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Symposium: Varieties of Constitutionalism: Contestations of Liberalism in Comparative Constitutional Law

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SYMPOSIUM

Varieties of Constitutionalism: Contestations of Liberalism in Comparative Constitutional Law

By *Michael Riegner*[*]

Abstract: This overview article introduces the special issue on "Varieties of Constitutionalism: Contestations of Liberalism in Comparative Constitutional Law", which concludes a collaborative research project with the same theme. The project mapped liberal, illiberal, and transformative varieties of constitutionalism and assessed contestations of, and alternatives to, liberal constitutionalism in Germany, Brazil, and the respective regional contexts. This introductory article summarizes findings from the project, discusses its contributions to extant literature, and points out avenues for future research. It argues that, firstly, from a global comparative perspective, constitutionalism does not come in one but several varieties, including liberal, social, transformative, directive, illiberal, and authoritarian types. Secondly, these ideal-typical varieties come in multiple variants, localized adaptations, and hybrid combinations in actual constitutional reality, as our case studies from Brazil and Germany illustrate. Thirdly, to remain resilient in times of global polycrisis, democratic constitutionalism not only needs to resist external pressures and shocks, but also adapt to legitimate critiques, changing contexts, and new environments full of challenges. Understanding constitutionalism in its varieties offers a comparative framework to distinguish between these two paths, and thus contributes to constitutional resilience at home and abroad.

Keywords: Varieties of constitutionalism; Transformative Constitutionalism; Autocratic Legalism; Authoritarianism; Populism; Constitutional Resilience

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A. Introduction: Between transformation and backsliding in Brazil, Germany and beyond

Liberal constitutionalism is under pressure. The wave of transitions to constitutional democracy and market economy in the 1990s marked the end of the Cold War, but not the end of history. Today, economic crises, increasing inequalities, the rise of authoritarian regimes, the resurgence of populism, and democratic backsliding pose renewed challenges to liberal constitutionalism. Autocratic legalism and constitutional authoritarianism are promoted as alternative models of governance. The distinctive constitutional experiences of the Global South, shaped by postcolonial contexts of greater inequality and poverty, have pluralized the global constitutional canon, and transformative constitutionalism has been hailed as a Southern counter-concept to Northern liberal constitutionalism.[1]

Against this background, a group of German and Brazilian researchers set out in 2020 to investigate contestations of, and potential alternatives to, liberal constitutionalism in a collaborative research project, entitled "Varieties of Constitutionalism: Contestations of Liberalism in Comparative Constitutional Law" (VACON) and co-funded by the German national science foundation DFG and its Brazilian counterpart CAPES. This special issue presents selected findings from the project and complements earlier publications, including two special issues in this journal, a joint blog symposium, and a series of individual articles and chapters.[2]

The VACON project pursued three main objectives: First, our "varieties" framework aimed to pluralize comparative constitutional law and to capture variation within and beyond the liberal constitutional type, especially with regard to transformative and authoritarian varieties. The second objective was to get a better understanding of transformative and authoritarian contestations of liberal constitutionalism in past and present Brazil and Germany and to assess the extent to which these two cases fit into global patterns and frameworks described in extant literature. Thirdly, in bringing together scholars, case studies, and perspectives from Brazil and Germany, the project sought to practice what is often preached, namely genuine "slow comparison", i.e., a longer-term, context-sensitive, and

1 For an overview of these debates, see only *Philipp Dann / Michael Riegner/ Maxim Bönnemann (eds.)*, The Global South and Comparative Constitutional Law, Oxford 2020; *Ran Hirschl*, Comparative Constitutional Law: Reflections on a Field Transformed, in: Madhav Khosla / Vicki C. Jackson (eds.), Redefining comparative constitutional law, Oxford 2025, p. 12.

2 See symposium on "The Directive Constitution in the Varieties Constitutionalism" in special issue 3-2023, World Comparative Law 56 (2023), and the collaboration with the autocratic legalism project in special issue 3-2022, World Comparative Law 55 (2022). See also our blog symposium on the 2022 elections in Brazil, *Philipp Dann / Conrado Hübner Mendes / Michael Riegner*, Bolsonaro at the Ballot Box, Verfassungsblog, 20.09.22,https://verfassungsblog.de/category/debates/bolsonarism-at-the-ballot-box-debates/ (last accessed on 20 December 2024), DOI: 10.17176/20220920-230907-0; The full range of project activities and outputs are documented at our project website https://www.uni-erfurt.de/en/faculty-of-economics-law-and-social-sciences/fields-of-study/law/administrative-law-and-public-international-law/projekte/varieties-of-constitutionalism (last accessed on 20 December 2024).

iterative research collaboration among equal partners from North and South. Focusing on Brazil and Germany not only ensured contextual expertise, but also promised comparative insights from two major constitutional democracies beyond the anglophone world that share important post-authoritarian legacies, socio-political challenges, and global entanglements.

This overview article introduces the special issue, summarizes findings from the project, discusses its contributions to extant literature, and points out avenues for future research. It makes three related arguments: Firstly, when analyzed from a global comparative perspective, constitutionalism does not come in one but several varieties. We can identify a (limited) number of global varieties of constitutionalism, including liberal, social, transformative, directive, illiberal, and authoritarian types, that help capture the patterned diversity of distinct constitutional experiences across the Global North and South. Secondly, these ideal-typical varieties rarely exist in pure form in specific jurisdictions, but rather come in multiple variants, localized adaptations, and hybrid combinations. In Brazil and Germany, liberal elements co-exist with social-transformative features; the transformative variety appears as the younger variant of an older lusophone tradition of directive constitutionalism; and current right-wing contestations draw on a global autocratic playbook but also add distinctive features to it, such as the militarist variant of constitutional authoritarianism in Brazil. Thirdly, to remain resilient in times of global polycrisis, democratic constitutionalism not only needs to resist external pressures and shocks, but also needs to adapt to legitimate critiques, changing contexts, and new environments full of challenges. Understanding constitutionalism in its varieties offers a comparative framework to distinguish between these two paths, and thus contributes to constitutional resilience at home and abroad.

The other contributions to this special issue elaborate specific aspects of these arguments and deepen selected questions from our conversations that have not been analyzed in such detail in extant literature. In the first article, Clara Iglesias Keller and Diego Werneck Arguelhes analyze the peculiar role of Brazilian courts in the fight against disinformation-driven democratic backsliding.[3] Jessica Holl and Jasmin Wachau examine the rise of historical revisionism by right-wing populists in Germany and Brazil and compare how the legal systems of both countries address their respective authoritarian pasts today.[4] Fernando Leal provides a critical account of how Brazilian judges have justified public participation in judicial proceedings and the expansion of potentially transformative judicial authority, by borrowing the concept of "open community of constitutional interpreters" from German scholarship.[5] Next, Diego Pereira compares how German and Brazilian courts interpret constitutional objectives (also known as directive principles), which set both constitutional

3 *Clara Iglesias Keller / Diego Werneck Arguelhes,* Facing disinformation in democratic backsliding: the role of courts in Brazil, World Comparative Law 57 (2024), in this issue.

4 *Jessica Holl / Jasmin Wachau,* Responding to the Instrumentalization of the Past by Right-Wing Actors: Analyzing the Varieties of Law and Memory in Brazil and Germany, World Comparative Law 57 (2024), in this issue.

5 *Fernando Leal*, Rethinking the concept of an open society of constitutional interpreters: Lessons from Germany and Brazil, World Comparative Law 57 (2024), in this issue.

orders apart from purely liberal systems.[6] Thilo Herbert provides an eye-opening case study of "authoritarian federalism" during the last civil-military dictatorship in Brazil, challenging the widespread assumption that federalism necessarily functions as a barrier to autocratization and democratic backsliding.[7] In a final addition to our special issue, Antonio Maués demonstrates that parallel constitutional entrenchment of social and fiscal policies has led to some social progress but also limited the transformative impact of the Brazilian constitution of 1988.[8]

The remainder of this overview article proceeds in four steps: Part B asks how we can understand and research "varieties of constitutionalism" in terms of comparative constitutional theory and methods. Part C addresses how transformative constitutionalism fits into these varieties and to what extent it differs from liberal constitutionalism when analyzed from a Brazilian and German perspective. Part D asks what German and Brazilian constitutional law and history can contribute to the debate on constitutional authoritarianism and autocratic legalism. Section E concludes with some pointers for future research on constitutional resilience.

B. Comparative theory and method: Constitutional variety in North-South comparison

In 2016, Mark Tushnet called for "a richer taxonomy of varieties of constitutionalism" that would "unsettle the view that liberal constitutionalism simply *is* constitutionalism, and that all other varieties are defective".[9] Since then, a growing literature has discussed several varieties beyond liberal constitutionalism, ranging from "social-democratic" and "transformative" to "illiberal" or "authoritarian".[10] These categorizations echo older attempts at classifying and typologizing constitutional systems to capture the patterned diversity of

6 *Diego Platz Pereira*, The Influence of Constitutional Objectives on Constitutional Interpretation: Some Propositions Based on the Brazilian and German Cases, World Comparative Law 57 (2024), in this issue.

7 *Thilo Herbert*, Authoritarian Federalism in its own right? The case of Brazil, World Comparative Law 57 (2024), in this issue.

8 *Antonio Moreira Maués*, Constitutional Entrenchment and Social Policy in Brazil, World Comparative Law 57 (2024), in this issue.

9 *Mark Tushnet*, Editorial: Varieties of constitutionalism, ICON 14 (2016), pp. 1-2. Italics in original.

10 *Michael Dowdle / Michael Wilkinson (eds.)*, Constitutionalism beyond liberalism, Cambridge 2017; *David Law*, Alternatives to Liberal Constitutional Democracy, Maryland Law Review 77 (2017), p. 223; *Kanad Bagchi*, Transformative Constitutionalism, Constitutional Morality and Equality, World Comparative Law 51 (2018), p. 367; *Helena Alviar García / Günter Frankenberg (eds.)*, Authoritarian constitutionalism, Cheltenham 2019; *Dann et al.,* note 1. For a quantitative study of scholarship on "adjectival constitutionalism" see *Diana Kapiszewski* / *Deborah Groen* / *Katja Newman*, Constitutionalism with Adjectives: Conceptual Innovation in the Comparative Study of Law, Law & Social Inquiry 49 (2024), p. 178.

constitutional phenomena around the world at a time before liberal constitutionalism had become the global norm.[11]

This diversity had been somewhat forgotten during the transition of formerly socialist or authoritarian states to democracy and market economy in Eastern Europe, Latin America, and Africa. After the end of the Cold War, comparative constitutionalists were primarily interested in the global diffusion of liberal constitutionalism.[12] A widely, if not universally shared assumption in this literature was that constitutional orders were converging around a basic set of liberal principles and institutions, especially in the areas of judicial review, human rights, trade, and investment. Comparatists observed an "inevitable globalization of constitutional law" or the emergence of a "global constitutionalism".[13] At the same time, skeptics worried about the democratic legitimacy of newly empowered constitutional courts and criticized one-size-fits-all "IKEA constitutionalism".[14] More recently, comparative constitutionalists have expanded the case selection and acknowledged greater local variation and adaptation of constitutionalist principles even within the liberal tradition.[15]

Given the aims of our project, we took the call for varieties of constitutionalism seriously as an epistemic strategy, methodological approach, and theoretical framework. To do so, we did not adopt a definitional approach that equates "constitutionalism" with one specific set of ideas, institutions, and practices associated with a few Euro-American jurisdictions – such as liberalism, civil and political rights, competitive elections, separation of powers, and judicial review.[16] Instead, we adopted a typological approach that aimed to reconstruct a limited number of ideal-typical varieties of constitutionalism based on concept

11 *Dieter Grimm*, Types of constitutions, in: András Sajó / Michel Rosenfeld (eds.), The Oxford handbook of comparative constitutional law, Oxford 2012, p. 98; *Karl Loewenstein*, Political power and the governmental process, Chicago 1957. On legal families, see only *H. Patrick Glenn*, Comparative Legal Families and Comparative Legal Traditions, in: Mathias Reimann / Reinhard Zimmermann (eds.), The Oxford handbook of comparative law, Oxford 2019, p. 422.

12 See e.g. *Tom Ginsburg*, Judicial review in new democracies, Cambridge 2003; *Gretchen Helmke / Julio Ríos-Figueroa (eds.)*, Courts in Latin America, Cambridge 2011.

13 *Mark Tushnet*, The Inevitable Globalization of Constitutional Law, Virginia Journal of International Law 50 (2009), p. 985; *Wiener et al.,* Global constitutionalism: Human rights, democracy and the rule of law, Global Constitutionalism 1 (2012), p. 1. See also *David Law*, Generic constitutional law, Minnesota Law Review (2005), p. 669.

14 *Günter Frankenberg*, Constitutional transfer: The IKEA theory revisited, ICON 8 (2011), p. 563. On judicial legitimacy, see *Alec Stone Sweet*, Governing with judges, Oxford 2000; *Ran Hirschl*, Towards juristocracy, Harvard 2007; *Conrado Hübner Mendes*, Constitutional courts and deliberative democracy, Oxford 2013.

15 *Cheryl Saunders*, Towards a Global Constitutional Gene Pool, National Taiwan University Law Review 4 (2009), p. 1; *Ran Hirschl*, Comparative matters, Oxford 2014, pp. 192 ff.; *Rosalinde Dixon / Tom Ginsburg (eds.)*, Comparative constitutional law in Latin America, Cheltenham 2017; *Doreen Lustig / J. H. H. Weiler*, Judicial review in the contemporary world - Retrospective and prospective, ICON 16 (2018), p. 315.

16 On these attributes of constitutional liberalism, see only *Massimo Fichera*, Liberalism, Max Planck Encyclopedia of Comparative Constitutional Law,2017, https://oxcon.ouplaw.com/home/MPECCOL (last accessed on 20 December 2024).

formation through multiple observation (rather than based on specific prototypical jurisdictions). Building global typologies on a more representative case selection contributes to more finely grained comparative frameworks than transcend simple binaries of universal vs. particular, liberal vs. non-liberal, North vs. South. This required not only broadening the case selection to constitutional systems in the Global South like Brazil, but also rethinking constitutional concepts and theories in Northern jurisdictions like Germany in a spirit of epistemic reflexivity.[17]

In constructing our typology, we sought to avoid, or at least acknowledge, the methodological and epistemic problems that plague comparative constitutional law in general, and extant attempts at constitutional classification in particular.[18] We tried to be clear that what we call "varieties of constitutionalism" are conceptual ideal types, distinguishing them from historical prototypes, empirical real types, and taxonomies that exist in actual constitutional reality, as well as from explanatory and normative theories of constitutional variation.[19] Such ideal types then help comparatists understand the patterned diversity of constitutionalism as a global phenomenon, and they can serve as *tertium comparationis* when analysing the extent to which an actually existing constitutional system conforms to a particular type. They do not represent a global hierarchy, and cannot replace deeply contextual analyses of specific constitutional systems.

When it comes to analyzing specific cases like Brazil and Germany, it is important to acknowledge that ideal-typical varieties, by definition, do not exist in pure form in the constitutional reality of any one jurisdiction. Actual constitutional systems are often multidimensional combinations of multiple influences from different sources and types, with local adaptations and innovations that are not easily placed within one ideal-typical category. For instance, a constitutional system may be politically liberal and democratic,

17 *Philipp Dann* / *Michael Riegner* / *Maxim Bönnemann*, Towards a Southern Turn in Comparative Constitutional Law: An Introduction, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 1.

18 See general only *Günter Frankenberg*, Comparative law as critique, Cheltenham 2016. On lege artis typological method in the social sciences, see *David Collier* / *Jody LaPorte* / *Jason Seawright*, Putting Typologies to Work, Political Research Quarterly 65 (2012), p. 217.

19 Conceptual ideal-types (in Max Weber's sense) are analytical constructs that abstract and emphasize distinctive characteristics of a social phenomenon; they do not exist in pure form in empirical reality, unlike historical prototypes or real types, with which empirical taxonomies are constructed. On these distinctions see *Kevin B. Smith*, Typologies, Taxonomies, and the Benefits of Policy Classification, Policy Studies Journal 30 (2002), pp. 379, 381. Extant literature does not always make these distinctions: *Tushnet*, note 9, speaks of "taxonomy" but his approach seems more conceptual. *Law*, note 10, at p. 4, seems to abstract types from single or small-N case studies, e.g. his "social democratic" type from Scandinavian countries. *Signe Rehling Larsen*, Varieties of Constitutionalism in the European Union, The Modern Law Review 84 (2021), p. 477, builds a descriptive typology, which she then uses to explain different approaches to the EU, which in turn become a normative argument against the theory of constitutional pluralism. For a carefully constructed explanatory typological theory of judicial review systems, see *Theunis Roux*, The politico-legal dynamics of judicial review, Cambridge 2018.

but not evince the same degree of economic liberalism, as may be the case with many European welfare states. Or it may be economically liberal, but politically undemocratic, as has been argued for contemporary Singapore or "authoritarian liberalism" in late Weimar.[20] In Latin America, constitutional hybridity has been described as the norm rather than the exception, and hybrid systems pre-date many prototypically "liberal" or "social" constitutions in North America or Europe.[21]

What is more, these hybrid elements are not static over time but evolve in response to changing contexts, local contestations, and global influences. A transformative constitution may be designed as an anti-model to (neo)liberal systems, but may become more preservative (or liberal if you will) when faced with politically repressive, right-wing populists in power.[22] Right-wing populists, in turn, may borrow liberal constitutional forms for illiberal purposes or seek to entrench neoliberal economic policies.[23] In that sense, the varieties framework highlights not only differences but also transnational influences and entanglements. Ultimately, a typology of global varieties of constitutionalism can inform, but also needs to be informed by more in-depth case studies and contextual comparisons. Our project thus used Brazil and Germany as case studies to contribute to wider debates about transformative constitutionalism, democratic backsliding, and constitutional resilience.

Our selection of Brazil and Germany as case studies was motivated by several methodological considerations.[24] For one, selecting our own constitutional systems ensured the contextual expertise necessary for our in-depth studies. But beyond that, studying these two systems transcends the North-South divide that has long pervaded comparative constitutional law and thus enabled us to test both, claims to universality of Northern concepts

20 For an overview of possible combinations, see *Grimm,* note 11, pp. 115 ff. See also *Michael W. Dowdle / Michael J. Wilkinson*, On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity, in: Michael W. Dowdle / Michael A. Wilkinson (eds.), Constitutionalism beyond liberalism, Cambridge 2017, p. 17; *Hermann Heller*, Authoritarian Liberalism? European Law Journal 21 (2015), p. 295.

21 Constitutional hybridity can also take different forms and does not carry any normative valence though; for a discussion, see *Francisca Pou Giménez*, Hybridity and Constitutional Taxonomy in Latin America, The Law & Ethics of Human Rights 16 (2022), p. 245, discussing especially the influential account by *Roberto Gargarella*, Latin American constitutionalism, 1810-2010, Oxford 2013.

22 On anti-models, see *Heinz Klug*, Model and Anti-Model, Wisconsin Law Review 597 (2000); *Kim Scheppele*, Aspirational and aversive constitutionalism, ICON 1 (2003), p. 296. On preservative aspects of transformative constitutionalism, see *James Fowkes*, Transformative Constitutionalism and the Global South: The View from South Africa, in: Armin von Bogdandy et al. (eds.), Transformative constitutionalism in Latin America, Oxford 2017, p. 97, and the discussion below in part C and D.

23 *Rosalinde Dixon / David Landau*, Abusive Constitutional Borrowing, Oxford 2021, and the discussion below in part D.

24 Cf. *Ran Hirschl*, The Question of Case Selection in Comparative Constitutional Law, American Journal of Comparative Law 53 (2005), p. 125.

and claims to particularism of a constitutionalism of the Global South.[25] Finally, the two systems display sufficient similarities, but also variations, that make comparison both possible and productive.

In some respects, Brazil and Germany are unlike cases: their constitutions emerge from different historical processes, periods, and waves of constitution-making; their socio-economic contexts are shaped by differing levels of wealth, inequality, varieties of capitalism, and positions in the global economy; and their political systems, parties, and power structures differ in important respects. In other aspects, however, Brazil and Germany share important features. Both share a history of constitutional borrowing and legal entanglements, for example with respect to the legacies of the Weimar constitution.[26] Their current constitutional systems both emerge from post-authoritarian transitions, enshrine similar basic principles such as democracy and federalism, and combine liberal with social-transformative elements.[27] Both are influenced by relatively thick regional legal orders such as the EU and the Inter-American system.[28] And, as analyzed in detail below, both face similar challenges and contestations, such as increased political mobilization from the far-right, economic pressures from a changing global economy, and the digitalization and polarization of the public sphere by global internet platforms.

To study the two systems, we adopted a contextual and collaborative approach of "slow comparison".[29] Scholars from both jurisdictions collaborated for a prolonged period of four years, met for multiple workshops and events, discussed shared readings, and reflected without pressure to publish results immediately. As importantly, the conveners and

25 To what extent Brazil qualifies, or self-identifies, as part of the "Global South" is a contested and complicated question that depends on perspective and in turn influences conceptions and categorizations of Brazilian constitutionalism. In relevant comparative literature, however, it is usually not counted among the Global North. See only *Daniel Bonilla Maldonado (ed.)*, Constitutionalism of the global South, Cambridge 2013; *Oscar Vieira / Upendra Baxi / Frans Viljoen (eds.)*, Transformative constitutionalism, Pretoria 2013; *Dann et al.,* note 1.

26 See e.g. *Mônica Clarissa Henning Leal*, Die brasilianische Verfassungsgerichtsbarkeit zwischen US-amerikanischer Institutionalisierung und deutschem Rechtsdenken, in Uwe Kischel (ed.), Der Einfluss des deutschen Verfassungsrechtsdenkens in der Welt, Tübingen 2014.

27 For a partial comparison, see *Rainer Schmidt / Virgílio Afonso da Silva*, Verfassung und Verfassungsgericht: Deutschland und Brasilien im Vergleich, Baden-Baden 2012. For overviews of the two constitutional systems, see *Virgílio Afonso da Silva / Thomaz Pereira*, The Constitution of Brazil in Context, in: Roberto Gargarella / Conrado Hübner Mendes / Sebastián Guidi (eds.), Oxford Handbook of Constitutional Law in Latin America, Oxford 2022, p. 57; *Virgílio Afonso da Silva*, The Constitution of Brazil, Oxford 2019; *Werner Heun*, The constitution of Germany, Oxford 2011; *Donald P. Kommers / Russel A. Miller*, The Constitutional Jurisprudence of the Federal Republic of Germany, Berlin 2012; *Matthias Herdegen / Johannes Masing / Ralf Poscher / Klaus Gärditz* (eds.), Constitutional law in Germany, München 2025.

28 *Armin von Bogdandy et al. (eds.)*, Transformative constitutionalism in Latin America, Oxford 2017.

29 For a similar approach see *Philipp Dann / Arun Thiruvengadam*, Comparing constitutional democracy in the European Union and India: an introduction, in: Philipp Dann / Arun Thiruvengadam (eds.), Democratic Constitutionalism in Continental Polities, Cheltenham 2021, pp. 1, 5-8.

principal investigators did not prescribe a predefined conceptual framework or normative theory for comparison, but rather encouraged an incremental and iterative dialogue guided by the varieties of constitutionalism theme. As a result, the project did not purport to produce one internally coherent output, such as one edited volume, but rather inspired a range of different reflections and publications by its members. Some of these contributions are in-depth single-country studies that situate Brazil or Germany in a broader context, while others compare the two jurisdictions. This introductory article tries to pull together some threads from the project, but does not purport to speak for all project members as a group.

C. Transformative constitutionalism and its varieties

When we started discussions on the VACON project in 2018, the debate on varieties of constitutionalism was driven by increasing engagement with economically rising constitutional democracies like Brazil, India, and South Africa. Rather than liberal convergence, this literature identified a "Constitutionalism of the Global South" with distinct features.[30] In contexts of greater material inequality and poverty, this "Southern" constitutionalism arguably placed greater emphasis on social rights, material equality, positive state obligations, and social change through judicial activism and public interest litigation.[31] In post-colonial or post-authoritarian transition contexts, these features crystallized in the concept of transformative constitutionalism. Initially developed with a view to South Africa's post-apartheid constitution, the concept diffused to other constitutional orders like India, Colombia, and Brazil.[32] Brazil was hailed as one instance of transformative constitutionalism, marked by an increasingly activist supreme court and progressive social programs aided by a commodity boom during President Lula da Silva's first two terms (2003-2011).[33]

Given its origins, many authors conceived transformative constitutionalism as a "post-liberal" Southern counter-concept to Northern liberal constitutionalism.[34] Excessive inequality, poverty, and exclusion in postcolonial contexts arguably required stronger emphasis on social rights, material equality, active states, and activist courts. Other scholars rather considered transformative elements a variation and adaptation of the liberal tradition to new

30 *Bonilla Maldonado,* note 25.

31 *Florian Hoffmann / Fernando R. N. M. Bentes*, Accountability for Social and Economic Rights in Brazil, in: Varun Gauri / Daniel M. Brinks (eds.), Courting social justice, Cambridge 2008, p. 100; *Henriette Aasen et al. (eds.)*, Juridification and social citizenship in the welfare state, Cheltenham 2014. For a broader argument in that vein, see *Dann et al.,* note 17.

32 *Karl Klare*, Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights 14 (1998), p. 146; *Vieira et al.,* note 25; *Fowkes*, note 22; *Bagchi*, note 10.

33 See e.g. *Vieira et al.,* note 25.

34 *Klare,* note 32; *Upendra Baxi*, Preliminary notes on transformative constitutionalism, in: Oscar Vieira / Upendra Baxi / Frans Viljoen (eds.), Transformative constitutionalism, Pretoria 2013, p. 19; *David Bilchitz*, Constitutionalism, the Global South, and Economic Justice, in: Daniel Bonilla Maldonado (ed.), Constitutionalism of the global South, Cambridge 2013, p. 41.

contexts.[35] Some comparatists went further and argued that transformative elements could equally be found in Northern constitutions like the German basic law.[36] Other scholars extended the concept to capture transformative aspects of regional integration and multi-level constitutionalism in both Europe and Latin America.[37]

These debates raised important questions for our project: Does transformative constitutionalism embody distinct Southern constitutional experiences and mark categorical differences to, and contestations of, Northern liberal constitutionalism? Or is it rather an adaptation and development of liberal-democratic constitutionalism in the context of the Global South? And to what extent are these models living up to their emancipatory and transformative promises in our case studies?[38]

I. Typology and genealogy: The many faces of transformative constitutions

The discussions in our project suggested differentiated responses to these questions that depend on prior conceptual choices, methodological approaches, and theoretical assumptions. In this vein, we made three related findings regarding the typology, genealogy, and hybridity of transformative-type constitutions in Brazil and Germany.

In a first step, we noted that as transformative constitutionalism has become part of the global constitutional canon, its meanings and uses in extant literature have multiplied: it can designate a historically specific, prototypical constitutional enactment (the post-apartheid constitution in South Africa); a collective constitutional identity (as a legal product and innovation of and by the Global South); a normative constitutional theory (about the purpose of the constitution and the state); a set of constitutional doctrines (including social rights, positive obligations, expanded judicial remedies, etc.); a method of constitutional interpretation (purposive and anti-formalist); a conceptual transplant whose meaning changes with context (including in the Global North and regional systems); and a conceptual ideal type in a global typology of varieties of constitutionalism. For the purposes of our project, we found it useful to distinguish liberal and transformative varieties of constitutionalism as analytical ideal types, with ideal-typical differences in, *inter alia*, constitutional purpose (limited government vs state-driven transformation), values (liberty vs equality), rights

35 *Theunis Roux*, Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?, Stellenbosch Law Review 20 (2009), p. 258.

36 *Michaela Hailbronner*, Overcoming obstacles to North-South dialogue, World Comparative Law 49 (2016), p. 253; *Michaela Hailbronner*, Transformative Constitutionalism: Not Only in the Global South, American Journal of Comparative Law 65 (2017), p. 527. See also *Mark A. Graber*, What's in crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy, in: Mark A. Graber / Sanford Levinson / Mark Tushnet (eds.), Constitutional democracy in crisis?, Oxford 2018, p. 665.

37 *von Bogdandy et al*., note 28.

38 For a recent reformulation and discussion of these questions with regard to India and South Africa, see *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), p. 5.

doctrines (civil-political vs social rights, positive obligations, horizontal effect, etc.), and associated implications for the role of courts and separation of powers.

In a second set of findings, our case studies illustrated that transformative-type constitutions have multiple genealogies, traditions, and variants that predate the South African example and are often overlooked in the anglophone debates. From the Brazilian and German perspective, the concept of "transformative constitutionalism" is not a homegrown innovation primarily designed to overcome a repressive colonial past as in South Africa or India. It is rather a conceptual transplant that interacts with and reinterprets older constitutional traditions of state-led social transformation in the wake of right-wing authoritarian regimes. One manifestation of this older tradition in the Lusophone world is the concept of the "directive constitution", associated with the Portuguese constitution of 1973 and developed by Portuguese scholar Gomes Canotilho, who was in turn influenced by German debates on the obligations flowing from the social state principle.[39] The Brazilian constitution of 1988 incorporated ideas of directive constitutionalism, while also carrying forward earlier influences of the Weimar Constitution of 1919, the Mexican Constitution of 1917, and other models.[40]

As discussed in our prior special issue, directive and transformative constitutions share important features but differ with respect to their protagonists: In the directive constitution, as originally conceived, the main driver of transformative change was the (politically progressive) legislator (with legislative omissions subject to judicial review), whereas transformative constitutionalism centered on courts from the outset.[41] Although the differences turned out to be less pronounced in practice, there may be an argument to analytically distinguish transformative and directive variants: the first as a form of legal constitutionalism primarily driven by courts, and the second as a form of political constitutionalism driven by legislatures and executive branches.[42]

In a third set of findings, our case studies also illustrated that at the level of actual constitutional systems, liberal and transformative features come in local variants that are not

39 *Mariana Canotilho*, "Constitucionalismo dirigente" and Transformative Constitutionalism: Common Elements, Differences and Methodological Challenges, World Comparative Law 56 (2023), p. 506.

40 *Diego Arguelhes Werneck / Evandro Süssekind*, Constitucionalismo transformador, Revista Direito E Práxis 13 (2022), p. 2557 (finding transformative characteristics as far back as in the Mexican constitution of 1917); *Florian Hoffmann / Fabio Carvalho Leite*, Transformation by Decree? A (Brief) Reflection on the 'Directive Constitution' (Constituição Dirigente) in Brazil, World Comparative Law 56 (2023), p. 549; *Deo Campos Dutra*, The Theories of Constituição Dirigente and Transformative Constitutionalism and their Reception by Brazilian Constitutional Theory: An Approach Based on Critical Comparative Law, World Comparative Law 56 (2023), p. 568.

41 *Canotilho*, note 39, p. 520. That said, the Portuguese constitution of 1973 also introduced expanded forms of judicial review, such as review of legislative omissions.

42 *Michael Riegner*, The Directive Constitution in the Varieties of Constitutionalism: An Introduction, World Comparative Law 56 (2023), pp. 493, 497. See also *Tarunabh Khaitan*, Constitutional Directives: Morally-Committed Political Constitutionalism, Modern Law Review 82 (2019), p. 603.

necessarily mutually exclusive but can form multidimensional hybrids. Marxist readings of transformative constitutionalism may be the antithesis of a market-radical constitutional neoliberalism, but more social-democratic interpretations of transformative constitutionalism may well co-exist or compete with (neo-)liberal and conservative elements within the same constitutional order.[43]

Both Germany and Brazil have developed locally adapted variants of constitutional liberalism, which they combine with social-transformative elements. Post-war Germany, in turn, has often been considered a posterchild of liberal-democratic constitutionalism, but more recent analyses have also highlighted transformative elements of the Basic Law, shaped by its powerful constitutional court, post-authoritarian ethos, social state principle, value-oriented rights doctrine, horizontal effect, etc.[44] In the absence of explicit social constitutional rights, however, much of the German welfare state system has been developed by political majorities and legislative action, enabled but not necessarily driven by the social state principle and its judicial interpretation.[45]

The system that emerged under the 1988 constitution of Brazil combines liberal principles – civil and political rights, separation of powers in a system of coalitional presidentialism, independent courts with judicial review powers, etc. – with social rights, directive principles creating positive obligations, and an empowered Supreme Court.[46] The makers of the 1988 constitution of Brazil originally placed hope in a legislative transformation driven by progressive political forces, but also expanded judicial review, e.g. to legislative omissions. When conservative majorities in the Brazilian Congress hampered the realization of transformative aspirations and a new generation of constitutional judges took office, the Brazilian Supreme Court became a judicial protagonist.[47] Yet, as critical observers in Brazil have argued, not all elements of a constitutional system have been equally transformative at all times, and the transformative rhetoric of the Brazilian Supreme Court has not

43 Contrast e.g. *Baxi*, note 34; *Kim Scheppele*, Liberalism against Neoliberalism, in: Carol Greenhouse (ed.), Ethnographies of neoliberalism, Philadelphia 2012, p. 44; *Guy Scott*, Resisting Neo-Liberalism: Developing a New Social Democratic Conception of Constitutionalism, Maquarie Law Journal 10 (2012), p. 23; *Benjamin Alemparte*, Towards a theory of neoliberal constitutionalism: Addressing Chile's first constitution-making laboratory, Global Constitutionalism 11 (2021), p. 83.

44 *Hailbronner*, note 36; and in detail *Michaela Hailbronner*, Traditions and transformations, Oxford 2015, p. 41 et seq.; *Justin Collings*, Democracy's guardians, Oxford 2015. On German (ordo-)liberalism see *Hans Vorländer*, The Case of German Liberalism, in: Patrick van Schie (ed.), The dividing line between success and failure, Berlin 2006, p. 55; *Jens Hacke,* Die Bundesrepublik als Ergebnis liberaler Lernerfahrung?, in: Karsten Fischer / Sebastian Huhnholz (eds.), Liberalismus, Baden-Baden 2019, p. 99.

45 On social policy, see *Peter Caldwell*, Democracy, Capitalism, and the Welfare State, 2019; on the constitutional framework, see *Heun*, note 27, pp. 44-46; *Pereira*, note 6, and the summary below.

46 *Werneck / Süssekind*, note 40; *da Silva,* note 27, pp. 175 et seq. On Brazilian varieties of liberalism, see only e.g. *Milton Tosto*, The meaning of liberalism in Brazil, Langham 2005.

47 *Hoffmann / Leite*, note 40, p. 555.

always led to transformative change in practice.[48] Prior contributions from our project have also pointed out that the Brazilian constitution, initially designed for progressive change, has increasingly been mobilized as a shield against retrogression in the face of right-wing attacks against progressive achievements, such as guarantees of the right to health during the pandemic.[49]

From the perspective of our project, one possible conclusion is that liberal and transformative constitutionalism in Brazil and Germany can be conceived as distinct layers within the same constitutional system that receive different emphasis in different contexts and periods. In other words, transformative constitutionalism may be considered as "para-liberal", rather than "post-liberal".

II. Evolution and variation: Constitutional hybridity, objectives, openness

Several articles in this special issue elaborate on these themes and add nuance to prior debates about Brazil and Germany as examples of transformative constitutionalism. In his contribution to this issue, Antonio Maués goes beyond the dominant, court-centric perspective on transformative constitutionalism and focuses on constitution-making and constitutional amendments by political (super-)majorities.[50] In his perspective, the implementation of social policies was less driven by judicial enforcement of social rights and more by constitutional mandates for social policy and social spending, which *inter alia* prescribed minimum spending floors for education (at least 18% of federal tax revenue) and health (15%). These social mandates clashed, however, with equally constitutionalized rules on fiscal policy and fiscal adjustment, which constrain public spending and entrench a regressive tax system based on indirect taxes. As Maués argues, it is the parallel constitutional entrenchment of both redistributive social policies and neoliberal and conservative fiscal policies that characterizes and limits the transformative nature of the Brazilian constitution. This fiscally conservative, neoliberal side of the constitution limited the redistributive consequences of otherwise transformative elements and resulted in a hybrid constitution that contributed to alleviating poverty, but did not significantly reduce inequality.

In a second contribution to this special issue, Diego Pereira takes an in-depth look at a distinctive element of transformative and directive constitutionalism in Brazil and Germany – namely, the judicial interpretation of constitutional objectives (also known as "directive

48 *Diego Arguelhes Werneck*, Transformative Constitutionalism in Latin America: A view from Brazil, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 165.

49 *Juliana Cesario Alvim*, Bridging Past and Future: Transformative Constitutionalism and Directive Constitutions Amidst Authoritarian Challenges, World Comparative Law 56 (2023), p. 587. For a similar point on South Africa, see also *Fowkes*, note 22.

50 *Maués*, note 8.

principles" in anglophone discourse).[51] These objectives contain potentially transformative aims, such as the social state principle in Art. 20 (1) of the German Basic Law, or the reduction of poverty and inequality in Art. 3 of the Brazilian constitution. Pereira shows that these objectives have significant effects on constitutional interpretation and separation of powers: In Germany, constitutional objectives often weigh in favor of the proportionality of rights-restrictive measures and thus empower legislators to pursue social ends, making liberal rights and social ends compatible at a doctrinal level. In contrast, Brazilian courts have used constitutional objectives for purposive interpretation of, e.g., non-discrimination provisions in order to fill perceived legislative gaps.

In a third contribution, Fernando Leal turns attention back to the judicial branch and analyses how apex courts have opened up judicial proceedings to public participation by diverse social groups.[52] The procedural inclusion of civil society and NGOs into strategic litigation has often been associated with the broadening of access to justice in the context of transformative constitutionalism.[53] Leal highlights another, less well-known aspect: In Brazil, the expansion of public hearings, *amicus curiae* briefs, and other forms of third-party involvement has been justified by the concept of an "open society of constitutional interpreters", originally developed by German constitutionalist Peter Häberle.[54] The idea that openness improves the deliberative quality and democratic legitimacy of constitutional interpretation has been borrowed enthusiastically by Brazilian judges, legislators, and scholars. Yet, as Leal critically argues, it is not self-evident that these procedural mechanisms actually democratize or otherwise improve constitutional interpretation. The contribution thus highlights the global entanglements of judicial doctrines and practices as much as the complications that arise in borrowing, transplantation, and migration of constitutional ideas, especially if they involve presumed (but unjustified) hierarchies between North and South.

51 *Pereira*, note 6. On directive principles, see also *Khaitan*, note 42; *Fernando Leal*, National Objectives, Max Planck Encyclopedia of Comparative Constitutional Law,2024, https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e391?rskey=EHYK4J&result=203&prd=MPECCOL (last accessed on 20 December 2024); *Luís Malheiro Meneses do Vale*, Asking for directions: the origins of Gomes Canotilho Directive Constitutionalism at the Crossroads of Contemporary Constitutional Thought, World Comparative Law 56 (2023), p. 524.

52 *Leal*, note 5.

53 *Marcela Fogaça Vieira / Flavia Annenberg*, Remarks on the role of social movements and civil society organisations in the Brazilian Supreme Court, in Oscar Vilhena Vieira / Upendra Baxi / Frans Viljoen (eds.), *Transformative constitutionalism*, Pretoria 2013, p. 491; *David Bilchitz*, Socio-Economic Rights and Expanding Access to Justice in South Africa, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 210.

54 *Peter Häberle*, Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und „prozessualen" Verfassungsinterpretation, Juristenzeitung 30 (1975), p. 297; english translation in *Markus Kotzur (ed.)*, Peter Häberle on Constitutional Theory, Baden-Baden 2018.

D. Varieties of constitutional authoritarianism and autocratic legalism

By the time our VACON research group met for its first workshop in 2020, the context had changed considerably: A pandemic was raging across the globe and leading to often unprecedented restrictions of public and academic life, forcing our project into online mode. Concerns about democratic backsliding and constitutional erosion were intensifying not only in newer democracies like Hungary and Poland, but also in established ones like the United States under the first Trump administration.[55] In Germany, the far-right party "Alternative for Germany" (AfD) was rising in the polls. And in Brazil, right-wing nationalist and ex-military Jair Bolsonaro had been elected to the presidency and was directing attacks against democratic, legal and scientific institutions.[56]

The developments in Brazil and Germany occurred within a broader pattern of contestations of liberal democracy driven by rising populism and nationalism, illiberal governments, and authoritarian regimes. These contestations were not necessarily rejecting law and constitutions as such, but rather promoting alternative models of legal governance, conceptualized variously as "authoritarian constitutionalism", "autocratic legalism" or "illiberal" constitutional democracy.[57] As with transformative constitutionalism, these purported alternatives to liberal constitutionalism were not all new but rather poignant reminders of the long history of illiberal and autocratic uses of constitutional law.[58]

Against this background, our VACON project analyzed past and present contestations of liberal constitutional democracy in Brazil and Germany: To what extent do these contestations fit the general patterns and global playbooks of autocratic legalism and constitutional authoritarianism? What specific role did constitutions, law, and courts play in our case studies – and how did constitutional law and institutions change in the process of resistance against backsliding? What new insights could our case studies contribute to the comparative study of constitutional erosion and resilience more broadly?

55 *Mark A. Graber / Sanford Levinson/ Mark Tushnet (eds.)*, Constitutional democracy in crisis?, Oxford 2018; *Tom Ginsburg / Aziz Z. Huq*, How to Save a Constitutional Democracy, Chicago 2018.

56 *Emilio Peluso Neder Meyer*, Constitutional Erosion in Brazil, London 2021; *Tom Gerald Daly*, Understanding Multi-directional Democratic Decay: Lessons from the Rise of Bolsonaro in Brazil, Law and Ethics of Human Rights 14 (2022), p. 199.

57 From the literature, see only *Turkuler Isiksel*, Between text and context: Turkey's tradition of authoritarian constitutionalism, ICON 11 (2013), p. 702; *Tom Ginsburg / Alberto Simpser (eds.)*, Constitutions in authoritarian regimes, Cambridge 2014; *Mark Tushnet*, Authoritarian Constitutionalism, Cornell Law Review 100 (2015), p. 392; *Roberto Niembro Ortega*, Conceptualizing authoritarian constitutionalism, World Comparative Law 49 (2016), p. 339; *Kim Scheppele*, Autocratic legalism, University of Chicago Law Review 85 (2018), p. 545; *Weitseng Chen*, Same bed, different dreams?, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 250; *David E. Landau*, The Myth of the Illiberal Democratic Constitution, in: András Sajó / Renáta Uitz / Stephen Holmes (eds.), Routledge handbook of illiberalism, Oxfordshire 2022, p. 425.

58 See only *Grimm*, note 11, pp. 119 ff., and as *locus classicus Loewenstein*, note 11.

I. Typology and genealogy: Of nerds, punks and soldiers

From our project's comparative perspective, it quickly became clear that contemporary right-wing contestations of constitutional democracy in Brazil and Germany have been neither locally isolated nor historically new phenomena. They have been drawing on a globalized playbook as well as specific historical authoritarian legacies, and they display common features as well as distinctive characteristics shaped by local contexts. It is thus important to understand these challenges in both their global, local, and historical contexts and to develop more finely grained comparative typologies of constitutional authoritarianism and autocratic legalism. In this regard, our project made three sets of findings concerning global entanglements, local variations, and historical legacies.

Firstly, in terms of the global context, we found that right-wing actors and movements in Brazil and Germany have been influenced by, and have contributed to, multidirectional processes of legal diffusion, networking, and globalization on the right. For some time, comparative lawyers have noted changing patterns of legal diffusion: rather than the spread of liberal norms and ideas, they now observe the diffusion of autocratic legalism, abusive borrowing of constitutional forms for illiberal ends, and the emergence of a global right-wing populist playbook.[59] Going beyond the contents of these new globalization processes, our project highlighted the global networks and advocacy coalitions in which right-wing governments, parties, activists, associations, and faith-based organizations exchange legal ideas, forge common strategies, and organize mutual intellectual and financial support.[60] Both Bolsonaro under Brazil and the German far-right have been inserted in, and connected through, these global networks. Brazilian conservative and radical Christian lawyers have an even longer history of building transnational advocacy networks that serve as transmission belts for ideas and resources between the US, Latin America, and Europe. These connections indicate that the current wave of legal globalization on the right is not marked by one-way transfers and unidirectional borrowing, but rather by the multidirectional circulation of illiberal legal ideas in which Europe, North America, and the Global South are deeply entangled.[61]

59 *Dixon / Landau*, note 23; *Scheppele*, note 57.

60 *Christopher McCrudden*, Transnational culture wars, ICON 13 (2015), p. 434; *René Urueña*, Evangelicals at the Inter-American Court of Human Rights, AJIL Unbound 113 (2019), p. 360; *Alicja Curanović*, The International Activity of Ordo Iuris. The Central European Actor and the Global Christian Right, Religions 12 (2021), p. 1038; *A. Meyerrose*, International Sources of Democratic Backsliding, in: András Sajó / Renáta Uitz / Stephen Holmes (eds.), Routledge handbook of illiberalism, Oxfordshire 2022, p. 88.

61 *Michael Riegner*, Globalization on the Right: Bolsonarism and the Circulation of Illiberal Legal Ideas, Verfassungsblog, 28.09.2022, https://verfassungsblog.de/globalization-on-the-right/ (last accessed on 20 December 2024), DOI: 10.17176/20220928-230529-0; *Benjamin Cowan*, A hemispheric moral majority: Brazil and the transnational construction of the New Right, Revista Brasileira de Política Internacional 61 (2018), p. 1.

Secondly, these global influences do not translate into uniform contestations of constitutional liberalism at the national level but meet with distinctive political and social contexts, historical legacies, and constitutional responses. Both Brazil and Germany have gone through historical periods of backsliding and (re-)autocratization, and authoritarian (dis)continuities also influence the role of law and courts in contemporary processes of erosion and backsliding. Contemporary contestations thus show some parallels but also variations of, deviations from, and distinctive contributions to, the global playbooks of right-wing populism, autocratic legalism, and constitutional authoritarianism.

