD suggests moving away from what they describe as the "cult of guilt".[138] These illustrative examples hint at what the AfD is aiming at, once upon gaining (even more) power. How dangerous such statements are in the contemporary climate can be exemplified by that increased attacks on concentration camp facilities.[139] Heads of concentration camp memorials reiterate, "[..] that the societal consensus on remembrance politics is increasingly being questioned and

133 Author's own translation, AfD Grundsatzprogramm, note 101.

134 Frankfurter Allgemeine Zeitung, Gauland: Hitler nur „Vogelschiss" in deutscher Geschichte, 02.06.2018, https://www.faz.net/aktuell/politik/inland/gauland-hitler-nur-vogelschiss-in-deutscher-geschichte-15619502.html (last accessed on 20 February 2024).

135 Author's own translation, see *Tessa Högele,* Darum ist es problematisch, wenn Gauland sagt, wir sollten stolz auf die Wehrmacht sein, Zeit, 15.09.2017, https://www.zeit.de/zett/politik/2017-09/darum-ist-es-problematisch-wenn-gauland-sagt-wir-sollen-stolz-auf-deutsche-wehrmacht-sein (last accessed on 14 June 2024).

136 E.g. The increased emphasis on the "positive" aspects of German history is, according to the AfD, intended to simultaneously strengthen national pride ("Nationalstolz"), which is seen as a necessary component to ensure "national unity", see for instance Lpb, Leitantrag der Bundesprogrammkommission der Alternative für Deutschland zum 21. Deutschen Bundestag zum 16. Bundesparteitag der AfD in Riesa 11. bis 12. Januar 2025 (Stand 28 November 2024), https://www.bundestagswahl-bw.de/fileadmin/bundestagswahl-bw/2025/Wahlprogramme/AfD_Leitantrag-Bundestagswahlprogramm-2025.pdf (last accessed on 7 January 2025), p. 83.

137 Deutschlandfunk, Wie zeitgemäß ist der Nationalstolz?, 23.03.2001, https://www.deutschlandfunk.de/wie-zeitgemaess-ist-der-nationalstolz-100.html (last accessed 20 September 2024).

138 Author's own translation, *Martin Debes,* Alternative für deutsche Geschichte, Zeit Online, 24.09.2023, https://www.zeit.de/2023/40/erinnerungskultur-afd-nationalsozialismus-thueringen-nordhausen-wahlkampf/seite-2 (last accessed on 6 February 2024), see also *Stefan Locke,* Der Richter und sein Höcke, Frankfurter Allgemeine Zeitung, 24.01.2017, https://www.faz.net/aktuell/politik/inland/umstrittene-rede-der-richter-und-sein-hoecke-14743898.html (last accessed on 13 February 2024).

139 Author's own translation, Post by Stiftung Gedenkstätten Buchenwald und Mittelbau Dora on X, "We are tired of it. Hardly a week goes by now without neo-Nazi graffiti in the #memorial #Buchenwald. Yesterday evening, graffiti and a swastika were found in the memorial's parking lot", see https://twitter.com/Buchenwald_Dora/status/1699347367936360537 (last accessed on 20 September 2024).

undermined by the normalization of right-wing discourses".[140] This is quite problematic because National Socialist ideology is becoming increasingly an integral part of public discourse.[141]

2. Fragmenting Social Consensus?

Alarmingly, there appears to be a tendency within broader society to advocate for leaving the "dark chapter of history" behind, which plays into the hands of right-wing forces who instrumentalize the past. There is a noticeable inclination towards the sentiment of wanting again to "draw a line under history" ("Schlussstrich-Debatte").[142] For instance, surveys conducted during the 75th anniversary of the liberation of Auschwitz revealed that a significant portion of the population expressed a desire to "move on" and focus on the future.[143] Most of those surveyed were affiliated with the AfD, though not all. Another troubling trend is the increase in radicalization during crises, as seen during the COVID-19 pandemic. During this period, the notorious "Querdenker"-movement emerged, often linked with right-wing ideologies, who instrumentalized the past in a troubling manner.[144] Members of this movement frequently relativized historical injustices by comparing their own experiences to those of the victims of the Nazi regime[145], claiming that they faced