Both Bolsonaro and the German far-right have been following global patterns in some respects, e.g. with regard to populist anti-establishment sentiments, claims to unmediated representation of a homogeneous people, a revival of nationalism, revisionist memory politics, and intensive use of disinformation and hate speech on social media. In other respects, the two right-wing movements display similarities that are not (yet) established parts of the global playbook, namely with regard to their embrace of economic neoliberalism, which calls into doubt simplistic binary oppositions of liberalism and illiberalism.[62]

With regard to other aspects, the two case studies do not fit the global patterns described in the literature. In Germany, the far-right party AfD has had increasing electoral success and has become the largest party in a few federal states, but until now has not managed to control political majorities, executive power, and apex courts in ways comparable to Hungary under Orban, or Poland under the right-wing PiS-government. So far, Germany has seen the erosion of political norms but has not become a case of democratic backsliding, let alone autocratic legalism. Its constitutional system remains shaped by a distinctively post-fascist variety of constitutionalism, informed by a strong commitment to militant democracy and judicial checks on electoral majorities.[63] This is, of course, a legacy of historical experiences of backsliding and authoritarianism: the Weimar Republic has been studied intensely as a prototypical historical case of constitutional erosion and democratic backsliding.[64] And while the National Socialists never enacted their own writ-

62 For an overview of the two cases, see *Rafael Mafei Rabelo Queiroz / Thomas Bustamante / Emilio Peluso Neder Meyer*, From Antiestablishmentarianism to Bolsonarism in Brazil, in: András Sajó / Renáta Uitz / Stephen Holmes (eds.), Routledge handbook of illiberalism, Oxfordshire 2022, p. 778; *Talita Tanscheit*, Jair Bolsonaro and the defining attributes of the populist radical right in Brazil, Journal of Language and Politics 22 (2023), p. 324; *Ralf Havertz*, Right-Wing Populism and Neoliberalism in Germany: The AfD's Embrace of Ordoliberalism, New Political Economy 24 (2019), p. 385. On this ideological combination, see generally *Michael Wilkinson*, Authoritarian Liberalism and the Transformation of Modern Europe, Oxford 2021.

63 *Larsen*, note 19, pp. 482 et seq.; *Jan-Werner Müller*, Militant democracy, in: Michel Rosenfeld / András Sajó (eds.), The Oxford handbook of comparative constitutional law, Oxford 2012, p. 1253. With regard to the AfD, a party ban has been discussed, but no formal procedure has been brought before the Constitutional Court.

64 *Peter C. Caldwell*, Popular sovereignty and the crisis of German constitutional law, Durham 1997; *Arthur J. Jacobson / Bernhard Schlink*, Weimar. A Jurisprudence of Crisis, Oakland 2000; *Steven Levitsky / Daniel Ziblatt*, How democracies die, Neq York 2018; *Ellen Kennedy*, Constitutional

ten constitution, the role of law, courts and constitutional theorists like Carl Schmitt in Nazi rule has been well documented.[65]

In Brazil, Bolsonaro's presidential rule from 2019-2022 also displayed distinctive features. The label of "populism" only partly describes his peculiar type of rule that became known as Bolsonarism, which relied on deeply rooted authoritarian legacies, militarist traditions, religious conservatism, as well as neoliberal economic ideology, developmentalist anti-environmentalism and libertarian reflexes against public health measures.[66]

With respect to the role of law and courts, Bolsonarism was also not a typical case of autocratic legalism as originally defined, i.e. the use of high-level legal changes, namely constitution-making, constitutional amendment, or at least ordinary legislation, to undermine democratic processes and checks and balances.[67] Despite his autocratic pretensions, Bolsonaro did not succeed in controlling Congress or the courts in ways that enabled such high-level legal changes. He remained trapped, to a considerable extent, in the "legal maze" of the thoroughly judicialized Brazilian political system constrained by coalitional presidentialism.[68] Consequently, Bolsonaro pursued his agenda at lower levels of the legal system through executive orders, appointments, pardons, surveillance and prosecution of opponents, and other mechanisms of the administrative state – a strategy that has been labeled "autocratic legalism 2.0" or "authoritarian infra-legalism".[69]

At the same time, many of Bolsonaro's executive measures were invalidated by the courts. Our project participants discussed to what extent this was part of a strategy, i.e.

Failure Revisited, in: Mark A. Graber / Sanford Levinson/ Mark Tushnet (eds.), Constitutional democracy in crisis?, Oxford 2018, p. 67.

65 *Ellen Kennedy*, Constitutional Failure: Carl Schmitt in Weimar, Durham 2004; *Peter C. Caldwell*, Controversies over Carl Schmitt, Journal of Modern History 77 (2005), p. 357; *Fernando Leal*, Zwischen Nützlichkeit und Ablehnung: die hartnäckige Positivismuslegende und ihre Auswirkungen auf den brasilianischen Konstitutionalismus, in: Rodrigo Borges Valadão (ed.), Rechtspositivismus und Nationalsozialismus, Berlin 2021, pp. 301 ff.; *Thomas Wischmeyer*, Verfassung, in: Benjamin Lahusen et al. (eds.), Das Erbe der Diktaturen, München forthcoming 2025.

66 *Rafael Mafei Rabelo Queiroz / Thomas Bustamante / Emilio Peluso Neder Meyer*, From Antiestablishmentarianism to Bolsonarism in Brazil, in: András Sajó / Renáta Uitz / Stephen Holmes (eds.), Routledge handbook of illiberalism, Oxfordshire 2022, p. 778; *Emilio Peluso Neder Meyer*, Illiberalism in Brazil: From Constitutional Authoritarianism to Bolsonarism, Journal of Illiberalism Studies 3 (2023), p. 21; *Danielle Hanna Rached / Cecilia Oliveira*, Right-Wing Populists and the Global Climate Agenda: What Does Jair Bolsonaro Bring to the Playbook of Autocratic Leaders?, Verfassungsblog, 21.09.2022, https://verfassungsblog.de/right-wing-populists-and-the-global-climate-agenda/ (last accessed on 20 December 2024), DOI: 10.17176/20220921-230800-0.

67 *Fabio de Sa e Silva*, Autocratic Legalism 2.0: Preliminary Insights from a Global Collaborative Research Project, World Comparative Law 57 (2022), pp. 419, 435. For the original definition, see *Scheppele*, note 57, drawing on Hungary as the archetypical case.

68 *Florian Hoffmann*, Constitutionalism under Bolsonaro: The Legal Maze and the Tchutchuca do Centrão, Verfassungsblog, 21.09.2022, https://verfassungsblog.de/constitutionalism-under-bolsonaro/ (last accessed on 20 December 2024), DOI: 10.17176/20220921-230738-0.

69 *de Sa e Silva*, note 67, p. 435; *Oscar Vilhena Vieira / Rubens Glezer / Ana Laura Pereira Barbosa* , Supremocracia e infralegalismo autoritário, Novos estudos CEBRAP 41 (2022), p. 591.

the systematic use of illegal measures to overwhelm courts and to use them as stages for revolt and provocation, rather than for confirmation and legitimation. In our VACON blog symposium, Philipp Dann has usefully contrasted two archetypes of autocratic rulers: the punk and the nerd.[70] Nerds know how to manipulate the system and skilfully use the whole array of legal means to legitimate and entrench their own power (think Orban in Hungary and Modi in India). In contrast, punks rather seek to trash the system through systematic legal provocations, institutional vandalism, incompetence, and disinformation (Bolsonaro and Trump). While nerds may be more efficient while in office, punks pose particular threats when faced with electoral defeat – as illustrated by the post-election violence and resistance to peaceful transition in the case of Trump and Bolsonaro. Unlike Trump, however, Bolsonaro was able to appeal to a distinctive constitutional legacy of authoritarian militarism, and a third archetype of an autocratic ruler: the soldier.

Our third set of findings relates to this distinctive militarist variety of constitutional authoritarianism that has evolved in Brazilian constitutional history. The Constitution of 1988 has been hailed as an instrument of liberalization and democratic transformation, but a closer look also uncovers legacies and continuities from the authoritarian past. Criticism in extant literature has focused on the incompleteness of the transitional justice process, especially continued impunity under the controversial (self-)amnesty law.[71] Our project has highlighted another aspect, namely the continued constitutional role of the military.

As Evandro Süssekind has argued in our blog symposium, Bolsonaro also represented the return of the military to political power – this time not through a coup but through elections.[72] Not only was Bolsonaro himself a former military officer, but he also appointed nu-

70 *Philipp Dann*, Of Punks and Nerds: Two Types of Authoritarian Leaders and Their Meaning for Constitutionalism, Verfassungsblog, 27.09.2022, https://verfassungsblog.de/of-punks-and-nerds/ (last accessed 20 December 2024), DOI: 10.17176/20220927-230626-0. For further attempts to distinguish difference types of populist regimes, see also *Stephen Gardbaum*, The Counter-Playbook: Resisting the Populist Assault on Separation of Powers, Columbia Journal of Transnational Law 59 (2021), p. 1.

71 *Fabia Fernandes Carvalho*, Whose exceptionalism? Anti-impunity and the human rights agenda: Debating the Inter-American View on Amnesty and the Brazilian Case, in: Karen Engle / Zinaida Miller / D. M. Davis (eds.), Anti-Impunity and the Human Rights Agenda, Cambridge 2016, p. 185; *Emilio Peluso Neder-Meyer,* Criminal responsibility in Brazilian transitional justice, Indonesian Journal of International and Comparative Law 4 (2017), p. 41; *Andrea Ribeiro Hoffmann / Giancarlo Summa*, Memória Coletiva no Cone Sul - Bolsonaro, Milei e a justiça transicional, in: Giancarlo Summa / Monica Herz (eds.), Multilateralismo na mira. A direita radical no Brasil e na América Latina, Rio de Janeiro 2024, p. 131.

72 *Evandro Süssekind*, The Armed Forces and the Constitution in Brazil,Verfassungsblog, 22.09.2022 https://verfassungsblog.de/the-armed-forces-and-the-constitution-in-brazil/ (last accessed 20 December 2024), DOI: 10.17176/20220922-230632-0. For earlier problematizations of the continued role of the military, see *Jorge Zaverucha*, The 1988 Brazilian Constitution and its authoritarian legacy: Formalizing democracy while gutting its essence, Journal of Third World Studies 15 (1998), p. 105; *Emilio Neder-Meyer / Marcelo Andrade Cattoni de Oliveira / Thomas da Rosa Bustamante*, The Brazilian Constitution of 1988, the Armed Forces, and the Coup d'Etat, I-CONnect, 03.10.2017, https://www.iconnectblog.com/the-brazilian-constitution-of-1988-the-arm

merous other officers and generals to civilian leadership positions in his government. This re-militarization of government was enabled by a range of provisions in the 1988 constitution that preserve the interests and influence of the military. Most controversially, Art. 142 of the constitution continues to enshrine internal powers for the military to "guarantee the constitutional branches of government" – a provision that Bolsonaro and his supporters relied on in calling for a military intervention to keep him in power, almost turning backsliding into a classical (self-)coup.[73]

This problematic role of the military is rooted in a comparatively less well-known, yet distinctive tradition of authoritarian constitutionalism that developed in Brazil since the beginning of the 20th century. More so than in Germany, authoritarian regimes in Brazil at least since the Estado Novo under Gétulio Vargas relied intensely on constitution-making and constitutional law, inspired by constitutional theorists like Francisco José Oliveira Viana and Francisco Campos – the Brazilian Carl Schmitts, so to speak.[74] Characteristically, the Brazilian military also took painstaking care to justify successive coups with constitutional arguments, to the point that coup-supporting officers became known as "legalists". The idea that the military acted as a politically "neutral" guarantor of the constitutional order with a "moderating role" was instrumental in the 1964 military coup that ushered in the last civil-military dictatorship, and the new military rulers also quickly enlisted constitutionalist Francisco Campos, to draft constitutional amendments (so-called "Institutional Acts") that legitimated their dictatorial regime.[75] If there is thus one contribution of Brazil to the global playbook of constitutional authoritarianism, it is the distinctive variant of constitutional militarism.

II. Resistance and militant democracy: Federalism, memory, courts

Understanding different autocratic types, playbooks and legacies is a first step in devising effective strategies of resistance and militant democracy. In this special issue, several contributions deepen the analysis in this regard.

ed-forces-and-the-coup-detat/ (last accessed 20 December 2024). On the broader Latin American trend towards remilitarization at the behest of civilian politicians, see *Julio Ríos-Figueroa*, The "new militarism" and the rule of law in Latin American democracies, in: Rachel Sieder / Karina Ansolabehere / Tatiana Alfonso, Routledge handbook on law and society in Latin America, London 2019, pp. 433.

73 *Süssekind*, note 72; *Vanessa Barbara*, Brazil Is in Grave Danger. These 1,105 Pages Prove It, New York Times, 08.01.2025, https://www.nytimes.com/2025/01/08/opinion/bolsonaro-brazil-coup.html?smid=nytcore-ios-share&referringSource=articleShare&tgrp=sty&pvid=096FB768-6E23-4EE1-BA48-6E3B2AEC3B47 (last accessed on 20 January 2025).

74 *Luis Rosenfield*, The history of ideas of Brazilian authoritarian constitutionalism, in: Draiton Gonzaga de Souza / Evandro Pontel / Jair Tauchen (eds.), A democracia: uma urgência educativa, Porto Alegre 2021, p. 77.

75 *Peluso Neder Meyer*, note 66.

Thilo Herbert provides an in-depth analysis of the ways in which the Brazilian civil-military dictatorship has organized, entrenched, and legitimated its power through constitutional law in general, and through a distinctive form of "authoritarian federalism" in particular.[76] Mainstream accounts typically conflate liberal constitutionalism, democracy, and federalism, claiming that "all cases of genuine federal states are founded upon liberal democratic constitutionalism."[77] Cautioning against such generalizations, Herbert argues that federalism not only continued to exist during the military dictatorship installed by the 1964 coup, but that the military regime actively utilized the country's federal structure through constitutional means for its own benefit, co-opting local and regional elites into its own form of "authoritarian federalism". His contribution thus serves as a warning that autocratic "nerds" are able to manipulate federal systems for their own ends and adds a novel analytical dimension to the study of constitutional authoritarianism, calling for closer contextual analysis of constitutional designs and concepts typically associated with liberal democracy.

In the next contribution, Jessica Holl and Jasmin Wachau compare the ways in which Brazilian and German law deal with the memory of authoritarian regimes and atrocities, and analyze how the two legal systems respond to revisionist and denialist speech.[78] While extant literature on memory laws is largely focused on Europe[79], they expand the case selection and analytical framework to other legal approaches to dealing with the past outside Europe. They show that contemporary right-wing populists in both Germany and Brazil instrumentalize memory by glorifying the authoritarian past, downplaying and/or denying past injustices. While German law criminalizes certain forms of public Holocaust denial and glorification of Nazi atrocities in punitive memory laws, legal responses in post-authoritarian Brazil remain shaped by an incomplete transitional justice process and the continued enforcement of its (self-)amnesty law. Rather than memory laws, Brazil has adopted transitional justice measures such as truth commissions and an amnesty commission that seeks to ensure victims have a voice and receive reparations. This is often criticized as insufficient, but the German approach also poses risks for free speech and the courts, which risk being instrumentalized as political stages by punk-type right-wing provocateurs.

Last but not least, Clara Iglesias Keller and Diego Werneck Arguelhes detail how Brazilian courts have responded to disinformation-driven backsliding with an array of measures, including content removal, social media regulation, criminal prosecutions, and disqualifications for future elections.[80] Keller and Arguelhes analyze how systematic disin-

76 *Herbert*, note 7.

77 *Michael Burgess / Alain G. Gagnon*, Introduction: federalism and democracy, in: Michael Burgess / Alain- G. Gagnon (eds.), Federal Democracies, London 2010, p. 9.

78 *Holl / Wachau*, note 4.

79 See e.g. *Uladzislau Belavusau / Aleksandra Gliszczyńska-Grabias* (eds.), Law and memory: Towards legal governance of history, Cambridge 2017.

80 *Iglesias Keller / Werneck Arguelhes,* note 3.

formation, such as election fraud claims, has become a symptom and vector of democratic backsliding, as it undermines public trust in traditional accountability institutions and creates anti-pluralist illiberal public spheres. They also show how Brazilian courts became protagonists in the fight against disinformation and election fraud claims, expanding their own powers over social media platforms, launching criminal investigations, and declaring political candidates ineligible for public office for spreading disinformation. While these judicial measures protected the electoral process and contributed to Bolsonaro's electoral defeat, Keller and Arguelhes caution against considering the Brazilian experience as an unqualified success that *can* be emulated, given the institutional peculiarities of the Brazilian apex courts, and that *should* be emulated, given the risks associated with the expansion of judicial powers.

Overall, Germany and Brazil can be read as case studies of constitutional resilience in different ways: German legal and democratic institutions have resisted right-wing threats largely through political strategies and some individualized criminal proceedings. Brazil, in turn, can be considered as a case of bouncing back from backsliding: its democracy has outlasted Bolsonarism (for now) and stands out as one of the few jurisdictions in Latin America where courts have put up considerable resistance against re-autocratization.[81]

E. The way forward: Constitutional resilience in times of polycrisis

In sum, our project has highlighted the patterned diversity of constitutionalism as a global phenomenon, and its adaptation, variation, and contestation in domestic contexts. Liberal and transformative constitutionalism have diffused and diversified globally, as have different varieties of autocratic legalism and constitutional authoritarianism.

Going forward, constitutional democracy is faced with an increasingly unfavorable global environment, shaped by what has been called the "polycrisis": a combination of multidimensional crises that are interconnected and mutually reinforcing, including the climate crisis, pandemic threats, devastating wars in Ukraine, the Middle East and Africa, rising geopolitical tensions with increasingly aggressive authoritarian regimes, a new wave of military coups, an empowered far-right emboldened by the return of Donald Trump, and an increasingly oligarchic and securitized global political economy.[82] Whether and how constitutional democracy can remain resilient and preserve the relative autonomy of law in times of polycrisis, will likely be a key question for comparative constitutional law in the decade to come.

81 For an overview, see *Diego A. Zambrano / Ludmilla Martins da Silva / Rolando Garcia Miron / Santiago P. Rodriguez,* How Latin America's Judges are Defending Democracy, Journal of Democracy 35 (2024), p.118.

82 On the concept, see *Adam Tooze*, Defining polycrisis, Substack, 24.06.2022, https://adamtooze.substack.com/p/chartbook-130-defining-polycrisis (last accessed 20 December 2024); *Michael Lawrence / Thomas Homer-Dixon / Scott Janzwood / Johan Rockstöm / Ortwin Renn / Jonathan Donges*, Global polycrisis, Global Sustainability 7 (2024), p. 1.

To contribute to the resilience of constitutional democracy, future comparative research will need to address questions and challenges along three main axes: how to conceptualize and theorize constitutional resilience, how to capture the main actors and sites of the struggle for resilience, and how to make global cooperation, including in comparative research, itself resilient.

The first set of questions concerns the conceptual and theoretical frameworks that will enable comparatists to research how constitutional democracy can resist, and adapt to, the challenges of the polycrisis. This work can build on long-standing debates on militant democracy in liberal constitutional systems and on more recent experiences with transformative constitutions under pressure. But to survive, constitutional democracy will not only need to resist external pressures and shocks, but will also have to adapt to legitimate critiques, changing contexts, and new environments full of challenges. This dialectic of resistance and adaptation may be best captured by the concept of resilience, which implies a certain internal elasticity and flexibility that allows it to adapt to new circumstances and bounce back from temporary deformation. Future research should thus explore this theoretical potential of resilience and understand its patterns, concepts, and determinants.[83]

Understanding constitutionalism in its global varieties offers a framework for distinguishing between the two paths of resistance and adaptation. Acknowledging the patterned diversity of constitutional experiences by way of more representative global typologies not only gives comparatists a better sense of what needs to be defended, but also of what has been, and can be successfully adapted to new circumstances. After all, many constitutional orders in the Global South have been faced with multiple crises at once, have eroded and been reconstructed multiple times, and thus offer important experiences of constitutional resilience also for jurisdictions in Euro-America. Future research on the varieties and resilience of constitutionalism thus faces important questions: How can we treat constitutional liberalism not as a fixed monolithic category, but as an open source and a model susceptible to adaptation and development in both the Global North and South?[84] Similarly, rather than giving up on transformative constitutionalism as a hopeless endeavor in the face of polycrisis, how can we understand it as a global resource to draw from

83 For discussions of resilience as a conceptual framework see *Swati Jhaveri / Tarunabh Khaitan / Dinesha Samararatne*, Constitutional Resilience in South Asia: A Primer, in: Swati Jhaveri / Tarunabh Khaitan / Dinesha Samararatne (eds.), Constitutional Resilience in South Asia, London 2023, p. 3 and the other contributions to that volume; *Vanessa A. Boese / Amanda B. Edgell / Sebastian Hellmeier / Seraphine F. Maerz / Staffan I. Lindberg,* How democracies prevail: democratic resilience as a two-stage process, Democratization 28 (2021), p. 885.

84 See e.g. *Philipp Dann*, Guest editorial: Liberal constitutionalism and postcolonialism in the South and beyond: On liberalism as an open source and the insights of decolonial critiques, ICON 20 (2022), p. 1 For a similar argument on the adaptabiliy of liberal constitutionalism, see also *Roux*, note 38.

in attempts to build back better and to manage cyclical challenges of re-democratization, transitional justice, political economy, and ecological transformation?[85]

A second set of questions for future research concerns the main actors and sites of constitutional resilience. The Brazilian example of judicial resistance against backsliding suggests that we should not prematurely discount the potential of courts as actors and sites of resilience, all while remaining aware of the future risks and limitations of judicial interventions to protect democracy. At the same time, as constitutional law is becoming more ideologically diverse and more contested as a terrain for social struggles and political lawfare, a range of other actors and sites of constitutional resilience deserve more attention in future research. These actors include parliaments and parties, federal states and fourth-branch institutions, civil society and business, security forces, and the military.[86]

The sites of struggle include at least four battlefields where the polcycrisis will play out and constitutional resilience will be won or lost: Firstly, the crisis of global political economy will make economic constitutionalism and the law of democracy even more contested battlefields, raising important questions such as: how can democratic constitutionalism address not only the problems of poverty and inequality, but also of concentrated wealth? How can it resist not only the threat of autocracy, but also of oligarchy? How can constitutional law adapt to geo-economic de-coupling and the securitization of economic relations? How can business corporations, as vehicles of concentrated wealth and foreign influence, be understood and regulated in constitutional law beyond the liberal canon?[87]

Secondly, growing geopolitical tensions, the return of military coups, and internal and external security threats draw renewed attention to the role of the military and security in the varieties of constitutionalism. Often neglected and treated as an apolitical monolith under civilian control in liberal research perspectives, the military needs to be understood as a complex constitutional actor and site of struggle across democratic and authoritarian regimes: How does the constitutional role of the military vary in authoritarian and democratic constitutional systems? How can constitutional law address the political instrumental-

85 For research in that direction, see *Lucas Delgado / Chris Thornhill*, Conjunctures of democratic erosion: Is Brazil a global paradigm of resilience?, Direito Público 21 (2024), p. 121; ConTrans conference "A Playbook for Reinstating the Rule of Law", https://ruleoflaw-freiburg.de/ (last accessed on 20 December 2024).

86 For a broadening of the actor perspective along these lines, see also *Jhaveri / Khaitan / Samararatne*, note 83, pp. 20 et seq.

87 On the different approaches to the corporation, see *Michael Riegner*, Canonizing the corporation: Liberal, social and transformative varieties of corporate constitutionalism, in: Sujit Choudhry / Michaela Hailbronner / Michael Kumm (eds.), Global Canons in an Age of Contestation, Oxford 2024, p. 531; *Mariana Pargendler*, Corporate Law in the Global South: Heterodox Stakeholderism, Seattle University Law Review 47 (2024), p. 535. On geoeconomic changes, see e.g. the programme on de-globalization and global decoupling at https://www.uni-erfurt.de/en/research/researching/research-projects/doctoral-programme-de-globalisation-and-global-decoupling-deglobe (last accessed on 20 December 2024). On the law of democracy, see only recently *Tom Ginsburg* / *Aziz Z. Huq / Tarun Khaitan*, The Entrenchment of Democracy, Cambridge 2024.

ization of the military by civilian populists without undermining civilian control? What role do internal constitutional beliefs, cultures, and dynamics within the military play in democratic backsliding and resilience?[88]

Thirdly, as the climate crisis and environmental stresses intensify, environmental constitutionalism will be another key battlefield for constitutional resilience: How can constitutional courts adapt liberal or transformative constitutional doctrines to nudge state and society towards more effective climate action? How do environmental movements and counter-movements mobilize constitutional law in struggles for their competing ecological, political, or economic goals? What role does (anti-)environmentalism play in the playbook of right-wing populists and in authoritarian constitutional systems?[89]

Finally, constitutional resilience will be defined by intensifying struggles over competing visions of gender, race, and other markers of identity and discrimination. Feminists and critical race theorists have long sought to transcend liberal theories of rights and constitutional categories like the public-private divide, but conservative counter-movements, religious groups, far-right populists and authoritarian regimes are also increasingly mobilizing constitutional arguments and human rights to entrench their own agendas. How to walk the line between adaptation and resistance in these struggles for resilience? How to respond to the globalization of exclusionary anti-feminist and anti-abortion activism?[90] To the instrumentalization of postcolonialism and the notion of the Global South by autocratic regimes?[91] And to illiberal re-interpretations of human rights more generally?[92]

88 On the complex roles of the military, see *Ozan Varol*, The military as guardian of constitutional democracy, Columbia journal of transnational law 50 (2013), p. 547; *Michael Head*, Domestic Military Powers, Law and Human Rights, Routledge 2019; *Nam Kyu Kim*, Illiberalism of Military Regimes, in: András Sajó / Renáta Uitz / Stephen Holmes (eds.), Routledge handbook of illiberalism, Oxfordshire 2022, p. 571; *Melissa Crouch*, The Military Turn in Comparative Constitutional Law: Constitutions and the Military in Authoritarian Regimes, Annual Review of Law and Social Science 20 (2024), p. 53.

89 On these questions, see *Rike Krämer-Hoppe*, The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide, German Law Journal (2021), p. 139; *Ingo Sarlet / Tiago Fensterseifer*, Fundamental rights theory and climate protection through the lens of the Brazilian Constitution, e-publica 9(3) (2022), p. 26; *Danielle Rached / Marco Alberto / Bernardo Tagliabue*, Environmental Authoritarianism, World Comparative Law 55 (2022), p. 542; *Cecilia Oliveira / Jens Marquardt / Markus Lederer*, Same, same but different? How democratically elected right-wing populists shape climate change policymaking, Environmental Politics 31 (2022), p. 777.

90 On gender, see *Ligia Fabris / Holly Patch / Karsten Schubert*, Liberalism and the Construction of Gender (Non-)Normative Bodies and Queer Identities, in: Alexandra Scheele et al. (eds.), Global Contestations of Gender Rights, Bielefeld 2022, p. 267; *Gabriele Dietze / Julia Roth*, Right-Wing Populism and Gender, in: ibid. (eds), Right-Wing Populism and Gender, 2020, 1-20; *Martha Gayoye*, Gendered Constitutionalism in the Global South, World Comparative Law 56 (2023), p. 115, and the other contributions to that special issue.

91 *Ekaterina Degot / David Riff / Jan Sowa* (eds.), Perverse Decolonization, Berlin 2021.

92 *Alexandra Huneeus*, When Illiberals Embrace Human Rights, AJIL Unbound 113 (2019), p. 380; *Marie-Luisa Frick*, Illiberalism and Human Rights, in: András Sajó / Renáta Uitz / Stephen

A third set of questions for future research concerns the transnational and global dimensions of constitutional resilience. Understanding the processes, networks, and institutions that enable the circulation of illiberal legal ideas remains an important task for research in comparative constitutional law and public international law alike. Do these ideas diffuse through the same channels as liberal-democratic norms, or can we observe different dynamics? Do captured constitutional courts engage in "judicial dialogue", will we see autocracy-promotion projects in foreign aid, do illiberal lawyers spread their ideas at international conferences? Do international organizations become sites and actors of an authoritarian international law?[93]

In a next step, researchers will need to devise global strategies for resistance and adaptation in transnational spaces and collaborations. Universities, conferences, and research cooperations themselves will need to become sites of resilience where scholars not only research but also defend constitutional democracy. This raises complex ethical and practical questions of how to respond to the circulation of illiberal legal ideas in our own discipline, how to protect academic freedom and preserve a diversity of viewpoints, and where to draw red lines and practice solidarity against authoritarian abuse – questions that we have faced in our VACON project, and that are likely to recur in other contexts. In that sense, slow comparison remains as important as ever – but will also need to adapt and evolve towards new forms of more militant comparison.[94]

Holmes (eds.), Routledge handbook of illiberalism, Oxfordshire 2022, p. 861; *Tobias Berger*, Human Rights beyond the Liberal Script, International Studies Quarterly 67 (2023), p.1.

93 See *Riegner*, note 61; *Tom Ginsburg*, Authoritarian International Law?, American Journal of International Law 114 (2020), p. 221; *Alejandro Rodiles*, Is there a 'populist' international law (in Latin America)?, Netherlands Yearbook of International Law 49 (2018), p. 69.

94 *Riegner*, note 61; *Brazilian scholars*, Academic Freedom as Democracy's Last Defense: Open Letter in support of Professor Conrado Hübner Mendes, Verfassungsblog, 30.07.2021, https://verfassungsblog.de/academic-freedom-as-democracys-last-defense/ (last accessed on 20 December 2024), DOI: 10.17176/20210731-015921-0. For another example, see the Consortium on Global Resistance to Authoritarian Diffusion, https://www.kcl.ac.uk/tli/consortium-on-global-resistance-to-authoritarian-diffusion (last accessed on 20 December 2024).

Facing disinformation in democratic backsliding: the role of courts in Brazil

By *Clara Iglesias Keller*[*] and *Diego Werneck Arguelhes*[**]

Abstract: This paper examines how democratic institutions respond to disinformation when it is weaponized by elected officials for illiberal purposes. It focuses on the role of courts in countering disinformation in Brazil from 2018 to 2022, when the country experienced threats to democracy, marked by the use of disinformation to undermine electoral and judicial checks. In response, Brazil's High Courts took an array of measures against disinformation, including content removal, social media regulation, and criminal proceedings. While these actions were crucial in promoting democratic resilience, they also raised concerns about judicial aggrandizement and its implications. The paper discusses the tension between the courts' role in protecting democracy and their institutional limitations as well as the potential impact on the public perception of courts and freedom of expression, of having judges taking the leading role in fighting disinformation.
Keywords: Disinformation; Democratic Backsliding; Courts; Brazil; Freedom of Expression; Democratic Resilience

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A. Introduction

Information manipulation has long been a contingency of democratic politics. However, disinformation – the spread of false information aiming at a certain harm, whether economic, political, or reputational – acquired global salience in connection with various political processes that threaten liberal democracy. As a symptom or even a vector of a deeper democratic crisis, disinformation weakens the public sphere, enabling authoritarian politicians to bypass institutional and societal controls and promote the gradual erosion of

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key democratic commitments. Countermeasures against disinformation have been largely explored by academics, civil society, and politicians.[1] Popular prescriptions – such as fact-checking, media literacy, and regulating social media platforms – mostly emphasize disputes over facts (i.e. how to ensure that people have access to accurate information) and perhaps the transformation of flows of information and attention in extensively digitalised public spheres. But how do democracies respond when, beyond its communicational dynamics and implications, disinformation is directly weaponized by elected actors for illiberal purposes?

Using Brazil as a case study, we investigate how judicial institutions have been coping with disinformation in contexts of democratic backsliding – here understood as the gradual, state-led undermining of key features of liberal democracies as political regimes.[2] We use this case to understand both the potential contribution to democratic resilience of particular features of judicial institutional design and the implications of judges acting as protagonists in dealing with disinformation. While the country has been in political turmoil for over a decade, the rise of Jair Bolsonaro to the presidency presented unprecedented challenges. Between 2018 and 2022, he largely used disinformation to pollute public debate and mobilize extremist supporters against electoral and judicial checks on his powers. For years now, Brazilian debates on threats to democracy and how to face them have centred around disinformation, from Congress to the press, from academia to civil society organizations. Amidst unsuccessful legislative attempts to enact rules on disinformation and regulate social media,[3] the *Supremo Tribunal Federal*, or STF, and the *Tribunal Superior Eleitoral*, or TSE (here the "High Courts"), took on a leading role in checking Bolsonaro's attacks on institutions, within which disinformation played a central role. By means of a combination of different powers that often challenge typical conceptions of the judicial role, judges issued injunctions to remove content and block social media profiles and adopted new rules and expansive interpretations of electoral laws, while also initiating and promoting criminal proceedings against those deploying disinformation practices.

These judicial interventions, however, highlight a tension between the democracy-protecting role of courts and their institutional limitations. Courts are generally expected to act as bulwarks of liberal democracy, either by dampening majoritarian decision-making

1 *Clara Iglesias Keller / Charlotte Freihse / Cathleen Berger*, Towards a Healthy Public sphere: State Actions against Disinformation, Gütersloh 2024; *Samuel Cipers / Trisha Meyer / Jonas Lefevere*, Government Responses to Online Disinformation Unpacked, Internet Policy Review 12 (2023).

2 e.g. *Nancy Bermeo*, On Democratic Backsliding, Journal of Democracy 27 (2016).

3 Despite disinformation implicating various actors, public debates in Brazil have approached it largely as a social media contingency, to the point that digital-platforms regulation to counter disinformation became the epitome of democratic reconstruction after Bolsonaro's term was over. Since 2020, a series of legislative proposals for digital platforms have been discussed in Congress under the scope of what is now Bill of Law 2.630. Despite the ongoing presence of regulation of digital communications in the political debate, the proposal did not move forward, and the possibility of approving a comprehensive, national regulatory framework for digital platforms in the country remains uncertain.

that threatens fundamental rights or by exerting horizontal accountability over incumbents. For the same reasons, they are often targeted by illiberal leaders. At the same time, courts are peculiar institutional actors. With their selective case-by-case approach, they were not designed to act as the prime policy makers on complex societal phenomena such as disinformation.[4] Moreover, as judges interpret existing provisions to streamline prosecutions and adapt electoral law to the realm of digital communications, they attract heightened public scrutiny. While judicial resistance against the flood of disinformation has been considered a key element in democratic resilience in Brazil, it also increased the country's High Court's public exposure and raised legitimate concerns over judicial excesses and restrictions on free speech, with consequences for the public perception of courts as impartial guardians of constitutional and electoral norms.

In section B, we reconstruct the Brazilian case in consideration of existing perspectives on democratic backsliding, highlighting the role of disinformation campaigns and the courts' (contingent) potential to promote resilience. In section C, we describe the main features of judicial engagement with disinformation in the context of threats to democracy. Rather than exhaustively listing the many procedures and mechanisms available to judges, we discuss key cases that illustrate the features of institutional design that have been crucial for judicial scrutiny of disinformation in Brazil. In the penultimate section, we lay out an analysis of institutional repercussions, with a focus on the potential impact of judicial protagonism against disinformation in cases of democratic backsliding on (i) societal perception of courts' legitimacy and (ii) the country's freedom-of-expression landscape, as well as courts' ability to hold politicians accountable for similar abuses in the future.

B. Disinformation in democratic crisis

I. Autocratization, backsliding, self-coups, and democratic resilience (so far)

Where, why, and how do democracies end? In some countries, different political processes have led to the visible breakdown of the norms of liberal democracy,[5] regardless of whether these developments are understood as constituting a "global wave" or not.[6] There are a variety of versions of this story: from gradual, "stealth" processes ultimately leading to regime changes, as has been the case in Venezuela or Hungary, to a decrease in the stability, integrity, or quality of political institutions and processes, both in recent (like Brazil and Poland) and older (like the UK and the US) democracies. To better capture the piecemeal nature of these processes, scholars both adjusted older concepts (like "populism" and

4 *Clara Iglesias Keller*, Policy by Judicialisation: The Institutional Framework for Intermediary Liability in Brazil, International Review of Law, Computers & Technology 35 (2021).

5 *Aziz Huq / Tom Ginsburg*, How to Lose a Constitutional Democracy, UCLA Law Review 65 (2018).

6 *Andrew Little / Anne Meng*, Subjective and Objective Measurement of Democratic Backsliding, PS: Political Science & Politics 57 (2024).

"authoritarianism") and crafted novel ones, such as "democratic backsliding", "democratic decay", or "constitutional erosion".[7]

In the Brazilian case, the same factual backdrop can also be read through a variety of frameworks. From 2018 to early 2023, the country underwent processes that illustrate the different threats that democracy faces. First, Brazil experienced a gradual decrease in its "Liberal Democracy Index (LDI)" in several consecutive V-DEM reports,[8] especially in view of factors such as government intimidation, electoral intimidation, polarization, and (in)tolerance for counter-arguments.[9] Yet, already from 2022 on, even before Jair Bolsonaro left office (2019–2022), the indicators have shown improvement along some of these dimensions, partially due to pro-democracy mobilization in the 2022 electoral process. The 2024 V-DEM report presents Brazil as a "U-turn democratization" case – a country that has "bounced back" from previous processes of autocratization.[10]

Second, there were visible elements of democratic backsliding, defined as "the state-led debilitation or elimination of the political institutions sustaining an existing democracy".[11] If we understand backsliding as a process of regime change[12] that is the outcome of purposeful institutional changes,[13] President Bolsonaro promoted measures typically associated with backsliding. This includes, for example, him adopting decrees that would disempower mechanisms of accountability within the public administration, and his security forces establishing "checkpoints" that made it harder for voters in pro-Lula regions to reach the ballot box on election day.[14]Specifically aimed at the courts, he petitioned for the

7 *Marianne Kneuer*, Unravelling Democratic Erosion: Who Drives the Slow Death of Democracy, and How?, Democratization 28 (2021); *Tom Gerald Daly*, Democratic decay: Conceptualising an emerging research field, Hague Journal on the Rule of Law 11 (2019).

8 V-DEM, Democracy Report 2023: Defiance in the Face of Autocratization; https://v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf (last accessed on 30 July 2024).

9 According to the report that was "the fourth consecutive Democracy Report featuring Brazil among the top 10 autocratizers in the world", Ibid., p. 22,

10 V-DEM, Democracy Report 2024: Democracy Winning and Losing at the Ballot, https://www.v-dem.net/documents/43/v-dem_dr2024_lowres.pdf (last accessed on 13 November 2024).

11 *Bermeo*, note 2, p. 5.

12 *Laura Gamboa*, Resisting Backsliding: Opposition Strategies against the Erosion of Democracy, Cambridge 2022.

13 *Stephan Haggard / Robert Kaufman*, The Anatomy of Democratic Backsliding, Journal of Democracy 32 (2021).

14 See, e.g., *Oscar Vilhena Vieira / Rubens Glezer / Ana Laura Barbosa*, Supremocracia e Infralegalismo Autoritário: O Comportamento Do Supremo Tribunal Federal Durante o Governo Bolsonaro, Novos Estudos CEBRAP 41 (2022). For a description of the politicization of the Federal Highway Police (*Polícia Rodoviária Federal*) and the "checkpoints" on election day, see *Marcelo Roubicek*, Como a PRF caminhou para a ação política no governo Bolsonaro, Nexo, 01.11.2022, https://www.nexojornal.com.br/expresso/2022/11/01/como-a-prf-caminhou-para-a-acao-politica-no-governo-bolsonaro (last accessed on 30 July 2024).

impeachment of a Supreme Court judge and defended an amendment proposal to increase the size of the court.[15]

Yet, such backsliding measures failed to gain traction in Congress,[16] and the ones that were adopted by executive decree were subsequently suspended or annulled by the judiciary.[17] Ultimately, Bolsonaro lost the elections and stepped down. In Brazil, then, the president purposefully promoted backsliding, but - despite attacking central norms of democratic governance - was not successful in remaining in power and consolidating a regime reversal. This does not mean that Brazilian democracy is safe, however, since future illiberal politicians might follow in Bolsonaro's footsteps – perhaps more effectively exploiting the same political, institutional, and social fault lines in the country. Nonetheless, it is undeniable that backsliding did not lead to regime change in Brazil.

Third, there were plans for an old-fashioned self-coup attempt. Information revealed in criminal investigations in 2023 shows that, while publicly mobilizing his voter base to disregard electoral results in case of a defeat in October 2022, Bolsonaro and his inner circle spent months trying to enlist the armed forces to disregard a Lula victory and help them to remain in power against constitutional rules.[18] However, they were unable to muster the support of the army or the air force. His radicalized followers that stormed through the buildings of Congress, the Presidency, and the Supreme Court on January 8th, a week after Lula's inauguration, were pleading for the armed forces to seize power and reinstate Bolsonaro – to no avail.

Autocratization, backsliding, and the spectre of an old-fashioned self-coup for which the president actively sought military support: Brazilian democracy faced all these persistent threats, but survived. The country might still find itself in a broader arc of backsliding over the next few elections, and Bolsonaro left a legacy of damage to several norms, communities, and rights. But democracy has so far resisted. How so? While the answer is multi-faceted, we focus here on the role of courts in dealing with disinformation

15 These measures are associated with events that led to backsliding in other countries (see, e.g., *Rosalind Dixon / David E. Landau*, Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy, Oxford 2021). In *Haggard / Kaufman*, note 13, terms, Bolsonaro "eroded" Brazilian democracy (backsliding did not result in regime change), even though he was not successful in promoting a reversal of democracy by seeking support in the armed forces and his constituents to remain in power even after suffering an electoral defeat.

16 *Marcus André Melo / Carlos Pereira*, Why Didn't Brazilian Democracy Die?, Latin American Politics and Society 2024.

17 *Vieira / Glezer / Barbosa,* note 14.

18 See *Kareem El Damanhoury / Julia Vargas Jones*, Brazil's ex-president Bolsonaro presented coup plot to military leaders, court documents allege, CNN, 16.03.2024, https://edition.cnn.com/2024/03/15/americas/brazil-bolsonaro-coup-plot-allegations-intl-hnk/index.html (last accessed on 30 July 2024); *João Fellet*, Quanto o Brasil esteve perto de um golpe militar em 2022?, BBC News Brasil, 09.02.2024, https://www.bbc.com/portuguese/articles/ce942rp236yo (last accessed on 30 July 2024).

weaponized against key aspects of a liberal democracy – e.g. the conditions for public deliberation, electoral integrity, rule of law, and checks and balances.[19]

II. Disinformation and the communicational dimension of democratic backsliding

The question of why and to what extent disinformation is harmful is inseparable from its role in recent processes of democratic transformation. Disinformation's supposed immediate effects are disputed, with popular assumptions – such as the idea that it necessarily swings voter preferences or that it is widespread across populations – having already been debunked by international empirical evidence.[20] Still, of greater concern are the ways in which disinformation puts democracies at stake.

Disinformation's most toxic traits target the pillars of participation and deliberation that constrain political power and allow democracies to function. It affects public trust in accountability institutions, such as parliaments and courts, potentially lowering the costs for authoritarian politicians to bypass societal and institutional checks on their power. This clears the way for authoritarian politics, where disinformation takes the stage as a means for creating segmented narratives and engaging right-wing and populist supporters.[21] In this context, people usually spread disinformation not necessarily because they believe it, but as a means to what Mourão and Robertson call "discursive integration", that is, "a form of political narrowcasting targeted at particular partisan audiences and designed to flare up their passions".[22] Disinformation also stokes distrust of legacy media and professional journalism, harming their ability to report on key political disputes and hold power accountable. In fact, in a "post-truth" context, adherence to disinformation expresses "rejection and devaluation of the dominant institutions of knowledge production, including their norms and procedures for examining claims to validity", affecting not only professional journalism but also "law, science and public administration".[23]

When disinformation turns into political action particularly directed at these democratic standards, it is no wonder that it becomes salient in scenarios of backsliding. In these contexts, Bennet and Kneuer associate disinformation with the "rise of illiberal public spheres", where communications systems contribute to the decay of liberal democracy norms through "violations of basic norms of civility, tolerance, inclusion, mutual recognition, and reasoned exchanges of different views, along with attacks on the independent

19 *Huq / Ginsburg*, note 5.

20 *Jeanette Hofmann*, Desinformation Als Symptom: Ein Überblick, in Bundesamt für Verfassungsschutz (ed.) Tagungsband Wissenschaftskonferenz 2023: Meinungsbildung 2.0 – Strategien im Ringen um Deutungshoheit im Digitalen Zeitalter, Köln 2023.

21 Ibid., p. 22.

22 *Rachel R. Mourão / Craig T. Robertson*, Fake News as Discursive Integration: An Analysis of Sites That Publish False, Misleading, Hyperpartisan and Sensational Information, Journalism Studies 20 (2019), p. 2091.

23 *Hofmann*, note 20, p. 26.

press, civil society organizations, and various ethnic, racial, religious, and sexual minorities".[24] This communicational dimension has been deemed by Jee et al. as one of the political arenas where backsliding takes shape.[25] In this sense, disinformation is understood as a crucial part of institutional erosion aimed at the conditions that enable "political representatives to implement their decisions effectively" – like the "shared understanding of facts" that ground "rational-critical public discourse".[26]

Empirical evidence on how disinformation has unfolded in Brazil's political landscape is, to some degree,[27] in tune with international experiences. Studies show that, while disinformation does not outnumber legitimate information in social media, it is particularly present within specific groups. The 2018 presidential elections are considered a landmark for the use of digital disinformation as political communication.[28] Studies on the use of X (formerly Twitter) during the electoral period indicated greater exposure to hyper-partisan and disinformation content by individuals who identify as "right-wing",[29] even though Twitter users in general were found to share more professional journalism than disinformation sources.[30] Similarly, during the COVID-19 pandemic, users shared more content to raise awareness about the virus and containment measures from professional journalism than content classified as disinformation; nonetheless, disinformation content received more engagement than reliable sources.[31]

In this context, disinformation's effects have proven both "minimal and powerful",[32] with significant impact among its targeted audiences. Right-wing groups are commonly moved by popular social network profiles that act as "opinion leaders" and who attract

24 *W. Lance Bennett / Marianne Kneuer*, Communication and Democratic Erosion: The Rise of Illiberal Public Spheres, European Journal of Communication 39 (2024), p. 179.

25 *Haemin Jee / Hans Lueders / Rachel Myrick*, Towards a Unified Approach to Research on Democratic Backsliding, Democratization 29 (2022).

26 Ibid., p. 761.

27 This diagnosis is necessarily limited and tentative, due to the so far small number of empirical studies available on the Brazilian case.

28 *Patricia Campos Mello*, A Máquina Do Ódio: Notas de Uma Repórter Sobre Fake News e Violência Digital, São Paulo 2020; *Rafael Evangelista / Fernanda Bruno*, WhatsApp and Political Instability in Brazil: Targeted Messages and Political Radicalisation, Internet Policy Review 8 (2019).

29 *Felipe Bonow Soares / Raquel Recuero*, Hashtag Wars: Political Disinformation and Discursive Struggles on Twitter Conversations During the 2018 Brazilian Presidential Campaign, Social Media + Society 7 (2021).

30 COMPROP Data Memo, News and Political Information Consumption in Brazil: Mapping the First Round of the 2018 Brazilian Presidential Election on Twitter, https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/12/2018/10/machado_et_al.pdf (last accessed on 30 July 2024).

31 *Luisa Massarani / Igor Waltz / Tatiane Leal*, COVID-19 in Brazil: An Analysis about the Consumption of Information on Social Networks, Journal of Science Communication 19 (2020), p. 15.