140 *Lucie Wittenberg*, KZ-Gedenkstätten alarmiert: "Stärkere Präsenz von Rechtsradikalen an unseren Orten", RND, 22.09.2023, https://www.rnd.de/politik/kz-gedenkstaetten-verzeichnen-mehr-vandalismus-und-hakenkreuz-schmierereien-TU2OMFA2X5DOXMK6ACPEFUN5YA.html (last accessed on 6 February 2024).

141 *Jens-Christian Wagner,* Die Maske der Selbstverharmlosung, Deutschlandfunk, 21.07.2024, https://www.deutschlandfunkkultur.de/vor-landtagswahl-in-thueringen-bjoern-hoecke-bedient-sich-weiter-der-ns-rhetorik-dlf-kultur-1b4b51ba-100.html (last accessed on 19 September 2024); *Sarah Zerback*, Warum Björn Höcke ständig Grenzen des Sagbaren übertritt, Deutschlandfunk, 18.04.2024, https://www.deutschlandfunk.de/prozessauftakt-gegen-hoecke-afd-interview-dierk-borstel-extremismusforscher-dlf-b5e24f07-100.html (last accessed on 19 September 2024).

142 *Wolfgang Buschfort,* Interestingly, we somewhat observe a revival of the "Schlusstrich"-sentiment which was already present in the 1950s, Schlussstrich statt Sühne, Bpb, 25.07.2012, https://www.bpb.de/themen/deutschlandarchiv/139635/schlussstrich-statt-suehne/ (last accessed on 19 September 2024); see also *Alexander Fürniß,* Irgendwann muss auch mal Schluss sein! Oder?, Katapult Magazin, 26.01.2024, https://katapult-magazin.de/de/artikel/irgendwann-muss-auch-mal-schluss-sein-oder (last accessed on 13 August 2024).

143 Infratest, 75. Jahrestag der Befreiung von Auschwitz, https://www.infratest-dimap.de/umfragen-analysen/bundesweit/umfragen/aktuell/75-jahrestag-der-befreiung-von-auschwitz/ (last accessed on 19 September 2024); see also DW Reporter, Nie wieder! Kampf um die Erinnerungskultur in Deutschland, 04.08.2024,

https://www.youtube.com/watch?v=jSASqt5qzQM (last accessed on 19 September 2024).

144 *Patrick Gensing*, NS-Relativierung verfestigt sich, ARD, 09.11.2021, https://www.tagesschau.de/investigativ/antisemitismus-querdenken-ns-verharmlosung-101.html (last accessed on 19 September 2024).

145 Author's own translation, "In MEMO IV/2021, the responses of participants were compared based on their attitudes towards conspiracy theories, and it was found that those who agreed with conspiracy narratives had engaged less intensively with the history of National Socialism and

similar "restrictions". It has, however, proved difficult to legally pursue these actions, such as wearing yellow star badges with the "not vaccinated" slogan during protests.[146] These cases, however, illustrate how quickly public sentiment can shift and how such movements may normalize these comparisons without facing (legal) consequences.

III. Same Same but Different

Discussing past mass atrocities often triggers conflicts about who holds the authority of interpretation. Some states have actively acknowledged past human rights violations, while others either avoid confronting them, distort the truth, or even glorify their past actions. Germany is frequently cited as a prime example of a country that has not "glossified" its horrific crimes committed during Nazism. In contrast, Brazil has often shied away from officially admitting past injustices. These starting points continue to affect both countries to this day. However, what we observe in both countries is that the debate over how to "appropriately" remember the past is increasingly dominated by right-wing forces. In our analysis, we closely examined how this is unfolding and how the societal majority may respond to such threats.