32 *Hofmann*, note 20, p. 23.

enough attention to significantly spread narratives amongst their followers.[33] These narratives promote a strong relationship between supporters of the former president, the use of right-wing sources of information, and belief in disinformation about the COVID-19 pandemic, and ultimately lead to individuals "becoming more misinformed over time".[34] Similarly, support for right-wing politics and the use of WhatsApp and Facebook as news sources were strongly associated with persistent and growing engagement with disinformation. Overall, this scenario limits the effectiveness of content-based countermeasures. In this vein, a study on the 2018 elections showed fact-checking initiatives were mostly unsuccessful in reducing the acceptance of rumours about political candidates, as political preferences have become the main determinant for engagement with content.[35]

Disinformation has been deployed as a political tool in many contexts, and the studies we briefly review here show that its political relevance and impact transcend a dispute over facts. In countries such as Brazil, it has become part of a broader, deliberate backsliding process promoted by political actors, thus inviting judicial intervention in a twofold way: courts engage with these processes not just as arbiters of the limits of free speech in the public sphere, but also as guardians of democratic governance more generally.

III. Courts as protectors of democracy

During the Bolsonaro government, Brazilian courts checked illiberal policies in many different fields, from science and public health (especially during the COVID-19 pandemic) to budgetary rules, from the rights of indigenous communities to the regulation and use of personal data, as well as the regulation of digital content and disinformation.[36] While these judicial checks did not fully prevent setbacks in rights and democratic norms, they are decisive in explaining why, after all that happened, the political regime in Brazil remains a democracy.[37] In scenarios of backsliding, it might seem intuitive that judges would occupy a central role – both as actors resisting democratic erosion and as targets of illiberal polit-

33 *Tatiana Maria Silva Galvão Dourado*, Fake News Na Eleição Presidencial de 2018 No Brasil, Salvador 2020.

34 *Patrícia Rossini / Antonis Kalogeropoulos*, Don't Talk to Strangers? The Role of Network Composition, WhatsApp Groups, and Partisanship in Explaining Beliefs in Misinformation about COVID-19 in Brazil, Journal of Information Technology & Politics 2023.

35 *Frederico Batista Pereira et al*., Fake News, Fact Checking, and Partisanship: The Resilience of Rumors in the 2018 Brazilian Elections, The Journal of Politics 84 (2022).

36 See *Vieira et al.*, note 14; *Juliana Cesario Alvim Gomes / Diego Werneck Arguelhes / Thomaz Pereira,* Brazil, in: Richard Albert / David Landau / Pietro Faraguna / Šimon Drugda / Rocío De Carolis (eds.), 2021 Global Review of Constitutional Law, Trieste 2022; *Vanessa Elias de Oliveira / Lígia Mori Madeira*, Judicialização Da Política No Enfrentamento à Covid-19: Um Novo Padrão Decisório Do STF?, Revista Brasileira de Ciência Política 35 (2021).

37 *Diego A. Zambrano / Ludmilla Martins da Silva / Rolando Garcia Miron / Santiago P. Rodriguez.*, How Latin America's Judges Are Defending Democracy, Journal of Democracy 35 (2024); *Melo / Pereira*, note 16.

icians. In the first dimension, recent quantitative studies suggest that independent judges might be a key ingredient to democratic resilience,[38] and scholars have documented cases in which democracy was protected by non-democratic, independent judges precisely because they were insulated from current political tides.[39]

However, judicial resistance is contingent on the broader political context. It is shaped by executive-legislative and party dynamics,[40] and it is not the historical norm in Latin America.[41] Political dynamics affect judicial behaviour in both the short and the long run. Over time, appointment mechanisms can lead to courts aligning with or being captured by autocrats,[42] as in Hungary. Moreover, even in the short run, individual judges might be intimidated into submission,[43] as in Venezuela. Whatever the mechanisms employed, judges are bound to be prime targets of rising authoritarian politicians everywhere.[44] In Latin America, in particular, as Llanos and Weber remark, the combination of strong courts and a strong executive has often been a "recipe for conflict".[45]

These dynamics were visible in Brazil between 2018–2022. The more judges performed their role and checked illiberal initiatives, the more Bolsonaro attacked courts as agents of the ruling elites who oppose measures favoured by the "true people" of Brazil. The relationship between Bolsonaro and the Supreme Court was never amicable, but the conflict escalated quickly in the second year of his presidency (2020), especially once the COVID-19 pandemic began in earnest. Since that moment, presidential threats against judges became a recurring feature of Brazilian politics under Bolsonaro, and the president-candidate turned attacking the High Courts into a rallying cry for his re-election bid. Judges were at the very centre of Bolsonaro's crosshairs, but they managed to resist.

While judicial protagonism did prove effective against backsliding in Brazil, judges are far from a "silver bullet" in the protection of democracy. The question of *how* exactly

38 e.g., *Vanessa A. Boese / Amanda B. Edgell / Sebastian Hellmeier / Seraphine F. Maerz / Staffan I. Lindberga*, How Democracies Prevail: Democratic Resilience as a Two-Stage Process, Democratization 28 (2021).

39 *Tom Ginsburg*, The Jurisprudence of Anti-Erosion, Drake Law Review 66 (2018); *Mila Versteeg et al*., The Law and Politics of Presidential Term Limit Evasion, Columbia Law Review 120 (2020).

40 *Julio Ríos Figueroa*, El poder judicial ante el populismo y la erosión democrática. El caso de México, 2018-2021, Revista de Estudios Políticos 198 (2022).

41 *Zambrano et al.*, note 37.

42 *Dixon / Landau*, note 15; *Aziz Huq*, Why Judicial Independence Fails, Northwestern University Law Review 115 (2021).

43 *Jeffrey K. Staton / Christopher Reenock / Jordan Holsinger*, Can Courts Be Bulwarks of Democracy? Judges and the Politics of Prudence, Cambridge 2022.

44 For examples in different national contexts, see e.g., *Dixon / Landau*, note 15; *Erik Voeten*, Populism and Backlashes against International Courts, Perspectives on Politics 18 (2020); *Ríos Figueroa*, note 40; *Michael Zürn*, How Non-Majoritarian Institutions Make Silent Majorities Vocal: A Political Explanation of Authoritarian Populism, Perspectives on Politics 20 (2022).

45 *Mariana Llanos / Cordula Tibi Weber*, Facing the Stress Test: Courts and Executives during the COVID-19 Pandemic, GIGA Focus Latin America 6 (2022).

courts mattered in a certain context is crucial to understanding *if* and *when* they will matter in other contexts. Available quantitative studies provide limited answers at this point, since they typically operate with highly stylized, abstract conceptions of courts and judicial power.[46] Case studies are necessary for us to better understand how different courts in different systems can, due to their specific design and powers alongside the political context in which they operate, contribute to checking threats to democracy effectively. Brazil's recent history provides such an opportunity – with the added feature of being able to highlight politicians weaponization of mass disinformation in digital media against judicial and electoral institutions.

C. Judicial engagement with disinformation

Judicial engagement with disinformation in Brazil was shaped by the contextual background of Bolsonaro's political attacks[47] as well as the particular design and interaction between the STF and the TSE. The STF is the country's highest court. It has broad powers of constitutional review, via both appeals and direct, abstract challenges, as well as extensive original criminal jurisdiction (on investigations and lawsuits filed against members of Congress, ministers of State, high-ranking army officials, other High Court judges, and the president himself).[48] The TSE, the country's highest electoral authority, is a powerful and multi-faceted institution. Although formally part of the judiciary, the TSE acts in the electoral process as administrator, rule-maker, and adjudicator – enacting, enforcing, and monitoring electoral regulations as well as deciding cases concerning their application.[49]

Due to this design, judicial resistance against disinformation took place across these two different institutions (STF and TSE) under three different judicial competences (constitutional, criminal, and electoral), with judges performing three different institutional roles (adjudicating, rule-making, and managing the electoral process). Moreover, there is an overlap of personnel between the STF and TSE, leading to a very close relationship

46 *Boese et al.*, note 38, for example, conclude that "stronger judicial constraints on the executive are significantly associated with greater democratic resilience to experiencing autocratization". However, the judicial power variable used by the authors is built around the question "*To what extent does the executive respect the constitution and comply with court rulings, and to what extent is the judiciary able to act in an independent fashion?*",*Michael Coppedge et al.*; V-DEM Codebook, https://v-dem.net/documents/24/codebook_v13.pdf (last accessed on 30 July 2024).

47 As described in the previous section.

48 For a critical reconstruction of the STF's design, procedures, and decision-making practices since democratization, see *Diego Werneck Arguelhes / Ivar A. Hartmann / Rafael B. Lima*, The Jurisprudence of the Supreme Federal Tribunal of Brazil, in Johanna Fröhlich (ed.), Constitutional Reasoning in Latin America and the Caribbean, London 2024.

49 For a critical overview of the TSE's powers and role in Brazilian politics, see *Muniz da Conceição / Lucas Henrique*, Electoral Justice and the Supreme Federal Court in Brazilian Democracy, in: *Cristina Fasone / Edmondo Mostacci, / Graziella Romeo* (eds.), Judicial Review and Electoral Law in a Global Perspective, Rochester 2024; *Eneida Desiree Salgado*, The Judicial Branch as a (Pretty) Bad Political Regulator: Notes from Brazil, Revista De Derecho Politico 113 (2022).

between the two institutions.[50] Three STF judges also sit on the TSE, and the latter's Chief Justice who wields great power over the court's agenda and the prerogative to issue individual injunctions in urgent cases – is always one of the STF judges. This concentrated a wide array of competences amongst the same individual judges, who also became popular targets of disinformation campaigns steered by Bolsonaro and his supporters.

I. The STF: the constitutional review and criminal jurisdiction fronts

The pandemic brought the first direct clashes between Bolsonaro's use of disinformation and the STF. During that period (which witnessed almost 700k deaths in Brazil), Bolsonaro denied scientific evidence on COVID-19, on public health risks, even on official statistics and the efficacy and safety of vaccines, and he rejected most social distancing measures. In court, he fought and lost against vaccines, masks, and other public health measures. The STF unanimously affirmed, for example, that local governments could adopt their own restrictive measures,[51] taking available scientific evidence, international guidelines, and local realities into consideration. Bolsonaro's radical laissez-faire stance was generally unpopular across the political spectrum,[52] which made it easier for the court – which gained popularity during the pandemic[53] – to check him more aggressively, in contrast with traditional patterns of judicial deference towards the central government.

Public support built up by the STF during the pandemic was decisive in the court's stance against Bolsonaro.[54] However, the president used judicial resistance itself as a focal point for disinformation, further inviting judicial reaction. While the court launched public campaigns and a fact-checking platform,[55] its most significant reactions took place through its vast criminal jurisdiction. In 2019, the STF initiated the so-called "Fake News

50 *Vitor Marchetti*, Justiça Eleitoral e a competição política no Brasil, Santo André 2013; for a critical perspective on this institutional overlap, see *Salgado*, note 49.

51 *Gustavo Ribeiro*, States Free to Continue Isolation Measures, says Supreme Court, Brazilian Report, 09.04.2020, https://brazilian.report/newsletters/brazil-daily/2020/04/09/brazilian-states-free-continue-isolation-measures-supreme-court/ (last accessed on 30 July 2024).

52 *Lucio Rennó / Leonardo Avritzer / Priscila Delgado de Carvalho*, Entrenching right-wing populism under covid-19: denialism, social mobility, and government evaluation in Brazil, Revista Brasileira de Ciência Política (2021).

53 *Fabiana Luci de Oliveira / Luciana Gross Cunha / Luciana Ramos,* O STF na visão dos brasileiros: ruim com ele, pior sem ele, Jota, 13.08.2021, https://www.jota.info/opiniao-e-analise/colunas/judiciario-e-sociedade/o-stf-na-visao-dos-brasileiros-ruim-com-ele-pior-sem-ele-13082021 (last accessed on 30 July 2024).

54 *Zambrano et al*., note 37.

55 For example, disinformation claiming that the Chief Justice of the TSE had said, in a lecture abroad, that Bolsonaro would only be re-elected "over his dead body". See this and other examples: Supremo Tribunal Federal, Confira os últimos desmentidos de notícias falsas feitos pelo STF. Verificação de informações suspeitas antes do compartilhamento evita a propagação de fake news, https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=464183&ori=1 (last accessed on 30 July 2024).

Inquiry", which is still ongoing, as a reaction against online threats to Supreme Court justices. The Constitution grants the STF extensive original criminal jurisdiction regarding political authorities, and criminal rulings by the court against politicians have become a common feature of Brazilian politics in the last decade.[56] But the inquiry was a further and unprecedented expansion of these competences, because starting investigative procedures was traditionally outside of the court's scope. The Fake News Inquiry was initiated by the Chief Justice to investigate online attacks against the judges and the "honourability of the institution".[57] In doing so, the court took a narrow and previously unused internal rule allowing for the investigation and prosecution of conduct that takes place within the STF's premises and extended it to cover all online threats to the court and its justices.

Although originally established to deal with direct threats to the STF and its members, from 2020 on, the Fake News Inquiry increasingly spawned a host of connected investigations at the intersection of digital disinformation against democracy and the Bolsonaro presidency, becoming a (controversial) tool to identify and check anti-democratic mobilization across many sectors of society – from politicians to businessmen, from ordinary Bolsonaro voters to military personnel and even digital platforms. Regarding the latter, for instance, in a 2022 injunction, Judge Alexandre de Moraes, who presided over both the Inquiry and the TSE (an example of the institutional overlap we mentioned), mandated blocking the Telegram messaging app from operating in Brazil after it failed to remove several messaging channels used by Bolsonaro, as per previous judicial decisions.[58] In another decision within the inquiry, Moraes pointed to a "digital criminal organization"[59] promoting disinformation against democracy, involving Bolsonaro and some of his key political allies.[60] Criminal investigations and correspondingly restrictive measures thus became a tool for real-time judicial engagement with anything associated with the organized dissemination of disinformation against democracy. Other decisions included expeditious content removal, blocking of social media profiles, and denying specific digital platforms' access to the Brazilian public.

56 *Luciano da Ros / Matthew M. Taylor*, Bolsonaro and the Judiciary: Between Accommodation and Confrontation, in: Peter Birle / Bruno Speck (eds.) How endangered is democracy?, Berlin 2022.

57 See Supremo Tribunal Federal, Gabinete da Presidência, Portaria n. 69, 14 March 2019.

58 DW, Brazil blocks messaging app Telegram, 19.03.2022, https://www.dw.com/en/brazil-telegram-messaging-app-blocked-by-top-court/a-61183805 (last accessed 13 November 2024). Telegram later complied with the Court's decision, and the blockage was lifted.

59 *Márcio Falcão / Fernanda Vivas*, Moraes arquiva inquérito dos atos antidemocráticos no STF e abre outro sobre organização criminosa, G1 Globo, 01.07.2021, https://g1.globo.com/politica/noticia/2021/07/01/moraes-arquiva-inquerito-dos-atos-antidemocraticos-no-stf-e-abre-novo-inquerito-sobre-organizacao-criminosa-contra-a-democracia.ghtml (last accessed on 30 July 2024).

60 *Márcio Falcão / Fernanda Vivas*, Polícia Federal abre inquérito sobre atuação de milícia digital contra a democracia, G1 Globo, 16.07.2021, https://g1.globo.com/politica/noticia/2021/07/16/pf-abre-inquerito-sobre-atuacao-de-milicia-digital-contra-a-democracia.ghtml (last accessed on 30 July 2024).

II. The TSE and the electoral front

The TSE engaged with disinformation across its multidimensional competences. Administrative measures in preparation for the 2022 national elections included digital literacy campaigns, fact-checking (largely dedicated to Bolsonaro's constant claims of electoral fraud), and agreements with digital platforms[61] by which they committed to deploy soft countermeasures against the online spread of electoral disinformation.[62] In comparison with the 2018 elections, the TSE increased the use of its administrative competences across several different dimensions.[63]

In its rule-making capacity, the TSE enacted Resolution n. 23714/2022, expanding its own competences to act without provocation by external parties regarding "disinformation that jeopardizes the integrity of the electoral process". This gave the TSE grounds to order platforms to immediately suspend content with "gravely decontextualized or knowingly false facts" that affected the integrity of the electoral process, as well as to suspend social media profiles or channels characterized by their recurring promotion of disinformation. The resolution also empowered the TSE's Chief Judge to individually determine the removal of content identical to already flagged disinformation and the suspension of access to online platforms in case of "reiterated non-compliance of injunctions based on this Resolution". Despite criticisms from across the political spectrum, the STF upheld the resolution – hardly a surprising outcome since, given their composition, the two courts display a close relationship.[64] That norm remained in force throughout the elections, having been used in individual injunctions to suspend profiles and content involving disinformation.

Beyond Resolution 23714/2022, the TSE shaped the law on disinformation through adjudication, revisiting its previous interpretations of existing rules to maintain the removal of online disinformation content and impose fines on disseminators. From the elections on, the TSE established that it could issue fines and suspend content even after the electoral

61 Tribunal Superior Eleitoral, TSE e plataformas digitais assinam acordo nesta terça-feira (15), https://www.tse.jus.br/comunicacao/noticias/2022/Fevereiro/tse-e-plataformas-digitais-assinam-acordo-nesta-terca-feira-15 (last accessed on 30 July 2024).

62 The agreements vary considerably for each platform. Overall measures include labelling elections-related content, investment in media literacy initiatives, and implementation of direct channels with the electoral authority for it to report Terms of Service infringing content regarding the elections. *Tribunal Superior Eleitoral*, TSE e plataformas digitais assinam acordo nesta terça-feira (15), https://www.tse.jus.br/comunicacao/noticias/2022/Fevereiro/tse-e-plataformas-digitais-assinam-acordo-nesta-terca-feira-15 (last accessed on 30 July 2024).

63 *Emilio Peluso Neder Meyer / Fabrício Polido*, International Law, Constitutions, and Electoral Content Moderation: Overcoming Supranational Failures Through Domestic Solutions, Chicago Journal of International Law 24 (2023).

64 Especialistas criticam TSE por mudar regras a 10 dias da votação e se autoconceder mais poderes, https://www.estadao.com.br/politica/especialistas-criticam-tse-por-mudar-regras-a-10-dias-da-votacao-e-se-autoconceder-superpoderes/ (last accessed on 30 July 2024); *Supremo Tribunal Federal*, Plenário Mantém Resolução Do TSE Sobre Combate à Desinformação, https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=496383&ori=1 (last accessed on 30 July 2024).

period had passed whenever disinformation was targeted at the electronic voting system itself and, in the court's words, its "content could be used for new and unwarranted aggressions in future electoral disputes".[65]

In its judicial capacity, the TSE had issued two rulings that revoked a politician's eligibility for office due to them spreading disinformation. Three years after a widespread pro-Bolsonaro Whatsapp-based microtargeting campaign in the 2018 elections, the court held that the distribution of microtargeted disinformation for electoral purposes via messaging applications could be treated as an abuse of economic and communicational power.[66] This entailed treating these digital platforms as social communications media – a category generally limited to broadcasters and legacy media. While the TSE did not find a violation of electoral law due to the specifics of that case, it made clear that, if such a violation was found, the court could remove from office any politician accused of spreading digital electoral disinformation through messaging apps. This judicial warning turned into an actual conviction in the case of Fernando Francischini, a state legislator in Paraná, who was stripped of his mandate for spreading disinformation about the electronic voting system during the 2018 electoral process.[67] During the 2022 elections, the same precedent posed a warning to Bolsonaro as the country waited for the TSE to begin ruling on the merits of several lawsuits filed against the former president, charging him with several types of illegal behaviour in the elections.

On June 30th, 2023, months after Bolsonaro's defeat, the TSE finally ruled on the first of these lawsuits. It began nearly a year before, in July 2022, when Bolsonaro had called a meeting with dozens of foreign diplomatic representatives, claiming that the Brazilian electoral system was not transparent or reliable and that his potential defeat would not be legitimate. Rehashing long-debunked false stories that had echoed amongst his followers, he suggested to the diplomats that judicial-electoral authorities were working to favour Lula.[68] After the meeting, the TSE issued another official statement debunking Bolsonaro's claims.[69] But judicial measures went far beyond fact-checking. In August 2022, the TSE is-

65 TSE, Representação n.0601365-65.2022.6.00.0000, Rel. Ministro Benedito Gonçalves, decided on 23 May2023.

66 TSE, AIJE 0601968-80 and AIJE 0601771-28, https://www.tse.jus.br/comunicacao/noticias/2021/Outubro/tse-julga-improcedentes-acoes-contra-jair-bolsonaro-e-hamilton-mourao (last accessed on 1 June 2024).

67 Tribunal Superior Eleitoral, Deputado Francischini é cassado por propagar desinformação contra a urna eletrônica, https://www.tse.jus.br/comunicacao/noticias/2021/Outubro/plenario-cassa-deputado-francischini-por-propagar-desinformacao-contra-o-sistema-eletronico-de-votacao (last accessed on 30 July 2024).

68 *Mauricio Savarese*, Brazil's Bolsonaro Meets Diplomats to Sow Doubts on Election, AP News, 19.07.2022, https://apnews.com/article/jair-bolsonaro-elections-caribbean-voting-brazil-8acf78e1e58650424b1dec4ecfc35ce4 (last accessed on 30 July 2024).

69 TSE divulga resposta a 20 acusações de Bolsonaro contra as eleições, https://veja.abril.com.br/coluna/radar/tse-divulga-resposta-a-20-acusacoes-de-bolsonaro-contra-as-eleicoes/ (last accessed on 30 July 2024).

sued an injunction to remove videos of Bolsonaro's speech in said meeting from Facebook, Instagram, and YouTube. A centre-left political party (PDT) also filed a lawsuit arguing that Bolsonaro's meeting with foreign diplomats was an abuse of the powers of his office to spread disinformation on the voting system.[70] It was in this lawsuit that, in 2023, in a 5 to 2 decision that included a long, detailed list of deliberate falsehoods uttered and promoted by Bolsonaro, the TSE declared him ineligible for eight years due to "abuse of political and communicational power".[71] Bolsonaro has since appealed to the STF, and at the time of writing, the case is still pending.[72]

D. Outcomes of judicial engagement with disinformation in democratic backsliding

While democratic resilience to backsliding is shaped by many factors, judicial institutions have played a key role across the globe.[73] However, their capacity to check illiberal actors and protect key aspects of democratic governance depends on their structure and the distribution of power within a given system. The institutional independence of Brazilian High Courts has certainly been decisive.[74] But independence is not the only relevant dimension configuring apex courts; their authority also varies, with different implications for their political power.[75]

Institutional design contingencies largely shaped our case study, notably with the overlap of constitutional review, civil, criminal, and electoral competences, from jurisdictional to administrative and rule-making – an expansive combination of powers that can be hard to reconcile with typical images of what "courts" and "judges" are expected to do. Moreover, these courts provide their individual members with an array of agenda-setting and decision-making competences that allow for flexibility in applying these different remedies to different actors (government agents, politicians, citizens, and even digital platforms). As other institutions have lagged behind in dealing with the upsurge in disinformation, Brazil's unusual judicial design placed judges in a powerful position to check Bolsonaro and his extremist supporters.

70 See Tribunal Superior Eleitoral, Referendo Na Ação de Investigação Judicial Eleitoral Nº 0600814-85 (Pje) – Classe 11527 – Brasília – Distrito Federal, https://www.migalhas.com.br/arquivos/2022/12/E5A076E1E8393F_AIJE0600814-85-0.relatorioevot.pdf (last accessed on 30 July 2024).

71 Tribunal Superior Eleitoral, Por maioria de votos, TSE declara Bolsonaro inelegível por 8 anos, https://www.tse.jus.br/comunicacao/noticias/2023/Junho/por-maioria-de-votos-tse-declara-bolsonaro-inelegivel-por-8-anos (last accessed on 30 July 2024).

72 Supremo Tribunal Federal, Recurso Extraordinário Com Agravo (ARE) 1474354, https://portal.stf.jus.br/processos/detalhe.asp?incidente=6820240 (last accessed on 30 July 2024).

73 *Boese et al*., note 38; *Melis G. Laebens / Anna Lührmann*, What Halts Democratic Erosion? The Changing Role of Accountability, Democratization 28 (2021).

74 *Zambrano et al*., note 37.

75 *Daniel M. Brinks / Abby Blass*, Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice, International Journal of Constitutional Law 15 (2017).

These contingent features limit the possible takeaways of the Brazilian case in terms of a broader theory of judicial resistance to backsliding. But the case allows us to explore the conditions under which courts *can* exercise their powers and independence – such as political fragmentation, public support, and elite support –,[76] and it shows that the kind of powers that courts have in the first place is a decisive factor. Moreover, we can ask, what are the potentially troubling implications of these same institutional contingencies that made Brazilian High Courts powerful enough to act to buffer backsliding? The fact that a few individual judges could do so much, so flexibly, and so visibly is potentially in tension with established expectations for the role of the judiciary and, substantively, the scope of freedom of expression in Brazil. We discuss these two sets of implications below.

I. Judicial resistance and the political context: judicial capture and public support

In Brazil, disinformation has functioned less as a widespread digital manipulation strategy and more as a communication practice willingly adopted to manifest one's ideological affiliations.[77] This makes it all the more challenging to hold politicians accountable for spreading disinformation and for their misconduct in various ways. For instance, civil society initiatives on information quality, like fact-checking, can still provide information plurality and public debate. Such measures are less likely to alter the *status quo*, however, as supporters will endorse incumbents regardless of how harmful their information manipulation proves to democracy.[78] In this scenario, independent accountability institutions become decisive.

Courts were crucial channels for holding accountable citizens and politicians who were popular disinformation spreaders. The STF's criminal jurisdiction includes the president, his cabinet, and members of Congress; with the Fake News Inquiry expansion, the STF was able to exert horizontal accountability over some of Bolsonaro's disinformation practices as they unfolded on the ground. As the body responsible for managing and overseeing elections, the TSE was a central institution promoting both vertical accountability (ensuring that elections would happen on fair terms and that the legitimate result from the polls would be respected) and horizontal accountability (imposing electoral sanctions on actors who engaged in disinformation).[79]

However, the fact that courts can take on this role does not mean they will – or that it will come without political costs. Even when judges have vast powers to contain backsliding, they will be more or less likely to exercise such powers under different political

76 e.g., *Zambrano et al*., note 37; *Ríos Figueroa*, note 40.

77 *Galvão Dourado*, note 33; *Rossini / Kalogeropoulos*, note 34.

78 *Batista Pereira et al*., note 35.

79 For a conceptual clarification on different paths for accountability, see *Laebens / Lührmann*, note 73.

conditions.[80] For the promotion of accountability, a general commitment to democracy and its institutions is insufficient;[81] institutional design and political context, including the various interests and forces that shape judicial behaviour, are also decisive. The STF and TSE judges' array of powers were expanded – mostly by new judicial interpretations – amidst the judicial-executive conflict of the Bolsonaro era, regarding both criminal law and constitutional review; some of those STF judges also had been granted access to the TSE's electoral rule-making and adjudication powers. Appointed by previous governments, with guarantees of independence and a significant level of public and political support, these judges were able to reign in the spread of disinformation both in- and outside of elections. Moreover, since Bolsonaro's attacks and disinformation were often directly aimed at these two judicial institutions and specific judges within them, they had an even greater incentive to present a united front and resist.[82]

While this scenario made judicial resistance possible and effective, it is also heavily dependent on changes in the political context over time. First, this concentration of powers in the hands of a few judges arguably makes political capture more dangerous. In the next presidential elections (2026), the two judges to be appointed (potentially by Bolsonaro) will be the TSE's President and Vice-President, with access to the same array of institutional powers that were deployed against disinformation in 2022. The interests or political outlook shaping the court's jurisprudence could thus drastically change, together with the use of this institutional legacy – from protecting democracy, perhaps, to enabling attacks on democracy. Comparative studies show how courts can, over time, become empowering instead of constraining factors for would-be authoritarian leaders.[83] Courts that are excessively powerful – and that concentrate power in the hands of individual judges – make these institutional dynamics even more problematic.

Second, in contexts of political crisis and polarization, judges who embody the highly visible function of holding elected politicians accountable will invite more political exposure. Polarization fuels and is fuelled by mistrust that political adversaries are committed to democratic norms.[84] Bolsonaro's official electoral campaign and speeches, beyond mass disinformation coming from his political camp, largely centred on questioning the High Courts' commitment to democracy. He successfully mobilized followers against judges who – according to this narrative – abused their powers and wanted to interfere with elections. In such a scenario, the more judges use their expanded powers to fend off attacks on judicial and electoral institutions, the more they might be perceived as political players themselves – that is, as taking a side in the political conflict – potentially undermining

80 *Ríos Figueroa*, note 40.

81 *Laebens / Lührmann*, note 73, p. 913.

82 *Felipe Recondo / Luiz Weber*, O Tribunal: Como o Supremo Se Uniu Ante a Ameaça Autoritária, São Paulo 2023.

83 see e.g., *Dixon / Landau*, note 15.

84 *Andreas Schedler*, Rethinking Political Polarization, Political Science Quarterly 138 (2023).

their own legitimacy as impartial guardians of constitutional and electoral rules. This is particularly true considering that some decisions taken within the arc of resistance to Bolsonaro can reasonably be framed as examples of judicial "hardball".[85]

Judicial protagonism against disinformation, however decisive in the short run, might have troubling implications for the STF's public standing, creating conditions that will make it harder for judges to perform the same role in future rounds of backsliding. Recent surveys suggest that public perceptions of the STF might be shifting, becoming increasingly politicized. In a national survey conducted in 2021, 49% of respondents agreed with the statement "STF judges are just like other politicians".[86] In a survey conducted shortly after the January 8th, 2023, unrest in Brasília, around 44% of respondents declared they did not trust the court (against 45% that trusted it). When the same survey was conducted one year later, the results changed to nearly 51% (do not trust) versus 42% (trust).[87] In September 2023, a different survey showed that the number of respondents who did not trust the court had increased since previous editions.[88]

These apparent trends might not remain stable in the following years, and we should be careful not to rely too much on survey results that refer to a critical, conflictive period in Brazilian politics. Still, if public support was a key factor empowering judges to resist Bolsonaro,[89] they give plausibility to the dynamics and concerns described above. Considering that the next presidential elections might take place under similar political instability,

85 See *Rubens Glezer*, Catimba constitucional: o STF, do Antijogo à Crise Constitucional, Belo Horizonte 2020. Moreover, criticisms of excessive politization by the STF are not new in Brazilian politics. Even before the Bolsonaro era, scholars were already discussing whether the STF's role in the ongoing constitutional crisis was overly political, although the context and nature of those earlier debates were very different. See, e.g., *Emilio Peluso Neder Meyer,* Judges and Courts Destabilizing Constitutionalism: The Brazilian Judiciary Branch's Political and Authoritarian Character*,* German Law Journal 19 (2018); *Juliano Zaiden Benvindo*, Brazil's Increasingly Politicized Supreme Court, ICONnect, 16.02.2017, https://www.iconnectblog.com/brazils-increasingly-politicized-supreme-court/(last accessed 20 September 2024).

86 *de Oliveira et al.*, note 36.

87 *Carolina Ingizza*, 50,9% afirmam não confiar nos ministros do STF e 42,3% dizem confiar, aponta pesquisa*,* JOTA, 15.02.2024, https://www.jota.info/stf/do-supremo/509-afirmam-nao-confiar-nos-ministros-do-stf-e-423-dizem-confiar-aponta-pesquisa-15022024 (last accessed on 30 July 2024). The complete survey results are available at Atlas Intel, Confiança No Judiciário & Imagem Dos Ministros Do STF, https://slack-files.com/T0A5W4YA0-F06K6EZ4T25-b44bfe6a59 (last accessed on 30 July 2024).

88 *Nicolas Iory*, Partidos, Congresso, igrejas, STF: o quanto o brasileiro confia nessas e em outras instituições?, O Globo, 13.09.2023, https://oglobo.globo.com/blogs/pulso/post/2023/09/partidos-congresso-igrejas-stf-o-quanto-o-brasileiro-confia-nessas-e-em-outras-instituicoes.ghtml (last accessed on 30 July 2024).

89 *Zambrano et al*., note 37; *Diego Werneck Arguelhes,* Public Opinion, Criminal Procedures, and Legislative Shields: How Supreme Court Judges Have Checked President Jair Bolsonaro in Brazil, Georgetown Journal of International Affairs (GJIA), 25.04.2022, https://gjia.georgetown.edu/2022/04/25/public-opinion-criminal-procedures-and-legislative-shields-how-supreme-court-judges-have-checked-president-jair-bolsonaro-in-brazil/ (last accessed on 30 July 2024).

this scenario could soon provide politicians with grounds to mobilize support for constitutional or statutory reforms against judicial power and create further resistance towards their decisions. The post-2022 Congress has already signalled that it will keep considering proposals to reform and even curb the court's powers, and a constitutional amendment that would limit the STF judges' powers to issue individual rulings was approved in the Senate in November 2023.[90] While no such drastic legislative reform has been approved yet, a court with legitimacy problems would make it less costly for its opponents in Congress to publicly promote such measures before their constituents. Judicial resistance against disinformation in 2022, then, might have contributed to worsening conditions for the same institutions to perform this role in the future.

II. Communications, free speech, and courts' institutional limitations to rule on disinformation

Courts are legitimate arbiters of the scope of freedom of expression, and their competence to adjudicate disinformation is well-established: cases involving disinformation practices would inevitably reach judicial dockets as matters of abuse of freedom of expression, both in and outside of elections.[91] In this sense, it is expected that courts would figure as one of several institutional actors countering the complex societal phenomenon that is disinformation.[92] But, in Brazil, where legislative initiatives to mitigate disinformation never came through, High Courts had to play the main role in coping with a problem whose roots and consequences extend far beyond their competences and capacities. First, because even though disinformation is essentially about what can and cannot be said within democratic standards, its socio-political significance goes beyond the regulation of speech and its limits. Its instrumental use by political elites and popularity within specific political crowds indicate that, in scenarios of backsliding, disinformation functions as a form of political action that often expresses deep dissatisfaction towards democracy. In this sense, as we mentioned in section B.II, people share disinformation regardless of whether they believe it or not and, most importantly, they often do so to signal political identity. While courts must

90 Senado aprova PEC que limita decisões individuais em tribunais, Agência Senado, https://www12.senado.leg.br/noticias/materias/2023/11/22/senado-aprova-pec-que-limita-decisoes-individuais-em-tribunais (last accessed on 13 September 2024).

91 Which is not to say that judges in Brazil have adequately performed this role. See, e.g. *Ivar A. Hartmann,* Protecting Online Speech in Latin America: Are Courts the Answer?, Centre for International Governance Innovation, 13.06.2022, https://www.cigionline.org/articles/protecting-online-speech-in-latin-america-are-courts-the-answer/?utm_source=twitter&utm_medium=social&utm_campaign=platform-governance-series (last accessed on 13 September 2024) (arguing that "the track record of Latin American courts on freedom of expression has not been stellar, however", and these institutions "have missed the opportunity to adequately help minorities in speech cases by favouring powerful plaintiffs, suppressing speech based on erratic legal reasoning, on one hand, and refusing to enforce criminal sanctions that would protect historically oppressed groups, on the other").

92 *Iglesias Keller et al.,* note 4.

sanction abuses of speech and protect the integrity of the electoral process, adjudication alone is not fit to address the deep, broader socio-political crisis where disinformation thrives. Brazil is a case in point. Despite strong judicial action against disinformation – and the fact that Bolsonaro was not re-elected – disinformation and its democracy-eroding effects remain a distinguished feature of the country's political debate.

Even within their competences, courts are limited by essential features of their institutional design.[93] For instance, courts are essentially selective decision-makers, meaning that they will only decide if disinformation abuses the scope of freedom of expression when provoked. In this case, litigating constitutional guarantees – like free speech itself, access to information in and outside of elections, and participation in public debate – is limited to those with material and subjective conditions to access the judiciary. This narrows the set of controversies that reach judicial scrutiny, leaving mitigation of disinformation to civil society (including fact-checkers, whose effectiveness has proved limited) and digital platforms – whose incentives to engage in this task are mixed. Selectivity can also explain why most cases tried within the Fake News Inquiry and during the 2022 electoral period referred to online disinformation. But disinformation is not a phenomenon restricted to the digital sphere, despite the fact that digital intermediaries are considered central, as their privately-owned infrastructures allow for speedy content distribution at scale.[94] Critical studies on the topic have shown that other powerful actors, like traditional media and governments, have a relevant role in replicating and diffusing manipulated information in the public sphere.[95] Regarding the interactions between digital and traditional media, empirical studies conducted in other jurisdictions have shown that news media sometimes amplify selected, even false content from social media, which can lead to "blowing marginal phenomena out of proportion",[96] as information that was shared within a certain online community gets covered and thus disseminated by professional wide-reach outlets.[97]

93 *Clara Iglesias Keller*, Policy by Judicialisation: The Institutional Framework for Intermediary Liability in Brazil, International Review of Law, Computers & Technology (2020). For an organization of the critiques towards court's institutional limitation, see *Jane Reis Gonçalves Pereira*, Direitos Sociais, Estado de Direito e Desigualdade: Reflexões Sobre as Críticas à Judicialização dos Direitos Prestacionais, Quaestio Iuris 8 (2015).

94 A concern that the evolution of artificial intelligence technologies further fuels, as "generative AI" allows for the production and distribution of text, audio, image, and video content that can accurately mimic people and make disinformation even harder to debunk. See *Bobby Chesney/ Danielle Citron,* Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security, California Law Review 107 (2019), pp. 1753-1819.

95 *Fernando Miró-Llinares / Jesús C. Aguerri*, Misinformation about Fake News: A Systematic Critical Review of Empirical Studies on the Phenomenon and Its Status as a 'Threat,' European Journal of Criminology 20 (2023).

96 *Shannon McGregor,* Social Media as Public Opinion: How Journalists Use Social Media to Represent Public Opinion, Journalism 20 (2019), pp. 1070–1086.

97 *Andreas Jungherr / Ralph Schroeder*, Disinformation and the Structural Transformations of the Public Arena: Addressing the Actual Challenges to Democracy, Social Media + Society 7 (2019).

Case-by-case decision-making is furthermore inadequate to assess effects beyond individual rulings; meanwhile, decisions on single cases might have unintended consequences beyond their original scope. For instance, in building the legal grounds for disqualifying politicians for spreading disinformation, the TSE equated messaging platforms with traditional social communication media for electoral law purposes. This interpretation would make existing provisions that sanction "abuse of communication media" with electoral ineligibility also applicable to misconduct through digital media, as per the decisions described in C.II. Although this can be a creative line of reasoning from a legal perspective, extending regulatory obligations reserved for traditional media to such online platforms is a double-edged precedent. While digital platforms may perform functions also associated with traditional media, the infrastructure and the means through which they do so require regulatory approaches that fit their influence in information and attention fluxes. In this case, equating messaging apps and traditional communication media empowered the court – but this understanding might lead to jurisprudential inconsistencies and undesired results in other cases. Consider, for instance, the ordering of messaging platforms to block content within the Fake News Inquiry (such as the Telegram case mentioned above). Should messaging platforms be equated to social communication media, judicial restrictions would need to articulate the extent of the constitutional requirements that apply, for instance, to broadcasters.[98]

Finally, the overlap of jurisdictions in our case study implied a continuous interpretation of disinformation against dubious legal standards, i.e. the scope of freedom of expression in- and outside of elections. In Brazilian law, the electoral period abides by a special set of rules meant to both ensure voters' access to pluralistic information and constrain electoral propaganda and speech in order to ensure electoral integrity. The overall assumption that elections require special standards has long-grounded strict rules for speech during elections, like the ones limiting the timing, media, and content of electoral propaganda.[99] For disinformation, this special regime justified the aforementioned Resolution n. 23714/2022 and its enforcement. However, as adjudicating elections began to mix with a broader task of protection of democracy itself, restrictions that traditionally make sense within the specific legal regime for elections can potentially spread to free speech adjudication in general.

While this jurisprudential turn is yet to be confirmed, a few STF decisions raise concerns about a potential trend to enforce stricter freedom of expression standards outside of elections. For instance, in November 2023, the Supreme Court held a newspaper liable for damages for publishing an interview in 1995, where a local politician was accused

98 See Brazilian Federal Constitution, section 222.

99 *Marilda De Paula Silveira / Amanda Fernandes Leal*, Restrição de Conteúdo e Impusionamento: Como a Justiça Eleitoral Vem Construindo Sua Estratégia de Controle, Direito Público 18 (2021), p. 582.

of committing a bomb attack.[100] Asserting that press freedom must be accompanied by responsible conduct, the STF established standards under which media outlets can be held liable for publishing false accusations of criminal activity – namely, whether there were concrete indications that the accusation was false and negligent in fulfilling the duty to verify the veracity of facts prior to publication.[101] While balancing the constitutional values of freedom of the press against the rights to personal image and honour is a legitimate goal, this decision departed from the Court's landmark precedent for freedom of speech, known as "The Press Law" case. In that lawsuit, the Court struck down a law enacted during the military dictatorship to regulate press activities, declaring unconstitutional any sort of legislative intervention over press freedom. This included stripping broad legal concepts that had been used to suppress political dissent, such as bans on content deemed harmful to "morality and common decency". However, the ruling also nullified provisions that would not necessarily be interpreted as disproportionate restrictions on speech, such as the protection of a right to publish a reply in the same outlet.[102] In years following "The Press Law" case, the Court's jurisprudence leaned towards a libertarian approach to speech. While it is too early to identify a definitive shift in the Court's stance related to disinformation adjudication, the possibility of a change in its standards already appears in public debates.[103]

The political forces driving backsliding in Brazil did not prevent courts from holding political actors accountable for disinformation. Judges were indeed a key mechanism deterring backsliding in this dimension. Their high exposure and empowerment in this role, however, might have come at high institutional costs. In a context where democracy survived in the short run but might still be at stake in the next elections, the legacy of judicial engagement with disinformation remains ambiguous. The same factors associated with judicial effectiveness in the last election might compromise, in the future, judicial capacity to exercise accountability and adjudicate communication structures and freedom of expression.

100 Supremo Tribunal Federal, RE 107412, trialled on 29 November. 2023, https://portal.stf.jus.br/processos/detalhe.asp?incidente=5263701 (last accessed on: 19 September 2024).

101 The case was classified as one with "broad repercussions", meaning that the thesis stipulated by the court is a parameter of judicial interpretation applicable in general. See Supremo Tribunal Federal, Theme 995, https://portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=5263701&numeroProcesso=1075412&classeProcesso=RE&numeroTema=995 (last accessed on: 19 September 2024).

102 *Clara Iglesias Keller,* Media Law in Brazil, International Encyclopaedia of Laws, Alphen aan den Rijn 2022.

103 *Angela Pinho / Renata Galf*, STF engata decisões controversas sobre liberdade de expressão em sintonia com o TSE, Folha de S.Paulo, 02.12.2023, https://www1.folha.uol.com.br/poder/2023/12/stf-engata-decisoes-controversas-para-liberdade-de-expressao-em-sintonia-com-tse.shtml (last accessed on 19 September 2024).

E. Final remarks

Disinformation is at the centre of political disputes around the globe, expressing social, economic, and political power struggles that are contingent on context and transcend the digital realm, incurring old and new institutional stakeholders. It has recently become intertwined with processes of democratic backsliding in many countries, notably Brazil, where disinformation jeopardizes aspects of democratic governance, like trust in institutions, democratic standards for knowledge production and legitimation, as well as the very idea of a shared reality to ground public debate. If we conceive of backsliding as a phenomenon driven by the deliberate behaviour of political actors, disinformation can be weaponized by them, even if other societal actors also engage in producing and disseminating it. In such contexts, the usual public-sphere-focused prescriptions for the mitigation of disinformation have proved simply not enough to address the broader democratic crisis that it serves, and the actions of democratic institutions will be key to mitigating its effects and promoting resilience. From an institutional perspective, then, when backsliding and disinformation intersect in this way, courts can play an important role in this task. This is what happened in Brazil, where judges were the protagonists in the country's long engagement with disinformation promoted by President Bolsonaro in his attempt to undermine vertical and horizontal checks on his powers. In our reconstruction of the Brazilian case, we argue that the concentration and overlap of extensive powers of electoral rulemaking, administration and adjudication, criminal jurisdiction and investigation, and constitutional review powers in the hands of a limited set of judges made this protagonism effective. However, this same judicial protagonism has potentially troublesome implications for the future. The concentration of such varied powers in judicial hands made courts the main institutional check on this complex phenomenon, but it might have also reshaped the boundaries between the need to protect elections and the broader regime of freedom of expression in Brazil. Moreover, in a polarized public sphere, the extreme public exposure of individual judges wielding such a powerful (and, in some cases, controversial) combination of competences might have also impacted the court's standing before the public, arguably making it easier for future illiberal actors to mobilize against the judges – and perhaps harder for those judges to check them. While the Brazilian case shows that courts can help deter disinformation in democratic backsliding, it also shows that this role depends more on what judges can do, beyond simply having guarantees of independence, and that expansive powers to investigate and counter disinformation might create new problems on their own.

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

By *Jessica Holl*[*] and *Jasmin Wachau*[**]

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.

Rethinking the concept of an open society of constitutional interpreters: Lessons from Germany and Brazil

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Abstract: The concept of an "open society of constitutional interpreters", originally formulated by Peter Häberle, is one of the most overused *clichés* in Brazilian constitutionalism. In this paper, drawing on (i) criticisms formulated against Häberle's thesis in Germany and other objections that could be raised against his conception of the openness of constitutional adjudication, (ii) empirical data related to the implementation of public hearings and the role played by *amici curiae* in the Brazilian Federal Supreme Court (the most important mechanisms of Brazilian constitutional adjudication that ensures the openness of constitutional decision-making to social worldviews), and (iii) dialogues established between democratic theory and legal epistemology, I intend to investigate: (a) to what extent it is possible to recognize that constitutional adjudication (especially in Brazil and Germany) is open; (b) whether a broad openness of constitutional decision-making process may be incompatible with the very idea of democracy, particularly in deciding legal issues involving intricate factual issues; and (c) whether the openness of constitutional interpretation to alternative viewpoints is always desirable when we consider other values, beyond democracy, that could conflict with Häberle's thesis.
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A. Introduction

The concept of an "open society of constitutional interpreters" is one of the most overused *clichés* in Brazilian constitutionalism. Its original formulation traces back to Peter Häberle's work *Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und "prozessualen" Verfassungsinterpretation*[1], translated into Portuguese by Gilmar Ferreira Mendes, Justice of the Brazilian Supreme Federal Court, and initially published in

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1 *Peter Häberle*, Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und "prozessualen" Verfassungsinterpretation, JurtistenZeitung 10 (1975), pp. 297-305.

Brazil in 1997.[2] At the core of this idea lies the thesis that "constitutional interpretation is not exclusively a 'state event,' either theoretically or practically speaking".[3] It should also include diverse viewpoints from pluralistic forces within society to align constitutional decisions with the reality in which they are made, particularly the political context. Political parties, scientific opinion, interest groups, and citizens are all encompassed within the concept of "the people" ([das] *Volk*), which also serves as a "pluralistic element for interpretation that emerges in a legitimizing manner in the constitutional process".[4] For Häberle, these influences, rather than creating a threat to judicial independence, are to be conceived as "part of legitimization and a means to prevent the judicial interpretation from being arbitrary".[5] As a result, instead of posing dilemmas for legal reasoning, these influences strengthen the democratic legitimacy of constitutional decisions and help to calibrate the intensity of judicial review.[6]

One of the primary practical recommendations stemming from Häberle's theory – and arguably the most emphasized among Brazilian constitutional scholars – is the expansion and improvement of information-gathering instruments for constitutional judges.[7] Thus, the idea of an "open society of constitutional interpreters" has served in Brazil particularly as a basis for justifying and bolstering mechanisms allowing for societal participation in constitutional decision-making, such as public hearings, the assistance of *amicus curiae*, and other forms of deepening third-party involvement in Brazilian constitutional adjudication.[8] This represents a crucial contribution towards democratizing constitutional decision-making and, consequently, enhancing the legitimacy of decisions rendered by the Brazilian Supreme Federal Court.

As one can see, the "open society" idea lies at the core of a *normative* constitutional theory, which presents itself as *procedural*[9] and prescribes how constitutional adjudication ought to be understood and implemented. Nevertheless, as a proposal for mediating normativity and *reality*, the theory also informs a series of empirical research agendas aimed at investigating whether the openness of constitutional review to the integration of diverse worldviews is indeed observable within a certain legal-political order. In this regard, the notion of an open society, detached from the normative ambitions of Häberle's theory, can also be invoked descriptively to convey (i) whether constitutional interpretation is (or is

2 *Peter Häberle*, A sociedade aberta dos intérpretes da Constituição: contribuição para interpretação pluralista e 'procedimental' da Constituição, Porto Alegre 1997.

3 Ibid., p. 299.

4 Ibid., p. 302.

5 Ibid., pp. 300-301.

6 In Häberle's own words: "a *minus* in effective participation should lead to a *plus* in constitutional control". Ibid., p. 304.

7 Ibid., p. 304.

8 *Inocênio Mártires Coelho*, As ideias de Peter Häberle e a abertura da interpretação constitucional no direito brasileiro, Revista de Informação Legislativa 35 (1998), p. 158.

9 *Häberle*, note 2, p. 305.

not) actually permeable to distinct social groups and (ii) whether it effectively incorporates the viewpoints of different interpreters in decision-making regarding the meaning of the Constitution. Finally, serving as a pivotal component of a theory of democratic legitimation of constitutional adjudication, the idea of an open society appears to suggest and rest upon a conceptual relationship between the openness of decision-making processes in constitutional interpretation and constitutional democracy. Within the realm of the philosophy of language, this means that the former would be a necessary condition (albeit not a sufficient one) for the existence of the latter.

As evident from its broader scope, the conception of an open society of interpreters can, in a nutshell, be used to assert that constitutional adjudication (i) is open (ii) because it should be so, and (iii) because, were it otherwise, it could not be fully considered democratically legitimate. As Häberle's theoretical framework is not entirely clear in all these aspects, this likely constitutes the most powerful version of the argument for the open society of constitutional interpreters. However, this does not imply that the descriptive, normative, and conceptual claims that can be traced back to the theory are easily sustainable. Precisely for this reason, this work aims to explore in more detail each of them. In other words, drawing on (i) criticisms formulated against Häberle's thesis in Germany and other objections that could be raised against his conception of the openness of constitutional adjudication, (ii) empirical data related to the implementation of public hearings and the role played by *amici curiae* in the Brazilian Federal Supreme Court (the most important mechanisms of Brazilian constitutional adjudication that ensures the openness of constitutional decision-making to social worldviews), and (iii) dialogues established between democratic theory and legal epistemology, I intend to investigate: (a) to what extent it is possible to recognize that constitutional adjudication (especially in Brazil and Germany) is open; (b) whether a broad openness of constitutional decision-making process may be incompatible with the very idea of democracy, particularly in deciding legal issues involving intricate factual issues; and (c) whether the openness of constitutional interpretation to alternative viewpoints is always desirable when we consider other values, beyond democracy, that could conflict with Häberle's thesis.

B. Häberle's idea in Brazil: Enthusiastic reception

The translation of Häberle's article into Portuguese was received with enthusiasm from the outset. In 1998, shortly after the publication of the translation of "The Open Society of Constitutional Interpreters", Inocêncio Mártires Coelho affirmed: "[t]wo highly significant events for the improvement of Brazilian constitutional adjudication have just occurred in the country".[10] One of them was the submission to the National Congress of Bill No. 2,960/97, concerning the functioning of abstract and concentrated judicial review; the other,

10 *Coelho*, note 8, p. 157.

the "publication of Peter Häberle's work".[11] By evaluating the publication of a normative act as so relevant as the publication of an academic work, Coelho expresses the impact, from that moment on, of Häberle's paper on academic and practical debates regarding the importance of pluralizing constitutional interpretation. And what had sounded like a prophecy at that time became true in the following years. Just over 10 years after the translation of the text on the open society of constitutional interpreters, the influence of Häberle's paper was already evident. Mendes & Rufino[12], for example, acknowledged at that time that "Peter Häberle's doctrine has been incorporated with evident vitality, both in the academic sphere, through the dizzying bibliographic production or teaching and learning practices in law schools, and by the constituted branches, in the form of legislative production and judicial decision-making".[13]

In Brazil, several factors materialize the process of opening up constitutional adjudication to diverse segments of society. The amplitude of the list of legitimate actors for provoking abstract review of legislation after the promulgation of the Brazilian Constitution in 1988 is one of them.[14] However, Häberle's work is particularly associated with justifying the relevance of two mechanisms introduced into Brazilian constitutional adjudication in 1999 by Laws No. 9,868 and 9,882: the participation of social groups through *amicus curiae* briefs and the possibility of convening public hearings[15] by justices of the Brazilian Supreme Federal Court (STF). As an acknowledgment of this influence, Häberle himself stated in an interview given in 2011 that Justice Gilmar Mendes, the translator of his work, embraced his proposal of allowing *amicus curiae* briefs.[16]

11 Ibid.

12 *Gilmar Ferreira Mendes / André Rufino do Vale*, O pensamento de Peter Häberle na jurisprudência do Supremo Tribunal Federal, Observatório da Jurisdição Constitucional 2 (2008/2009).

13 Ibid., p. 3.

14 *Daniel Sarmento / Cláudio Pereira de Souza Neto*¸ Direito Constitucional: teoria, história e métodos de trabalho, Belo Horizonte 2012, p. 400.

15 Public hearings may be convened in cases where there is a need for clarification of facts or circumstances, or when there is a clear inadequacy of information available in the case files, aiming to hear testimonies from individuals with expertise and authority in the matter under discussion (see Article 9, Paragraph 1 of Law No. 9,868/99). A similar provision is found in Article 6, Paragraph 1 of Law No. 9,882/99. Empirical research shows that "the greater the number of amicus curiae briefs filed in a case and the more news articles published about it (measures used as a proxy for social impact), the higher the chances that the Reporting Justice will convene a public hearing". See *Marjorie Marona / Lucas Fernandes de Magalhães / Mateus Morais Araújo*, Por que são convocadas as Audiências Públicas no Supremo Tribunal Federal, Revista de Sociologia e Política 30 (2022).

16 *Rodrigo Haidar / Marília Scriboni*, Constituição é declaração de amor ao país, Consultor Jurídico, 29.05.2011, https://www.conjur.com.br/2011-mai-29/entrevista-peter-haberle-constitucionalista-alemao/ (last accessed on 16 May 2024). In Häberle's words: "Ele [o Ministro Gilmar Mendes] recepcionou a minha proposta do *amicus curiae*, por exemplo". See also *Peter Häberle*, Verfassungsgerichtsbarkeit in der offenen Gesellschaft, in: Robert Chr. Van Ooyen / Martin H. W. Möllers (eds.), Das Bundesverfassungsgericht im politischen System, Wiesbaden 2006, pp. 37, 40. *Mendes & Vale* confirm, in a way, this perspective: "[i]n the legislative sphere, Law No.

In Brazilian literature, both *amicus curiae* briefs and public hearings are associated with, at least, four different goals. They serve legitimizing, epistemic, social, and justificatory purposes.

The first of these objectives is to tackle one of the traditional challenges of constitutional adjudication in contemporary democracies: coping with the democratic deficit related to the counter-majoritarian role played by the STF.[17] The second concerns compensating for epistemic deficit in constitutional review, which may be a key theme when judges are called upon to address factual issues or assess prognoses made by other branches of government (especially the Legislative) in the exercise of their competencies. In this sense, Mendes & Vale acknowledge that Häberle's "open procedural formula constitutes an excellent *informational* tool for the Supreme Court".[18] The third involves the pluralization of constitutional adjudication, allowing different social segments that cannot provoke abstract review of legislation to be heard when the Court faces constitutional dilemmas. This may also include ensuring a special arena for those who are marginalized and disempowered in the normal political process.[19] In this sense, commenting on the role of public hearings in the STF, Tushnet, for example, acknowledges that "the Brazilian Constitution is already a reasonably open and participatory one. Public hearings in the Federal Supreme Court may reflect, but also enhance, that characteristic"[20]. The fourth, finally, consists in deepening the quality of the court's decision-making by enabling different sorts of arguments (legal, political, economic, and epistemic ones, for instance) to be considered and incorporated into the justices' deliberative processes.[21] This could expand the conditions for constitutional decisions to become more rational and intersubjectively accountable.

9,868/99, by institutionalizing the figure of amicus curiae in Brazilian constitutional adjudication, represents a striking example of the strong influence of Häberle's doctrine advocating for an open and pluralistic interpretation of the Constitution" (*Mendes* / *Vale*, note 12, p. 3). Later in the same work, the authors further assert: "Peter Häberle advocates for the necessity of expanding the informational tools available to constitutional judges, especially concerning public hearings and the 'interventions of potential stakeholders,' ensuring new forms of participation from pluralistic public powers as interpreters in the broad sense of the Constitution" (*Mendes* / *Vale*, note 12, p. 7).

17 See *Alexander Bickel*, The Least Dangerous Branch: The Supreme Court at the bar of politics, New Haven & London 1962. *Jeremy Waldron*, The Core of the Case against Judicial Review, The Yale Law Journal 115 (2006).

18 *Mendes* / *Vale*, note 12, p. 8 (emphasis added).

19 *Aileen Kavanagh*, Participation and Judicial Review: a Reply to Jeremy Waldron, Law and Philosophy 22 (2003).

20 *Mark Tushnet*, New institutional mechanisms for making constitutional law, in: Thomas Bustamante / Bernardo Gonçalves Fernandes (eds.), Democratizing Constitutional Law Perspectives on Legal Theory and the Legitimacy of Constitutionalism, New York 2016.

21 See *Thiago Luís S. Sombra,* Supremo Tribunal Federal representativo? O impacto das audiências públicas na deliberação, Revista Direito GV 13 (2017); *Marjorie Corrêa Marona / Marta Mendes da Rocha*, Democratizar a jurisdição constitucional? O caso das audiências públicas no Supremo Tribunal Federal, Revista de Sociologia e Política 62 (2017); *John Ferejohn / Pasquale Pasquino*,

The influence of Häberle's work is also evident in a load of precedents of the Brazilian Federal Supreme Court. A search conducted on May 2, 2024, on the court's website using the terms "Peter Häberle" and "open society" yielded 31 plenary rulings and 51 monocratic decisions, with the most recent references from the year 2023. This outcome indicates that the author and his text are salient references for the justices and do not merely represent a temporally localized trend.

C. The descriptive problem: Is constitutional decision-making truly open?

The enthusiasm surrounding Häberle's work does not necessarily mean that his ideas effectively influence the decision-making practices of constitutional courts. In its descriptive aspect, the idea of an "open society of constitutional interpreters" refers to judicial review in Brazil as if it were already open and permeable to different worldviews. It is a matter of fact: constitutional interpretation is or fulfills all the necessary conditions to be open due to mechanisms like public hearings or the acceptance of *amicus curiae* briefs.

Nevertheless, this can be contested. Firstly, in Germany, where the conception stemmed from. Criticisms raised by Blankenburg & Treiber[22] and Hailbronner[23] regarding the challenges of implementing the idea of an open society of constitutional interpreters already cast doubt on the possibility of a widespread openness in constitutional adjudication in the country. According to the former, the German Federal Constitutional Court is only relatively open, as it turns constitutional interpretation into a discussion limited to the privilege of a truly closed society of jurists.[24] For Hailbronner, Häberle's vision does not correspond to the conception commonly advocated by either jurists or the political elite in the country.[25] In Germany, the constitutional court is widely understood as the sole and final interpreter of the Constitution, with constitutional adjudication opening at most to the realm of professional jurists, always constrained by the specialized discourse of legal dogmatics.[26] In the strongest version of the criticisms formulated in these two works, the society of constitutional interpreters is not open in Germany because it simply cannot be.

In Brazil, it is disputable whether the conclusion is different. Sarmento & Pereira Neto, for instance, argue that in the country, the "conventional doctrine (...) conceives the Constitution as an eminently technical document, whose meaning can only be discussed

Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice, Law and Philosophy Library 62 (2002).

22 *Erhard Blankenburg / Hubert Treiber*; Die geschlossene Gesellschaft der Verfassungsinterpreten, JuristenZeitung 15/16 (1982).

23 *Michaela Hailbronner*, We the Experts: Die geschlossene Gesellschaft der Verfassungsinterpreten, Der Staat 53 (2014).

24 *Blankenburg / Treiber*, note 22, p. 543.

25 *Hailbronner*, note 23, p. 442.

26 Ibid., p. 429.

and understood by specialists initiated into the mysteries of legal dogmatics"[27], suggesting the closure of constitutional adjudication as a feature of legal reality and the openness of constitutional decision-making as a state of affairs to be pursued. Of course, there are significant differences between the German and the Brazilian Supreme Courts on the willingness to be open to the voice of social groups. In comparison to the German Federal Constitutional Court, the Brazilian Supreme Court is not as deferent to academic community, guarantees more opportunities for social segments to express their perspectives on constitutional issues[28], and its Justices are more "populists" in the sense that they seem to care about what specific social or political groups have to say about their opinions.[29] However, this does not mean that the court adopts clear criteria for convening public hearings or actually incorporates their results in its rulings – a condition that I think is presupposed in Häberle's argument.

Judicial review in Brazil encompasses several mechanisms that allow social participation in constitutional decision-making. But this is just part of the story. Häberle's conception presupposes – or *should* presuppose – a sort of *culture of justification*. Generally speaking, this means, following Mureinik's formulation, "a culture in which every exercise of power is expected to be justified"[30] in the sense of what Möller calls "being supported by strong enough substantive reasons".[31] In the shift toward this culture, Häberle's argument would ideally require that constitutional decision-making should take the voices of social groups that may be affected by its rulings seriously in order to fulfill the burden of justification that it sets. Ultimately, the incorporation of different social positions serves as part of a constitutional interpretation process, an activity aimed at defining and justifying the normative outcome prescribed by the Constitution for a specific issue on the basis of conceptions of interpretation and constitutionalism that requires the integration of social

27 *Sarmento / Pereira Neto*, note 14, p. 401.

28 On the differences between the functioning of the amicus curiae in the USA and public hearings in Brazil, for instance, Tushnet argues: "Public hearings do resemble the amicus curiae practice because they allow interested parties to present their views to the court. They differ, though, because in the amicus curiae practice the presentations are almost entirely in writing; rarely the Court will allow one amicus curiae to participate in the oral argument, and never more than one or two. In contrast, the Brazilian public hearings involve in-person presentations by a large number of interested participants" (p. 15).

29 See *Patrícia Perrone Campos Mello*, Quando julgar se torna um espetáculo: a integração entre o Supremo Tribunal Federal e a opinião pública, a partir de reflexões da literatura estrangeira, Revista de Direito Internacional 14 (2017).

30 *Etienne Mureinik*, A Bridge to Where?: Introducing the Interim Bill of Rights, South African Journal on Human Rights 10 (1994), p. 32.

31 *Kai Möller*, Justifying the culture of justification, I.CON 17 (2019), p. 1081. According to Dyzenhaus, "in Mureinik's picture, a culture of justification is not only one in which parliamentarians offer political justifications to the electorate for their laws, but is also one in which they offer legal justifications in terms of the values set out in the bill of rights". See *David Dyzenhaus*, What is a 'democratic culture of justification'?, in: Murray Hunt / Hayley Hooper / Paul Yowell (eds.), Parliaments and Human Rights: Redressing the Democratic Deficit, London 2015, p. 425.

forces from the public sphere, as part of the publicity and reality of the Constitution, into decision-making processes.[32] As I see it, the alleged integration also holds for constitutional justification. This incorporation is pivotal to link normativity and reality, something that lies at the heart of Häberle's conception of constitutional interpretation.[33] For him, "the pluralistic public sphere unfolds normative force. After that, the Constitutional court has to interpret the Constitution accordingly with its public update".[34]

Therefore, if some sort of practical difference is not assumed in Häberle's theory, the argument in itself and the Brazilian transplant of the idea of an open society of constitutional interpreters might show one of its weaknesses. As Sombra argues focusing on the functioning of public hearings in the Brazilian Supreme Court, some scholars indeed admit, on the one hand, "that the mere holding of public hearings, with broad participation from civil society segments, would be sufficient to ensure the democratic representation of the STF and grant greater legitimacy to the deliberation process".[35] However, the author also emphasizes that "for contemporary democratic theory of political representation, more than being represented and participating, it is essential [that social groups are] (…) able to effectively *influence* the rulings during the decision-making process".[36] Therefore, the mere reference to *informational gains*[37] resulting from the contributions of different social actors, while important, would not be sufficient for the full implementation of Häberle's argument in what could be called its best version, unless this information were somehow incorporated into the reasoning of the decisions.

For sure, this does not mean that the Supreme Court should decide in consonance with the voices of society. As highlighted by Coelho, the risk of extreme openness is, drawing on Lassalle, the emergence of "conflicts between the Political Charter and an unconstitutional reality, in which, as a general rule, the real factors of power end up prevailing over the text of the Constitution on paper".[38] However, the argument of practical difference should impose, at the very least, the burden of dialogue with the voices of society considered during the solution of constitutional issues. Otherwise, what we may have in the end of the day may be a mere apparent openness, in which social participation is limited to a mere ornament in constitutional justification.

Therefore, empirically investigating how these mechanisms of openness have operated in Brazilian constitutional adjudication can be useful to support how open, indeed, constitutional decision-making is to different worldviews. And, in this regard, research already

32 *Häberle*, note 2, p. 301.
33 *Mendes / Vale*, note 12, p. 7.
34 *Häberle*, note 2, p. 303.
35 *Sombra*, note 21, p. 242.
36 Ibid., p. 242 (emphasis added).
37 *Marona / Rocha*, note 21, p. 149.
38 *Coelho*, note 8, p. 160.

conducted in Brazil points to a certain gap between what theory seems to recommend and what actually occurs.[39] Some examples may support this claim.

Regarding the performance of *amici curiae* in the Brazilian Supreme Federal Court, empirical analyses support their effective *presence* in Brazilian constitutional adjudication. Between 1999 and 2014, 2,103 briefs were registered, representing about one-third of the total cases that are undergoing judicial review, in a proportion of almost three *amici* per lawsuit and with significant participation from rights defense organizations.[40] However, when reflecting on the genuine *influence* of the *amici*, the picture is slightly different. Almeida, for example, argues that "although *amici curiae* are available to all justices (...), [their] procedural capabilities fall short of the functions that *amici curiae* should perform in constitutional decision-making, which mainly restricts their ability to enhance the quality of decisions".[41] Similarly, Ferreira & Branco analyzed 120 decisions made between 1990 and 2015 with the aim of testing the (pessimistic) hypothesis that "the practical effectiveness of the institute is inferior than that propagated by the theory that supports it".[42] The analysis distinguished cases where there was mere *mention* of *amici* from cases where there was actual *consideration* of their submissions in the justices' opinions. In the end, the hypothesis was confirmed: 94% of the reports and 70% of the opinions did not explicitly consider the arguments presented by *amici curiae*.[43] This suggests what the authors referred to as the "rhetoric of mythification" of the *amicus curiae* in the Court.[44]

When scrutinizing public hearings, one can observe analogous results. Empirical research conducted by Leal, Herdy & Massadas on the dynamics of public hearings in the STF between the years 2007 (the year of the first hearing) and 2017 supports that, with "no practical criteria for the convening of public hearings and for the definition of who is qualified to participate in them", and at the same time, "low levels of interaction and confrontation among participants, reduced presence of justices [during the hearings], low incorporation of the hearings into justices' opinions and the appeal to participants' speeches in the opinions as a means of confirming pre-existing beliefs or hypotheses, which tends to reveal myopic or strategic use"[45], there are relevant limitations to claiming that constitutional adjudication exercised by the STF is really open. In the same vein, Sombra states that "it does not seem clear or is inconclusive, from the empirical data obtained [in his research], the argument that the STF uses public hearings to bring its decisions closer

39 *Marona / Rocha*, note 21, p. 139.

40 *Eloísa Machado de Almeida*, Capacidades institucionais dos *amici curiae* no Supremo Tribunal Federal: acessibilidade, admissibilidade e influência, Direito e Práxis 10 (2019), p. 680.

41 Ibid., p. 701.

42 *Débora Costa Ferreira / Paulo Gustavo Gonet Branco*, Amicus curiae em números: nem amigo da corte, nem amigo da parte?, Revista de Direito Brasileira 16 (2017), p. 170.

43 Ibid., p. 182.

44 Ibid., p. 180.

45 *Fernando Leal / Rachel Herdy / Júlia Massadas*, Uma década de audiências públicas no Supremo Tribunal Federal (2007-2017), Revista de Investigações Constitucionais 5 (2018), p. 367.

to the plural interests of civil society".[46] In debates about factual issues, the author points out that it is "undeniable, from the empirical data obtained, that the Court increasingly relies less on technical information due to rhetorical argumentative flaws and repeated judicial practices not subjected to constant revisions or analyses".[47] Finally, Guimarães, based on the analysis of the first 19 public hearings held by the Court, challenges the belief that public hearings effectively function as mechanisms designed to overcome epistemic and democratic deficits of the STF and proposes the alternative view of their use as a *locus* for lobbying and strategic action by interest groups in constitutional adjudication. Furthermore, she claims that public hearings may be conceived as a tool wielded by justices for the self-legitimization of their decisions.[48] For Guimarães, the fact that invitation and previous appointment as *amici curiae* are the main door access to the hearings along with the vagueness of the criteria for selecting speakers, and the lack of transparency and control over the rejection of certain registrants "further highlight the democratic weaknesses of public hearings".[49]

As the mentioned studies show, cultural aspects and the effective incorporation of opening mechanisms in constitutional adjudication disclose that there are still significant barriers to be overcome so that the argument of the open society of constitutional interpreters do not play merely a symbolic role in constitutional decision-making in countries like Germany and Brazil.

D. Normative concerns

The question of whether constitutional interpretation is indeed open in Germany and Brazil remains a puzzling issue. Furthermore, it is also contestable if Häberle's main claim may be sound from a normative perspective. Specifically, the desirability of openness in constitutional interpretation hinges on two substantive issues.

The first issue is conceptual, involving the relationship between the openness of constitutional adjudication and fundamental principles of democracy. This presents a problem of political morality, as it relates to the value we attribute to democracy and the potential legitimacy deficit that arises when constitutional interpretation is not open in accordance with Häberle's thesis. Consequently, this conceptual issue is normative in nature.

The second substantive issue involves exploring whether there are other legal values—beyond democracy, which assumes a demand for openness in constitutional interpretation—that might conflict with Häberle's argument.

46 *Sombra*, note 21, p. 265.

47 Ibid., pp. 265-266.

48 *Lívia Gil Guimarães*, Participação social no STF: repensando o papel das audiências públicas, Direito e Práxis 11 (2020).

49 Ibid., p. 262.

I. The conceptual challenge: more openness, more democracy?

In the conceptual dimension, the question of whether the pluralism of views stimulated by the openness of constitutional decision-making is a condition for the democratic legitimation of judicial rulings becomes particularly puzzling when the resolution of legal issues depends on dialogues between legal authorities and the scientific community. This is especially true when the matter at hand involves understanding or resolving highly technical discussions, such as for the informed formulation of public policies. In short, the problem at this point is: How can we include diverse worldviews in constitutional adjudication without collapsing the concept of expertise, *i.e.* without diluting it between intuitions and mere speculations? In an open society of interpreters, how can we differentiate factual truths from mere opinions and ensure a privileged place for specialized knowledge?

Of course, factual truths are revisable, and scientific discourse coexists with dissenting opinions. The proliferation of platforms for disseminating knowledge and contesting scientific authority, particularly by demystifying the assumption that scientific information is neutral and value-free – what may justify triggering precautionary measures[50] – also contributes to weakening the notion that we should preserve an entrenched and sacrosanct arena for expertise in any democratic society. As Moore argues, this state of affairs expresses "an important tension within contemporary anxieties about the fate of expert authority in a democratic society. We clearly need scientific and expert authority in order to formulate considered collective judgements and carry out collective decisions. Yet public questioning, criticism and rejection seem to make such authority ever harder to sustain".[51]

At one extreme of this tension, other forms of knowledge besides traditional scientific knowledge must be incorporated with the same dignity in public discourse, considering that "experts are (…) not seen as 'guardians of the truth', but as political agents who try to enforce their discursive version of the truth upon the public sphere".[52] In this context, the idea of an open society of constitutional interpreters would play a fundamental role in constitutional democracies by enabling, through its concrete mechanisms, the inclusion and empowerment of groups traditionally excluded from debates on socially important matters. From this perspective, openness to different forms of knowledge would go beyond the moral value related to the right of equal participation, becoming rather a requirement of the very concept of democracy. This seems to be what Häberle has in mind when he connects the openness of constitutional decision-making with the democratic credentials of judicial review. Although Häberle doesn't explicitly define it, his argument presupposes

50 See *Vern R. Walker*, The myth of science as a 'neutral arbiter' for triggering precautions, Boston College International & Comparative Law Review 26 (2003).

51 *Alfred Moore*, Critical Elitism: Deliberation, Democracy and the Problem of Expertise, Cambridge NY 2017, p. 2.

52 *Julia Hertin / Klaus Jacob / Udo Pesch /; Carolina Pacchi*, The production and use of knowledge in regulatory impact assessment – An empirical analysis, Forest Policy and Economics 11 (2009), p. 415.

a normative concept of democracy. This concept apparently combines active and equal participation as core features that can minimize the democratic deficits inherent in judicial review when it drives societal participation in constitutional decision-making. In other words, the open society of constitutional interpreters should be conceived as a democratic necessity within judicial review, as it ensures that diverse social groups can participate in and contribute to deliberation on issues that affect them. This is particularly important in contexts where uncertainties about facts may lead to a perception that participation is compromised due to "the inequalities in knowledge that are necessary for the analysis, regulation and management of social and technological problems".[53]

However, this conclusion is controversial. In contrast to the previous relationship between scientific knowledge and democracy, Herdy, while acknowledging that science is "a fallible practice and susceptible to corruption", emphasizes that "it constitutes thus far the most successful attempt to objectively understand certain aspects of the world. Science is not – and it is good that it is not – subject to social construction based on contingent interests and needs. In a certain sense, science is a violation of democracy".[54] The argument – normative in nature – aims to preserve a protected zone for specialized knowledge in democracy, which is necessary even when some political decisions need to be made in complex societies. Indeed, the expert view is crucial to provide essential technical information to deal with many social dilemmas and, thus, support the acceptance and trust of political decision-making. As Schudson stresses "[a] democracy without experts either fail to get things done or fail to get things done well enough to satisfy citizens".[55] Therefore, while democracy may require institutional arrangements for keeping experts accountable to the people's representatives, it seems important that democratic authority can ensure enough autonomy to scientific community so that (i) the voice of experts represents their voices rather than the views of politicians or bureaucrats[56], and (ii) this voice carries some qualified weight compared to non-specialized ones.

Yet, this sort of argument does not imply that democracy and knowledge are definitely irreconcilable.[57] Robert Post[58], for instance, claims that a healthy marketplace of ideas depends on the production and recognition of specialized knowledge. Broad participation and equal tolerance (both based on the idea of democratic legitimation) around which the

53 *Moore*, note 51, p. 10.

54 *Rachel Herdy*, Quando a ciência está em jogo, a democracia não importa, in: Joaquim Falcão / Diego Werneck Arguelhes / Felipe Recondo (eds.), Onze Supremos: o Supremo em 2016, Rio de Janeiro 2017, p. 46.

55 *Michael Schudson*, The trouble with experts – and why democracies need them, Theory and Society 35 (2006), pp. 505 ff.

56 Ibid., p. 497.

57 Ibid., pp. 500 ff. *Cathrine Holst / Anders Molander*, Epistemic democracy and the accountability of experts, in: Cathrine Holst (ed.), Expertise and Democracy, Oslo 2014, pp. 13-35.

58 *Robert Post*, Democracy, Expertise, and Academic Freedom: A first amendment jurisprudence for the modern state, New Haven / London 2012.

marketplace of ideas paradigm of the First Amendment is established should be addressed as obstacles, not virtues, to the realization of freedom of expression. The key point is that "the value of democratic legitimation causes First Amendment doctrine to construct public discourse as a domain of opinion because it prevents the state from maintaining the standards of reliability that we associate with expert knowledge".[59] This cannot be seen as an inherent democratic problem. In what he defines as "democratic competence", Post advocates for the presence of a privileged arena for specialized knowledge that ensures the supply of the marketplace of ideas with necessary information for autonomous and critical decision-making in the public sphere. For him, "democratic competence refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge. Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimation".[60]

It is true that Post primarily considers the academic environment when he asserts that expertise should be safeguarded against a broad, active, and equal participation bias, conceived as a vital feature of democracy. However, there are compelling arguments for supporting this claim in the context of judicial decision-making. This is particularly relevant when we shift our focus from active citizen participation to active citizen *judgment* as a key aspect of collective will-formation and coherent collective action.[61]

If democratization is not limited to participation but is instead enhanced by mechanisms that promote well-informed judgments, the potential conflict between democracy and expertise may be merely apparent, even within the public sphere, particularly when legal decisions rely on scientific knowledge. Moreover, this argument aligns seamlessly with constitutional adjudication within a culture of justification, as the legitimacy of judicial decisions on controversial issues depends on the quality of the reasons provided for their justification. From this perspective, addressing the democratic deficits of judicial review should rely less on what the openness of constitutional adjudication offers in terms of social participation, and more on what it provides to inform the arguments that support legal rulings.[62]

Therefore, the openness of constitutional interpretation should not be regarded solely as a matter of participation but primarily as a matter of justification. Restricting the permeability of constitutional decision-making to all social segments when certain technical issues arise can mitigate the risks associated with recognizing and selecting the relevant knowledge needed to resolve a constitutional issue. Within this framework that connects

59 Ibid., p. 31.

60 Ibid., pp. 33-34.

61 *Moore*, note 51, p. 6 ss.

62 A strong version of this argument can be found in Alexy's conception of the role played by constitutional courts in democratic societies. For Alexy, "[t]he representation of the people by a constitutional court is, in contrast [to the representation of the people by the parliament], purely argumentative". See *Robert Alexy*, Balancing, constitutional review, and representation, I-CON 4 (2005), p. 579.

democracy, justification, and informed judgement, such restrictions are not necessarily undemocratic.

As evident from this perspective, there is no conceptual tension between democracy and expert knowledge. Rather, there is a democratic foundation for the preservation of expertise. On the same path, Schudson claims that "[j]ust as important as making experts safe for democracy, democracy must become safe, or safer, for expertise".[63] Consequently, the open society of constitutional interpreters would need to include constraints (whether through restricted access or in a form of a qualified burden of argumentation to disregard expert opinion) on the participation of any citizen in the discussion of certain topics to be utterly compatible with democracy. In its best light, perhaps Häberle's proposal should be conceived as a procedural mechanism whose primary aim would also be to preserve specialized knowledge in democracy without promoting an *epistocracy.*[64]

Just as in the descriptive dimension of the argument, the conceptual debate also justifies why the idea of an open society of constitutional interpreters should not be transplanted uncritically. Apart from specific circumstances within a legal culture that may render its implementation unfeasible and its potential incompatibility with important Rule of Law values (which will be discussed next), the democratic ideal of an open society may, albeit partially, be, in fact, antidemocratic. Therefore, addressing this disagreement and providing viable alternatives to the potential tension between democracy and specialized knowledge is nothing less than central to justifying the open society of constitutional interpreters as a mechanism for democratic (and epistemic) legitimation of judicial review.

II. Is an open society of constitutional interpreters unquestionably desirable?

In a lecture delivered in Brazil in 2005, Häberle articulated his thesis as follows: "In the process of constitutional interpretation, all state organs, public powers, citizens, and groups are potentially linked. There is no *numerus clausus* of interpreters of the Constitution!".[65] The linguistic form chosen suggests that the thesis refers to how reality is shaped. However, the meaning of the expression carries normative assumptions. What Häberle fundamentally asserts is that there *should* be no *numerus clausus* of interpreters of the Constitution. This becomes evident when the author, in the subsequent paragraph, states that "[c]onstitutional interpretation has hitherto been consciously carried out by a closed society. It is an activity in which only legal interpreters 'linked to corporations' and the formal members of the

63 *Schudson*, note 55, p. 506.

64 *David Estlund*, Why not Epistocracy?, in: Naomi Reshotko (ed.), Desire, Identity and Existence. Essays in Honor of T. M. Penner, Kelowna 2003, pp. 53-69.

65 *Peter Häberle*, A sociedade aberta dos intérpretes da Constituição – considerações do ponto de vista nacional-estatal constitucional e regional europeu, bem como sobre o desenvolvimento do direito internacional, Direito Público 18 (2007), p. 57.

constitutional process participate".[66] The reality, as observed, is one of closure; openness, on the other hand, is an aspiration.

In a normative sense, then, Peter Häberle's conception of an open society of constitutional interpreters – besides the requirement of practical difference, as mentioned earlier – represents a correctional device that should be used both to foster the participation of different social groups in constitutional decision-making and to criticize constitutional rulings in at least two different scenarios: (i) those rulings that shut down the door to social groups that might be affected by the decision or (ii) those that don't incorporate the views of these groups in constitutional adjudication. However, the extent to which the openness of constitutional interpretation is desirable involves overcoming conflicting arguments supported by conflicting values. On the one hand, one may claim that excessive closure of constitutional jurisdiction can weaken democracy and distort political decisions.[67] As previously discussed, this is not necessarily the case, for there is no necessary conceptual tension between democracy and restricting the participation of social groups in judicial review by recognizing a special *locus* for specialized knowledge within constitutional interpretation. On the other hand, one may problematize whether the openness of judicial review in Häberle's sense can lead to a "juridification of politics" (*Juridifizierung von Politik*) and, thereby, to an expansion of judicial protagonism, either through the intensification of control of political decisions, the amplification of judicial leeway as a by-product of the enlargement of decision alternatives, or the development of other decision-making strategies.[68] As a result, the openness to different worldviews can create a state of affairs in which the Supreme Court may feel legitimate to act not only in a counter-majoritarian way but also unconstrained to adopt some majority-driven rulings on the basis of the inputs brought by social participation.

From this angle, the broad openness of constitutional decision-making can not only promote democracy and pluralization of constitutional decisions, but also restrict the principles of separation of powers and legal certainty. As a sort of side effect, excessive openness can widen the margins of uncertainty in constitutional adjudication by potentially increasing the variables capable of influencing judicial decisions, thereby stretching judicial evaluation margins and making the results of constitutional dilemmas less predictable, since the criteria the court can use to filter and incorporate the inputs produced by broad participation in its rulings may become unclear. Coping with these challenges requires rationalizing the decision-making process through the creation of mechanisms capable of filtering the entry of these diverse viewpoints into judicial review, such as setting burdens of argumentation, burdens and standards of proof, and decision rules resulting from dogmatic endeavor. Without this, Coelho points out, "constitutional exegesis may dissolve into a large number

66 Ibid., p. 57.

67 *Hailbronner*, note 23, pp. 440 ff.

68 *Blankenburg / Treiber*, note 22, pp. 547 ff.

of interpretations and interpreters, leading to a *hermeneutic babel* that will inevitably compromise the unity and normative-aggregating force of the Constitution".[69]

In cases involving disputes over facts, there is a risk of a *juridification of science* that could convert judges into unprepared arbitrators of disputes between experts, especially when there is no reasonable scientific consensus on certain key empirical issues for constitutional decision-making.[70] This could be another problematical consequence of Häberle's argument, as it requires not only the openness of judicial review to social perspectives but also its permeability to "new scientific paradigms".[71] From an institutional perspective, the problem is exacerbated when disputes among experts lie at the heart of the potential judicial review of decisions made by other branches of government. This makes any requirement for accountability from constitutional courts that aim to be open particularly challenging.[72]

All these tensions pose quandaries on when and how the permeability of judicial review to society should occur for the actual operationalization of Häberle's idea. Taking seriously the fact that, as much as democracy, legal certainty, accountability, and separation of powers are constitutional values, it may be reasonable to claim that constitutional decisions do not always need to be open, or that even when they are, this openness does not need to be extensive. This has led us to the last theme. Indeed, the relationships between law and expert knowledge not only normatively influence how desirable the opening of constitutional interpretation can be by potentially restricting legal certainty and the separation of powers, but also expresses a deeper conceptual dilemma involving the very idea of democracy. However, as discussed before, this is also not necessarily the case.

E. Concluding remarks

In this paper, I intended to shed some critical light on the enthusiastic way in which we praise the idea of an open society of constitutional interpreters in Brazil, as if it could not be challenged or as if it is in fact implemented in Germany or in Brazilian judicial practice. Except for recent empirical research, the Brazilian literature tends to refer to Häberle's proposal as a sort of mantra, which is repeated again and again just like other slogans, such as the relevance of engaging in a *moral reading of the Constitution*[73], taking *institutional*

69 *Coelho*, note 8, p. 160.

70 *Luis Fernando Schuartz*, Interdisciplinaridade e adjudicação: caminhos e descaminhos da ciência no direito, FGV Direito Rio – Textos para discussão, 01.06.2009, p. 12, https://repositorio.fgv.br/items/7f9d2f4c-f488-4230-a2c3-2d64501d0b03 (last accessed on 16 May 2024).

71 *Häberle*, note 16, p. 46.

72 *Sombra*, note 21, p. 265.

73 The often-referenced study is *Ronald Dworkin*, Freedom's Law: The Moral Reading of the American Constitution, Cambridge 1997.

capacities[74] seriously or implementing *institutional dialogues*[75] with other branches of government, just to mention some catchphrases that are frequently used rhetorically in Brazilian legal community.

The supposed abuse of the symbolic nature of the argument, however, obscures its potential weaknesses. This does not mean that the aim of this work was to assess whether the defense of an open society of constitutional interpreters in the sense advocated by Häberle makes sense or not, whether it is right or wrong. Nor was the purpose of this text to point out solutions to deal with the descriptive, normative, and conceptual dilemmas raised. With modest ambition, it only wanted to show that the idea of an open society of constitutional interpreters may also be controversial. It is not an obvious and untouchable truth. If we want to keep it as a strong guideline for judicial review, we should also address some challenges to ensure that the conception of an open society of constitutional interpreters does not remain – as seems to be the case in Brazil – a mere empty slogan. Without such endeavor, the risk is keeping Häberle's motto far from being truly implemented and leaving the idea of an open society of constitutional interpreters as a sort of myth in Brazilian legal culture.

74 One frequently mentioned work in Brazilian literature is *Cass Sunstein / Adrian Vermeule*, Interpretation and Institutions, Michigan Law Review 101 (2003).

75 See *Peter W. Hogg / Allison A. Bushell*, The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All), Osgoode Hall Law Journal 35 (1997).

The Influence of Constitutional Objectives on Constitutional Interpretation: Some Propositions Based on the Brazilian and German Cases

By *Diego Platz Pereira*[*]

Abstract: Constitutional objectives are often general and vague. They constitute future-oriented norms that usually have a high political content and are binding on all branches of the state, despite not providing exhaustive clarifications about who is to implement which aspects of their contents. Therefore, the interpretation of these objectives by constitutional courts tends to be crucial both for the separation of powers and for determining the role of constitutional jurisdiction in dealing with teleology in law. Against this background, this paper aims to make four propositions about the influence of constitutional objectives on constitutional interpretation, based on experiences of the Brazilian and German constitutional law in dealing with constitutional objectives. The thesis is that these four propositions elucidate potentialities and limitations to the judicial application of constitutional objectives. The subject will be pursued through the examination of concrete jurisprudential understandings and decision-making practices of both the Brazilian Federal Supreme Court and the German Federal Constitutional Court. The propositions concern possible influences of constitutional objectives on the proportionality analysis, on teleological constitutional interpretation, on the constitutionalization of central principles of ordinary law, and on metanormative preconceptions for constitutional interpretation. Finally, a few general remarks will be made about law and politics, constitutional contexts, and the role of legal scholarship in shaping constitutional doctrine.[1]

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1 This paper aims to further develop and systematize certain aspects of a previous work, upon which this paper is largely based on *Diego Platz Pereira*, Die Bindung der Verfassungsgerichtsbarkeit an die Verfassungsziele: Bedingungen der Verfassungskonkretisierung durch das Bundesverfassungsgericht und das Supremo Tribunal, Jahrbuch des öffentlichen Rechts der Gegenwart 72 (2024). I would also like to express my gratitude to Oliver Lepsius, Henning Ahlers, Michaela Hailbronner, Thomaz Pereira, Michael Riegner, Conrado Hübner Mendes, and the anonymous reviewer for valuable discussions on issues related to this work and for comments on earlier drafts of this paper.

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A. Introduction

Constitutional objectives are future-oriented norms with constitutional status that usually have a high political content and are binding on all branches of the state.[2] They assume a non-realized state of things and set norms with a prospective character, aiming to provoke various kinds of transformation in society, political reality, and economy. Not rarely, they are understood as mandatory constitutional norms, having more than a declaratory or programmatic nature, despite of primarily not guaranteeing subjective rights.[3]

The possibilities of their concretization by constitutional jurisdictions are, however, limited. Constitutional objectives are often comprehended as norms that must be shaped by the legislature and are not subject to judicial enforcement.[4] Indeed, they tend to differ significantly from other constitutional norms that are applied by constitutional jurisdictions, as they contain particular final content that goes beyond norms with primarily conditional content.[5] Constitutional objectives often lack clear guidance on their implementation,

2 Most papers in English deal with similar norms by using the term "directive principles", mainly because they discuss and have in mind constitutional orders – such as the Indian one – that have established constitutional goals by using this nomenclature. However, since this paper will focus on the Brazilian and German constitutional law, as I will justify further, I will use the term "constitutional objectives", which is used explicitly by the Brazilian Constitution in its Article 3 and is arguably closer to the German term "Staatszielbestimmungen" (literally, state objective provisions). Other constitutional orders also refer to objectives of the constitution or of the state: See e.g. Article 2 of the Colombian Constitution, Article 9 of the Bolivian Constitution, and Article 63, No. 5 of the Portuguese Constitution. For a use of the term "directive principles" (principios rectores) by a country with a civil law tradition, Chapter 3 (Articles 39 ff.) of the Spanish Constitution.

3 For example, *Lael K. Weis*, Constitutional Directive Principles, Oxford Journal of Legal Studies 37 (2017), p. 920; and *Karl-Peter Sommermann*, Staatsziele und Staatszielbestimmungen, Tübingen 1997, p. 5. For a critical account see *Fábio Corrêa Souza de Oliveira*, Eficácia Positiva das Normas Programáticas, Revista Brasileira de Direito 11 (2015).

4 See *Jeffrey Usman*, Non-Justiciable Directive Principles: A Constitutional Design Defect, Michigan State Journal of International Law 15 (2007); *Weis*, note 3, pp. 933 ff.; and *Joseph Minattur*, The Unenforceable Directives in the Indian Constitution, Supreme Court Cases 1 (1975). That is, however, not always the case, especially when directive principles are applied in combination with other constitutional rights, see *Ulrike Davy*, Southern Welfare: From Social Insurance to Social Security, in: Ulrike Davy / Albert H. Y. Chen (eds.), Law and Social Policy in the Global South: Brazil, China, India, South Africa, Abingdon 2023, pp. 242 ff.; *James Fowkes*, Normal Rights, Just New: Understanding the Judicial Enforcement of Socioeconomic Rights, American Journal of Comparative Law 68 (2020), p. 736; and *Oliveira*, note 3.

5 About norms in law with final content, see *Marcelo Neves*, A Constitucionalização Simbólica, São Paulo 1994, p. 102; *Niklas Luhmann*, Positives Recht und Ideologie, Archiv für Rechts- und Sozialphilosophie 53 (1967), pp. 557 ff.; and *Sommermann*, note 3, pp. 356 ff.

leaving significant room for interpretation by those responsible for carrying them out. Additionally, there is often ambiguity regarding the extent to which each branch of the state should be involved in the implementation process.

Against this background, a great concern in developing connections between constitutional objectives and judicial interpretation lies in the danger of an overjudicialization of constitutional objectives. Submitting the implementation of constitutional objectives to judges could be problematic for constitutional democracies given the restricted capacity of political accountability of constitutional jurisdictions.[6] Besides, ruling based on constitutional objectives might mean ruling in issues that go beyond guaranteeing individual rights and opens a significative margin of interpretative possibilities due to the special final content of constitutional objectives.

These concerns could hypothetically become even more worrisome in countries with strong constitutional courts. However, powerful constitutional courts do not necessarily assume a protagonist role in the implementation of constitutional objectives. This has to do both with the influence of legal-political and legal-doctrinal expectations on the decision-making practices of a constitutional court as well as with institutional settings and practices.

Among countries with a civil law tradition[7], such an influence of expectations can be exemplified based on the Brazilian and German cases. While a large part of the Brazilian legal doctrine and jurisprudence tends to hold the judiciary responsible for the implementation of constitutional objectives through constitutional interpretation, it prevails the idea in Germany that the judiciary should carefully intervene in the implementation of constitutional objectives (Staatszielbestimmungen) by the legislature, which is mostly understood as responsible for the concretization of these constitutional norms.[8] Although

6 See e.g. *Weis*, note 3, p. 921.

7 In common law countries, debates about the judicial implementation of "constitutional objectives" are prevalent especially in constitutional orders that have followed the Irish initiative of systematically codifying directive principles, see *Usman*, note 4, p. 643f.; and *Tanurabh Khaitan*, Directive Principles and the Expressive Accommodation of Ideological Dissenters, International Journal of Constitutional Law 16 (2018), p. 391, fn. 6. In these contexts, the influence of directive principles on judicial interpretation has been apparently mostly discussed with focus on possibilities of judicial application of fundamental or socio-economical rights taking directive principles in both their constraining and constructive interpretative functions into consideration. Cf. diverse approaches in this sense in *Atudiwe P. Atupare*, Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria, Harvard Human Rights Journal 27 (2014), pp. 74 ff.; *Gautam Bhatia*, Directive Principles of State Policy, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu (eds.), The Oxford Handbook of the Indian Constitution, Oxford 2016, pp. 644 ff.; *Usman*, note 4; and *Gerard Hogan*, Directive Principles, Socio-Economic Rights and the Constitution, Irish Jurist 36 (2001), pp. 175 ff. Also discussing this subject, despite denying possibilities of judicial enforcement, see *Weis*, note 3.