As seen in both experiences, although the contexts may vary, the way far-right groups challenge historical narratives is often quite similar. To illustrate this point, we provide several examples. As mentioned earlier, in Brazil, Bolsonaro praised the notorious torturer Ustra. Moreover, there were several attempts to celebrate the coup that led to the Brazilian dictatorship as a "revolution". In Germany, there were attempts to downplay the horrendous crimes during Nazism, as exemplified by statements rendered by AfD politician Maximilian Krah "Our ancestors were not criminals! [They] were great men and women, they were heroes, they were role models, and each of us is called to strive to live up to the standards of our ancestors!".[147] This is a blatant attempt to promote the narrative of the "brave Germans", a strategy to evoke patriotic feelings. In both cases, there is an effort to glorify

more frequently held revisionist views", see Multidimensionaler Erinnerungsmonitor (MEMO) Studie V (2022), p. 32, https://www.stiftung-evz.de/assets/1_Was_wir_f%C3%B6rdern/Bilden/Bilden_fuer_lebendiges_Erinnern/MEMO_Studie/MEMO_5_2022/evz_brosch_memo_2022_de_final.pdf (last accessed on 20 September 2024), p. 32.

146 Adults and children six years and older, "classified" as Jews by the Nuremberg Laws, were mandated to display the yellow star "clearly on the left side of their garments" from September 1941 onward, see *Annelie Kaufmann,* Ist das Tragen von "Ungeimpft"-Sternen strafbar?, LTO, 02.03.2022, https://www.lto.de/recht/hintergruende/h/ungeimpft-judenstern-strafbar-volksverhetzung-verharmlosung-holocaust-olg-entscheidungen (last accessed on 19 September 2024), see also *Sören Lichtenthäler*, Volksverhetzung durch Verwendung eines gelben «nicht geimpft»-Sterns auf «Telegram», RSW Beck, 07.06.2022, https://rsw.beck.de/aktuell/daily/magazin/detail/volksverhetzung-durch-verwendung-eines-gelben-nicht-geimpft--sterns-auf-telegram (last accessed on 19 September 2024).

147 Author's own translation, see *David Gebhard / Julia Klaus / Ulrich Stoll*, Wie geschichtsvergessen ist die AfD?, ZDF, 20.04.2024, https://www.zdf.de/nachrichten/politik/deutschland/afd-geschichtsvergessen-100.html (last accessed on 19 September 2024).

historical events and individuals linked to severe human rights violations. Rather than acknowledging past mass atrocities, the focus is shifted toward the purportedly "positive" aspects of these periods.

A key factor remains, in any case, how society responds to these attempts to "reinterpret" the past. While the previous part raises the question of how politics can respond to the right-wing threats, this section advocates for more critical self-reflection which extends beyond the law.[148] In that sense, the societal majority should become more active in responding to the right-wing capture of the discourse. So far, actively combating this phenomenon seems rare, which will be elaborated further below.

As stressed along the text, some projects by the Brazilian government tried to raise attention for the gross human rights violations perpetrated during the dictatorship. However, those projects reached a limited public and have not been completely restructured since Bolsonaro's government ended.[149] This is a possible obstacle towards creating instruments to bring the remembrance of human right violations perpetrated during the dictatorship closer to the population. The importance of democracy and its institutions need to be constantly highlighted, in order to counter the anti-institutionalist discourse.

The German case demonstrates that, instead of assuming the country has fully addressed its past injustices, there is a need to continually redefine what active remembrance of past injustices entails. The official recognition of Nazi injustices is often regarded as a crucial step in addressing and reconciling with history. However, upon closer examination, the situation is more complex. While it is true that Germany has so far resisted promoting a glorified official version of its history, the often promoted narrative of "coming to terms with the past" is far from flawless, warranting a more critical reflection.[150] First and

148 See Adorno citation "Education would only make sense if it is aimed at fostering critical self-reflection", *Theodor W. Adorno,* Erziehung nach Auschwitz, in: Gerd Kadelbach (ed.), Erziehung zur Mündigkeit, Vorträge und Gespräche mit Hellmuth Becker 1959 – 1969, Frankfurt am Main 1970, p. 93.