8 See *Pereira*, note 1, pp. 686 ff. This does not negate the importance of the implementation of constitutional objectives by the public administration, but rather point to a possible deficiency of both the Brazilian and the German constitutional doctrine in analyzing the binding of the public administration to constitutional objectives. An early example of this approach in the Indian context can be

these expectations do not clarify much about how constitutional objectives are factually applied by these jurisdictions, it does indicate a relevance of different experiences and concepts about the juridification of political processes, which in turn shape the treatment of constitutional objectives by constitutional courts.[9]

In terms of institutional settings and decision-making practices, Brazilian and German constitutional law offer good examples of different perspectives on the codification and on the judicial enforcement of constitutional objectives. On the one hand, the developments of the Brazilian Federal Supreme Court (STF) are based on an implementation model of constitutional objectives that is strongly characterized by a wide-ranging, broadly conceived (and often vaguely articulated) balancing of constitutional principles as well as by the assumption that virtually every case can involve reasoning in connection with the human dignity,[10] On the other hand, the approach of the German Federal Constitutional Court (FCC) is characterized by the allocation of greater leeway to the legislature, but with a clear preservation of the court's power to determine the core content of constitutional objectives.[11]

These different approaches to constitutional objectives tend to produce specific effects on constitutional interpretation. Diverse institutional arrangements and decision-making

found in *Dattareya Gopal Karve*, Public Administration & the Directive Principles of the Constitution, Indian Journal of Public Administration 11 (1955). For an example of a German approach, see *Eberhard Schmidt-Aßmann*, Das allgemeine Verwaltungsrecht als Ordnungsidee: Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung. Heidelberg 2006, pp. 154 ff.

9 About bad experiences with political processes and their following "legalization", see *Christoph Möllers*, Legality, Legitimacy and Legitimation of the Federal Constitutional Court, in: Mathias Jestaedt / Oliver Lepsius / Christoph Möllers / Christoph Schönberger (eds.), The German Federal Constitutional Court: The Court Without Limits, Oxford 2020, p. 145.

10 *Luís Roberto Barroso*, Curso de Direito Constitucional Contemporâneo: Os conceitos fundamentais e a construção do novo modelo, São Paulo 2018, pp. 134 ff.; *Enzo Bello* / *Gilberto Bercovici* / *Martonio Mont'Alverne Barreto Lima*, O Fim das Ilusões Constitucionais de 1988? Revista Direito e Práxis 10 (2019), pp. 1801 ff.; and *Marcelo Neves*, Os Estados no Centro e os Estados na Periferia: Alguns problemas com a concepção de Estados da sociedade mundial em Niklas Luhmann, Revista de Informação Legislativa 206 (2015), pp. 123 ff. These practices might be potentialized through numerous possible assumptions of connections between prospective norms and constitutional rights through the text of the Brazilian Constitution. Such assumptions can be also ascertained, in part, in the Portuguese (Article 63, No. 5; Article 67, No. 2, b); Article 69, No. 1, e etc.) and in the Colombian (Article 44; Article 46, 2 etc.) constitutions.

11 This leeway consists in particular in the court's interpretative competence to determine the substantive legal core content of the constitutional objectives, and this is precisely where it is also casuistically controversial due to its not predetermined scope. For examples of critiques about the court's interpretative practices. See *Oliver Lepsius*, The Standard-Setting Power, in: Mathias Jestaedt / Oliver Lepsius / Christoph Möllers / Christoph Schönberger (eds.), The German Federal Constitutional Court: The Court Without Limits, Oxford 2020, pp. 93 ff.; and *Robert Christian van Ooyen*, Hüter von Staat und Volk – in Karlsruhe nicht Neues: die Lissabon-Entscheidung, in: *Robert Christian van Ooyen* (ed.), Die Staatstheorie des Bundesverfassungsgerichts und Europa: von Solange über Maastricht und Lissabon zur EU-Grundrechtecharta und EZB, Baden-Baden 2022, pp. 122 ff.

practices may lead to various forms of dealing with constitutional objectives and, consequently, to various forms of influence of constitutional objectives on constitutional interpretation. In that sense, how and to what extent courts may participate in the implementation of constitutional objectives are questions that may become clearer once possible applications of constitutional objectives are deepened in different constitutional contexts.

Therefore, this paper aims to explore possible legal understandings of constitutional objectives by making four propositions about their influence on constitutional interpretation through exemplifications based on Brazilian and German constitutional law. The primary intention of the paper is conceptual: To contribute to a typification of uses of constitutional objectives that influence interpretative practices of constitutional jurisdictions.[12] These typifying propositions can serve as tools to help distinguish how constitutional objectives are used in constitutional reasoning. Illustrating these conceptual typifications based on Brazilian and German constitutional law serves two main purposes. The first is to exemplify how constitutional contexts corroborate for the development and applicability of different uses of constitutional objectives by constitutional jurisdictions and, consequently, for the emergence of varieties of constitutionalism. The second is to discuss some aspects specifically of the German and Brazilian experiences with constitutional objectives, which are rather scarcely addressed in a conceptual way as a main subject in English-language publications.[13] The thesis is that the four presented propositions elucidate potentialities and limitations to the judicial application of constitutional objectives.

12 For an influence of constitutional objectives on judicial decision-making practices that goes beyond an influence on constitutional interpretation: *Diego Platz Pereira*, A integração jurídica latino-americana: possibilidades de seu fomento na Constituição Federal brasileira por meio de Comparação Constitucional, Anuario de Derecho Constitucional Latinoamericano 29 (2023), pp. 469 ff..

13 For an example of an exception, see *Guilherme Camargo Massaú* / *André Kabke Bainy*, The Role of the Fundamental Objectives of Brazilian Federal Constitution: The Dialetics System-Problem, Rechtstheorie 51 (2020). For other publications in English, which mention German or Brazilian constitutional objectives, without having them necessarily as a main subject, e.g. *Ryan Kraski* / *Marek Prityi* / *Saskia Münster*, Constitutional Provisions, in: Kirk W. Junker / M. C. Mehta (eds.), Environmental Law Across Cultures: Comparisons for Legal Practice, London 2020; *Karl-Peter Sommermann*, Constitutional State and Public Administration, in: Sabine Kuhlmann / Isabella Proeller / Dieter Schimanke / Jan Ziekow (eds.), Public Administration in Germany, Cham 2021; *Jorge V. B. de Andrade et al*., Constitutional Aspects of Distributed Generation Policies for Promoting Brazilian Economic Development, Energy Policy 143 (2020). A rather more common approach in reference to German and Brazilian constitutional objectives is to address problematics surrounding a specific constitutional objective. Although this might also be realized conceptionally, it is, differently to this paper, restrained to one or more specific constitutional objective(s), e.g. *Claudia E. Haupt*, The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law's Animal Protection Clause, Animal Law 16 (2010); *Petra Minnerop*, The 'Advance Interference-Like Effect' of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court, Journal of Environmental Law 34 (2022); *Eduardo Scheiner Lesch*, Environmental Courts and Tribunals in Brazil and Bolivia: A Comparative Analysis Between Institutional Systems of Environmental Protection, DPCE Online 58 (2023);

These four propositions should not be understood as abstract rules, applicable to any constitutional order that has established constitutional objectives.[14] Instead, the propositions explore possibilities for the influence of constitutional objectives on constitutional interpretation on the basis of concrete constitutional orders, so that the spectrum of application of the propositions and of reflection on them must be considered contextually. Nonetheless, they can be insofar useful and applicable to other constitutional systems besides the Brazilian and the German ones, as they may correspond to a greater or lesser degree to pertinent constitutional circumstances of such constitutional systems. Furthermore, they intentionally address methodological issues of constitutional interpretation that can be as well relevant for other constitutional contexts.[15] While the first proposition will have essentially a normative character, the following three will have primarily a descriptive one.

Moreover, I assume in the propositions that the constitutional jurisdiction is bound by constitutional objectives. "Constitutional binding" will be understood broadly in this work by neither assuming the exclusivity of a constitutional binding through the constitutional text nor through case law. The "binding" of the constitutional jurisdiction will rather partly refer to a dichotomy: What courts are sometimes "supposed" to do as a result of being bound will be hard to separate from what courts "can" do at all within the constitutional structure.[16] In that sense, the paper's mentions to "constitutional interpretation" will also refer only to judicial interpretation. Given that constitutional objectives often contain both final and conditional normative contents, I will consider that especially the former can be realized to a greater or lesser degree, instead of with an all-or-nothing logic.[17]

and *Carlos Eduardo Artiaga Paula* /*Ana Paula da Silva* / *Cléria Maria Lôbo Bittar*, Expansion of the judiciary in the Brazilian public health system, Revista Bioética 27(2019).

14 Some of them may even be better suited to either the German or the Brazilian constitutional context.

15 In this sense, the enforceability or non-enforceability of constitutional objectives by their own normative effects will not be a subject of this article, which will pursue much more methodological and interpretative effects of constitutional objectives. Thus, the approach does not establish primarily a relation to the so-called "interpretation approach" to constitutional objectives, which have been shortly explored in *Weis*, note 3, pp. 931 ff.

16 See also *Pereira*, note 1, pp. 667 ff.

17 This assumption might be confused with the wide-spread definition of legal principles of *Alexy*, according to which – in its first formulation – principles are optimization commands: See *Robert Alexy*, Theorie der Grundrechte, Frankfurt am Main 1986, pp. 75 ff. However, I do not presuppose *Alexy*'s model of principles application for the application of constitutional objectives in this paper. Although the focus of this paper will not be distinguishing constitutional objectives as principles from other constitutional principles, I do assume that constitutional objectives have special features especially because of their distinct final content in comparison to other constitutional principles. Furthermore, I also assume that the normative application of constitutional objectives can reach beyond principles balancing, as the four following propositions will clarify. For a supposition that the "theory of principles" of *Alexy* should be rather grasped and reformulated as a "theory of optimization commands", which could be valuable for deepening characteristics of constitutional objectives that come closer to optimization commands than other constitutional principles: *Ralf Poscher*, Resuscitation of a Phantom? On Robert Alexy's Latest Attempt to Save His Concept of

The paper is structured as follows. Initially, there will be made some preliminary remarks about constitutional objectives in Brazil and Germany, in which I will clarify what I mean by referring to "constitutional objectives" in these constitutional orders. Subsequently, the four propositions will be presented briefly and with support from concrete experiences of the Brazilian and the German constitutional law.[18] They will address, respectively, nuances of the legitimate purpose of the proportionality analysis in light of constitutional objectives, conditioning circumstances of teleological interpretation through constitutional objectives, the influence of constitutional objectives on principles of specific fields of ordinary law, and the possibility of constituting interpretative metanorms through features and practices based on constitutional objectives. Finally, a summarization of the four propositions will be accompanied by a few general remarks about law and politics, constitutional contexts, and the role of legal scholarship in shaping constitutional doctrine.

B. Preliminary remarks about constitutional objectives in Brazil and in Germany

The conceptual locus communis of the Brazilian discussion on constitutional objectives is rather to be found in the broad concept of "programmatic norms", which would encompass a large number of norms of the Brazilian Constitution.[19] According to a traditional Brazilian doctrine, these norms would be constitutional norms that are binding on all branches of the state and seek to achieve social goals through prospective constitutional change.[20]

Principle, Ratio Juris 33 (2020), pp. 146 ff. For a systematization of the "three-rounds" of the Alexy-Poscher debate, *Rafael Giorgio Dalla-Barba* (ed.), The Alexy-Poscher Debate on Legal Principles, Oxford 2025 (forthcoming). For further reflections about these issues, *Fernando Leal*, Ziele und Autorität: Zu den Grenzen teleologischen Rechtsdenkens, Baden-Baden 2014, p. 202 ff.

18 These propositions are based on *Pereira*, note 1, pp. 690 ff.

19 The main foreign influences for the development of this concept in Brazil might have been the doctrines of V. Crisafulli and of J. J. G. Canotilho (referring to a directive constitution), see *Carlos Eduardo Nobre Correia*, Eficácia das Normas Constitucionais Programáticas, Master's Thesis, São Paulo 2012, pp. 35 ff.; *Paulo Roberto Lyrio Pimenta*, A Eficácia das Normas Constitucionais Programáticas da Constituição Federal de 1988 em seu Vigésimo Aniversário: os avanços da jurisprudência do Supremo Tribunal Federal, Revista do CEPEJ 11 (2009), pp. 29 ff.; and *Regina Maria Macedo Nery Ferrari*, Normas Constitucionais Programáticas: Normatividade, operatividade e efetividade, Doctoral Thesis, UFPR, Curitiba 2000, pp. 97 ff. Many authors also mention the influence of the Weimar Constitution (1919) and of the Mexican Constitution (1917) on the social-programmatic character of the Brazilian Constitution: See e.g. *Denise Auad*, Os direitos sociais na Constituição de Weimar como paradigma do modelo de proteção social da atual Constituição Federal Brasileira, Revista da Faculdade de Direito da USP 103 (2008), pp. 344 ff.; *Marcelo Neves*, Constituição de Weimar, presente!, Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte 27 (2019), pp. 444 ff.; and *André Ramos Tavares*, Influência de 1917 na doutrina e nas constituições econômicas brasileiras, in: Hector Fix-Zamudio / Eduardo Ferrer Mac-Gregor (eds.), Ciudad de México 2017, pp. 721 ff.

20 *José Afonso da Silva*, Aplicabilidade das normas constitucionais, São Paulo 1998, p. 138; and *Raul Machado Horta*, Estrutura, natureza e expansividade das normas constitucionais, Revista da Faculdade de Direito da UFMG 33 (1991), pp. 5 ff. On the discussion of emerging subjective rights with

However, this ideal concept has been harshly criticized for contrasting with reality. Some argue that programmatic norms have a "hypertrophic symbolic" or "dead word" character, as they do not pursue a radical-structural transformation of Brazilian social and political conditions.[21] Based on these characteristics, one could argue that the ongoing Brazilian debate on programmatic norms and constitutional objectives involves a complex relationship between doctrinal concepts and the practical implementation of constitutional law.

Despite sharing a basis with programmatic norms, constitutional objectives constitute arguably a specific normative category in Brazilian constitutional law: They are a subcategory of programmatic norms and a higher category for the "fundamental" constitutional objectives listed in Article 3 of the Brazilian Constitution[22], as well as for other constitutional objectives. The objectives of the Brazilian Constitution differ from (primarily) right-guaranteeing, state-structuring and competence norms[23], as well as from constitutional commands to legislate, because constitutional objectives are binding on all branches of the state.[24] Furthermore, constitutional objectives are norms with a fundamentally legal-objective, future-oriented, and final character – although they may contribute to the establishment of subjective rights and to norms with a conditional character.[25]

negative or positive character from programmatic norms, *Barroso*, note 10, pp. 127 ff.; and *Oliveira*, note 3, pp. 35 ff.

21 *Neves*, note 5, pp. 102 ff.; and *Bello et al.,* note 10, pp. 1802 ff. Differently in: *Barroso*, note 10, pp. 134 ff.

22 Article 3 of the Brazilian Federal Constitution states: "Article 3. The fundamental objectives of the Federative Republic of Brazil are: I – to build a free, fair and solidary society; II – to guarantee national development; III – to eradicate poverty and marginalization and to reduce social and regional inequalities; IV – to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination".

23 For a similar categorization of constitutional norms, albeit without specifying "constitutional objectives" as a constitutional category, *Luís Roberto Barroso*, A efetividade das normas constitucionais revisitada, Revista de Direito Administrativo 197 (1994), pp. 37 ff. For criticism about this categorization of *L. R. Barroso*, which, however, do not affect the merely purpose of differentiating constitutional objectives from the mentioned kinds of constitutional norms, see *Oliveira*, note 3, pp. 36 ff.; and *Christian Edward Cyril Lynch* / *José Vicente Santos de Mendonça*, Por uma história constitucional brasileira: uma crítica pontual à doutrina da efetividade, Revista Direito e Práxis 8 (2017), pp. 982 ff.

24 Bonavides has similarly written on what he called "programmatic norms in stricto sensu", *Paulo Bonavides*, Curso de Direito Constitucional, São Paulo 2004, p. 250.

25 For possible connections of constitutional objectives with subjective individual rights and even social rights, see *Oliveira*, note 3, pp. 39 ff.; *Barroso*, note 10, pp. 127 ff.; *Ana Paula de Barcellos*, O mínimo existencial e algumas fundamentações: John Rawls, Michael Walzer e Robert Alexy, Revista de Direito Público Contemporâneo 1 (2017), p. 9; and *Andreas J. Krell*, Realização dos direitos fundamentais sociais mediante controle judicial da prestação dos serviços públicos básicas (uma visão comparativa), Revista de Informação Legislativa 144 (1999), p. 255. The future-oriented and final character of constitutional objectives distinguishes them from the constitutional fundaments and the constitutional principles for international relations, as outlined, respectively, in Articles 1 and 4, all sections, of the Brazilian Constitution. Although this is only a provisional and exemplary "catalog", norms in the Brazilian Constitution that are to be considered constitutional

The German basic concept of constitutional objectives (Staatszielbestimmungen) is relatively comparable to the Brazilian one: Constitutional objectives are applicable objective constitutional norms that legally bind all state to pursue specific goals without guaranteeing subjective rights.[26] Nonetheless, the (well-established) German doctrine on constitutional objectives assumes that they have a special binding effect on the legislature, without excluding their guiding interpretative effect on the executive and the judiciary.[27] Almost all German constitutional objectives – which are less numerous than the Brazilian ones – have been incorporated into the Basic Law by constitutional amendments[28] and are found only scattered throughout the constitutional text.

objectives, at least in part, and that go beyond the fundamental constitutional objectives of Article 3 of the Brazilian Constitution can arguably be found in Articles 4, sole paragraph; 144, caput; 170, sections I to IX; 193; 194, sole paragraph and sections I to VII; 196; 201, caput; 203; 204; 205; 215 to 218; 225; 227, paragraph 1; and 230 of the Brazilian Constitution, as discussed in *Pereira*, note 1, pp. 683 ff.

26 *Sommermann*, note 3, p. 5; *Harmut Maurer* / *Kyrill-Alexander Schwarz*, Staatsrecht I: Grundlagen, Verfassungsorgane, Staatsfunktionen, München 2023, pp. 128 ff.; *Stefan Korioth* / *Michael W. Müller*, Staatsrecht I: Staatsorganisationsrecht unter Berücksichtigung europäischer und internationaler Bezüge, Stuttgart 2022, pp. 116 ff.; *Christoph Degenhart*, Staatsrecht I: Staatsorganisationsrecht, Heidelberg 2022, p. 106. This conception has been early influenced by a noteworthy article of Scheuner, see *Ulrich Scheuner*, Staatszielbestimmungen, in: Joseph Listl / Wolfgang Rüfner (eds.), Staatstheorie und Staatsrecht: Gesammelte Schriften, Berlin 1978, p. 224 ff.; and *Sommermann*, note 3, p. 349. The first use of the terminology "*Staatszielbestimmung*" is often associated to a speech of H. P. Ipsen, see *Hans Peter Ipsen*, Über das Grundgesetz: Rede gehalten anlässlich des Beginns des neuen Amtsjahres des Rektors der Universität Hamburg am 17. Nov. 1949, Hamburg 1950, pp. 14 ff.; *Heinz-Christoph Link*, Staatszwecke im Verfassungsstaat – Nach 40 Jahren Grundgesetz, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 48 (1990), p. 18; and *Daniel Hahn*, Staatszielbestimmungen im integrierten Bundesstaat: Normative Bedeutung und Divergenzen, Berlin 2010, pp. 63 ff. Ipsen himself would have used the terminology from the doctoral thesis of *K. Wilk* and have applied it to the context of the year 1949, *Hans Peter Ipsen*, Das große „Staatsrecht" von Klaus Stern, Archiv des öffentlichen Rechts 103 (1978), pp. 423 ff.

27 This has also been strongly influenced by the results of the expert commission "Staatszielbestimmungen / Gesetzgebungsaufträge", formed by the German Federal Ministries of the Interior and of Justice in 1983, relatively short after other European constitutions (such as the Greek from 1975, the Portuguese from 1976, the Spain from 1978, and even the of the Swiss Canton Aargau from 1980) had established similar norms: Report of the Experts Commission "Staatszielbestimmungen / Gesetzgebungsaufträge", Bonn 1983; *Peter Häberle*, Die Kontroverse um die Reform des deutschen Grundgesetzes, Zeitschrift für Politik 39 (1992), pp. 235 ff.; *Sommermann*, note 3, pp. 349 ff.; and *Link*, note 26, p. 48.

28 An exception is the social state's principle (Article 20 of the Basic Law), which is largely considered as a constitutional objective in Germany and was already established in the original version of the German Basic Law, e.g. *Roman Herzog*, Staatszielbestimmungen, in: Rainer Pitschas / Arnd Uhle (eds.), Wege gelebter Verfassung in Recht und Politik: Festschrift für Rupert Scholz zum 70. Geburtstag, Berlin 2007, p. 220. The German discussion on the nature of the social state normativity is, however, considerably plural, as it has been described not only as a constitutional objective, but instead also as a constitutional task (Verfassungsauftrag), general legal principle, state-structural principle, or even as no legal concept. For a detailed overview of diverse approach-

Furthermore, the German conceptualization of constitutional objectives encompasses a remarkable and particular imprint of German constitutional doctrine (Verfassungsdogmatik), which makes itself felt especially in detailed conceptual distinction between constitutional objectives and other constitutional categories. For instance[29], constitutional objectives differ particularly from the categories of implicit constitutional or state objectives[30], general state-structural principles[31], constitutional tasks[32], social rights[33], and specific constitutional commands to legislate.[34]

In light of this, it is evident that the Brazilian Constitution and the German Basic Law – originally and also after constitutional amendments – posed different challenges to the concretization of constitutional objectives. The "festive loading" of the Brazilian

es, see *John Philipp Thurn*, Welcher Sozialstaat?: Ideologie und Wissenschaftsverständnis in den Debatten der bundesdeutschen Staatsrechtslehre 1949-1990, Tübingen 2013.

29 For detailed categorical differentiations of constitutional objectives to other kinds of constitutional norms, *Hahn*, note 26, pp. 66 ff.; *Scheuner*, note 26, pp. 227 ff.; *Jakob Michael Stasik*, Staatszielbestimmung im Grundgesetz zugunsten des Sports?, Hamburg 2017, pp. 14 ff.; and *Nicolai Müller-Bromley*, Staatszielbestimmung Umweltschutz im Grundgesetz?, Berlin 1990, pp. 35 ff.

30 For a differentiation between explicit and implicit constitutional objectives of the German Basic Law, see *Pereira*, note 1, fn. 7.

31 While constitutional objectives substantively direct state action, state-structural principles define the forms and modus operandi by which state action and constitutional objectives are to be concretized in the constitutional order, see explicitly *Sommermann*, note 3, pp. 372 ff.; and *Hahn*, note 26, p. 80. This differentiation is especially debatable in the case of the social state, which could fit (simultaneously) into both categories, see note 28.

32 It has been historically controversial in German constitutional doctrine whether constitutional tasks (Verfassungsaufträge) are to be understood as more concrete or more general than constitutional objectives (*Sommermann*, note 3, pp. 364 ff.). According to the former view, tasks could be established by means of constitutional objectives (e.g. *Link*, note 26, p. 19). The latter argues that a broad concept of constitutional tasks would be able to encompass the totality of constitutional norms with a final character (e.g. *Hahn*, note 26, p. 79; and *Christian Walter*, "Offene Staatlichkeit" als Verfassungsauftrag: Wie Völkerrecht und Verfassungsrecht zur Bewältigung globaler Gemeinwohlherausforderungen zusammenwirken, Jahrbuch des öffentlichen Rechts der Gegenwart 72, Tübingen 2024, pp. 293 ff.).

33 The approximation of constitutional objectives to social rights is a topic that has often been discussed in Germany. This discussion has focused on instances where social rights are enshrined in the form of constitutional rights without a subjective and justiciable character. However, this possibility of implementing social rights in a subjective or objective manner, along with the requirement of a specific social orientation, has served to distinguish both, see *Jörg Lücke*, Soziale Grundrechte als Staatszielbestimmungen und Gesetzgebungsaufträge, Archiv des öffentlichen Rechts 107 (1982), pp. 18; *Sommermann*, note 3, pp. 371 ff.; and *Hahn*, note 26, p. 76.

34 *Scheuner*, note 26, pp. 230 ff.; *Sommermann*, note 3, pp. 362 ff.; and *Hahn*, note 26, pp. 66 ff. For a prominent article about specific constitutional commands to legislate, see *Peter Lerche*, Das Bundesverfassungsgericht und die Verfassungsdirektiven: Zu den „nicht erfüllten Gesetzgebungsaufträgen", Archiv des öffentlichen Rechts 90 (1965).

constitutional text[35] was aimed at an ambitious and holistic transformation of the Brazilian life reality. In comparison, the establishment of constitutional objectives in the Basic Law has been more gradual, leaving a large scope for action to the federal legislation and to the federated states. State action has been redirected over time on some central matters through the adoption of new constitutional objectives, but without the same holistic textual ambition as the Brazilian constitution.

Nevertheless, as shown above, their basic conceptions of constitutional objectives are comparable. Hence, discussing possibilities of judicial application of constitutional objectives based on Brazilian and German constitutional law means also discussing different developments of a comparable concept.

C. Proportionality Test, Legitimate Purpose and Constitutional Teleology

The judicial interpretation of constitutional law in Brazil and in Germany is methodologically marked by the pregnant presence of the proportionality test. Especially in the German application of proportionality, teleology and final content play an interesting role, as the first step of the proportionality test is usually the proof of a legitimate purpose.[36] Accordingly, the state measure to be proven by the proportionality analysis must pursue a constitutionally legitimate purpose. By legitimate understands the FCC "a purpose not prohibited by the Constitution. No additional element, such as a 'sufficient importance' or 'pressing need', is required".[37]

Determining what is the legitimate purpose of a particular state measure is not merely a factual issue, however, but first and foremost a matter of legal interpretation.[38] The Court often has the power to construct the legitimate purpose of a state measure, rather than simply discovering it. This is because a law or its creators, e.g., may name multiple purposes for the measure.[39] With the definition of the legitimate purpose the Court can

35 *Rainer Schmidt*, Verfassung und Verfassungsgerichtsbarkeit: Deutschland und Brasilien im Vergleich, in: Rainer Schmidt / Virgílio Afonso da Silva (eds.), Verfassung und Verfassungsgerichtsbarkeit: Deutschland und Brasilien im Vergleich, Baden-Baden 2012, p. 145.

36 Especially the considered inaugural decision of the Federal Constitutional Court regarding prportionality, BVerfGE 7, 377, para. 87 – Pharmacies Case (1958). For clarification, see also *Dieter Grimm*, Proportionality in Canadian and German Constitutional Jurisprudence, University of Toronto Law Journal 57 (2007), pp. 387 ff.; *Andrej Lang*, Proportionality Analysis by the German Federal Constitutional Court, in: Mordechai Kremnitzer / Talya Steiner / Andrej Lang (eds.), Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice, Cambridge 2020, p. 37.

37 *Grimm*, note 36, p. 388.

38 *Oliver Lepsius*, Chancen und Grenzen des Grundsatzes der Verhältnismäßigkeit, in: Matthias Jestaedt / Oliver Lepsius (eds.), Verhältnismäßigkeit: Zur Tragfähigkeit eines verfassungsrechtlichen Schlüsselkonzepts, Tübingen 2015, p. 38.

39 Ibid.

pre-structure the balancing regarding whether the purpose of the state measure to justify a certain intervention in the scope of protection of a fundamental right.[40]

Notwithstanding the purposively highly loaded characteristics of constitutional objectives, these norms are, in the jurisprudence of the FCC, usually neither used more frequently than other constitutional norms to justify constitutionally legitimate purposes (quantitatively), nor are they treated differently than other norms that provide grounds for legitimate purposes, despite their noteworthy purposive contents (qualitatively).[41] Therefore, it is questionable whether there is a legal relevance for the proportionality test not only in the judicial determination of what is the purpose pursued by a state measure[42], but also in the determination of on what legal basis this state measure can be considered as "legitimate".[43]

In view of that, my first proposition is that the purpose of a state measure that is considered "legitimate" on the basis of a constitutional objective may require a specific treatment in the sequence of the proportionality analysis.

Several factors could speak in favor of a differentiated treatment by the Federal Constitutional Court of a pursued purpose that can be justified as "legitimate" on the basis of a constitutional objective. First, constitutional objectives have a special binding final and directive content on state measures in comparison to other constitutional norms. Second, compared to other constitutional norms, there is a particularly wide scope for the legislature to determine the mode of implementation of constitutional objectives in the German context, which could play a role for a distinct treatment especially of the reasonableness[44] (fourth step of the proportionality test).[45] Third, this differentiated consideration of constitutional objectives could also be important for the further proportionality test in the question of whether the intervening measure can be supported by a core content

40 Ibid.; *Grimm*, note 36, p. 388. The balancing is the last step of the German proportionality test and is often reached in cases judged by the FCC.

41 Indications about the quantitative aspect can be seen in *Christoph Engel*, Das legitime Ziel in der Praxis des Bundesverfassungsgerichts: Eine quantitative Analyse der Entscheidungen des Jahres 2011, in: Matthias Jestaedt / Oliver Lepsius (eds.), Verhältnismäßigkeit: Zur Tragfähigkeit eines verfassungsrechtlichen Schlüsselkonzepts, Tübingen 2015, pp. 117 ff. The qualitative aspect, on the other hand, can be asserted through the conspicuous doctrinal lack in addressing such a differentiation when systematizing the application of proportionality in consideration of the FCC's jurisprudence, e.g. *Thorsten Kingreen* / *Ralf Poscher*, Grundrechte, Staatsrecht II, Heidelberg 2024, pp. 405 ff.; *Niels Petersen*, Deutsches und Europäisches Verfassungsrecht II: Grundrechte und Grundfreiheiten, München 2022, pp. 29 ff.; *Gerrit Manssen*, Staatsrecht II: Grundrechte, München 2024, pp. 80 ff.; *Friedhelm Hufen*, Staatsrecht II: Grundrechte, München 2023, pp. 114 ff.; and *Jörn Ipsen*, Staatsrecht II: Grundrechte, München 2019, pp. 49 ff.

42 *Lepsius*, note 38, p. 38.

43 *Sommermann*, note 3, p. 423.

44 For different translations of the fourth step of the proportionality test in Germany. see *Lang*, note 36, p. 37.

45 The relevance of considering the legislative scope for decision-making purpose analysis has also been discussed by Schlink, *Bernhard Schlink*, Abwägung im Verfassungsrecht, Berlin 1976, p. 152, 180.

of a constitutional objective, which might deserve a special judicial protection, or only by a statutory regulation of a constitutional objective. Finally, it could be considered to what extent the Federal Constitutional Court should in a specific case possibly participate in the implementation of a pursued purpose that is perceived as legitimate based on a constitutional objective. This hypothesis does not assume unreflective judicial activism, but rather explores possibilities for integrating the complexity of constitutional objectives into the treatment of collisions between constitutional norms in the proportionality analysis.

Basically, the same problem could be discussed in the Brazilian constitutional law. However, it is important to bear in mind two particularities: First, the Brazilian legal doctrine does not give much importance to a clear definition of legitimate purposes of state measures. This tendency is prevalent in the current constitutional doctrine, where the relationship between ends and means is often blurred between the criteria of suitability, necessity and proportionality in the strict sense or reasonableness.[46] Second, it could be questioned to what extent a categorical and differentiated consideration should be made between the purposes pursued by state measures that are linked to the fundamental objectives (Article 3 of the Brazilian Federal Constitution) and those that cannot be linked to them. In any case, this line of thought stands in contrast to the constitutional objectives of the German Basic Law. In other words, should the special categorization of fundamental objectives give rise to particular concerns when determining the legitimate purposes of state measures in comparison to other constitutional objectives?

D. Constitutional Objectives and Interpretation Based on Teleology

Besides the proportionality test, the FCC and the STF frequently use teleology itself as a method to interpret and apply constitutional law.[47] Constitutional teleology is used both retrospectively and prospectively. The former is the case through constitutional interpretations based on the purpose of the constitutional text or on the purpose of the constitutional

46 *Humberto Ávila*, Teoria dos Princípios: da definição à aplicação dos princípios jurídicos, São Paulo 2005, pp. 116 ff.; *Gilmar Ferreira Mendes* / *Paulo Gustavo Gonet Branco*, Curso de Direito Constitucional, São Paulo 2021, pp. 439 ff.; *Virgílio Afonso da Silva*, O proporcional e o razoável, Revista dos Tribunais 798 2002, pp. 34 ff. A critical account can be found in *Dimitri Dimoulis* / *Leonardo Martins*, Teoria geral dos direitos fundamentais, São Paulo 2014, pp. 182 ff.

47 *Dieter Grimm*, Verfassung, Verfassungsgerichtsbarkeit, Verfassungsinterpretation an der Schnittstelle von Recht und Politik, in: Dieter Grimm (ed.), Verfassungsgerichtsbarkeit, Berlin 2021, p. 168; *Michaela Hailbronner* /*Stefan Martini*, The German Federal Constitutional Court, in: András Jakab / Arthur Dyèvre / Giulio Itzcovich (eds.), Comparative Constitutional Reasoning, pp. 376 ff.; *Rodrigo Brandão* / *André Farah*, Consequencialismo no Supremo Tribunal Federal: uma solução pela não surpresa, Revista de Investigações Constitucionais 7 (2020); *Fernando Leal*, Juízes Pragmáticos São Necessariamente Juízes Ativistas?, Revista Brasileira de Direito 17 (2021), pp. 6 ff.

legislators.[48] Second is the case by diverse considerations of consequences of judicial decisions.[49]

Both have been subject of judgment of the STF in the writ of injunction (MI) No. 4.733[50]. The Brazilian Association of Gays, Lesbians and Transgenders (ABGLT) filed this writ against the Brazilian National Congress in order to obtain the specific criminalization of all forms of homophobia and transphobia, since there was no statutory regulation in this sense and the exercise of constitutional rights by the LGBT population would have been severely restricted due to the high degree of violence and discrimination against the LGBT population in society[51]. In face of that, the Court judged considering different dimensions of the constitutional objective of promoting the well-being of all, without prejudice or forms of discrimination of any kind (Article 3, section IV of the Brazilian Constitution).

In this context, my second proposition is that constitutional objectives are able to bind teleological interpretations of constitutions in a deontological dimension and/or in a teleological dimension in the strict sense.[52] I will clarify this and then return to the judgment of the MI 4.733, which I will use to exemplify this dimensional differentiation of constitutional binding and to propose an interpretation of some aspects of this judgment.

The deontological dimension concerns above all the question whether the constitutional objectives may influence any teleological interpretation of constitutional norms, insofar as

48 For discussions on the so-called "objective" and "subjective" approaches to teleological interpretation, see *Thomas Wischmeyer*, Zwecke im Recht des Verfassungsstaates: Geschichte und Theorie einer juristischen Denkfigur, Tübingen 2015, pp. 342 ff.; *Aharon Barak*, Purposive Interpretation in Law, Princeton / Oxford 2005, pp. 120 ff. and 148 ff.

49 Brandão / Farah, note 47; *Wolfgang Hoffmann-Riem*, Innovation und Recht – Recht und Innovation: Recht im Ensemble seiner Kontexte, Tübingen 2016, pp. 88 ff.; and *Philipp Lassahn*, Rationalität und Legitimität der Folgenberücksichtigung, Archiv für Rechts- und Sozialphilosophie 99 (2013).

50 STF, MI 4.733/DF, Pleno, Rel. Min. Edson Fachin, pub. in 06.13.2019. The guarantee of writs of injunction is especially regulated in Article 5, section LXXI of the Brazilian Constitution, which states: "a writ of injunction shall be granted whenever the lack of regulatory provisions hinders the exercise of constitutional rights and liberties in addition to the prerogatives inherent in nationality, sovereignty and citizenship".

51 Ibid., pp. 5 ff.

52 This categorial distinction is based on a similar differentiation of Habermas in *Jürgen Habermas*, Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats, Frankfurt am Main 1994, pp. 255, 310 ff.,562, see also: *Pereira*, note 1, pp. 692 ff. This proposition does not presuppose a general teleological thinking of constitutional objectives, which would necessarily and systemically influence all cases of a certain constitutional jurisdiction. Such an assumption can lead not only to a generalization of the content of constitutional objectives, but also to an essentially rhetorical effect in constitutional reasoning, which can be marked by confusion and imprecise mixtures of the content of different constitutional objectives. The proposition pertains rather to the influence of constitutional objectives on the purposive interpretation in its dimensions as practice, approach, and method of constitutional interpretation. Such a general teleological thinking is assumed by *Massaú / Bainy*, note 13, pp. 374 ff.

they are shown to be relevant in view of the circumstances of the specific case in question. The admission of a deontological dimension would merely mean that in constitutional teleological interpretation, related constitutional objectives would have to be taken into account for the determination of the concrete telos of constitutional norms (primarily retrospective use of constitutional objectives)[53]. By taking their normative content into account when determining constitutional teleology, the normative promotion of the constitutional objectives would then be present in interpretative practices of constitutional courts.

The teleological dimension in the strict sense concerns more the question of how the constitutional objectives influence the teleological interpretation of constitutional norms. Assuming that constitutional objectives bind teleological interpretations in the strict sense, is to assume that a constitutional interpreter is obliged in a specific case to choose the interpretation that not only better accommodates the relevant constitutional objective in comparison to all other possible interpretations, but also best optimizes its factual effect (primarily prospective use of constitutional objectives).[54] This dimension goes beyond the deontological dimension by assuming that the respective constitutional court is capable of both knowing and autonomously determining the best possible way of implementing constitutional objectives in a specific case. Although the deontological dimension also empowers a court to assume the normativity of constitutional objectives, it is limited to processing the influence of constitutional objectives on the teleological interpretation in a normative framework, as opposed to an optimizing framework, which would characterize the teleological dimension in the strict sense[55].

The admission of only a deontological dimension of influence of constitutional objectives on constitutional teleological interpretation would mean that judicial decisions could only diverge in their telos from the relevant constitutional objectives to the specific case by specific reasoning that addresses this issue. Otherwise, it would be binding to choose interpretative possibilities that do not undermine the relevant constitutional objectives to the specific case and, where possible, promotes them. Even by leaving aside the teleological aspect in the strict sense, a minimum level of reasoning would be deontologically required,

53 For specific issues arising from this assumption, such as possible normative collisions between different constitutional objectives, the influence of implicit constitutional objectives and the teleological content of constitutional norms that are not primarily to be regarded as constitutional objectives, *Sommermann*, note 3, pp. 411 ff.; *Klaus Günther*, Der Wandel der Staatsaufgaben und die Krise des regulativen Rechts, in: Dieter Grimm (ed.), Wachsende Staatsaufgaben – sinkende Steuerungsfähigkeit des Rechts, Baden-Baden 1990, pp. 63 ff.

54 See e.g. *Barcellos*, note 25, pp. 9 ff.; *Eros Roberto Grau*, Das Verhältnis der Richterschaft zum Recht: Auslegung und Anwendung des Rechts und der Rechtsgrundsätze, Baden-Baden 2019, pp. 93 ff.

55 For accounts on deontology and optimization in constitutional law in general, e.g. *Günther*, note 53, pp. 63 ff.; *Habermas*, note 52, pp. 309 ff.; *Alexy*, note 17, pp. 75 ff.; *Sommermann*, note 3, pp. 355 ff.; *Ernst-Wolfgang Böckenförde*, Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik, Der Staat 29 (1990), pp. 17 ff.; *Ronald Dworkin*, Taking Rights Seriously, Cambridge 1978, pp. 22 ff.

not in order to determine the best way to implement the constitutional objective, but rather to justify why the decision furthers the applicable constitutional objectives to some extent, or at least does not violate them normatively.[56]

Many opinions of the Supreme Court's judges in the MI 4.733 argued based on the constitutional objective of well-being of all and non-discrimination of Article 3, section IV of the Brazilian Constitution.[57] At issue in the case was not only the declaration of a lack of regulatory provision towards the legislature with the fixation of a deadline for filling this legal gap, but also the application of Federal Law No. 7.716 against homophobia and transphobia until the legislature would enact a legal provision[58]. This Federal Law defines crimes of discrimination and prejudice due to race, color, ethnicity, religion, or national origin. In face of that, some judges have argued that not only the acknowledgment of a lack of regulatory provision, but also a provisional application of this criminal law to discrimination towards homosexuals or transsexuals could mean a furthering of Article 3, section IV and of Article 5, section XLI[59] of the Constitution[60] – despite jeopardizing the principle of legality in criminal law (Article 5, section XXXIX of the Brazilian Constitution[61]).

A division of binding effects of constitutional objectives on teleological interpretation in a deontological dimension and a teleological dimension in the strict sense could have the following consequences for the comprehension of this concrete case. First, based on Article 3, section IV of the Brazilian Constitution, one could say that a deontological dimension led to a rejection of interpretative possibilities that would maintain an unreasonable differentiation of state punishment of multiple forms of discrimination regulated in the Federal Criminal Law No. 7.716 in comparison to state punishment of discrimination due to sexual identities or preferences. Teleologically, the legislative omission (and the legislative delay) in regulating this punishment could by no means further a general well-being combined with the rejection of all forms of discrimination. That is perceptible both retrospectively and prospectively, i.e., the omission could neither correspond to argued intentions from the constitutional norm nor contribute to any form of furthering the realization of the constitutional objective of Article 3, section IV of the Constitution.

Second, the admission of a teleological dimension in the strict sense led to the possibility of a provisional application of the Federal Criminal Law No. 7.716 also to homophobic

56 *Pereira*, note 12, pp. 468 ff.

57 STF, MI 4.733/DF, note 50.

58 Ibid., p. 6.

59 According to Article 5, section XLI of the Brazilian Constitution: "the law shall punish any discrimination that may attempt against fundamental rights and liberties".

60 STF, MI 4.733/DF, note 50, pp. 112 ff., 147 ff. and 190 ff. (respectively, opinions of Judges Rosa Weber, Luiz Fux and Cármen Lúcia). Differently in the short, decontextualized and virtually rhetoric reference of Judge Dias Toffoli to Article 3, section IV of the Constitution, Ibid., 280.

61 "There is no crime unless a prior law defines it, nor is there a punishment unless a prior law so provides" (Article 5, section XXXIX of the Brazilian Constitution). See also the dissenting opinion of Judge Ricardo Lewandowski in STF, MI 4.733/DF, note 50, p. 235 ff.

and transphobic discrimination until there would be another regulation by the legislature. Even though the Court argued that this would be justified by an "interpretation in accordance with the constitution"[62], the fact is that the judges opted for choosing what they held for the best means for guaranteeing the sought protection against discrimination. This would, teleologically, further the constitutional objective of guaranteeing the well-being of all, without any discrimination (Article 3, section IV of the Constitution) in the best possible way for the circumstances of the case at least until further regulation by the legislature – also considering the skepticism of the Court that the conservative Brazilian Legislature would take action in regulating this matter.[63]

E. Constitutional Law and Ordinary Law

My third proposition is that constitutional objectives may provide a textual basis for defining and interpreting important legal principles in various fields of ordinary law.

This is particularly evident in German environmental law. The only provision in the Basic Law that directly provides legal protection to the environment through substantial constitutional law is in Article 20a,[64] This provision is considered a constitutional objective in Germany[65] and calls for state protection of the natural foundations of life and animals,

62 STF, MI 4.733, note 50, pp. 26 and 99 ff. See also the concurring opinion of Judge Luís Roberto Barroso in Ibid.., p. 79 ff., in which he proposed an interpretation in accordance with the constitution of qualifying and aggravating criminal rules relating to frivolous or torpid motives, in order to include in them offenses based on homophobic and transphobic motivation.

63 STF, MI 4.733, note 50, pp. 75 ff., 128 ff. and 245 ff.

64 According to Article 20a of the German Basic Law: "Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order". Other articles of the Basic Law secure a legal protection of the environment especially by defining competence norms, e.g. Article 72, paragraph 3, No. 2; and Article 74, paragraph 1, No. 15 and No. 29 of the German Basic Law. The substantial constitutional protection of the environment has been also justified based on other constitutional norms, that are not specifically designed for environmental protection, such as (controversially) the human dignity (Article 1, paragraph 1 of the Basic Law) and the general freedom of action (Article 2, paragraph 1 of the Basic Law), BVerfGE 157, 30, para. 113 ff. and 182 ff. – Climate Ruling (2021). For controversies in Germany about an ecological minimum level of existence based on human dignity and the right of life, see *Christian Calliess*, Das "Klimaurteil" des Bundesverfassungsgericht: "Versubjektivierung" des Art. 20a GG?, Zeitschrift für Umweltrecht 6 (2021), p. 357; *Wolfgang Kahl* / *Klaus Ferdinand Gärditz*, Umweltrecht: Ein Studienbuch, München 2023, pp. 61 ff.; *Andreas Voßkuhle*, Umweltschutz und Grundgesetz, Neue Zeitschrift für Verwaltungsrecht 32 (2013), p. 6; *Sabine Schlacke*, Umweltrecht, Baden-Baden 2021, p. 70.

65 *Christian Calliess*, Rechtsstaat und Umweltstaat: Zugleich ein Beitrag zur Grundrechtsdogmatik im Rahmen mehrpoliger Verfassungsrechtsverhältnisse, Tübingen 2001, pp. 74 ff.; *Peter Badura*, Staatsrecht I: Systematische Erläuterung des Grundgesetzes für die Bundesrepublik Deutschland, München 2018, pp. 419 ff. For possible new developments from Article 20a of the Basic Law, based on the BVerfGE 157, 30 – Climate Ruling (2021), that would go beyond of traditional doctrinal features of Staatszielbestimmungen, see *Lorenz Lang*, Art. 20a GG in der Hand des Bun-

while also being mindful of its responsibility towards future generations. This appears to have the consequence that some central normative contents of environmental protection law are concentrated in Article 20a of the Basic Law, such as the precautionary principle (Vorsorgeprinzip) and the sustainability principle.[66] As a result, it seems that for constitutional interpretation the constitutional objective of Article 20a of the Basic Law provides the foundation for much of the argumentation and interpretation of environmental law on a constitutional level by giving it a textual background.[67]

In the Brazilian case, social security and tax laws are guided by the principles of solidarity and national development, which are based on the fundamental constitutional objectives outlined in Article 3, sections I and II of the Brazilian Federal Constitution. These principles can have various legal consequences.[68] In this sense, these constitutional objectives serve to condition constitutional interpretations related to these fields of law by subjecting them to a textual ground from which they can be argued in constitutional terms.

These two examples suggest possibilities of how constitutional objectives may serve as a measure of plausibility in the acceptance and development of specific content of central legal principles of ordinary law. Since the constitutional status of some of these principles are acknowledged and developed by the legal doctrine through the support on constitutional objectives that have been explicitly included in a constitutional text, it can be also said that constitutional objectives may as well affect interpretations of constitutional law that are related to specific fields of law which have been themselves influenced by these constitutional objectives.

Nevertheless, legal constructions based on vague and broad constitutional objectives can often be difficult to distinguish from rhetorical uses of them in constitutional reasoning.[69] This is particularly salient in the Brazilian case. However, despite dangerously blurring the legal content of constitutional objectives, such misuses do not diminish possibilities of defining and interpreting the scope of constitutionalized legal principles of

desverfassungsgerichts: Potential für einen Anspruch auf Gesetzgebung?, Natur und Recht 44 (2022); *Calliess*, note 61.

66 See especially *Calliess*, note 65, pp. 153 ff.; *Kahl / Gärditz*, note 64, pp. 93 ff., 100; *Schlacke*, note 64, pp. 52, 56.

67 See references to these principles of environmental law in BVerfGE 157, 30, para. 229 ff. – Climate Ruling (2021), see also *Kahl / Gärditz*, note 64, pp. 93 ff.

68 *Pereira*, note 1, pp. 680 ff. See also: STF, RE 381.367/RS, Pleno, Rel. Min. Marco Aurélio, pub. in 10.26.2016, 476 ff.; STF, RE 290.079-6/SC, Rel. Min. Ilmar Galvão, pub. in 10.17.2001, 1047; and STF, ADC 41/DF, Pleno, Rel. Min. Roberto Barroso, pub. in 06.08.2017, 39 ff. For an account in English of further applications of the Brazilian solidarity's principle, *Massaú / Bainy,* note 13, p. 372 ff.

69 About rhetoric uses of principles in the constitutional reasoning of the STF, see *Marcelo Neves*, Constitutionalism and the Paradox of Principles and Rules: Between the Hydra and Hercules, Oxford 2021, pp. VII-VIII; *Karina Nathércia Sousa Lopes*, Princípio da Proporcionalidade: questionamentos sobre sua consistência e riscos do uso retórico do STF, Master's Thesis, UnB, Brasília 2015, pp. 78 ff.

various fields of ordinary law on the basis of constitutional objectives. It "just" misguides them.

F. Metanorms in Constitutional Interpretation?

Finally, my fourth proposition is that constitutional objectives may give rise to metanormative preconceptions in constitutional interpretation.

In a previous occasion, I raised the hypothesis that the principle of Europarechtsfreundlichkeit (literally, friendliness towards European law), which is based on the constitutional objective of Article 23, paragraph 1, part 1 (in connection with the preamble) of the German Basic Law[70], may have been used in part as a metanormative predefinition for the constitutional interpretation.[71] Interpreting as "friendly" or "not friendly" towards European law has been presupposing a predetermination or a prior understanding of constitutional interpretation itself. Even suppressing European law-friendliness in specific cases sometimes does not lead directly to a legal consequence, but only confronts the interpreters with the possibility of interpreting the constitution without this prior understanding.[72]

In the Mangold / Honeywell ultra vires review decision, e.g., the Second Senate of the Federal Constitutional Court held that the ultra vires review may only be exercised in a manner that is friendly to European law.[73] Thereby, the Court rejected other possible

70 The first part of Article 23, paragraph 1 of the Basic Law states: "With a view to establishing a United Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law". According to the first and second part of the Preamble of the Basic law: "Conscious of their responsibility before God and man, inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law".

71 *Pereira*, note 1, pp. 676 ff. For an overview in English about the principle of "Europarechtsfreundlichkeit", see *Jacques Ziller*, The German Constitutional Court's Friendliness Towards European Law: On the Judgment of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon, European Public Law 16 (2010).

72 Although it must be also acknowledged that leaving aside European law-friendliness aside in concrete cases may have to do with interpretative or argumentative strategies of reinforcing the sovereignty or autonomy of the German state before to the European Union under specific circumstances. Furthermore, it may be related to concurrent relations between the German Federal Constitutional Court and European Courts, such as the European Court of Human Rights and the European Court of Justice. About these matters, *Robert Chr. van Ooyen*, Die Staatstheorie des Bundesverfassungsgerichts und Europa: Von Solange über Maastricht und Lissabon zur EU-Grundrechtecharta, Baden-Baden 2022; *Dieter Grimm*, Die Rolle der nationalen Verfassungsgerichte in der europäischen Demokratie, in: Dieter Grimm (ed.), Verfassungsgerichtsbarkeit, Berlin 2021.

73 BVerfGE 126, 286, para. 58 ff. – Ultra Vires Ruling Honeywell (2010). The Court based the acknowledgment of Europarechtsfreundlichkeit on the argumentation of the Lissabon Ruling, see BVerfGE 123, 267, paras. 225 ff. – Lisbon Ruling (2009). According to Article 79, paragraph 3 of the Basic Law: "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles

interpretations of the facts of the case that were not in line with European law. On another account, in the second judgment on the European arrest warrant, the Federal Constitutional Court justified not only the non-application of the principle of the primacy of Union law (Anwendungsvorrang des Unionsrechts), but also the principle of European law-friendliness. The Court reviewed the extent to which the transfer of sovereign rights to the European law is permitted by the Basic Law, taking into account the constitutional identity of the Basic Law as outlined in Article 79, paragraph 3 in connection with Article 1, paragraph 1 of the Basic Law.[74] In this context, the use and the limits of *Europarechtsfreundlichkeit* can be understood as metanormative preconceptions for constitutional interpretation in specific cases.

G. Conclusion

The normative content of constitutional objectives remains often underexplored, especially when it comes to the ways in which they may be applied by constitutional jurisdictions. In light of this, this paper explored various ways of understanding the judicial implementation of constitutional objectives in a broad sense by making four propositions about possible influences of constitutional objectives on constitutional interpretation. These propositions concerned possible effects of constitutional objectives on the proportionality analysis, on teleological constitutional interpretation, on the constitutionalization of central principles of ordinary law, and on metanormative preconceptions for constitutional interpretation.

Finding a balance between ensuring possibilities for concretization of constitutional objectives by the judiciary and securing discretion for the other branches of the state in the implementation of constitutional objectives may not be easy. Nevertheless, it could be said that one of the best chances for pursuing this balance lies in developing and clarifying conditions for a rational application of constitutional objectives by the judiciary. This task requires careful consideration and analysis of the concrete circumstances under which constitutional objectives are established and applied. Legal scholarship can and should support this task through creative, constructive and analytical approaches while remembering that constitutional contexts matter.

1 and 20 shall be inadmissible". Article 1, paragraph 1 of the Basic Law in turn states: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority".

74 BVerfGE 140, 317, paras. 40 ff. – European Arrest Warrant II (2015). The argumentation has also considered the jurisprudence of the Federal Constitutional Court in the Lisbon Ruling, BVerfGE 123, 267, paras. 348 ff., 402 – Lisbon Ruling (2009). A critical account can be found in: *Christoph Schönberger*, Karlruhe: Notes on a Court, in: Matthias Jestaedt / Oliver Lepsius / Christoph Möllers / Christoph Schönberger (eds.), The German Federal Constitutional Court: The Court Without Limits, Oxford 2020, pp. 28 ff.

Authoritarian Federalism in its own right? The case of Brazil

By *Thilo Herbert*[*]

Abstract: With the establishment of the military regime in Brazil in April 1964, the military achieved its long-standing objective of exerting lasting influence as a key political actor. Despite its commitment to "restore the rule of law" and fortify democratic institutions, the regime's use of Institutional Acts bypassed constitutional checks and judicial review. These Acts, evolving over time, reflected the evolution of authoritarian governance through extra-constitutional means. Despite occasional adherence to constitutional norms, the military's consolidation of power ultimately led to the establishment of a full-fledged military dictatorship, culminating in the Institutional Act No. 5, which effectively created an authoritarian constitution on its own. The federal structure of the country, however, persisted. Although it underwent continuous constraints imposed by the regime, it not only continued to coexist alongside this system of authoritarian constitutionalism. Through a delicate system involving the central government, ruling party and opposition party, governors, and state elites, it also ultimately aided the regime in strengthening its authority. This article attempts to analyze this system. It reveals a nuanced dynamic wherein the military regime initially attempted to centralize authority by diminishing the influence of state elites through "technocratic" appointments. However, facing resistance and electoral setbacks, the regime adapted its strategy, ultimately reintegrating state elites into the political apparatus. Through clientelist practices and constitutional reforms, the regime forged alliances with local power brokers, consolidating its grip on power while preserving a façade of democratic legitimacy. The study underscores the intricate relationship between formal constitutional structures and informal power dynamics, illustrating how federalism became both a tool and a constraint in the military's authoritarian project.

Keywords: Authoritarian Constitutionalism; Federalism; Brazilian Dictatorship; Authoritarian Federalism

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A. Introduction

Why does an authoritarian regime that is overtly hostile to reciprocal checks on its authority require a constitution? While similar questions had been posed already in the early decades of the 20th century,[1] it is only within the last 10 to 15 years that this specific field of research has come to the forefront of mainstream legal scholarship. Beginning in 2013 with a volume edited by Alberto Simpser and Tom Ginsburg,[2] a substantial body of research emerged exploring the complex role of constitutional law in authoritarian, illiberal, and populist regimes.[3] Long associated solely with liberal democracies, emerging interventions – particularly by critical legal scholars[4] – have emphasized that the employment of constitutional law by authoritarian leaders warranted a more nuanced understanding, surpassing the simplistic dismissals of "sham-constitutions"[5] or "constitutions without constitutionalism."[6] Over the years, it has come to light that constitutions assume a distinctive function within the political framework of authoritarian regimes. These functions vary from legitimizing the regime's authority to actively facilitating the consolidation and usurpation of power, thus serving as instrumental tools for such regimes.[7] Despite ongoing criticism

1 For example, *Karl Loewenstein*, Brazil under Vargas, New York 1942, pp. 48 ff.

2 *Tom Ginsburg / Alberto Simpser* (eds.), Constitutions in Authoritarian Regimes, Cambridge 2013.

3 For example, *Mark Tushnet*, Authoritarian Constitutionalism, Cornell Law Review 100 (2015); *Uladzislau Belavusau* / *Aleksandra Gliszczynska-Grabias* (eds.), Constitutionalism under Stress, Oxford 2020; *András Sajó*, Ruling by Cheating: Governance in Illiberal Democracy, Cambridge 2021; *Bojan Bugarič*, Populist Constitutionalism – Between Democracy and Authoritarianism, in: Adam Czarnota, Martin Krygier, and Wojciech Sadurski (eds.), Anti-Constitutional Populism, Cambridge 2022; *Andrea Pozas-Loyo* / *Julio Ríos-Figueroa*, Authoritarian Constitutionalism, in: Conrado Hübner Mendes / Roberto Gargarella /Sebastián Guidi (eds.), The Oxford Handbook of Constitutional Law in Latin America, Oxford 2022; *Tamir Moustafa*, Law and Courts in Authoritarian Regimes, Annual Review of Law and Social Science 10 (2014).

4 *Roberto Niembro Ortega*, Conceptualizing authoritarian constitutionalism, World Comparative Law 49, (2016); *Jorge González-Jácome*, From abusive constitutionalism to a multilayered understanding of constitutionalism: Lessons from Latin America, International Journal of Constitutional Law 15 (2017); *Duncan Kennedy*, Authoritarian constitutionalism in liberal democracies, in: Helena Alviar García / Günter Frankenberg (eds.), Authoritarian Constitutionalism: Comparative Analysis and Critique, Cheltenham 2019; *Günter Frankenberg,* Authoritarianism. Constitutional Perspectives, Cheltenham 2020.

5 *David S. Law* / *Mila Versteeg*, Sham Constitutions, University of California Law Review 101 (2013).

6 *H.W.O. Okoth-Ogendo*, Constitutions without Constitutionalism: Reflections on an African Political Paradox, in: Douglas Greenberg / Stanley N. Katz / Steven C. Wheatley, Constitutionalism and Democracy: Transitions in the Contemporary World, Cary 1993.

7 For example, *Rosalind Dixon / David Landau*, Abusive Constitutional Borrowing: Legal globalization and the subversion of liberal democracy, Oxford 2021; *Günter Frankenberg*, Authoritarian constitutionalism: coming to terms with modernity's nightmares, in: Helena Alviar García / Günter Frankenberg (eds.), Authoritarian Constitutionalism: Comparative Analysis and Critique, Cheltenham 2019.

of the concept,[8] a decade of rigorous scholarship has established authoritarian constitutionalism as, in Günter Frankenberg's words, "a phenomenon in its own right."[9]

The evolution of the study of authoritarian constitutionalism is instructive as it illuminates the scholarly progress dealing with a phenomenon that initially lay outside the bounds of established truths. Likewise, a similar trend is gradually emerging in an adjacent field, posing the potential to question long-held beliefs: the concept of authoritarian federalism. In a similar vein to "authoritarian constitutionalism", which explores the role of constitutionalism under authoritarian rule, "authoritarian federalism" denotes the effort of authoritarian regimes to manipulate the relationship between various levels of territorial authority for their benefit. Historically, the connection between federalism and authoritarianism has been either overlooked or dismissed.[10] While a small body of research has recently emerged, primarily from political scientists, and with a rather programmatic focus,[11] in-depth case studies remain the exception[12] – particularly in constitutional scholarship. This lack of scholarly focus is somewhat unexpected, considering the numerous intersections of federalism, authoritarianism, and constitutionalism across diverse contexts.[13]

8 *Martin Loughlin*, Against Constitutionalism, Cambridge 2022, pp. 7 ff.

9 *Frankenberg*, note 7, p. 7.

10 For example, *Ronald L. Watts*, Comparative reflections on federalism and democracy, in: Michael Burgess / Alain- G. Gagnon (eds.), Federal Democracies, London 2010, p. 8; *Ivo D. Duchacek*, Comparative federalism. The territorial dimension of politics, New York 1970, pp. 335 ff.; *William S. Livingston*, Federalism and Constitutional Change, Oxford 1956, p. 310; *Ivo D. Duchacek*, The Territorial Dimension of Politics: With, Among and Across Nations, Boulder 1986, p. 96; *Carl J. Friedrich*, Trends of federalism in theory and practice, London 1968, p. 8.

11 *Paolo Dardanelli et al*., Authoritarianism, democracy and de/centralization in federations: what connections?, Regional & Federal Studies 33 (2023); *Baogang He*, Democratization and Federalization in: Asia, in: Baogang He / Brian Galligan / Takashi Inoguchi, Federalism in Asia, Cheltenham 2007; *Arthur Benz*, Demokratisches Regieren im Föderalismus: Neue Literatur zu einem alten Thema, Neue Politische Literatur 64 (2019); *Arthur Benz / Sabine Kropp*, Föderalismus in Demokratien und Autokratien – Vereinbarkeiten, Spannungsfelder und Dynamiken, Zeitschrift für Vergleichende Politikwissenschaft 8 (2014); *Sabine Kropp*, The Ambivalence of Federalism and Democracy: The Challenging Case of Authoritarianism – With Evidence from the Russian Case, in: Nathalie Behnke / Jörg Broschek / Jared Sonnicksen (eds.), Configurations, Dynamics and Mechanisms of Multilevel Governance, Cham 2019.

12 *Ghazia Aslam*, Decentralization reforms in dictatorial regimes as a survival strategy: Evidence from Pakistan," International Political Science Review 40 (2017); *Katharine Adeney*, Democracy and federalism in Pakistan, in: Baogang He / Brian Galligan / Takashi Inoguchi (eds.), Federalism in Asia, Cheltenham 2007; *David Samuels* / *Fernando Luiz Abrucio*, Federalism and democratic transitions: The "New" Politics of the Governors in Brazil, Publius: The Journal of Federalism 30 (2000); *Rogerio Schlegel*, Dynamic de/centralization in Brazil, 1889–2020: The prevalence of punctuated centralization, Regional & Federal Studies 33 (2022). *William Case*, Semi-democracy and minimalist federalism in Malaysia, in: Baogang He / Brian Galligan / Takashi Inoguchi (eds.), Federalism in Asia, Cheltenham 2007.

13 Consider only the historical past of nations like the United Arab Emirates, Yugoslavia, Nigeria, Pakistan, Malaysia, Venezuela, Ethiopia, and the Soviet Union, among others.

The primary reason for this blind spot is what I refer to as an implicit fallacy: the steadfast belief that federalism is functionally and symbiotically associated with, first, liberty[14] and, second, democracy.[15] There are many starting points to discuss and criticize this association, as has been done already, notably by the works of Patricia Popelier and Arthur Benz.[16] This article will, however, confine itself to elaborating on one specific and perhaps overlooked reason: the conflation of federalism with liberal constitutionalism, as illustrated in the opening chapter of Michael Burgess and Alain-G. Gagnon's seminal volume on *Federal Democracies*. The authors argue that "while not all liberal democracies have federal governments, all cases of genuine federal states are founded upon liberal democratic constitutionalism."[17] Following this line of thought, federalism must be understood as a subcategory of liberal constitutionalism, implying that authoritarian constitutional states cannot, by definition, embody federalism. In a similar vein, Ronald Watts argues for a conflation of federations and liberal democracies. His asserts that that, since a federation is a constitutional form of government that distributes political and legal powers among several territorial decision-making entities, regimes that "nominally have a constitution but that are in reality authoritarian […] are incompatible with federal governance".[18] According to this perspective, federalism inherently presupposes liberal constitutionalism, which is inherently democratic. Thus, federalism is considered democratic due to its intrinsic alignment with constitutionalism.

This article seeks to confront this somewhat circular argument by offering some in-depth insight into the relationship between authoritarianism, constitutionalism, and federalism. To do this, it will examine the constitutional history of Brazil, which is a country

14 For an overview on this matter see *John Kincaid*, Values and Value Tradeoffs in Federalism, Publius: The Journal of Federalism 25 (1995), pp. 36-38*; Jaroslaw Kantorowicz*, Federalism, in: Roger D. Congleton / Bernard Grofman / Stefan Voigt (eds.), The Oxford Handbook of Public Choice, Volume 2, Oxford 2019, pp. 76 ff.; *Daniel Treisman*, The Architecture of Government: Rethinking Political Decentralization, Cambridge 2007, pp. 194-98.

15 For an overview on this matter see *Michael Burgess*, In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives*,* Oxford 2012, pp. 269-72; *Michael Burgess*, The penumbra of federalism, in: John Loughlin / John Kincaid / Wilfried Swenden (eds.), Routledge Handbook of Regionalism & Federalism, London 2013, pp. 45 ff.; *Ronald L. Watts*, Comparing federal systems, Montreal 2008, pp. 7, 192-200; *Daniel J. Elazar*, Exploring federalism, Tuscaloosa 1987, pp. 84-104.

16 *Patricia Popelier*, Federalism and Democracy. The Need for a Differentiated Approach, in: M. J. Vinod et al. (eds.), Cooperative Federalism in South Asia and Europe. Contemporary Issues and Trends, London 2023, pp. 20-32; *Patricia Popelier,* Dynamic Federalism: A New Theory for Cohesion and Regional Autonomy, Milton 2022, pp. 83-43; *Arthur Benz* / *Jared Sonnicksen*, Federalism and Democracy: Compatible or at Odds with One Another? Re-Examining a Tense Relationship, in: Cristina Fraenkel-Haeberle et al. (eds.), Citizen Participation in Multi-level Democracie, Leiden 2015, pp. 18 ff.; *Arthur Benz*, Föderale Demokratie: Regieren im Spannungsfeld von Interdependenz und Autonomie, Baden-Baden 2020, pp. 48, 80-90; *Arthur Benz*, note 11, p. 521.

17 *Michael Burgess / Alain- G. Gagnon*, Introduction: federalism and democracy, in: Michael Burgess / Alain- G. Gagnon (eds.), Federal Democracies, London 2010, p. 9.

18 *Watts*, note 10, p. 343.

where these three concepts emerged at regular intervals – and sometimes simultaneously– throughout the 20th century. As an inquiry into the entire 20th century is outside the scope of this article, it will focus on the first fifteen years of the military dictatorship which was a short but instructive period of Brazilian authoritarianism. The article is divided into two parts: The first part delves into the constitutional "engine room" of the military regime. It will show that the militaries operated through a distinct system of authoritarian constitutionalism blending elements of "extra-constitutionality" and "parallel constitutionalism". Against this background, the second part of the article has two objectives: First, it will attempt to show that federalism did, indeed, continue to exist in the Brazilian authoritarian context. Second, it will elaborate on how the military regime attempted to utilize the country's federal structure through constitutional means to advance its own agenda.

B. The Authoritarian Engine Room

In April 1964, the Military High Command seized state power in Brazil. This *coup d'état* differed from previous interventions of the military in the nation's historical timeline in that it led to the establishment of a permanent military regime. No longer a transformative but temporary phenomenon,[19] the military achieved its long-held goal of exerting long-term influence as a political actor.[20] From the outset, it demanded that "the revolution must be permanently institutionalized."[21] The manner in which this institutionalization unfolded was somewhat remarkable. A central pillar of military's legitimacy was their performative commitment to "restore the rule of law," while also aiming to fortify the "threatened democratic institutions."[22] Accordingly, the High Command intended to "show that we do not intend to radicalize the process of the revolution" and, therefore, "decided not to suspend the Constitution of 1946."[23] This constitution, however, was a liberal document by any means. It safeguarded individual fundamental rights,[24] mandated free, direct, and secret elections of the National Congress and the President and limited the presidential term of office to five years, without the possibility of immediate re-election.[25] Particularly relevant for this study, it also guaranteed local self-government,[26] and established a system of concurrent and exclusive powers for the Union and the twenty states. In subsequent years,

19 See the regular, though only short interventions in Brazilian politics, for example in 1889, 1930, 1937 and 1945.

20 *José Murilo de Carvalho*, Forças Armadas e Política no Brasil, Rio de Janeiro 2005, p. 134.

21 Preamble to Institutional Act No. 1 of 9 April 1964.

22 *Maria Helena Moreira Alves*, State and Opposition in Military Brazil, New York 1985, p. 31.

23 Ibid.

24 Art. 141 Constitution of the United States of Brazil of 24 September 1946, with particular reference to freedom of expression (§ 5) and freedom of association (§ 12).

25 Art. 37, 82 Constitution of the United States of Brazil of 24 September 1946.

26 Art. 28 Constitution of the United States of Brazil of 24 September 1946.

two more states – Guanabara and Acre – were added.[27] On the surface, the High Command thus appeared to subordinate itself to a democratic, pluralist, and federal constitutional model. In fact, however, the constitution was to be "supplemented" when the interests of "national security" demanded it.[28]

These "supplements" were based on the so-called "Institutional Acts" (*Atos Institucionais* – "AI"). These were sets of rules that included clauses through which the military conferred varying degrees of authority upon the governments they entrusted. The enactment of the Institutional Acts rested solely with the Military High Command without any involvement from Congress, making them exempt from the checks imposed by the 1946 Constitution and immune to judicial review. The Institutional Acts were a characteristic feature of the military's authoritarian constitutional engine room. As they evolved over time, the Institutional Acts reflected the historical evolution of authoritarian governance in the country.

Broadly, four different phases of military rule can be identified: The first phase spanned from the 1964 *coup d'état* to December 1968. It included the three-year term of Humberto de Alencar Castelo Branco (until March 1967) and the first two years of Artur da Costa e Silva's term of office (1967-1968). This period was characterized by the issuance of Institutional Acts Nos. 1 through and the enactment of the 1967 Constitution. It marked a shift of power from more moderate military generals to those who demanded tougher measures against the opposition.[29] The second phase lasted from December 1968 to March 1974, often referred to as the "Years of Lead" (*anos de chumbo*) due to the intensification of political repression against the opposition. This period coincided with Brazil's economic upswing and included the last months of General Costa e Silva's presidency, cut short by illness in August 1969, the transitional rule of Augusto Rademaker, who governed the country for two months, and the presidency of General Emílio Garrastazu Médici (1969-1974). During this period, Institutional Acts No.5 and No.6 were enacted. The third phase began with the presidency of Ernesto Geisel in March 1974. Geisel came to power with the plan of a slow, gradual political opening (*abertura*), signaling the beginning of the regime's transition away from strict authoritarianism. In the fourth phase of military rule, João Baptista Figueiredo (1979-1985) continued the process of political opening, which ended in March 1985 with the transfer of power to Tancredo Neves,[30] a civilian (albeit not democratically elected) president. The constitutional engine room of the military regime, which this subsection examines, primarily developed during the first two phases. The following sections will therefore focus on these periods.

27 Art. 5-36 Constitution of the United States of Brazil of 24 September 1946.

28 *Nina Schneider*, Legitimizing an Authoritarian Regime, Gainesville 2019.

29 *Leslie Bethell* / *Celso Castro*, Politics in Brazil Under Military Rule, 1964-1985, in: Leslie Bethell (ed.), The Cambridge History of Latin America: Volume 9: Brazil since 1930, Cambridge 2008, p. 168.

30 Tancredo Neves fell ill the day before taking office and subsequently died, after which his running mate José Sarney became president.

I. Transfer of Power: Institutional Act No. 1

The military government's constitutional engine room began operating with the enactment of the Institutional Act No. 1 (AI-1) by the High Command on 9 April 1964. This regulation encompassed three categories: First, an expansion of the powers of the President at the expense of the Congress (Art. 3-6); second, restrictions on opposition activity (Art. 7 and 8); and third, indirect but effective influence on the country's political system in general (Art. 10 and 2).

In the first category, Article 4 stands out as it established the legal framework for a procedural mechanism known as *decurso de prazo* ("lapse of time"). Essentially, this meant that military decrees would automatically be approved by Congress unless decided otherwise within thirty days. This automatic approval held particular significance, as the pro-government party *União Democrática Nacional* (UDN) could use simple filibustering tactics to guarantee the passage of any bill deemed "urgent" by the executive branch.[31] Article 5 granted the Executive exclusive authority over financial and budgetary legislation, while Article 6 empowered the President to decree a state of emergency. Congress alone had the right to accept or reject this measure within thirty days. Compared to the existing constitutional framework, these provisions represented a clear shift of power in favor of the President. However, since the 1946 Constitution remained in force, the separation of powers was not abolished. AI-1 effectively modified the constitutional order without asserting normative supremacy over the constitution itself.

Articles 7 and 8 laid the foundation for the measures in the second category. Article 7 suspended the "constitutional and legal guarantees for public servants for a period of six months."[32] Following a "summary enquiry", members of the government or military personnel could be "dismissed by decree of the armed forces [...] or placed on early retirement." This provision enabled the military to enforce political conformity with Castelo Branco's government within its own ranks.[33] By the end of military rule, around 3,000 to 5,000 people were affected by the political purges with around half of them being members of the military.[34] Article 8 extended this control to the civil opposition. The provision established a special official interest in investigating citizens who "commit a crime against the state, its property, the public or social order or participate in revolutionary acts of war." It thus provided the legal basis for the notorious special investigations by the military

31 *Alves*, note 22, p. 33. The three major parties were the *Partido Trabalhista Brasileiro* ("PTB"), the *União Democrática Nacional* ("UDN") and the *Partido Social Democrático* ("PSD"). The PTB represented the legacy of Getuilo Vargas, the PSD distanced itself from his policies but emerged from the leadership circle of the Estado Novo, while the UDN developed from the opposition to Vargas.

32 Art. 7 Institutional Act No. 1 of 9 April 1964, which also addressed municipal employees. See Art. 7, Para. 2 Institutional Act No. 1 of 9 April 1964.

33 *Alves*, note 22, p. 33. A judicial review of these measures was only possible in exceptional cases. Cf. Art. 7, Para. 4 Institutional Act No. 1 of 9 April 1964.

34 *Bethell / Castro*, note 29, p. 172.

police, the *Inquérito Politicial Militar* (IPM), which arrested around 50,000 people in the first few months after the coup.[35] As the AI-1 did not provide for any rules of evidence or other procedural regulations for these cases, the military police evaded legal supervision.[36]

However, the most lasting influence on Brazil's political system was exerted by Articles 10 and 2, which were enforced together. Article 10 enabled the High Command to cancel the electoral mandates of federal, state, and municipal representatives by decree (*cassação de mandato*). It also granted the military power to suspend the political rights of citizens for a decade, thereby depriving them of the right to vote and stand for election or engage in political parties. The drastic effects of this regulation became apparent when, just one day after its promulgation, a list was published naming more than 100 individuals whose mandates were canceled or whose political rights were revoked.[37] This in turn impacted the composition of the National Congress, leading to a shift in voting ratios. Of the three parties that together held over 80% of the seats in the National Congress elected in October 1962, the *Partido Trabalhista Brasilerio* (PTB), the party of former President João Goulart, suffered the heaviest losses. A total of eighteen of its 116 federal deputies were on the first list of forcibly retired officials whose political rights were withdrawn during the military regime (*cassados)*.[38] In contrast, the *Partido Social Democrático* (PSD), which had largely supported the coup, only lost 3 of its 118 MPs,[39] while the UDN which had unreservedly supported the coup, remained entirely unscathed.[40]

By exerting influence over the distribution of seats in Congress, Article 10 facilitated the implementation of Article 2, which outlined the procedures for transferring executive power from the High Command to the President. The President was not to be elected directly but through the now-purged National Congress.[41] As a result, General Castelo Branco was elected President on 11 April 1964, unopposed. In the Congress, which now comprised 388 members – 326 deputies and 62 senators – 361 voted in favor of Castelo Branco. This included all UDN and PSD deputies and more than seventy members of the PTB.[42] This marked the completion of the transfer of power from the High Command to a coalition of military and civilian actors.

35 *Alves*, note 22, p. 33, 37.

36 The *habeas corpus* principle continued to apply, although the military also found ways of circumventing it. *Ibid*., p. 37.

37 This first list also included two former presidents, João Goulart and Janio Quadros. *Bethell / Castro*, note 29, p. 172.

38 Ibid.

39 *Alves*, note 22, p. 39.

40 Ibid.

41 Ibid., p. 34.

42 *Bethell / Castro*, note 29, p. 172.

II. (Extra-)Constitutionality as a Structural Feature of the Engine Room

Article 10 and Article 2 also held significance because they clarified the correlation between AI-1 and the Constitution of 1946: Article 10 stated that in the interests of "social peace", the AI-1 was "not subject to the limitations of the Constitution [of 1946]"[43] and thereby placed the provisions of the AI-1 outside the scope of the Constitution. In contrast, Article 2 imposed a time limit on Castelo Branco's term of office (ending on 31 January 1966) and, in conjunction with Article 9, aligned his term of office with the electoral calendar provided for in the 1946 Constitution:[44] a new president was to be elected on 3 October 1965 by direct popular election and at a time when the election of eleven of the governors of the twenty-two states was also to take place.[45] Additionally, Article 11 limited the validity of the AI-1 itself to the date specified in Article 2.[46]This highlights a distinctive aspect of military rule during the first phase: On the one hand, the president was granted extensive powers, opposition activities were severely restricted, and Brazil's political system was restructured based on extra-constitutional grounds. On the other hand, the 1946 Constitution remained in place; political parties and opposition groups were not outlawed, and scheduled elections were not cancelled. Despite undergoing purges, the National Congress retained its legislative prerogatives and the judicial system continued to function. In his inaugural address to Congress, Castelo Branco pledged to hand over power in January 1966 to his "successor duly elected by the people in free elections."[47]Institutional Act No. 1 thus enabled the President to govern in a dominant but not unrestricted manner on an extra-constitutional basis, the temporal boundaries of which, it seemed, he accepted. For both the High Command and Castelo Branco himself, the existing constitutional order of 1946 continued to be the guiding principle.[48]

However, this affirming stance on the constitutionality of military rule faced controversy and ongoing renegotiations within the High Command. While President Castelo Branco appeared willing to accept the constitutional constraints on his authority, more conservative factions within the corps remained skeptical. They believed it premature to declare the "revolution" complete and return to "normalcy". These factions pushed to prolong the suspension of political rights, delay the upcoming gubernatorial elections, and extend Castelo Branco's mandate beyond January 1966.[49] Ultimately, they succeeded in extending his term: In July of the same year, Congress passed a constitutional amendment

43 Art. 10 Institutional Act No. 1 of 9 April 1964.

44 Art. 21 Constitutional Amendment Act No. 1 of 2 September 1961.

45 *Bethell / Castro*, note 29, p. 172.

46 Art. 11 Institutional Act No. 1 of 9 April 1964.

47 Quoted from *Bethell / Castro*, note 29, p. 172.

48 On the legitimate question of why the military cloaked itself not only in a democratic but also in a legalistic guise, see the authoritative study by *Anthony W. Pereira*, Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina, Pittsburgh 2005.

49 *Bethell / Castro*, note 29, p. 176.

extending the presidential term from January 31, 1966, to March 15, 1967, postponing the next presidential elections by one year.[50] The justification cited was Castelo Branco's insufficient time to implement necessary political reforms and the government's economic program aimed at reducing inflation and fostering economic growth.[51] However, while Castelo Branco conceded to the extension of his presidential term, he resisted pressure regarding the gubernatorial elections and pledged to adhere to the established timetable for October 3, 1965.

This decision sparked a significant political crisis. In the subsequent gubernatorial elections, UDN candidates endorsed by the regime suffered defeats in four out of ten states, including Guanabara and Minas Gerais, both of which had previously been governed by UDN politicians strongly supportive of the coup. Viewing these opposition victories as a "threat to the revolution" and fearing the resurgence of "corrupt politicians" whom they believed had brought Brazil to the brink of a "communist takeover"[52], conservative voices in the High Command advocated for intensified political repression.[53] As a result, on October 27, 1965, President Castelo Branco issued another rule of exception in the form of Institutional Act No. 2 (AI-2), with its validity limited to March 15, 1967. Once again, the "return to normalcy" was postponed.

In addition to provisions aimed at restricting the competencies of the Supreme Court,[54] the AI-2 primarily comprised two areas of regulation: controlling the functioning of Congress and reorganizing political representation. The first aspect of regulation included three measures: Article 2 reduced the number of votes required for the adoption of a constitutional amendment introduced by the executive from a two-thirds majority to a simple majority. Furthermore, both the *decurso de prazo* and the *cassação de mandato* were retained.[55] In addition, Article 31 granted the President the authority to temporarily close Congress and the state and municipal parliaments. During such periods, the executive branch was empowered to legislate on all matters.

The second aspect set entirely new standards, marked by the abolishment of existing political parties and the imposition of stringent requirements for the formation of new ones.[56] Establishing a new party required the endorsement of at least 120 deputies and

50 Ibid.

51 *Alves*, note 22, p. 50.

52 Quoted after *Thomas E. Skidmore*, Politics and Economy Policy Making in Authoritarian Brazil, 1937-1971, in: Alfred Stepan (ed.), Authoritarian Brazil. Origins, Policies and Future, New Haven 1973, p. 8.

53 *Philippe C. Schmitter*, The "Portugalisation" of Brazil?, in: Alfred Stepan (ed.), Authoritarian Brazil. Origins, Policies and Future, New Haven 1973, p. 210.

54 Art. 6, 8, 14, 19 Institutional Act No. 2 of 27 October 1965.

55 Art. 15 Institutional Act No. 2 of 27 October 1965.

56 See Article 18 of Institutional Act No. 2 of 27 October 1965, which also made the creation of new parties subject to the requirements of Supplementary Act No. 4, which was passed by Congress on 20 November 1965.

20 senators. As 257 deputies and 45 senators of 475 members of Congress joined the newly founded governing party – the *Alianca Renovadora Nacional* (ARENA) –, it was effectively possible to form only one more party.[57] As a result, a minority (149 deputies and 20 senators) formed the opposition party *Movimento Democratico Brasileiro* (MDB).[58] It is important to note that the installation of an "opposition party" by the military not contradictory upon closer examination. In actual fact, its purpose was to performatively confront the government with "democratic criticism"[59], serving to highlight the regimes need for democratic recognition both domestically and internationally. This will be further explored in Part C.

III. The 1967 Constitution

The military-civilian coalition consequently faced a dilemma between the unconditional preservation of power and, conversely, the pursuit of democratic legitimacy. This conceptual duality within the "revolutionary project" was mirrored in the division between two political movements within the corps: On one side was a moderate faction (*moderados),* which tended to be more democratic, legalistic, and inclined towards a constitutional order. On the other side were the so-called "hardliners" (*linha dura*), who prioritized maintaining control at any cost.

Against this background, it is evident that the frequent enactment of extra-constitutional provisions was met with disapproval, particularly from moderate forces, including President Castelo Branco. Measured against the revolutionary ideals of the 1964 coup ("democracy", "rule of law"), the exceptional powers granted to the regime by the Institutional Acts were expected to be subject to clear temporal and constitutional limits. The fact that the military had ruled exclusively by extra-constitutional means since the coup presented the *moderados* with a credibility problem.

This prompted Castelo Branco to take an unforeseen step. At his behest, all the provisions established by the military in the Institutional Acts since April 1964, were required to be consolidated in a new constitutional document and thus stripped of their exceptional character. Congress approved this initiative on January 24, 1967, binding the military's "revolutionary project" to formal constitutional standards. Castelo Branco hoped this move would enhance the government's legitimacy. However, it was also prompted by the outcome of the presidential election on October 3, 1966, in which Costa e Silva—a staunch supporter of the radical conservative faction—was elected..[60] His election not only gave the Castelo Branco government cause for concern that the economic reforms he had

57 *Alves*, note 22, p. 65.

58 *Bethell / Castro*, note 30, p. 178.

59 *Paul Cammack*, Clientelism and Military Government in Brazil, in: Christopher Clapham (ed.), Private Patronage and Public Power: Political Clientelism in the Modern State, London 1982, p. 64.

60 *Skidmore*, note 52, p. 11.

introduced would be discontinued.[61] Castelo Branco also feared that Costa e Silva would retain the expansion of executive powers through the Institutional Acts – and thereby prevent the return to the constitutional order of 1946 that the moderate forces were initially striving for.[62] From Castelo Branco's perspective, the new Constitution, therefore, served as an instrument to place his successor's presidency on a constitutional footing from the outset.[63] This duality between "conservative" and "moderate" forces within the military corps thus revealed varying degrees of constitutional commitment. While one side sought to uphold a constitutional order, the other side demanded unrestricted political freedom based on extra-constitutional grounds.

IV. "Parallel-Constitutionalism": Institutional Act No. 5

By late 1968 it had become evident that the moderate faction had failed to limit President Costa e Silva's power through constitutional means. On 2 September, Márcio Moreira Alves, a young congressman from Guanabara, expressed his apprehensions regarding the political repression in the country. In a highly publicized speech in Congress, he attacked the military head-on: "When will the military stop shooting people in the street? [...] When will the army stop being a haven for torturers?"[64] Alves concluded his speech with a call to boycott the annual Independence Day celebrations planned on 7 September. In response, the government sought to waive Alves' parliamentary immunity, invoking Article 51 of the 1967 Constitution.[65] However, on December 12, the majority of Congress members rejected the motion, voting to protect their colleagues by 216 votes to 136[66] This indicated that even ARENA members opposed the motion, challenging the notion that ARENA function solely as an extension of the regime. In conservative circles, the vote was interpreted as a loss of control. The following day, President Costa e Silva placed the armed forces on alert and issued Institutional Act No. 5 (AI-5).[67]

Unsurprisingly, the AI-5, like its predecessors, concentrated powers in favor of the executive branch. In some aspects, the act aligned with the provisions of the 1967 Constitution, while in others, it introduced significant deviations. The most important elements of AI-5 included the power to dissolve the National Congress[68] – a measure which Silva

61 In their eyes, the economic nationalism propagated by Silva would lead to a resurgence of inflation *Ibid*., The Politics of Military Rule in Brazil, 1964-85, New York 1993, p. 69.

62 Ibid.

63 Ibid.

64 Márcio Moreira Alves quoted from *Bethell / Castro*, note 29, p. 186.

65 *James N. Green* / *Victoria Langland* / *Lilia Moritz Schwarcz* (eds.), The Brazil Reader. History, Culture, Politics, Durham / London 2019, p. 49.

66 *Skidmore*, note 52, p. 14.

67 Ibid.

68 Article 2 Institutional Act No. 5 of 13 October 1968.

exercised immediately after enacting the provision.[69] The act also authorized the executive to annul electoral mandates,[70] suspend the right to vote and stand for election of certain citizens for ten years,[71] dismiss judges,[72] and declare a state of emergency.[73] Additionally, AI-5 provided for the possibility of suspending the principle of *habeas corpus* in cases involving "political crimes" and excluded legal remedies in corresponding proceedings before military courts.[74] However, the most significant feature of the AI-5 was *not* stated in the text: In contrast to the previous Institutional Acts, the AI-5 was not subject to any temporal limits but was to remain in force until the President signed a decree expressly repealing it.

This marked the distinct legal nature of the act. Unlike its predecessors, the AI-5 did not exist *outside* the existing constitutional order established by the 1967 Constitution but operated *alongside* it. It thus did not comprise extra-constitutional grounds for the exercise of power but instead formed a parallel authoritarian constitution in its own right. The regime's response to the moderate wing's ongoing call for "constitutional restoration" was, therefore, to craft a constitutional document tailored to its own political objectives. Authoritarian constitutionalism, one might argue, evolved from extra-constitutionality to a form of parallel constitutionalism. As the AI-5 effectively eradicated the horizontal separation of powers and signified the peak of state repression,[75] it indicated that the constitutionalization of military rule progressed hand in hand with the deepening of authoritarianism. To borrow the words of *Juan Linz*, the regime's nature and appearance shifted from an "authoritarian situation" to a full-fledged military dictatorship.[76] However, this raises the question of what transpired at the vertical level. How was the federal system affected by the subsequent

69 *Schmitter*, note 53, p. 210.

70 Article 4 Institutional Act No. 5 of 13 October 1968.

71 Article 5 Institutional Act No. 5 of 13 October 1968.

72 Article 6, paragraph 1, Institutional Act No. 5 of 13 October 1968.

73 Article 7 Institutional Act No. 5 of 13 October 1968. Although this point was also included in the 1967 Constitution, it only allowed recourse to the state of emergency under certain restrictions. See Article 155 of the Constitution of 24 January 1967 in the version of Constitutional Amendment No. 1 of 17 October 1969.

74 The STF could therefore no longer be called upon in these cases, see Article 10 Institutional Act No. 5 of 13 October 1968.

75 During its ten-year period, the AI-5 served as the basis for the political persecution of more than 1600 civilians. In addition, the electoral mandates of 113 deputies and senators and 30 mayors were revoked. A report published in 2014 by the Brazilian Truth Commission (*Comissão Nacional da Verdade*) revealed the broader scope of the regime's human rights violations. It recorded 8,341 victims across the indigenous people, 6,491 persecuted military officers and 10,000 people that were forced into exile. In addition, 7,367 people were persecuted by military courts, and 4,862 people had their political rights suspended. See *Emilio Peluso Neder Meyer*, Constitutional Erosion in Brazil, London 2021, p. 34.

76 *Juan Linz*, The Future of an Authoritarian Situation or the Institutionalisation of an Authoritarian Regime: The Case of Brazil," in: Alfred Stepan (ed.), Authoritarian Brazil. Origins, Policies, and Future, New Haven 1973, p. 235.

employment of "extra-constitutionality" and "parallel constitutionalism"? Did it offer any resistance to the development toward military dictatorship, or did it prove to be conducive to the military's authoritarian state project?

C. The Persistence of the "Underside of the State": Federalism and the Military

To address these questions, it is necessary to revisit the year 1965. As mentioned above, gubernatorial elections were held in ten states on October 3. In these elections, opposition forces secured victories in four states, exposing the military's political vulnerability. To maintain political control, President Castelo Branco enacted the AI-2, with the objective of replacing the existing political parties at national, state, and municipal levels with a two-party system. However, this measure did not fully resolve the issue as according to the 1946 Constitution, governor elections were still scheduled for the following year in eleven states where no elections had taken place in October 1965. Within the military corps, it was widely agreed that winning these upcoming elections was imperative.

I. The "Democratic Dilemma" and Clientelist Continuities: The Institutional Act No. 3

In light of this context, the Branco government issued Institutional Act No. 3 (AI-3) on February 3, 1966. Unlike previous measures, the AI-3 did not address the political system in a horizontal sense but instead altered the vertical separation of powers outlined in the 1946 Constitution. It replaced direct popular elections for gubernatorial positions with an indirect voting system.[77] Under this new system, governors would be elected solely by state parliaments from a pool of three candidates, requiring a simple majority vote. A key aspect of this reform was the prerequisite that receive confirmation from the central government.[78] The candidates proposed for election typically included at least one representative from ARENA and at least one representative from MDB. This significant shift in electoral modalities was supplemented by two additional measures: First, the ongoing practice of canceling the electoral mandates of federal, state, and municipal representatives by decree. Second, a mandate for strict party loyalty among ARENA and MDB parliamentarians, prohibiting them from supporting candidates of the opposing party in gubernatorial or presidential elections.[79] The High Command justified these targeted political purges as necessary measures to maintain control over the state parliamentarians.[80] Since parliamen-

77 Art. 1 Institutional Act No. 3 of 3 February 1966.

78 *Tulia G. Falleti*, Varieties of Authoritarianism: The Organization of the Military State and its Effects on Federalism in Argentina and Brazil, Studies in comparative international development 46 (2011), p. 148.

79 Cf. Supplementary Law No. 19 from 1966.

80 As a result, the MDB lost a total of seven members in Congress and 38 members in the state parliaments. *Samuels / Abrucio*, note 12, p. 48.

tarians were responsible for electing governors, these measures were designed to provide the regime with unrestricted influence over the selection process.

These measures had a significant impact: in the 1966 elections, ARENA candidates secured a total of 56.6 % of the valid votes for the Senate and 64 % for the House of Representatives, while the MDB garnered 43.4 % and 36 % respectively.[81] The disparity was even more pronounced in state parliamentary elections, where ARENA received 64.1% of the valid votes compared to 35.8% for the MDB.[82] Consequently, all eleven gubernatorial positions were won by ARENA candidates,[83] ensuring that the central government retained effective control over the political process.[84] In 1972, President Médici further solidified this system, by extending it to the 1974 elections.