149 *Alexia Massoud*, Lula recreates commission on political disappearances, Brazilian Report, 04.07.2024, https://brazilian.report/liveblog/politics-insider/2024/07/04/lula-political-disappearances-commission/ (last accessed on 20 September 2024).

150 See e.g. Frankfurter Allgemeine Zeitung, Speech by Antony Blinken, current US Secretary of the State, who talks about the Tulsa Race Massacre and Biden's statement on the 100th anniversary of the tragedy, Antony Blinken bezeichnet Deutschland als "Vorbild" in der Vergangenheitsbewältigung, 23.06.2021, https://www.faz.net/aktuell/politik/ausland/antony-blinken-in-berlin-deutschland-vorbild-in-vergangenheitsbewaeltigung-17403550.html (last accessed on 6 February 2024); see for a critical stance, *Susan Neiman*, author of Learning from the Germans, who once applauded Germany for its efforts to confront its past, now retracts most of her arguments, see e.g., *Derek Scally,* I wanted to revive Jewish intellectual life in Germany, but now I don't think they really want it, Irish Times, 18.03.2024, https://www.irishtimes.com/world/europe/2024/03/18/susan-neiman-i-wanted-to-revive-jewish-intellectual-life-in-germany-but-now-i-dont-think-they-really-want-it/(last accessed on 20 March 2024).

foremost, the notion of "coming to terms with the past" is itself problematic.[151] This phrase might suggest that merely remembering historical injustices is sufficient – if not to undo the injustice, then at least to prevent their recurrence. This concept closely aligns with the "never again" narrative, though its precise meaning is often debated and can differ depending on the context.[152] Some critics describe current commemoration practices however as a form of "remembrance theater" implying that it is more performative than genuine.[153] Instead of merely commemorating the past with ceremonial acts, it is crucial for contemporary societies to delve deeper and ask difficult questions: How did "ordinary" people become perpetrators? How do we explain the phenomenon of not-so-innocent "bystanders"? These questions demand a more profound engagement with history that goes beyond the surface, challenging both individuals and society as a whole to critically reflect on the level of large-scale complicity during the Nazi era.[154]

Furthermore, contemporary Brazilian and German societies are more pluralistic, with individuals from diverse backgrounds – many of whom have faced significant injustices themselves –now having a greater voice in society. While right-wing forces neglect such diversity and aim to undermine efforts towards greater representation, this should not deter measures to ensure more inclusive remembrance.[155] In any case, this challenges contemporary remembrance practices and raises questions of inclusivity and diversity. Some hence argue that we need to shift towards "multidirectional memory".[156] Only then marginalized groups can be adequately represented vis-à-vis the majority.[157] Therefore, more forums for discussion need to be established. Without them, there is a risk that remembrance will be perceived as imposed, failing to acknowledge other forms of suffering. A more thorough

151 In his speech at the Yad Vashem memorial, Frank-Walter Steinmeier stipulated, among other things, that "Never again, nie wieder, that is why there cannot be an end to remembrance", Der Bundespräsident, Fifth World Holocaust Forum at Yad Vashem, 23.01.2020, https://www.bundespraesident.de/SharedDocs/Reden/EN/Frank-Walter-Steinmeier/Reden/2020/01/200123-World-Holocaust-Forum-Yad-Vashem.html (last accessed on 7 January 2025).

152 *Mattias Kumm / Liav Organ*, Never Again: The Holocaust, Trauma and Its Effect on Constitutional and International Law, Verfassungsblog, 22.07.2024, https://verfassungsblog.de/category/debates/never-again-never-again/ (last accessed on 13 August 2024).

153 *Michal Bodemann*, Gedächtnistheater: Die jüdische Gemeinschaft und ihre deutsche Erfindung, Berlin 2001; See also *Sieglinde Geisel*, Die Utopie der radikalen Vielfalt, Deutschlandfunk Kultur, 01.10.2018, https://www.deutschlandfunkkultur.de/max-czollek-desintegriert-euch-die-utopie-der-radikalen-100.html (last accessed on 20 September 2024).