The formal transfer of competencies in favor of the state parliaments may appear contradictory at first. At the very least, it raises the question of why the AI-3 was enacted in the first place – could the regime not have exerted just as much influence over direct popular elections? One explanation lies in the performative commitment to democracy inherent to military rule. While the military could influence popular elections, its self-presentation as democratic barred it from outright banning them. Accordingly, while the likelihood of ARENA facing electoral defeat could be reduced, it could not be completely eliminated. This dialectical tension in the regime's democratic self-image extended to the opposition party, MDB, as well: The MDB could not be banned outright, as its existence served to legitimize the regime. However, contrary to its intended role, the MDB evolved into a significant political competitor, posing a genuine threat to the military government's grip on power.[85] This "democratic dilemma" explained the rationale behind the AI-3: By transferring the power to elect governors to state parliaments, it promised a high degree of control over the selection process, while avoiding the credibility problems that manipulating or outright banning direct popular elections would have caused.[86]

1. Skepticism towards the AI-3

However, the AI-3 was not without controversy. Doubts arose within the military corps about whether governors' dependence on state parliamentary majorities would continue to provide sufficient control over their election process in the future.[87] One frequent argument was that the gubernatorial candidates standing for election could themselves exert more

81 *Bolívar Lamounier / Octavio Amorim Neto*, Brazil, in: Dieter Nohlen (ed.), Elections in the Americas: a Data Handbook: Volume 2 South America, New York 2005, p. 194, 211.

82 *Alves*, note 22, p. 73.

83 *Bethell / Castro*, note 29, p. 181.

84 *Tulia G. Falleti,* Decentralization and Subnational Politics in Latin America, New York 2010, p. 157.

85 See also *Alves*, note 22, p. 9.

86 Ibid., p. 70.

87 *Samuels / Abrucio*, note 12, p. 49.

influence over state parliamentary majorities than the military, thereby substantially influencing the outcome of the ballot.[88] This perspective becomes clearer when one considers the clientelist structure of Brazil's political system, in which the so-called "state elites" held a central position. Historically, both during the "Old Republic" (1889–1930) and the *Estado Novo* (1937–1946), this group resisted centralization efforts by the national government. As U.S.-American political scientist Frances Hagopian illustrated in her authoritative work on Brazil's political clientelism, the political strength of the state elites endured into the post-1945 era, notably under military rule.[89] Hagopian's research focused on the concept of the "political elite", which she defined by two characteristics: First, members either held elected office at the municipal, state or national level, served as leaders of political parties or their state branches, or maintained family connections to these roles.[90] Second, it differed from other forms of social elitism, notably the military.[91] Unlike the military's formal, hierarchical structures, the political elite operated through clientelist networks, informal exchanges of favors, and dependency relationships with governments.[92] This system extended to state levels, where political support resulted in government positions or material benefits, ensuring that state affairs were controlled by a small, closed circle of politicians.[93] This elite network was largely inaccessible to the military, complicating its ability to exert influence over gubernatorial elections and raising questions about the long-term efficacy of AI-3 as a control mechanism.

Given this context, the widespread skepticism surrounding the effectiveness of the IA-3 becomes apparent. Critics doubted the regime's ability to sway parliamentarians to favor military-backed candidates over those with long-standing allegiance to the political elites.[94] The prevailing presumption was that, in instances of uncertainty, loyalty conflicts between the clientelist network and the regime would typically favor the former. Therefore, it could not be ruled out that candidates perceived as unfavorable by the military might still ascend to governorships. This fear was realized in 1978, when members of ARENA in parliament rejected the regime-appointed gubernatorial candidate. Instead, they opted for Paulo Maluf,

88 Ibid.

89 *Frances Hagopian*, Traditional Politics and Regime Change in Brazil, Cambridge 1996.

90 Ibid., p. 17.

91 Bryan Pitts, in his most recent study examining the "political elite" during military rule, highlighted this mutual rejection. Building on Hagopian's work, he emphasized two key distinguishing features. First, the gap between the political elite and the military stemmed from their class affiliations: the political elite typically belonged to higher social classes than the military. Second, the two groups were at odds due to their differently justified claims to power. *Bryan Pitts*, Until the Storm Passes. Politicians, Democracy, and the Demise of Brazil's Military Dictatorship, Berkeley 2023, pp. 5 ff.

92 *Hagopian*, note 89, p. 18.

93 Ibid.

94 *Samuels / Abrucio*, note 12, p. 49.

the former mayor of São Paulo, highlighting the limits of the regime's control over its own political apparatus[95]

2. Continuing Influence of the Governors

However, this underscored only one of the issues with the implementation of AI-3. Equally contentious was the regime's choice to convert only gubernatorial elections from direct popular votes to indirect parliamentary votes, while maintaining all direct elections for all other offices in the country. Citizens still retained the ability to directly elect members of parliament at both national and state levels, as well as senators and mayors.[96] This placed the central government in a difficult position. From the perspective of its conservative critics, it could not be ruled out that the governors, once appointed, might use their position of power to support opposition candidates in the remaining direct elections. This, in turn, increased the likelihood of another electoral defeat.[97]

Hagopian's study substantiated this claim with a detailed micro-study of the state of Minas Gerais. She demonstrated that from the mid-1950s until the late 1970s, a small group of politicians entrenched in long-standing system of patronage and nepotism dominated the state's political system.[98] Subsequent studies made similar observations in other states, reinforcing her conclusions.[99] Beyond this, Hagopian noted two key points: First, clientelist networks reshaped the binary party landscape. In other words, state elites organized themselves across party boundaries, diminishing the strict dichotomy between ARENA and the MDB. Secondly, the political elites were concentrated in the state government apparatuses, headed by the governors. This institutional focus of state-level clientelism heightened the military's concerns that the governors' primary loyalties were not to the regime, but to their clientelist networks.[100] This reintroduces the 'democratic dilemma' previously discussed. To preserve the façade of civilian democratic governance, the military reluctantly allowed direct popular elections. However, this inadvertently empowered the governors, the very figures the regime sought to control in the first place. To address this conundrum and ensure continuous control over election outcomes, the military adjusted its strategy, shifting its focus toward influencing the state elites themselves.

95 *Pitts*, note 91, p. 71.

96 This only changed with Supplementary Law No. 1 of 1969. Under this law, mayors of state capitals were now nominated by the governors subject to approval by the state parliaments. However, the appointment of mayors in the capital Brasília and municipalities of "national importance" became the direct responsibility of the president. Falleti, note 78, p. 148.

97 *Samuels / Abrucio*, note 12, p. 49.

98 *Hagopian*, note 89, pp. 118 ff.

99 For São Paulo, see *Pitts*, note 91.

100 *Cammack*, note 59, p. 64.

3. The técnicos

When President Médici assumed power in October 1969, he initiated significant changes to the profile of ARENA candidates. In an attempt to diminish the influence of state elites, the military introduced "technical governors" for the upcoming gubernatorial election. This marked a notable shift that extended beyond governorships, reverberating throughout cabinets and the broader state apparatus. Subsequently, at both national and state levels, spanning high-ranking offices to basic administrative roles, positions previously held by political elites were now to be filled by "*técnicos*".[101] The term referred to civil servants who lacked political backgrounds or institutional affiliations prior to the coup. *Técnicos* were distinguished by their professional trajectories, which were independent of the influence of state elites. The aim was to replace state elites with a different ruling class: an inherently "unpolitical" and purely "technocratic" elite believed to be unquestionably loyal to the regime.

During Médici's presidency, the technocratic influence reached its apex. In October 1969, Médici declared that his government was "immune to any political pressure" and "rose above society to act in the best interests of the unrepresented sectors of society."[102] Consistent with this proclamation, none of his close advisors possessed a "political" background.[103] Even at lower administrative tiers, the proportion of individuals categorized as part of the technocratic spectrum rather than the state elites increased.[104] This shift was especially evident at the state level: By 1970, ten out of the 22 governors were *técnicos,* compared to only five in 1966.[105]

II. Continuity despite Change

Nevertheless, the anticipated clash between state elites and *técnicos* failed to materialize as expected. In the parliamentary elections of 1974, MDB achieved substantial gains. In the Lower House, it received 48 percent of the vote, an improvement of almost eighteen points and 74 seats compared to the 1970 elections. In contrast, ARENA suffered considerable losses, securing only 52 percent of the vote, a sharp decline from the nearly 70 percent it had won four years earlier..[106] In the Senate, MDB secured 59 percent of the valid

101 Ibid*.,* p. 66.

102 Emilio Médici quoted from *Thomas E. Skidmore*, The politics of military rule in Brazil*,* 1964-85, New York 1993, p. 106.

103 *Edson de Oliveira Nunes*, Legislativo, Política e Recrutamento de Elites no Brasil, Dados 17 (1978), p. 63.

104 Between 1946 and 1964, 60% of the presidential cabinet comprised "conventional" politicians, with only 26% being técnicos. However, this trend reversed in the subsequent years. Between 1964 and 1974, only 29% came from the party-political spectrum, while 52% were técnicos, and 11% were directly recruited from the military. *Ibid*., p. 61.

105 *Falleti*, note 84, p. 158.

106 *Lamounier / Neto*, note 81, p. 194.

votes,[107] gaining nearly 20 points, while ARENA fell from 60.4 to 41 percent.[108] This resulted in the opposition winning 16 of the 22 Senate seats up for election.[109] Signs of the opposition's growing strength were also evident at the state level.. In the state parliamentary elections, MDB garnered 38.8% of the votes, marking an increase of approximately 15 points compared to 1970.[110] This surge gave the opposition a majority in five additional state parliaments, a notable achievement considering that prior to the election, they had only held a majority in the state of Guanabara.[111]

In a sense, the outcome of the 1974 elections echoed the gubernatorial elections of October 1965, during which ARENA also failed to meet the regime's expectations. Similar to a decade prior, it sparked concern within the military about its waning control over the country's political trajectory. Despite the strategic appointments of governors by the military since 1965 and the inclusion of *técnicos* in executive positions, ARENA – and, by extension, the government – experienced a significant decline in approval ratings. This decline can be attributed to several factors. One key issue was the limited scope of the *técnicos*' appointments. While *técnicos* were confined to executive offices, parliamentary representation remained subject to popular elections, over which the military, as shown above, had far less influence than the locally and regionally anchored political elites.[112] Another significant challenge arose from the fact that, by nominating technocratic governors, the regime alienated those state elites who had historically supported the government. This tension was rooted in two aspects: The first concerned the heterogeneous composition of the ruling ARENA party at the national level. The military had chosen to leave the nomination of MPs standing for election at the *national* level to the ARENA branches in the *states.*[113] Consequently, the state elites continued to select ARENA deputies who were sent to the National Congress. This arrangement intensified a conflict of loyalties: On one side, MPs were expected to align with the *national* party leadership and its military-driven agenda, regardless of whether it corresponded to the interests of their regional supporters.[114] On the other side, they remained beholden to these same voter base, led by the state elites, who demanded that their *regional* interests take precedence. As a result, ARENA's national party organization developed into a fractured amalgamation of heterogeneous interests.

107 21 per cent of the votes were declared invalid.

108 *Lamounier / Neto*, note 81, pp. 211 ff.

109 *Cammack*, note 59, p. 69.

110 *Samuels / Abrucio*, note 12, p. 51.

111 *Hagopian*, note 89, p. 149.

112 *David J. Samuels*, The Political Logic of Decentralisation in Brasil, in: Alfred P. Montero and David J. Samuels (eds.), Decentralization and Democracy in Latin America, Notre Dame 2004, p. 76.

113 Ibid.

114 *Margaret J. Sarles*, Maintaining Political Control Through Parties: The Brazilian Strategy, Comparative Politics 15 (1982), p. 51.

However, because the military exclusively determined ARENA's national agenda, the party was unable to programmatically address these diverse demands.

The second aspect revolved around the elitism inherent in the *técnicos* themselves. Once more, an example from Minas Gerais is instructive: Like many of his colleagues, Governor Rondon Pacheco (1971-1975), himself a *técnico,* appointed only "technocrats" to his cabinet after taking office. In an attempt to sway the Governor's mind, some ARENA deputies sought the assistance of Senator Gustavo Capanema, a "conventional" politician and representative of the state elites., Capanema appealed to Pacheco to include politicians from the broader political spectrum in his government to secure electoral support– but to no avail.[115] The *técnicos'* aspiration to establish autonomous political networks separate from existing structures, coupled with their inclination to disregard clientelist agreements,[116] alienated many ARENA supporters embedded in these networks.[117] As a result, ARENA effectively split into two factions.[118] One faction consisted of representatives with little popular support and limited connections to the state elites but with strong ties to the central government. The other faction comprised politicians with weaker links to the military but extensive clientelist networks with state elites. This division led to significant conflicts within the party. In some instances, members of the first group nominated by the government for ARENA leadership roles received little to no political support from members of the second group.[119] For example, in São Paulo, the military pushed its preferred candidate for the 1974 Senate elections, Carvalho Pinto, despite objections from some local ARENA branches. This conflict prompted some ARENA politicians to oppose their party's candidate and support the MDB candidate, Orestes Quércia.[120] This conflict, which also occurred in Minas Gerais, significantly contributed to the election results of 1974. In the Southeast Region, MDB achieved a nearly 21 percent increase in votes compared to the 1970 parliamentary elections.[121]

These developments marked yet another setback for the regime's strategy. A decade after the coup and nine years after the disastrous election outcomes in October 1965, the technocratic elite had failed to supersede the state elites and ensure compliance of regional ARENA party branches with the central government. As Frances Hagopian put it, the "underside of the state" – the entrenched organizational structures of state clientelism

115 *Samuels / Abrucio*, note 12, p. 50.

116 *Cammack*, note 59, p. 67.

117 *Sarles*, note 114, p. 49.

118 *Samuels / Abrucio*, note 12, p. 52.

119 Ibid.

120 *Carlos Estevam Martins*, O Balanço da Campanha, in: Bolívar Lamounier and Henrique Fernando Cardoso (eds.), Os Partidos e as Eleições Brasil, Rio de Janeiro 1975, p. 84.

121 *Lamounier / Neto*, note 81, p. 222.

– proved resilient to the central government's regulatory efforts.[122] This underscored the enduring strength of Brazil's informal multi-level system. Crucially, ARENA continued to lose public support, dashing the regime's hopes of shaping political competition in its favor without compromising democratic legitimacy.

III. New Change of Strategy: Reintegration of the State Elites and State Clientelism

With *técnicos* unable to secure sufficient votes, the regime sought alternative methods to garner political support at the state level. Remarkably, this support was found among the state elites themselves. By 1976, the regime's gubernatorial nomination process had evolved significantly, with an increasing number of state elite candidates being nominated instead of *técnicos*.[123] Additionally, the regime loosened its control over ARENA's state branches, enabling political elites to re-establish their connections with the national executive.[124] As a result, the state elites were reintegrated into the state apparatus. This marked a complete reversal in the military's strategy: whereas prior to 1974 the regime had opposed the state elites, from 1974 onward, it began collaborating with them.

1. State Clientelism

The effects of this strategic shift became evident when the military itself began to adopt clientelist practices to secure electoral support. This was particularly apparent in the allocation of transfer payments. From 1974 onwards, there was a nationwide expansion of social programs targeting the lower and working classes. Notably, loans for small farmers were increased and social housing programs were significantly expanded.[125] For example, in 1974, 7,831 housing units were built for low-income families in 1974, accounting for around 12 percent of the national housing program's budget. By 1980, nearly 200,000 units had been constructed.[126] What was particularly significant about this development was that fund allocations were concentrated in regions where the regime enjoyed strong political support. This was especially true for the Northeast Region of the country, where ARENA had regularly achieved favorably results in Chamber of Deputies and Senate elections since 1970.[127] During the presidencies of Ernesto Geisel (1974-1979) and João Figueiredo

122 *Hagopian*, note 91, pp. 123 ff. The term was originally coined by the US political scientist Peter McDonough. *Peter McDonough*, Mapping an Authoritarian Power Structure: Brazilian Elites During the Medici Regime, Latin American Research Review 16 (1981).

123 *Samuels*, note 112, p. 77.

124 Ibid.

125 *Barry Ames*, Political Survival: Politicians and Public Policy in Latin America, Berkeley 1987, p. 157.

126 Ibid., p. 168.

127 *Lamounier / Neto*, note 81, p. 206-07, 16-18. ARENA's dominance was even more pronounced in the national parliaments, where the opposition was regularly outnumbered by a ratio of 3 to 1.

(1979-1985), a substantial portion of the benefits was redirected to the lower class and labor in these regions.[128] Furthermore, loans to farmers were granted based on political evaluations: States where the MDB played a smaller role received higher loans per farmer compared to regions like the Southeast, where the opposition was strongest.[129] In essence, the regime appeared to purchase political support through social programs, thus deviating from its previous stance that economic development should be guided solely by efficiency criteria.

The resurgence of clientelism was also evident in the fiscal dynamics between the states and the central government. In 1966, the military set up two funds, one for the states (*Fundo de Participação dos Estados*) and one for the municipalities (*Fundo de Participação dos Municípios*), through which the central government automatically transferred a portion of the income tax and the tax on industrial products.[130] These funds were intended to be distributed according to a formular that accounted for population size and tax revenue, ostensibly favoring economically disadvantaged regions.[131] In practice, however, the North, Northeast, and Center-West – regions loyal to the regime – disproportionally benefited.[132] Between 1976 and 1982, transfer payments rose by 208 percent.[133] By 1983, around 45 percent of all transfers were directed to the Northeast, even though the region accounted for only 29 percent of the population.[134] This demonstrated that political allegiance to the central government was the primary determinant of fiscal support.. Clientelist practices also permeated the municipal level. Here, it was primarily the mayors who were drawn into the clientelist sphere of influence of the central government.[135] The central government offered them material incentives to join ARENA, a phenomenon that became known as *adesismo*.[136] After the 1972 local elections, ARENA successfully persuaded around half of the 466 mayors elected as MDB members to switch parties by offering transfer payments in exchange.[137] Even in São Paulo, a state traditionally resistant to the regime, clientelist practices were employed. Between 1976 and 1982, Governor Paulo Maluf managed to convince 78 of the 101 mayors elected in the 1976 municipal elections and 16 MDB deputies to switch their allegiance to ARENA.[138]

128 *Hagopian*, note 89, p. 156.

129 *Ames*, note 125, p. 176.

130 *David J. Samuels*, Ambition, Federalism, and Legislative Politics in Brazil*,* Cambridge 2003, p. 160.

131 *Ames*, note 125, p. 176.

132 *Wayne A. Selcher*, A New Start Toward a More Decentralized Federalism in Brazil?, Publius 19 (1989), p. 172.

133 *Samuels*, note 112, p. 77.

134 *Selcher*, note 132, p. 172.

135 *Hagopian*, note 89, p. 160.

136 *Cammack*, note 59, p. 67.

137 Ibid.

138 *Hagopian*, note 89, 160.

2. Reforms in the "Engine Room"

However, the regime did not only engage in clientelist practices; it also initiated reforms in the electoral system. The first measure was enacted in 1975 to address the distribution of Senate seats, where the ruling party had suffered considerable losses in the 1974 parliamentary elections. The regime believed that ARENA's poor performance in the Senate elections stemmed from the existing electoral law, which allowed only one candidate *per party* to be nominated per ballot in each state.[139] According to the government, this system had led factions within the state elites, who were generally aligned with ARENA but unable to secure the nomination of their preferred candidates, to shift their support to the opposition MDB instead..[140] This, the regime believed, explained the disparity in ARENA's performance between the Senate and the Chamber of Deputies elections,[141] as the latter allowed representatives from *all* internal party factions to run for election in the respective constituencies.

To rectify this issue and ensure that Senate seats left unfilled in the 1974 election[142] were secured by ARENA, the regime introduced the *sublegenda* electoral system. This procedural maneuver, already in use at the municipal level since the mid-1960s,[143] allowed both MDB and ARENA to nominate multiple candidates – referred to as sub-candidates – for Senate election. The *sublegendas* represented multiple lists of candidates under the same party, whose votes were collectively attributed to the party. For instance, ARENA 1, ARENA 2, and ARENA 3 candidates could all run for the same senate seat, with the cumulative vote count determining which candidate assumed office. This system was intended to incentivize various factions of the state elites to align with ARENA, preserving their traditional networks without forcing them to compromise their rivalries.[144]

Sharing a similar rationale, President Geisel implemented the "April Package" in April 1977, a comprehensive reform consisting of fourteen amendments to the 1967 Constitution and six new legislative decrees.[145] Key provisions included extending the presidential term from five to six years and reducing the quorum required for constitutional amendments

139 *Cammack*, note 59, p. 69.

140 *Claudio Ferraz/ Frederico Finan/ Monica Martinez-Bravo*, Political Power, Elite Control, and Long-Run Development: Evidence from Brazil, NBER Working Paper No. 27456 (2020), p. 10.

141 *Lamounier / Neto*, note 81, pp. 194, 212.

142 The term of office for senators was eight years. See Art. 41, Para. 1 of the 1967 Constitution, amended by Constitutional Amendment No. 1 of 17 October 1969.

143 Law No. 5.453 of 14 June 1968.

144 *Antonio Otavio Cintra*, Traditional Brazilian Politics: An Interpretation of Relations between Center and Periphery, in: Neuma Aguiar (ed.), The Structure of Brazilian Development, New Brunswick 1979, p. 151.

145 The 1967 Constitution was amended once before, in October 1969.

to a simple majority.[146] Another measure aimed at strengthening ARENA was to base the distribution of Chamber of Deputies seats on the number of registered votes rather than the total population. This intended to reduce the influence of the opposition's urban strongholds.[147] Additionally, the April Package altered the country's territorial structure. In order to increase the likelihood of retaining control over both chambers of Congress, the regime created a new state.[148] Mato Grosso do Sul was separated from Mato Grosso on October 11, 1977, and recognized as an independent state. A particularly controversial provision of the April Package stipulated that one-third of all Senate seats would be filled by "indirect election". Under this system, one senator per state would be nominated by the central government and confirmed by the state parliaments,[149] while the other two seats remained subject to direct election as per the existing constitutional provisions.[150] The appointment of these "bionic senators," as they were later called, provided the regime with an additional tool for political leverage. This mechanism allowed the government to appease dissatisfied factions within ARENA over gubernatorial nominations, enabling the regime to navigate competing interests within the party.[151] Once again, the military's intention to co-opt the state elites and consolidate its influence over the political system became apparent. This approach proved successful, as the military secured victory in almost all national elections in 1978.[152]

D. Conclusion

When examining the interplay between the subnational and national levels during the initial ten to fifteen years of military rule, three key observations emerge. First, the federal system remained intact. Brazil's authoritarian constitutionalism always retained a federal character. While measures such as the constitutional amendment of 1969, AI-3, and the "April Package" of 1977 sought to weaken the political power of governors and disrupt the entrenched loyalties of political elites in the states, the regime never abolished the office of governor, eliminated the states, or dissolved the Senate. The formal structure of federalism – self-rule of the federative states, shared rule through a federal constitutional body, and a constitutionally enshrined division of powers along territorial lines – was continuously modified by the regime but never entirely dismantled.

146 The reason for this was that the government was no longer able to muster a two-thirds majority after the 1974 elections. *Hagopian*, note 91, p. 150.

147 Ibid.

148 Ibid.

149 *Samuels*, note 112, p. 77.

150 Art. 41 of the 1967 Constitution, amended by Constitutional Amendment No. 1 of 17 October 1969.

151 *Cammack*, note 59, p. 69.

152 *Samuels*, note 112, p. 78.

Second, the military government sought to preserve the appearance of constitutionality, legality, and democratic legitimacy without relinquishing its grip on power. The federal multi-level system, which included popular elections for state legislatures and the Senate, played a key role in sustaining this facade. However, this effort to maintain a veneer of legitimacy placed the military in a "democratic dilemma." To avoid accusations of arbitrary rule, the opposition party MDB was granted space for political maneuvering. Paradoxically, this allowance enabled the MDB to evolve into a potent opposition force, challenging the regime's authority in both the National Congress and state legislatures.

Third, the regime adopted a dual strategy to counter its political adversaries. Against both parliamentary and extra-parliamentary opposition, it alternated between repression and constitutional adjustments to democratic rules, seeking to curtail the MDB's unexpected success without banning the party outright. In contrast, the regime approached the traditional elites in the states differently. Initially, it attempted to neutralize their influence by appointing técnicos to administrative positions. However, when it became clear that clientelist structures were too deeply entrenched to dismantle, the regime shifted tactics. It began to co-opt these networks for its own purposes, aligning traditional elites with its goals rather than opposing them.

This returns us to the question posed at the outset: Was the federal system a factor that facilitated the authoritarian development of military rule? Could the military regime, much like it did with constitutional law, transform federalism into an instrument of authoritarian rule? The answer is nuanced. While the entrenched and clientelist nature of the federal system posed challenges to vertical centralization, it also offered a framework for compromise. The regime skillfully navigated the complex relationships between the central government, ruling and opposition parties, governors, mayors, and traditional elites, leveraging clientelist practices to maintain control. Ultimately, the federal system emerged as both a catalyst for subnational resistance and an institutional framework for negotiations between regional and national power poles. This dynamic allowed the regime to sustain its grip on power without resorting to widespread violent intervention. The shift from initial opposition to informal federal structures toward their strategic integration into the authoritarian system highlights the adaptive and pragmatic nature of the Brazilian military dictatorship. This duality – between federalism as a limitation and federalism as a tool of authoritarianism – encapsulates the complex dynamics of Brazil's political structure during this era. It leaves a legacy that not only defined the regime but also shaped the country's political evolution in the post-dictatorship era.

Constitutional Entrenchment and Social Policy in Brazil

By *Antonio Moreira Maués**

Abstract: The 1988 Constitution promoted the expansion of social policy in Brazil, but other constitutional rules on fiscal policy limited the sources and funding of social spending. This paper discusses how the original text of the Constitution and its successive constitutional amendments entrenched both social and fiscal policy in Brazil, turning distributive conflicts into constitutional disputes over public resources. It also discusses how this constitutional regulation has constrained the policy options of different administrations regarding social spending. The paper concludes that these policies' strategic entrenchment produced an anti-poverty Constitution that falls short of a significant reduction of inequality in Brazil, shedding light on the limits of transformative constitutionalism in highly unequal societies.
Keywords: Brazil; Constitutional Law; Social Policy; Fiscal Policy; Transformative Constitutionalism

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A. A Transformative Constitution?

Since Karl Klare used the term "transformative constitutionalism" to describe the South African Constitution, this concept has traveled to many different jurisdictions, despite its very ambitious content. In fact, Klare qualified the South African Constitution as transformative because of its long-term project "to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[1] "Large-scale social change", not less than this, was the defining characteristic of transformative constitutions.[2]

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1 *Karl E. Klare*, Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights 14 (1998), p. 150.

2 More than twenty years later, transformative constitutionalism was defined as "the practice of interpreting and applying constitutional norms in a way that seeks to promote deep social change". See *Armin von Bogdandy / René Urueña*, International Transformative Constitutionalism in Latin America, The American Journal of International Law 114 (2020), p. 405.

The concept origin in the Global South[3] may have helped the migration of this transformative idea to Latin America, where, since the end of the twentieth century, several countries have approved new constitutions aimed at bringing about social change.[4] Although the constitutionalization of socioeconomic rights is an old phenomenon in the region[5], these constitutions expanded their declarations of rights and attempted to provide the state with new instruments for achieving substantive equality. More recently, the language of transformative constitutionalism has been used to describe the practice of the Inter-American Court of Human Rights and the emergence of a new *ius commune* in Latin America.[6]

Despite the widespread use of this concept, a case study on transformative constitutionalism should begin by asking which characteristics a particular constitution must have – in addition to a general commitment to social change – to justify its inclusion in the family. The specific features of transformative constitutions vary in the literature and some authors apply this idea to a wide range of constitutional experiences. For Graber, transformative constitutionalism is part of a "postwar constitutional paradigm" that includes constitutions committed to robust political freedoms, such as freedom of speech and voting rights; the provision of basic goods such as education, housing, and health care; prohibitions on discrimination; separation between church and state; and independent courts.[7] Hailbronner also rejects the idea that transformative constitutionalism should be understood as a Southern paradigm. According to her, Northern constitutions such as Germany's are also committed to "broad-scale social transformation, aspiring ultimately to a better and more equal society" through justiciable state duties and/or positive rights, the use of

3 For a definition of "Southern constitutionalism" as a "distinctive constitutional experience" shaped by socio-economic transformation, struggles about political organization, and denial of, and access to, justice, see *Philipp Dann / Michael Riegner / Maxim Bönnemann*, The Southern Turn in Comparative Constitutional Law: An Introduction, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, pp. 2-3. On the relevance of transformative constitutionalism in Africa beyond the South African experience, see *Heinz Klug*, Transformative Constitutionalism as a Model for Africa? in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, pp. 141-164.

4 Brazil (1988), Colombia (1991), Venezuela (1999), Ecuador (2008), and Bolivia (2009). These Constitutions are also known as examples of the "new Latin American constitutionalism". For a critical appraisal, see *Ana Micaela Alterio*, Entre lo Neo y lo Nuevo del Constitucionalismo Latinoamericano, Valencia 2021.

5 *Octávio Luiz Motta Ferraz*, Substantive Equality in Law and Reality, in: Conrado Hübner Mendes / Roberto Gargarella / Sebastián Guidi (eds.), The Oxford Handbook of Constitutional Law in Latin America, Oxford 2022, p. 710.

6 *Armin von Bogdandy / Eduardo Ferrer Mac-Gregor / Mariela Morales Antoniazzi / Flávia Piovesan / Ximena Soley* (eds.), Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune, Oxford 2017.

7 *Mark A. Graber*, What's in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy, in: Mark A. Graber / Sanford Levinson / Mark Tushnet (eds.), Constitutional Democracy in Crisis?, Oxford 2018, pp. 665-666.

constitutional rights in private disputes, and broad access to courts.[8] On the other hand, for those who defend a Southern view on this issue, the transformative elements found in Global North constitutions are less dominant and "do not envisage the same kind of deep, constitutionally driven transformation" that distinguishes Global South constitutions.[9] This approach proposes an understanding of transformative constitutionalism that includes, in addition to the aforementioned elements, the provision of social and collective rights, state interventionism, activist constitutional courts, and an anti-formalist legal culture.

Whatever the choice on these lists, it is easy to classify the Brazilian Constitution of 1988 as transformative.[10] After a long period of authoritarian rule (1964-1985), the Constitution re-established the core institutions of a "liberal constitutional democracy"[11] and provided broad rights to speech, assembly, and association. Moreover, the Constitution fosters political participation[12], grants economic and social rights and forbids all forms of discrimination. Article 3 commits the state "to build a free, just and solidary society", among many other provisions that aim to achieve substantive equality. Both individual and collective rights are protected by an independent judiciary and the Constitution creates a strong system of judicial review of legislation that gives comprehensive powers to the Federal Supreme Court (*Supremo Tribunal Federal*). Finally, the Brazilian state is secular (Article 19, I) and has broad competence on economic matters.

However, looking at Brazilian society thirty-five years after the promulgation of the 1988 Constitution, the transformative brand has become more polemical. Regarding socioeconomic inequalities, Brazil indeed achieved some remarkable improvements throughout these decades. The country expanded health and education policies, raised the minimum

8 *Michaela Hailbronner*, Transformative Constitutionalism: Not Only in the Global South, The American Journal of Comparative Law 65 (2017), p. 540.

9 *Dann / Riegner / Bönnemann*, note 3, p. 22.

10 Although the term "transformative constitutionalism" was absent from Brazilian constitutional discourse in the first decades after the promulgation of the 1988 Constitution, the concept of "directive constitution" (*constituição dirigente*) was widely used to describe the new Constitution's commitment to social change. On the reception of this concept in Brazil from its Portuguese origin, see *Deo Campos Dutra*, The Theories of Constituição Dirigente and Transformative Constitutionalism and Their Reception by Brazilian Constitutional Theory: An Approach Based on Critical Comparative Law, World Comparative Law 56 (2023), pp. 568-586, and *Florian F. Hoffmann* / *Fabio Carvalho Leite*, Transformation by Decree? A (Brief) Reflection on the 'Directive Constitution' (Constituição Dirigente) in Brazil, World Comparative Law 56 (2023), pp. 549-567. On the common features of transformative and directive constitutions, see *Michael Riegner*, The Directive Constitution in the Varieties of Constitutionalism: An Introduction, World Comparative Law 56 (2023), pp. 493-505, and *Mariana Canotilho*, "Constitucionalismo Dirigente" and Transformative Constitutionalism: Common Elements, Differences, and Methodological Challenges, World Comparative Law 56 (2023), pp. 506-523.

11 For a recent discussion on the elements of this concept, see *Tom Ginsburg / Aziz Z. Huq*, How to save a constitutional democracy, Chicago 2018.

12 *Gianpaolo Baiocchi / Patrick Heller / Marcelo K. Silva*, Bootstrapping Democracy: Transforming Local Governance and Civil Society in Brazil, Stanford 2011.

wage in real terms, and created new social assistance programs. As a result of these and other policies, Brazil reduced its level of poverty at an unprecedented pace. In 2014, the poverty rate decreased to 14%, and the rate of extreme poverty reached a historically low level of 2.51% of the population.[13]

Despite these good numbers, income concentration persists in Brazil. Although the Gini index decreased from 0.570 in 2004 to 0.515 in 2014[14], the income shares of the wealthiest 10% remained stable during this period.[15] Brazil remains one of the most unequal countries in the world, with more recent Gini data showing an increase in inequality since 2015.[16] The most recent study revealed that the richest 1% captured 23.7% of all income in 2022.[17]

An easy way to dismiss the relations between the 1988 Constitution and the persistence of inequality in Brazil is to attribute these transformative goals' failures exclusively to economic causes. As in other Latin American countries in the same period, social improvement followed a period of economic growth, and its recent decline has been associated with the economic stagnation that hit Brazil in the last decade. This external view also implies diminishing the role of political institutions in general; however, various studies confirm that the implementation of social policies was a key factor in reducing poverty in the country.[18] On the other hand, these policies' redistributive effects are highly dependent on how they are funded, which involves the design of the tax and budgetary systems.

13 *Luana Passos / Dyeggo Rocha Guedes / Fernando Gaiger Silveira*, Fiscal Justice in Brazil: Pathways to Progress, International Policy Centre for Inclusive Growth, Working Paper No. 180 (2019), p. 10.

14 *Patrícia Andrade de Oliveira e Silva*, Social Policy in Brazil (2004-2014): An Overview, International Policy Centre for Inclusive Growth, Working Paper No. 155 (2017), p. 4.

15 See *Marc Morgan*, Income Inequality, Growth and Elite Taxation in Brazil: New Evidence Combining Survey and Fiscal Data, 2001–2015, International Policy Centre for Inclusive Growth, Working Paper No. 165 (2018), and *Pedro H. G. Ferreira de Souza*, A History of Inequality: Top Incomes in Brazil, 1926–2015. International Policy Centre for Inclusive Growth, Working Paper No. 167 (2018).

16 *Marcelo C. Neri*, A Escalada da Desigualdade: Qual Foi o Impacto da Crise Sobre a Distribuição de Renda e a Pobreza?, Rio de Janeiro 2019.

17 *Sergio Gobetti*, Concentração de Renda no Topo: Novas Revelações pelos Dados do IRPF, Observatoria Politica Fiscal, 16.01.2024, https://observatorio-politica-fiscal.ibre.fgv.br/politica-economica/pesquisa-academica/concentracao-de-renda-no-topo-novas-revelacoes-pelos-dados-do (last accessed on 1 February 2024).

18 *Juliana Martínez Frazoni / Diego Sánchez-Ancochea*, The Double Challenge of Market and Social Incorporation: Progress and Bottlenecks in Latin America, desiguALdades.net Working Paper Series No. 27 (2012); *Giovanni Andrea Cornia*, Income Inequality in Latin America: Recent Decline and Prospects for Its Further Reduction, ECLAC – Macroeconomics of Development Series No. 149 (2014); *Alfred P. Montero*, Brazil: Reversal of Fortune, Cambridge 2014; *Marta Arretche*, Conclusões, in: Marta Arretche (ed.), Trajetórias das Desigualdades: Como o Brasil Mudou nos Últimos Cinquenta Anos, São Paulo 2015; *Francisco H. G. Ferreira / Sergio P. Firpo / Julian Messina*, Understanding Recent Dynamics of Earnings Inequality in Brazil, in: Ben Ross Schneider (ed.), New Order and Progress: Development and Democracy in Brazil, Oxford 2016; *Celia Lessa Kerstenetzky*, Redistribuição no Brasil no século XXI, in: Marta Arretche /

In Brazil, both fiscal and social policies have constitutional grounds. Transformative constitutionalism points to the importance of social rights provisions to achieve substantive equality. There is no shortage of this type of rules in the 1988 Constitution, but the same text also contains rules that help maintain structures of inequality in the country, including a robust protection of private property. Moreover, constitutional provisions on social policy clash with other constitutional rules on fiscal policy, which ultimately constrains social spending.

The progressive and conservative sides of the Brazilian Constitution are both relevant for understanding how it functions and for achieving a more realistic view of the possibilities of transformative constitutionalism in highly unequal societies, where social change demands structural and long-term measures. In confronting this question, this paper does not use a court-centered approach, despite its dominance in the literature[19], but place its focus on executive-legislative relations.[20] As shown below, the implementation of social policies in Brazil was mainly a consequence of constitutionally based agreements between political actors, with little participation of the courts. At the same time, political majorities were successful in resisting constitutional reforms that could have a greater impact on the distribution of wealth and income in the country.

The study of this political dynamic reveals that the 1988 Constitution has entrenched both fiscal and social policies in Brazil. Given the high number of constitutional rules on these matters, it was constantly necessary for the executive to obtain approval for constitutional amendments to implement its proposals. This need of supermajorities strengthened the powers of the mainly conservative National Congress, limiting the president's progressive agenda. Regarding social policy, the compromises between the executive and legislative branches created constitutional clauses on budget earmarking that ensured minimum levels of social spending. On the other hand, social policies' funding had to resort to indirect taxes and could not exceed the expenditure limits imposed by fiscal adjustment rules. We conclude that the entrenchment of these policies resulted in a constitution that alleviates poverty but falls short of the promises of transformative constitutionalism.

Eduardo Marques / Carlos Aurélio Pimenta de Faria (eds.), As Políticas da Política: Desigualdades e Inclusão nos Governos do PSDB e do PT, São Paulo 2019.

19 *Oscar Vilhena / Upendra Baxi / Frans Viljoen* (eds.), Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa, Pretoria 2013; *Daniel Bonilla Maldonado* (ed.), Constitutionalism of the Global South, Cambridge 2013; *Diego Werneck Arguelhes*, Transformative Constitutionalism: A View from Brazil, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020.

20 In Latin America, Gargarella also highlights that the organization of powers may block the enforcement of constitutional rights, mainly because of "hyper-presidentialism", that is, the over-concentration of presidential powers. See *Roberto Gargarella*, Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution, Oxford 2013. Despite the relevance of this analysis, it does not fit the 1988 Constitution, where a strong National Congress prevents an over-concentration of powers in the Presidency.

In the next sections of this paper, I will explain the mechanisms of constitutional entrenchment in Brazil (section B), discuss how the Constitution entrenched fiscal and social policies (section C), and the consequences of this entrenchment on social spending (section D). This study covers two periods of social policy expansion in Brazil, under Fernando H. Cardoso (PSDB (Partido da Social Democracia Brasileira), 1995-2002) and the Worker's Party (Partido dos Trabalhadores (PT)) administrations, led by Lula da Silva (2003-2010) and Dilma Rousseff (2011-2016). After Rousseff's impeachment, Michel Temer (2016-2018) and Jair Bolsonaro (2019-2022) sought to strengthen fiscal adjustment rules and limit public expenditures, but they have not completely succeeded in doing so.

B. Strategic Entrenchment in the Brazilian Constitution

The 1988 Constitution extensively regulates the central institutions of both political and social life, and is widely recognized as one of the most prolific and detailed constitutions in the world.[21] Many of its provisions represent the intent of different political actors to regulate the distributive conflicts that pervade Brazilian society through constitutional rules. This entrenchment of fiscal and social policies is a distinctive characteristic of the Brazilian Constitution, as it turns distributive conflicts into constitutional disputes over public resources.

These features of the 1988 Constitution reveal that political actors use constitutional rules to constrain further decisions on distributive issues, aiming to entrench their interests in the constitutional order. Starr highlights the importance of this type of "strategic entrenchment" in modern societies, as Constitutions increase the requirements for their amendment beyond the legislative majority and even define some of their clauses as unamendable.[22] Thus, constitutional entrenchment represents a conscious effort to prevent or set the direction of institutional reform by imposing the burden of obtaining supermajorities to achieve change. This requirement of a supermajority vote is widely used as a form of legal entrenchment.[23]

Strategic constitutional entrenchment is usually associated with electoral rules and counter-majoritarian institutions whose design protects elites' interests in a democratic system.[24] In fact, the constitutional design of democratic institutions can protect specific interests against the will of the majority, although this protection is mainly indirect, as it relies on the counter-majoritarian institutions' degree of independence from the government.

21 *Zachary Ellkins / Tom Ginsburg / James Melton*, The Endurance of National Constitutions, Cambridge 2009, p. 105.

22 *Paul Starr,* Entrenchment: Wealth, Power, and the Constitution of Democratic Societies, New Haven 2019.

23 *Nicholas W. Barber*, Why Entrench?, International Journal of Constitutional Law 14 (2016), pp. 325-350.

24 *Starr*, note 22, pp. 105-126.

The 1988 Constitution also incorporates rules and institutions that restrain the power of majorities, as the disproportionate representation of the less populous states in the National Congress and the powerful Supreme Court. In addition, the Constitution directly protects specific values and interests against political change. At the policy level, this type of strategic entrenchment both hinders the passing of legislation contrary to the interests protected by the Constitution and constrains the government to implement policies on their behalf. Consequently, constitutional amendments may be necessary to alter substantive policy preferences.

This substantive content of the Constitution changes how the government operates, as constitutional politics occupies the space of ordinary politics. Whenever its policy preferences conflict with constitutional provisions, the government will need supermajority support to implement its proposals, transforming constitutional rigidity into a decisive veto point in the system. Using the rules on the approval of constitutional amendments, political actors have more opportunities to prevent legislative changes than in the process of approving ordinary laws. Thus, the more detailed the constitutional provisions on policy are, the more constitutional reform tends to be a core aspect of governance.

Article 60 of the 1988 Constitution states its rules of change. Following Doyle's classification[25], this provision contains both process-constraints and content-constraints on constitutional amendment powers:

a) Process-constraints include rules about who may propose constitutional amendments and the procedure to be followed for their approval. Constitutional amendments may be proposed by one-third of the members of the Chamber of Deputies or the Senate, the President of the Republic, or more than one-half of the states' legislative assemblies, each manifesting its decision by a simple majority of its members.

Proposed amendments are to be submitted to a vote in each chamber of the National Congress in two readings and shall be considered approved if they obtain three-fifths of the votes of the respective members in both readings. Constitutional amendments are promulgated by the Directing Boards of the Chamber of Deputies and the Federal Senate. Moreover, the Constitution cannot be amended in three circumstances: during a federal intervention, a state of defense, or a stage of siege;

b) Content-constraints include provisions that forbid constitutional amendments aiming to abolish the federalist form of state; the direct, secret, universal and periodic vote; the separation of powers; and individual rights and guarantees.[26]

25 *Oran Doyle*, Constraints on Constitutional Powers, in: Richard Albert / Xenophon Contiades / Alkmene Fotiadou (eds.), The Foundations and Traditions of Constitutional Amendment, Oxford 2017, pp. 83-84.

26 In addition, Article 3 of the Transitional Constitutional Provisions Act (ADCT – Ato das Disposições Constitucionais Provisórias) provided for a "revision" of the Constitution five years after its promulgation, by the vote of the absolute majority of the members of Congress in a unicameral session. Under this provision, Congress passed six "revision constitutional amendments" in 1994.

As of December 2022, Congress had approved 128 constitutional amendments, using the procedure provided by Article 60. Consequently, almost all sections of the Constitution have undergone changes and most of these constitutional amendments added new provisions to an already sizeable constitutional text. Arantes and Couto[27] estimate that, in 2018, the Constitution increased from its original 1.855 provisions to 2.683 provisions. Given the party fragmentation in Brazil, these amendments required cross-party agreement to achieve a third-fifth vote, that is, the formation of supermajorities depended on extensive negotiations and compromises between political parties.

These numbers show that the many issues regulated by the Constitution create a constant need to adapt constitutional rules to changing circumstances. Although the Brazilian Constitution is rigid, its constraints on amendment powers do not prevent constitutional reform. The judiciary has not hindered constitutional change either. By August 2018, 35 constitutional amendments had been challenged before the Brazilian Supreme Court, which ruled against specific amendment provisions only in 15 cases.[28]

However, the approval of constitutional reforms does not mean that a given issue is no longer entrenched. In contrast, a constitutional amendment can reinforce entrenchment in two ways: by extending the existing rules to new situations or promoting changes that do not alter the core aspects of the previous regulation. Thus, constitutional reforms represent a "stress test"[29] for the degree of entrenchment of constitutional rules.

In democratic regimes, these tests usually stem from electoral changes. When a new coalition takes over the government and its program differs from constitutional rules, it is likely that this new administration will try to amend the Constitution. If the constitutional rules on the matter resist substantial change, constitutional entrenchment persists even when an amendment is passed.

The figure below shows the need for broad coalitions to reform the 1988 Constitution. It displays, in the Chamber of Deputies, the difference between the number of votes of the party of the president in his or her first year in office and the number of votes necessary to approve constitutional amendments.

According to Limongi[30], the executive has a high success rate under the 1988 Constitution, including the approval of constitutional amendments. However, without veto power on constitutional change, the president has less bargaining power and risks losing control of Congress's final decision. When hoping to change the status quo under a conservative Congress, a minority president must moderate his or her proposals to achieve supermajority

27 *Rogério Arantes / Cláudio Couto*, 1988-2018: Trinta Anos de Constitucionalização Permanente, in: Naercio Menezes Filho / André Portela Souza (eds.), A Carta: Para Entender a Constituição Brasileira, São Paulo 2019.

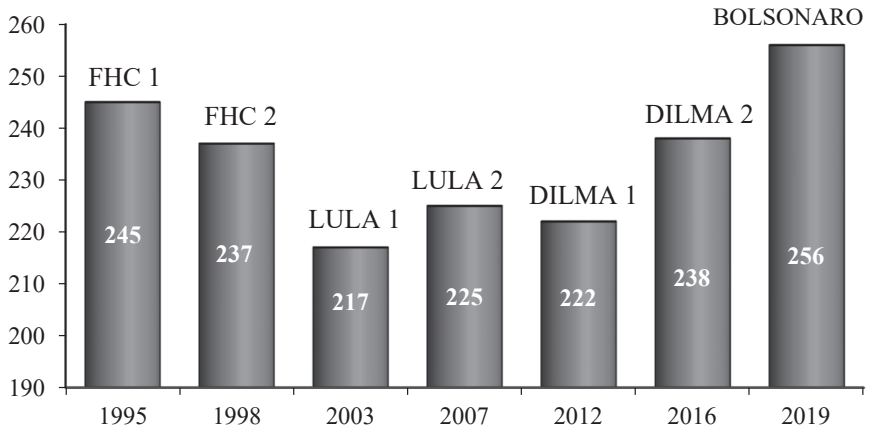
28 *Fabiana Luci de Oliveira / Diego Werneck Arguelhes*, O Supremo Tribunal Federal e a Mudança Constitucional, Revista Brasileira de Ciências Sociais 36 (2021).