154 *Harald Welzer / Sabine Moller / Karoline Tschuggnall*, »Opa war kein Nazi« Nationalsozialismus und Holocaust im Familiengedächtnis, Berlin 2002. For a criticism for the methodology used in the aforementioned survey, see interview *Fürniß*, note 142.

155 See e.g. "The debate surrounding the supposedly necessary 'decolonization' of our culture, which is accompanied by a demonization of the 'white man', calls into question the very foundation of our cultural identity as a whole. The AfD presents itself as the only political force opposing this dismantling of our historical-cultural identity", Lpb, note 136, p. 83.

156 *Michael Rothberg*, Towards Multidirectional Memory, Stanford 2009.

157 Memo Study STUDIE V (2022), note 143, p. 12.

analysis of this topic would however go beyond the extent of our comparison and requires further research.

E. Concluding Remarks

There are numerous reasons why Brazil and Germany have taken different approaches to memory laws and transitional justice. The confrontation with the past is at times painful, and different trajectories were taken in Brazil and Germany. Internal direct confrontation has in none of the cases occurred immediately. Brazil grapples until today with the Amnesty Law, and the transnational justice measures suffer from several shortcomings. While Germany has even adopted punitive memory laws, among others, the efficiency is hard to measure.

All those differences are quite frequently debated and studied within the domestic or regional contexts of both countries. A direct comparison between the two jurisdictions is less common. Their distinct approaches to the remembrance of past injustice can however offer valuable lessons, especially when evaluating comparable challenges both countries face, such as disputes over historical narratives, often driven by right-wing actors. Even coming from quite different historical contexts, Brazil and Germany face the expansion of right-wing ideology and politicians that praise, belittle or use the aesthetics of the former authoritarian or totalitarian regimes in order to gain the attention and sympathy of part of the electorate. To some degree, this strategy seems to be working, as Bolsonaro got elected in Brazil, referencing apologetic discourses of one of the main tortures of the dictatorship, and the AfD appears to be gaining more sympathizers, judging by the results of recent elections.[158]

It is possible to conclude that regardless of how a country deals with its past, there will always be a risk that sensitive agendas such as the remembrance of the past can be captured by populist rhetoric. Of course, the way a specific society deals with its past and the extent of reflection it has developed to make a difference in terms of the extension of this capture, its effects and the responses provided by democratic institutions. The main conclusion from this comparative exercise between Brazil and Germany is that democracy demands permanent vigilance from society, in the sense of being alerted to attempts of authoritarian regression. Democracy needs to be understood as a permanent process, inherently subject to setbacks. Therefore, society must remain vigilant to prevent any regression to reach such proportions as to structurally jeopardize the progress made so far. To mitigate further friction, the continued application of transitional justice strategies could be a valuable tool

158 Results Election, see European Parliament, https://results.elections.europa.eu/de/deutschland/ (last accessed on 14 June 2024); see also Wahlergebnisse Landtagswahlen 2024, https://www.wahlen.sachsen.de/landtagswahl-2024-wahlergebnisse.php (last accessed on 19 September 2024), Wahlergebnisse Landtagswahlen Thüringen, https://wahlen.thueringen.de/datenbank/wahl1/wahl.asp?wahlart=LW&wJahr=2024&zeigeErg=Land (last accessed on 19 September 2024).

for strengthening democratic institutions and practices, even if it means these strategies are employed long after redemocratization.

In conclusion, comparing Brazil and Germany's varieties of law and memory reveals significant differences as well as shared challenges. Both countries' experiences provide valuable insights into how societies confront their past and navigate the complexities of historical remembrance of gross injustice. The analysis demonstrates that the "appropriate" commemoration of past events, in as far from what to remember and how to remember it, remains a challenge. Ultimately, this study highlights that there is no universal template for addressing historical wrongs, emphasizing the unique context and nuanced strategies required for each nation's journey through its past.