29 *Starr*, note 22, pp. 3-4, 168-176.

30 *Fernando Limongi*, A Democracia no Brasil: Presidencialismo, Coalizão Partidária e Processo Decisório, Novos Estudos CEBRAP 76 (2006), pp. 24-25.

support, even though the result could be far from the president's ideal point. Under these circumstances, it may be more productive to give up substantial changes and propose amendments that do not alter some basic principles already established in the Constitution.

Figure 1. Vote Deficit to Supermajority (Chamber of Deputies)



Source: Author's elaboration

The ideological composition of the National Congress shows that the need of supermajorities may create a veto point for proposals to change the status quo. When studying the quorum to approve constitutional amendments, it is important to highlight which political groups have enough parliamentarians to block a proposal to reform the Constitution. In this way, we can identify whether a coalition of right-wing deputies and senators or a coalition of left-wing deputies and senators can command votes that represent a veto point in the constitutional system.

These numbers are 206 votes in the Chamber of Deputies and 33 votes in the Federal Senate. The analysis of the composition of the National Congress in all legislatures since 1990 shows that left-wing parties have never reached this level in any of the Houses of Congress. In the Chamber of Deputies, the best result obtained by the left was 179 votes in the 2011-2015 legislature, while its best result in the Federal Senate was 28 votes in the 2015-2019 legislature. Furthermore, only in the 2011-2015 legislature did the left-wing parties have more seats in both houses of Congress than the right-wing parties. Thus, apart from this legislature, right-wing parties have always been better positioned to use their

votes in the Chamber of Deputies and/or the Federal Senate to block proposed constitutional amendments, together with the votes of parliamentarians from center parties.[31]

These data show that conservative parties are in a privileged position to defend their interests through the Constitution. Although several other factors may contribute to the voting decision of parliamentarians, from their participation in the governing coalition to rewards for their alignment[32], the parties' ideological orientation cannot be ruled out as one of the factors that explains the adherence or resistance of deputies and senators to certain proposals. Therefore, constitutional rigidity in Brazil is a veto point that may be triggered especially by center and right-wing parties, creating difficulties to approve constitutional amendments that involve distributive conflicts.

The frequency of constitutional reform in Brazil also relates to distributive issues. As many constitutional amendments changed fiscal and social policy provisions, they reveal the constant intent to entrench these issues. The analysis of these amendments will show whether these attempts have succeeded.

C. Entrenching Fiscal Policy

After World War II, in Europe and the USA, one of the main factors for reducing inequality was the creation of a system of progressive taxation on the highest income and assets, which, in addition to increasing the revenues needed to finance the expansion of the welfare state, decreased the concentration of income in society.[33] In contrast to this trajectory, Brazil has a regressive tax system based on indirect taxation, which reduces the redistributive effects of fiscal policy. Several studies show that the taxes paid by the poor may even exceed the value of government transfers that they receive.[34]

31 My classification of Brazilian political parties is based on *Timothy J. Power / Cesar Zucco Jr.*, Estimating Ideology of Brazilian Legislative Parties, 1990–2005: A Research Communication, Latin American Research Review, 44 (2009), pp. 218-246, and, from the same authors, Elite Preferences in a Consolidating Democracy: The Brazilian Legislative Surveys, 1990–2009, Latin American Politics and Society 54 (2012), pp. 1-27, and Fragmentation without Cleavages? Endogenous Fractionalization in the Brazilian Party System, Comparative Politics 53 (2021), p 477-500. The number of seats was taken from the "Radiography of the New Congress", carried out regularly by the Inter-Union Department of Parliamentary Advice (www. diap. org. br/ index. php/ publicacoes/ category/ 13-radiografia-do-novo-congresso, last accessed on 14 July 2022). The classification is as follows: a) left: PT, PDT, PSB, PCdoB, PSOL, PCB/PPS/CID; b) center: PMDB/MDB, PSDB, PV; c) right: PFL/DEM, PDS/PPR/PPB/PP, PR/PL, PTB, PSD.

32 *Arnaldo Mauerberg Junior / Carlos Pereira*, How Valuable Is a Presidential Cabinet? Measuring Ministries' Political Attractiveness in Brazil, Latin American Politics and Society 62 (2020), pp. 25-45.

33 *Thomas Piketty*, Capital and Ideology, Cambridge 2020, pp. 445-462.

34 *Sean Higgins / Claudiney Pereira*, The Effects of Brazil's High Taxation and Social Spending on the Distribution of Household Income, CEQ Working Paper No. 7 (2013); *Maria Helena Zockun*, Equidade na Tributação, in: José Roberto Afonso / Melina Rocha Lukic / Rodrigo Octávio Orair / Fernando Gaiger Silveira (eds.), Tributação e Desigualdade, Belo Horizonte 2017.

The 1988 Constitution largely maintains the tax system developed during the military dictatorship[35] but expands the constitutional rules on the matter. The Constitution defines the taxes of the Union, the states, the municipalities, and the federal district[36]; establishes rules for revenue sharing between the federal units; and provides for limitations of tax power, among a wide range of provisions. The main taxes provided for by the Constitution are shown in the table below.

Table 2. Constitutional Rules on Taxation (selection)

	Taxes on income and profits	Taxes on goods and services	Taxes on property	Taxes on payroll
Union	• Income tax (IR) • Contribution on corporate profits (CSLL)	• Tax on industrial products (IPI) • Contribution on corporate gross revenues (COFINS)	• Rural property tax (ITR) • Tax on large fortunes (not yet implemented)	• Social security contributions (private and public sector) • Severance fund contribution (FGTS)
States	X	• Tax on the circulation of goods and services (ICMS)	• Tax on inheritances and donations (ITCD) • Tax on automotive vehicles (IPVA)	• Social security contributions (public sector)
Municipalities	X	• Tax on services (ISS)	• Tax on urban land property (IPTU) • Tax on real state transfers (ITBI)	• Social security contributions (public sector)

Source: Author's elaboration

The Constitution regulates in detail some of these taxes, defining their bases and exemptions, even for states and municipalities. However, the most innovative characteristic of the 1988 Constitution in this field is the creation of "social contributions" (COFINS and CSLL) to finance social welfare policies (health, social security, and social assistance). Through these taxes, the 1988 Constitution intended to guarantee an exclusive source of revenue to expand social policy and fulfil the government's new obligations regarding social rights (Article 195). In addition, employers and workers also contribute to social security, and

35 *Kurt Weyland*, Democracy without Equity, Pittsburgh 1996, pp. 106-117; *Gabriel Ondetti*, The Roots of Brazil's Heavy Taxation, Journal of Latin American Studies 47 (2015), pp. 749-779.

36 The federal district has the same tax powers as the states and municipalities.

there are other payroll taxes paid by employers, such as the severance fund contribution (Fundo de Garantia do Tempo de Serviço (FGTS)), all of which are provided for by the Constitution.[37]

During their administrations, both Cardoso, in 1995 (*Proposta de Emenda Constitucional* n. 175/1995), and Lula da Silva, in 2003 (*Proposta de Emenda Constitucional* n. 41/2003), proposed an encompassing reform of the constitutional tax system. Among other changes, these proposals sought to unify the ICMS rates and bases, limiting the tax jurisdiction of the states, and increase the progressiveness of the ITCD and the ITBI. Lula da Silva's proposal also tried to facilitate the approval of a tax on large fortunes, providing for its regulation by ordinary law and not by a complementary law, which requires an absolute majority of votes in Congress. In both administrations, the veto power of the governors, the opposition of the business sector, and the multidimensionality of the proposed changes prevented the formation of a supermajority coalition in favor of the reform.[38] Thus, the tax system's tendency to become locked in[39] was reinforced by constitutional entrenchment in Brazil. The various constitutional amendments on the tax system approved since then have not changed the regressive nature of the Brazilian tax system.

Despite the reasons for these failures, they contributed to maintaining the Brazilian tax system's disproportionate dependency on indirect taxes. Orair and Gobetti estimate that more than 40% of the tax collection results from taxes on goods and services.[40] Moreover, the entrenchment of fiscal federalism rules encouraged the federal government to fund social policies by increasing social contributions, namely, COFINS, as these taxes are not shared with subnational governments.[41]

In December 2023, the National Congress finally approved a significant reform of the consumption tax system, creating new taxes on goods and services (Constitutional Amendment n. 132/23). However, this reform will not be fully implemented until January 2033 and does not contain specific measures to increase the progressiveness of the tax

37 Other constitutional rules provide revenue redistribution to subnational levels of government. Given the low collection of taxes on property, the revenues of the states and municipalities depend on their taxes on goods and services and transfers from the federal government.

38 *Murilo de Oliveira Junqueira*, O Nó da Reforma Tributária no Brasil (1995-2008), Revista Brasileira de Ciências Sociais 30 (2015), pp. 93-113.

39 *Starr*, note 22, pp. 136-137.

40 *Rodrigo Octávio Orair / Sergio Wulff Gobetti*, Tax Reform in Brazil: Guiding Principles and Proposals under Debate, International Policy Centre for Inclusive Growth, Working Paper No. 182 (2019), p. 9.

41 *Rodrigo Octávio Orair / Sergio Wulff Gobetti / Ésio Moreira Leal / Wesley de Jesus Silva,* Carga Tributária Brasileira: Estimação e Análise dos Determinantes da Evolução Recente – 2002-2012, Instituto de Pesquisa Econômica Aplicada, Texto para Discussão No. 1875 (2013), pp. 34-37; *Rodrigo Octávio Orair / Sergio Wulff Gobetti*, Brazilian Fiscal Policy in Perspective: From Expansion to Austerity, International Policy Centre for Inclusive Growth, Working Paper No. 160 (2017).

system. According to an official study[42], the new taxes will benefit the poorer states and municipalities, but their impact on income inequality is not yet measurable.[43]

Public spending in Brazil is also heavily constitutionalized. In addition to procedural rules on budgetary laws (Articles 165-169), the 1988 Constitution contains a number of revenue-earmarking and mandatory spending provisions that limit the government's ability to make decisions regarding the budget. These budgetary rigidities, such as provisions regarding pensions and transfers to states and municipalities, imply that the competition for public funds occurs at the constitutional level before the annual budgeting process.[44]

In 1993, after the failure of several economic stabilization plans, President Itamar Franco launched the "Plano Real" under the command of his then-minister of finance, Fernando H. Cardoso. One of the central measures of this economic plan was the creation of the Social Emergency Fund (Fundo Social de Emergência) in Revision Constitutional Amendment n. 1/94, partially funded by a 20% share of government revenues in 1994 and 1995. This measure intended to guarantee financial resources for government spending and thus limit increases in public debt. Under a new name, the Fiscal Stabilization Fund (Fundo de Estabilização Fiscal), this instrument was extended with minor changes under the Cardoso administration by CA n. 10/96, until 1997, and CA n. 17/97, until 1999.

Budget flexibilization assumed a new role after 1998, when Brazil negotiated an agreement with the IMF in the midst of a serious financial crisis. This agreement required the implementation of a fiscal adjustment program that included the achievement of primary budget surpluses to stabilize and reduce public debt[45]. Therefore, the Cardoso administration passed a new constitutional amendment (CA n. 27/00) creating the Release of Union's Revenues (Desvinculação das Receitas da União (DRU)), which de-earmarked 20% of the Union's revenues to generate primary surplus and support fiscal adjustment. This constitutional instrument was renewed by Cardoso in 2002 (CA n. 37/02) and maintained by all

42 *Sérgio Wulff Gobetti / Priscila Kaiser Monteiro*, Impactos Redistributivos da Reforma Tributária: estimativas atualizadas, Instituto de Pesquisa Econômica Aplicada, Carta de Conjuntura No. 60 (2023).

43 During the discussion on this amendment, President Lula's Minister of Economy, Fernando Haddad, recognized that difficulties in approving changes in property and income taxes forced the government to postpone them to a "second phase", after Congress passes the laws necessary to regulate CA n. 132 (Mônica Bergamo, Folha de S.Paulo, 17.07.2023, www1.folha.uol.com.br/colunas/monicabergamo/2023/07/haddad-diz-que-reforma-do-imposto-sobre-a-renda-enfrentara-resistencia-e-sera-feita-com-cautela.shtml, last accessed on 30 July 2024).

44 According to an IMF study, compulsory expenditures amounted to approximately 78% of the budget in 2016. See *Teresa Curristine / Jorge Baldrich / Matthew Crooke / Fabien Gonguet*, Brazil: Supporting Implementation of the Expenditure Rule through Public Financial Management Reforms, IMF Country Report No. 17/292 (2017), p. 18. Another study concluded that Brazil, Argentina, and Bolivia have the largest shares of rigid spending compared to the other Latin American and Caribbean countries. See *Santiago Herrera / Eduardo Olaberria*, Budget Rigidity in Latin America and the Caribbean: Causes, Consequences, and Policy Implications, World Bank Group 2020, p. 27.

45 *Orair / Gobetti / Leal / Silva*, note 41.

the subsequent administrations: Lula da Silva (CA n. 42/03; CA n. 56/07), Rousseff (CA n. 68/11), and Temer (CA n. 93/16).

The DRU's continuous renewal for almost two decades demonstrates the power of the constitutional entrenchment of fiscal adjustment in Brazil. By amending the Constitution on this issue, each administration constrained its successor to acknowledge the primary surplus rule as one of the cornerstones of economic policy. As these governments were unable to promote a structural change in the fiscal system, they maintained de-earmarking as a constitutional instrument to achieve fiscal targets and avoid an increase in public debt. Thus, the expansion of social spending in Brazil was constrained by the constitutional entrenchment of both the tax system and fiscal adjustment.

D. Entrenching Social Policy

The 1988 Constitution recognizes social rights as fundamental rights (Article 6). Moreover, constitutional rules specify the government's duties that correspond to these rights, define the guidelines of social policies, and establish their means of financing. Education is financed by general taxes and free of charge at all levels of study; mandatory education lasts for 14 years, and each level of government organizes its own educational system (Articles 205-214). Health care is also financed by general taxes and free of charge, and it is provided by the Unified Health System (Sistema Único de Saúde (SUS)) with the participation of all levels of government; the SUS offers universal coverage for a wide range of services, from prevention to curative assistance (Articles 196-200). Social security participation is mandatory, and its benefits are funded by taxes and contributions from employers and workers; in addition to the private sector system (Articles 201-202), the Constitution organizes the public service systems of the federal, state and local governments (Article 40). The federal minimum wage is the floor for pension payments (Article 201, Paragraph 2). Finally, social assistance is non-contributory and includes a variety of means- or income-tested policies directed to the more vulnerable groups of the population, such as elderly people and disabled people (Articles 203-204). All these provisions were regulated by the National Congress in the first decade after the promulgation of the 1988 Constitution.

Also importantly, the Constitution makes use of revenue earmarking to expand social spending. According to the original text of the Constitution (Article 212), the federal government should assign no less than 18% of tax revenues to education policies, and the states, municipalities, and federal district should assign no less than 25% of tax revenues, including federal transfers, to education.

This mechanism was extended to other areas of social policy by several constitutional amendments to ensure financing. Thus, the 1988 Constitution did not restrict itself to social

rights constitutionalization[46]. During the Cardoso administration, CA n. 12/96 created a new tax to finance the unified health system (SUS): the provisional contribution on financial transactions (Contribuição Provisória sobre Movimentação Financeira (CPMF)). Although labelled "provisional", this contribution was in force until 2007, as it was extended by CA n. 21/99 and CA n. 42/03 under the Lula da Silva administration.

CA n. 29/00 also focused on health policies, creating a temporary spending floor for all levels of government in this area until the approval of a federal law on the financing of the public health system. States should assign at least 12% and municipalities at least 15% of their tax revenues, including federal transfers. The federal government should adjust its allocation to health by the nominal change in GDP. Afterwards, CA n. 86/15 set the minimum expenditure at 15% of the net current revenues for the federal government, to be achieved in 2020.

Constitutional earmarking is also an instrument for creating funds, composed of percentages of governments' revenues, to finance specific policies. CA n. 14/96 instituted the Fund for Elementary Education (Fundo de Manutenção e Desenvolvimento da Educação Fundamental (FUNDEF)), which aimed to redistribute state and municipal resources, based mainly on ICMS collection, to ensure universal primary education and lower secondary education for ten years. The Union should complement the resources of those states that could not reach the minimum expenditure per student defined by law. After the approval of CA n. 53/06, the FUNDEB replaced the FUNDEF and expanded its target to pre-primary education and upper secondary education, increasing federal resources to the fund. CA n. 59/09 extended compulsory education to fourteen years and required the legislator to define the public funds to be invested in education as a proportion of GDP. This amendment also reduced the percentage of education resources released by the DRU in 2009 and 2010 and reinstated their previous earmarking from 2011. Finally, CA n. 31/00 created the Fund to Fight and Eradicate Poverty (Fundo de Combate e Erradicação da Pobreza (FCEP)), which was renewed by CA n. 67/10.

Constitutional rules also create mandatory social security expenses, such as private employees' and public servants' pensions. Unlike the above amendments, the two major reforms on this issue, passed during the administrations of Cardoso (CA n. 20/98) and Lula da Silva (CA n. 41/03), sought to reduce benefits and increase requirements, especially regarding the public sector system. The 1988 Constitution does not provide for social security earmarking, but these expenses have also constantly increased in recent decades, partially due to the use of the federal minimum wage as the floor for pension payments (Article 201, Paragraph 2).

46 *Adam Chilton / Mila Versteeg*, Rights without Resources: The Impact of Constitutional Social Rights on Social Spending, The Journal of Law and Economics 60 (2017), pp. 713-748.

Table 3. Constitutional Amendments on Fiscal Adjustment and Social Spending (1995-2018)

	Fernando H. Cardoso (1995-2002)	**Lula da Silva (2003-2010)**	**Dilma Rousseff (2011-2016)**	**Michel Temer (2016-2018)**
Fiscal Adjustment	• CA n. 10/96 (Fiscal Stabilization Fund) • CA n. 17/97 (Fiscal Stabilization Fund) • CA n. 27/00 (Release of Union's Revenues - DRU) • CA n. 37/02 (Release of Union's Revenues - DRU)	• CA n. 42/03 (Release of Union's Revenues - DRU) • CA n. 56/07 (Release of Union's Revenues - DRU)	• CA n. 68/11 (Release of Union's Revenues - DRU)	• CA n. 93/16 (Release of Union's Revenues - DRU) • CA n. 95/16 (New Fiscal Rule)
Social Spending	• CA n. 12/96 (Health) • CA n. 14/96 (Education) • CA n. 21/99 (Health) • CA n. 29/00 (Health) • CA n. 31/00 (Poverty Eradication)	• CA n. 42/03 (Health) • CA n. 53/06 (Education) • CA n. 59/09 (Education) • CA n. 67/10 (Poverty Eradication)	• CA n. 86/15 (Health)	X

Source: Author's elaboration

The 1988 Constitution created universal social policies, and several of its amendments aimed at guaranteeing public resources to support those policies. However, the coalitions that managed to approve those amendments were also constrained by fiscal policy rules.

E. Social Spending in a Constitutionally Entrenched Setting

The last sections demonstrate the widespread use of strategic entrenchment in Brazil. Although constitutional provisions on taxes, budget, and social spending serve different purposes, all of them limit the government's policy options. The interaction between fiscal and social policy is particularly relevant in highly unequal societies such as Brazil, which demand a significant increase in revenues to expand and improve welfare state programs.

Given the detailed nature of the 1988 Constitution, all elected administrations had an agenda of constitutional reform and needed to organize a coalition to guarantee that amendments were approved by Congress. Cardoso, Lula da Silva, and Rousseff (in her first term) succeeded in managing multiparty alliances that provided the necessary three-fifths vote to change the Constitution, despite the high costs created by these coalitions' heterogeneity[47]. The PSDB led a coalition composed of 6 parties, while the PT led a coalition of 8 parties (Lula da Silva) and 7 parties (Rousseff).[48]

The need for multiparty coalitions under the regime of the 1988 Constitution is a constant topic in studies of Brazilian politics. The well-known concept of "coalitional presidentialism"[49] describes how governability in Brazil relies on the organization and management of broad coalitions by the executive. According to Power[50], effective coalition management is one of the "political causes" of the relative success of Brazil's inequality reduction policies. On the other hand, many studies on Latin American countries have demonstrated that this type of alliance restricts redistributive policies, even when a center-left coalition is in power.[51]

However, the difficulty of approving a general tax reform demonstrates that even a large coalition may not be sufficient to convert the president's policy preferences into law. In Brazil, as we saw, the president cannot veto constitutional amendments or enact them by decree, which prevents the use of some tools avalaible to presidents to maintain their coalition's support.[52] Moreover, the overlap of constitutionally entrenched issues may impose further restrictions on the government's ability to advance its agenda.

From Cardoso administration to Rousseff administration, the entrenchment of fiscal policy demanded the approval of constitutional amendments to increase social policy spending and compelled the use of indirect taxes to finance this expansion. In addition, these administrations had to abide by the fiscal adjustment rules also enshrined in the

47 *Leonardo Avritzer*, Impasses da democracia no Brasil, Rio de Janeiro 2016, pp. 29-48; *Paul Chaisty / Nic Cheeseman / Timothy J. Power*, Coalitional Presidentialism in Comparative Perspective: Minority Presidents in Multiparty Systems, Oxford 2018, pp. 64-74.

48 *Frederico Bertholini / Carlos Pereira*, Pagando o Preço de Governar: Custos de Gerência de Coalizão no Presidencialismo Brasileiro, Revista de Administração Pública 51 (2017), pp. 528-550.

49 *Sérgio Abranches*, Presidencialismo de Coalizão: Raízes e Evolução do Modelo Político Brasileiro, São Paulo 2018; *Chaisty / Cheeseman / Power,* note 45.

50 *Timothy J. Power*, The Reduction of Poverty and Inequality in Brazil: Political Causes, Political Consequences, in: Ben Ross Schneider (ed.), New Order and Progress: Development and Democracy in Brazil, Oxford 2016.

51 *Weyland*, note 35; *Giovanni Andrea Cornia*, Income Distribution under Latin America's New Left Regimes, Journal of Human Development and Capabilities 11 (2010), pp. 85-114; *Evelyne Huber / John D. Stephens*, Democracy and the Left: Social Policy and Inequality in Latin America, Chicago 2012; *Diego Sánchez-Ancochea*, Beyond a Single Model: Explaining Differences in Inequality within Latin America, Kellogg Institute for International Studies, Working Paper No. 434 (2020).

52 *Chaisty / Cheeseman / Power,* note 45, pp. 93-119.

Constitution. Under this scenario, the coalitions which conducted the expansion of social policy funding had to accept the limits imposed by pre-existing constitutional rules, but they differed in how they operated inside these limits.

The PSDB coalition inaugurated the strategy of amending the Constitution to guarantee the financing of social policies. Constitutional earmarking was applied to health, education, and poverty eradication policies and led to an increase in social spending: from 1995 to 2002, federal social spending *per capita* grew 32% in real terms.[53] However, this expansion slowed down after the adoption of primary surplus targets and the creation of the DRU. Federal social spending increased from 10.98% of GDP in 1995 to 12.56% in 2000 but only to 12.92% of GDP in 2002.[54]

This coalition also used social contributions such as CPMF and COFINS, to expand social spending.[55] Brazil's tax burden increased from 23.4% of GDP in 1988 to 32.3% of GDP in 2002, mainly due to the increase in social contributions, which the federal government did not share with the states and municipalities.[56] The COFINS, the most relevant of these contributions, collected the equivalent of 2.16% of GDP in 1995, the first year of Cardoso administration, and 3.54% of GDP in 2002, its last year.[57]

The creation of CPMF increased SUS financial resources. At the time of its repeal, in December 2007, CPMF collected the equivalent of 1.4% of GDP, although only part of these funds was directed to health care. An increase in CSLL rates partially compensated for this loss. In addition, the states and municipalities' indirect taxes (ICMS and ISS) were important sources of revenue for financing social policies at the subnational level.

The first years of the Lula da Silva administration did not change the main features of this policy. The new government maintained the Cardoso administration's macroeconomic management and raised the primary surplus target from 3.50% of GDP in 2002 to 4.25% in 2003. In this same year, CA n. 42/03 extended the DRU and CPMF until December 2007. From 1995 to 2016, the federal government's total tax revenue increased 150% and social contributions revenue increased 233%.[58] During the PT administrations (2003-2015), the COFINS represented nearly one third of the social welfare budget.

53 *Jorge Abrahão de Castro / José Aparecido Carlos Ribeiro / José Valente Chaves / Bruno Carvalho Duarte*, Gasto Social Federal: Prioridade Macroeconômica no Período 1995-2010, Brasília 2012, p. 9.

54 *Castro / Ribeiro / Chaves / Duarte,* note 51, p. 8.

55 *Ursula Dias Peres / Fábio Pereira dos Santos*, Orçamento Federal: Avanços e Contradições na Redução da Desigualdade Social (1995-2016), in: Marta Arretche / Eduardo Marques; Carlos Aurélio Pimenta de Faria (eds.), As Políticas da Política: Desigualdades e Inclusão nos Governos do PSDB e do PT, São Paulo 2019.

56 *Orair / Gobetti / Leal / Silva*, note 41, p. 34-37.

57 *Fabio Giambiagi*, Dezessete Anos de Política Fiscal no Brasil: 1991-2007, Rio de Janeiro 2007, p. 21.

58 *Peres / Santos,* nota 53, p. 112.

The approval of CA n. 42/03 demonstrates that the Lula da Silva administration continued to use the fiscal and social policy instruments created by the Cardoso administration. Faced with the expiration of the DRU and CPMF in December 2003, the government needed a supermajority to approve new constitutional rules on these matters in order to avoid a loss of fiscal control and a reduction in tax revenues. That same year, the government was facing difficulties in approving the more innovative aspects of its tax reform proposal, and the decision to maintain existing instruments facilitated the achievement of supermajority support. Thus, despite the opposition's electoral victory, the constitutional rules on these matters passed this stress test and had their entrenchment reinforced, as the new government maintained the core aspects of the tax system and fiscal adjustment rules. This entrenchment framed the cross-party consensus that had evolved since the Cardoso administration to expand social policies without compromising fiscal balance.

However, the PT's governments accelerated the expansion of social spending. From 2003 to 2010, the last year of the Lula da Silva administration, federal social spending *per capita* grew 70% in real terms.[59] Social spending continued to grow during Dilma Rousseff's first term (2011-2014) and was critical to improving social indicators in Brazil.[60] This acceleration impacted all fields of social policy, as we see in the figure below:[61]

As we saw above, passing constitutional amendments was necessary to increase the funding of the most important universalist policies. It is undeniable that Brazil's economic boom in the first decade of this century facilitated the expansion of social spending, but some political decisions also contributed to it. The PT governments used two instruments to limit the impact of fiscal adjustment on social spending: it neutralized the effects of de-earmarking on social policies[62] and reduced the primary surplus targets from 4.25% of GDP to 3.80% in 2008, 2.50% in 2009, and 3.30% in 2010. In 2012, Rousseff reduced it again to 3.10% of GDP and maintained this target until the end of her first term. These changes explain why the extensions of the DRU by CA n. 56/07 and CA n. 68/11 were compatible with the expansion of social policies during the PT administrations. In addition,

59 *Castro / Ribeiro / Chaves / Duarte,* note 51, p. 8-9.

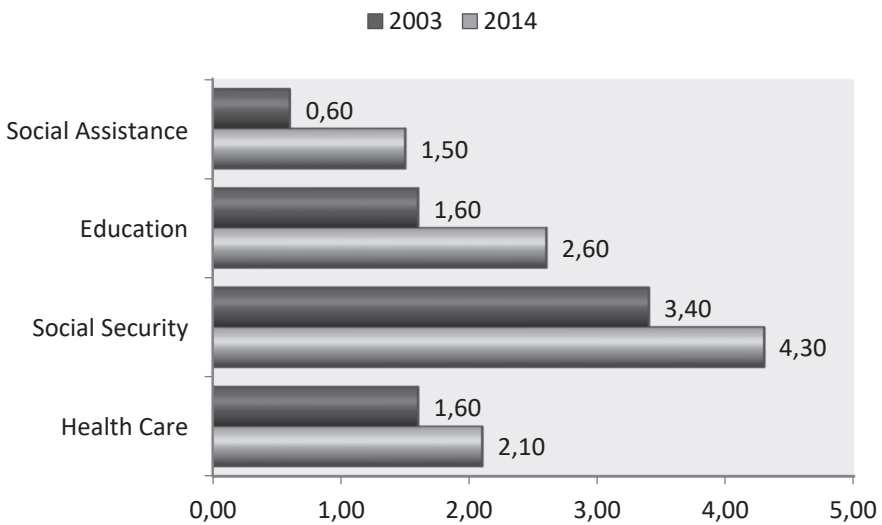
60 *Silva*, note 15; *Kerstenetzky,* note 19; *Arretche,* note 19.

61 Regarding social security, these data correspond to the payment of pensions and other benefits up to a minimum wage, as total social security expenditure reached 8.9% of GDP in 2014.

62 Initially, the DRU impacted education and social welfare policies as it released taxes and social contributions constitutionally earmarked for their funding. These de-earmarked revenues contributed to achieving primary surpluses. However, the continuity of the DRU during the Lula da Silva administration did not prevent the rise of social expenditures, as the government reallocated most of these revenues to the same social policies to fulfil its increasing duties in those areas. In 2010, the last year of Lula da Silva's term, 81% of the social contributions' released revenues were used to pay social welfare expenses, and the federal government reallocated more than the amount released by the DRU to education. See *Fernando Álvares Correia Dias*, Desvinculação de Receitas da União, Ainda Necessária? Brasília 2011. From 2003 to 2014, social welfare primary spending (health, social security, and social assistance) grew 273%. See Ministério do Planejamento, Orçamento e Gestão, Desvinculação das Receitas da União: PEC 87/2015, Brasília 2015.

other constitutional amendments sought to entrench the funding of these policies (CA n. 59/09, CA n. 67/10, and CA n. 86/15).

Figure 2. Federal Social Spending (% of GDP)



Source: Author's elaboration from *Secretaria do Tesouro Nacional*, Gasto Social do Governo Central: 2002 a 2015, Brasília 2016.

This analysis of the Cardoso and PT administrations demonstrates the impact of constitutional entrenchment on social policy in Brazil. The previous entrenchment of the tax and budgetary systems constrained both administrations' strategies to expand social policies. Unable to change these constitutional rules through a comprehensive reform, Cardoso, Lula da Silva, and Rousseff had to create budget earmarking for social expenditures and relied mainly on indirect taxes, like COFINS and ICMS, to fund them. This strategy allowed an expansion of social spending but, at the same time, limited the redistributive impact given the relatively low collection of direct taxes on income and property.[63]

Moreover, the increase in social spending during PT governments reveals that their administrations dealt differently with these constraints. During Cardoso's second term, the priority given to fiscal adjustment slowed down the increase in social spending to avoid an increase in public debt. On the other hand, Lula da Silva and Rousseff took advantage of economic growth to expand social policies rather than reduce public debt. However, both coalitions fell short to fully implement the Constitution's universal policies.

63 *Rodrigo Cardoso Fernandes / Bernardo Campolina / Fernando Gaiger Silveira*, The Distributive Impact of Income Taxes in Brazil, International Policy Centre for Inclusive Growth, Working Paper No. 171 (2018); *Orair / Gobetti,* note 40; *Passos / Guedes / Silveira*, note 14.

This second strategy was highly dependent on continuous economic growth, which made it possible to raise public spending while maintaining a stable public debt-GDP ratio. The limits imposed by this compromise between fiscal balance and social policy, along with the tax system's constraints, became apparent during Rousseff's brief second term. In 2015, Brazil suffered one of the most severe recessions in its history. The GDP was estimated at -3.7%, and the general government gross debt reached 65.5% of GDP. The consequent intensification of distributive conflicts amid serious corruption scandals led to a political crisis and the breaking of the coalition that allowed social spending to increase.[64]

Rousseff's impeachment, which lacked robust legal grounds, was the consequence of her administration's loss of legislative support. Moreover, this result makes clear that the cross-party consensus on social policy that emerged after the Cardoso-Lula era[65] was, in fact, dependent on maintaining fiscal balance. When social spending put fiscal adjustment at risk, center and right-wing parties stopped supporting the expansion of social policies, and the social democratic consensus collapsed.

The subsequent events demonstrate the continuing impact of constitutional entrenchment on Brazilian politics. A few months after Rousseff's deposition, the Temer administration approved CA n. 95/16, which enshrined a "New Fiscal Rule" that limits the growth in federal expenditures to the rate of inflation for twenty years, freezing primary spending at approximately its 2016 level, in real terms. This expenditure ceiling could only be revised in 2026 by a complementary law proposed by the executive.[66]

CA n. 95/16 also changed social spending earmarking in a significant way. Before this amendment, constitutional rules earmarked a minimum percentage of tax revenues for health and education policies. According to the New Fiscal Rule, health and education expenditures shall be annually adjusted by the inflation rate, and they will no longer benefit from tax collection increases. However, Temer's government did not promote a complete de-earmarking of social spending, as CA n. 95/16 maintained minimum levels of expenditures for these areas, despite the priority given to fiscal adjustment.

During the Bolsonaro administration, the entrenchment of social spending in Brazil passed a new stress test. In November 2019, the government sent three Proposals of Constitutional Amendment to the National Congress that aimed to promote further reductions in public spending and change budget earmarking rules. Regarding social spending, the most relevant of them was the Proposal of Constitutional Amendment n. 188/2019, in which health and education earmarking would be calculated jointly, as the resources granted beyond the constitutional minimum to one of these areas could be deducted in the

64 *André Singer*, O Lulismo em Crise: Um Quebra-cabeça do Período Dilma (2011-2016), São Paulo 2018.

65 *Timothy J. Power*, Brazilian Democracy as a Late Bloomer: Reevaluating the Regime in the Cardoso-Lula Era, Latin American Research Review 45 (2010), pp. 226-229.

66 A technical report from the IMF classified this measure as an essential step to rebuilding "fiscal credibility" in Brazil by avoiding continuing expenditure growth. See *Curristine / Baldrich / Crooke / Gonguet*, note 42, p. 12.

calculation of the minimum resources granted to the other. Consequently, an increase in health expenditure could lead to a decrease in education expenditure, and vice versa.

The legislative process of this proposal, however, was hampered by the outbreak of the COVID-19 pandemic, which generated "unparalleled fiscal flexibility" in the country's history.[67] Contrary to the government's intentions, the health crisis forced the administration to use a constitutional provision (Article 107, Paragraph 6, II of the ADCT) that allows an increase in public spending to meet "unpredictable and urgent" expenses, such as those resulting from public calamity. In addition, the National Congress approved CA n. 106/20, which created an extraordinary fiscal regime to address the pandemic.[68]

Another important change took place in education, through the approval of CA n. 108/20, which made FUNDEB a permanent constitutional rule. Before the expiration of CA n. 53/06, members of Congress and civil society organizations worked together to approve a new constitutional amendment to maintain the mechanisms of basic education funding.[69] This proposal was widely supported by both right-wing and left-wing parties, and it gained unanimous approval in the Federal Senate. The new FUNDEB increases the number of federal transfers to education, which are not subject to the spending cap, and maintains states and municipalities' budget earmarking in this area, which is based mainly on ICMS collection.

The approval of this constitutional amendment was a defeat for Bolsonaro's proposal to de-earmark social spending. Although the spending cap was still in force and the government managed to approve CA n. 109/21, which reinforces fiscal adjustment mechanisms, the new FUNDEB reduces the impact of these rules on basic education financing.

Constitutional amendments n. 106/20 and n. 108/20 demonstrate that attempts to implement a hard ceiling for public spending in Brazil did not eliminate minimum levels of social spending. Both health and education policies survived this stress test. The high number of beneficiaries of social policy expansion under the 1988 Constitution rendered it difficult even for a conservative government to gain supermajority support to dismantle these policies, despite the priority given to fiscal adjustment by the Temer and Bolsonaro

67 *Rodrigo Octávio Orair*, Política Fiscal e Resposta Emergencial do Brasil à Pandemia, in: Instituto de Pesquisa Econômica Aplicada, Políticas Sociais: Acompanhamento e Análise, Brasília 2021, p. 561.

68 Although the spending cap rule enacted by CA n. 95/16 continued to be formally enforced, the parallel budget created as a result of the pandemic has increased primary central government expenditures, which rose from 19.5% to 26.1% of GDP, reaching the highest level in the historical series (*Orair*, note 66, p. 565). More than half of these new expenses were allocated to the payment of an emergency aid for poor families, but supplementary resources for health care reached the amount of BRL 44 billion (*Orair*, note 66, p. 567 and 572). This increase exceeded the losses resulting from the application of the spending cap, estimated at BRL 22.5 billion, from 2018 to 2020 (*Fernando Gaiger Silveira / Maria Luiza Campos Gaiger*, O Gasto em Saúde e suas Bases de Financiamento: Dinâmica e Tendências para o Brasil, Rio de Janeiro 2021, p. 51).

69 *Carolina Esther Kotovicz Rolon / Milko Matijascic / Paulo Meyer do Nascimento / Sérgio Doscher da Fonseca,* Educação, in: Instituto de Pesquisa Econômica Aplicada, Políticas Sociais: Acompanhamento e Análise, Brasília 2021.

administrations. The continuous practice of constitutional earmarking provided an institutional framework that facilitated the creation of new public expenditures, either due to the pandemic or the financial needs of states and municipalities. In addition, Bolsonaro approved three other constitutional amendments (CA n. 113/21, CA n. 114/21 and CA n. 123/22) to expand basic income programs, with the aim of increasing his votes among the poor in the 2022 elections.

From the Cardoso to the Bolsonaro administrations, we can observe how social policy became constitutionally entrenched in Brazil. The enshrinement of social rights and the use of revenue earmarking assured a spending floor that led to an expansion of social policies, especially in education and social welfare, which resulted in an improvement of social indicators in Brazil. This expansion was greater during the PT governments, but even conservative governments have not succeeded in eliminating these constitutional rules.

This success, however, is partial. Under the 1988 Constitution, fiscal policy also became entrenched and limited the sources and funding of social spending. Different administrations had to make use of indirect taxes to finance social policy, and these administrations also had to abide by fiscal adjustment rules that reduced the allocation of resources to social expenditures. These constitutional constraints limited the expansion of social policies in Brazil and their redistributive effects.

Thus, the use of strategic entrenchment in the 1988 Constitution has both a conservative and a progressive side, creating a constitutional framework that is able to reduce the extreme levels of poverty in the country, but that falls short of a significant reduction of the inequality that pervades Brazilian society. Using Sitaraman's study on constitutional design and economic inequality, we can characterize the 1988 Constitution as anti-poverty. This type of constitution contains provisions that establish minimum social and economic rights, but its focus on a minimum core, even when these rights are justiciable before the courts, just alleviates the "greatest material or dignitary deprivations" and does not address inequality. Anti-poverty constitutions only lift up those at the very bottom, but provide "no remedy to the problem of accumulation of great wealth at the very top, and does not aspire to ensure relative equality as a society goal".[70]

Although the 1988 Constitution provides for universal social rights, its functioning did not consolidate the kind of redistributive policies that created a more egalitarian society in other countries. Constitutional entrenchment served not only to allow for an unprecedented expansion of social spending in Brazil, but also to limit its impact on economic inequality.

E. Concluding Remarks

The history of transformative constitutionalism in Brazil is twofold. The 1988 Constitution provides the state with appropriate means to implement social policies, but also maintains

70 *Ganesh Sitaraman*, Economic Inequality and Constitutional Democracy, in: Mark Graber / Sanford Levinson / Mark Tushnet (eds.), Constitutional Democracy in Crisis?, Oxford 2018, p. 543.

a regressive tax system and imposes limits on the expansion of social spending. Although there has been a significant reduction of poverty in the last three decades, great socioeconomic inequalities remain in the country.

Focusing on the relationship between the executive and the legislative powers, our study shows that both fiscal and social policies were entrenched in the 1988 Constitution, ultimately limiting the policy options of different administrations and forcing the approval of constitutional amendments to ensure social spending. However, this expansion was based mainly on a regressive tax system and was limited by fiscal adjustment rules. The conservative majority in the National Congress agreed to establish minimum spending levels on policies such as health and education, but this was insufficient to modify unequal structures in Brazilian society.

The promises of social change made by the 1988 Constitution have not yet been fulfilled. It is true that achieving equality is a task for many generations, and we must remember that this Constitution was able to survive the attacks of the last government. However, it is equally important to understand which constitutional mechanisms limit social progress.

BUCHBESPRECHUNGEN / BOOK REVIEWS

Wim Voermans, **The Story of Constitutions: Discovering the We in Us**, Cambridge University Press, 2023, 388 pages, $29.99/36,99 €, ISBN: 9781009385046

By a stroke of luck, just one year after graduating from law school, I was selected to teach at one of Brazil's top universities. While this opportunity brought me immense joy, it also came with significant anxiety. Tasked with teaching an introductory public law course to first-year students, I faced the daunting challenge of distilling complex concepts like the "state", "public powers", and "constitutions" into clear and engaging lessons for 18- to 20-year-olds fresh out of high school.

However, what occupied my thoughts the most at that time was how to explain to these young students the reasons for having a constitution and the historical narratives behind the evolution of constitutionalism. My utopian idea – much like the questions Voermans received from his friends studying economics, literature, history, and sociology during his university days (p. 1-2) – was to demonstrate to my students "why it was good to have a constitution or a legal system; why nearly the whole world had these institutions; what the economic, political, or social consequences of constitutional systems were; whether it mattered which kind of systems were in place and so on" (p. 2). I aimed for them to grasp not just the technical aspects but also to appreciate why constitutions are crucial for political and social organization and to ignite their curiosity about the historical narratives that have shaped modern constitutionalism.

Given this, it seemed that I, then in my late twenties, faced the same doubts and uncertainties that led Wim Voermans to write the book under review. Even as an experienced professor with over 30 years of teaching in courses like the one I was venturing into for the first time, Voermans encountered similar questions and challenges. As Voermans himself states, it was these very uncertainties and the desire to address them that motivated him to write this book. To my great misfortune, Voermans' book did not exist during my early teaching adventures. Had I had access to it then, I am certain that my journey would have been significantly easier.

"The Story of Constitutions: Discovering the We in Us" is the kind of book that challenges the notion of a linear narrative in the development of human society. In this context, the idea of constitutions as social phenomena is explored from investigative angles often overlooked by legal scholars who tend to focus on more concrete and specific issues within the constitutional and legal realm. Voermans even admits that the inspiration for the book stems from simple yet profound questions that troubled him deeply whenever he paused to reflect, such as: "how did we end up in a world of constitutions, a world aspiring to be ruled by law? Where does this all come from? What consequences does this have?" (p.2).

Divided into an introduction and five parts, "The Story of Constitutions: Discovering the We in Us" invites readers from all backgrounds to embark on a journey through the

world of constitutions, blending storytelling with a deep exploration of legal, political, and historical contexts. More than that, the book aims to be "a narrative about a journey and at the same time an experiment in making the medium (this book) part of the message (the story of constitutions)" (p. 27). It is structured in a clear and accessible manner, guiding readers through fundamental inquiries: where constitutions emerge, their historical development, the concept and types of constitutions, their practical impacts, and, ultimately, the role of constitutions in shaping societal perceptions. Or, as Voermans puts it, each part of the book "follows the trail of basic questions on where, whence, why, what and how, as they appear in our exploration" (p. 29).

To provide a comprehensive exploration of constitutional phenomena from proliferation to the nuanced realities they create, Voermans masterfully interweaves personal anecdotes, historical events, and theoretical insights, making complex constitutional concepts accessible and engaging. This book not only sheds light on the origins and development of constitutional systems but also prompts readers to ponder the broader implications of living in societies governed by these foundational documents. It is a compelling read for anyone interested in understanding how constitutions shape our collective life and why they remain vital to the fabric of modern civilization.

Despite being one of those few and rare legal books that appeal to general readers, what truly sets "The Story of Constitutions: Discovering the We in Us" apart is its ambivalence. Thus, it is simultaneously light and practical for readers not versed in the humanities and social sciences while maintaining profound depth and rigorous methodology characteristic of a dense legal endeavor. Voermans deftly navigates the balance between accessibility and scholarly thoroughness, making the book an invaluable resource for both laypersons and academic audiences alike.

One of the highlights of the book is Voermans' remarkable ability to advance his central argument through an expansive historical analysis that spans the globe. From the agricultural revolution of c. 10,000 BC to the Greek city-states, from the Roman Empire to the feudalism of the medieval era, and from the American Federalist debates to the post-Soviet world, his narrative seamlessly connects these diverse contexts. Through meticulous historical facts and insightful analysis, he addresses the central question: "why are there so many constitutions?". This global and temporal breadth provides readers with a profound understanding of the universal quest for constitutional governance throughout human history.

It is interesting to note that Voermans does not claim to provide definitive answers to the myriad questions that arise throughout his exploration. Nevertheless, he suggests that a straightforward explanation for the proliferation of constitutions could lie in the notion that "they provide for the elementary human needs arising from large-scale collaborative arrangements" (p. 342). Moreover, he firmly cautions that "constitutions are not administrative toys" (p. 345). With this perspective in mind, gaining a deeper understanding of their origins and dynamics facilitates more effective management of the human cooperation that constitutions are designed to foster.

For all these reasons, while I am elated and enthusiastically recommend the book to anyone seeking a captivating journey through the history of constitutions, I also feel a twinge of regret for not having had access to such a profound work when I began my teaching career several years ago. As I have mentioned, there is no doubt that my early experiences with young students would have been significantly smoother had I been able to draw upon the vast knowledge contained in this book. Voermans' insights and thorough exploration would have provided invaluable support in my efforts to make complex constitutional concepts clear and engaging for my students.

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Kevin Fredy Hinterberger, **Regularisations of Irregularly Staying Migrants in the EU. A Comparative Legal Analysis of Austria, Germany and Spain**, Nomos Verlagsgesellschaft, Baden-Baden 2023, 398 pages, 32,05 Euro, ISBN: 978-3-7489-1279-8.

Current political debates on migration law in the EU are characterised by a perceived loss of state control over migration matters and the call for effective and efficient management of migration flows. The intuitive way for decision-makers to regain control seems to be a constant emphasis on the need to effectively combat irregular migration by hindering access to Europe in the first place[1] and – especially on member state level – increase efforts to return irregular staying migrants[2]. Within this context, *Kevin Fredy Hinterberger*'s book "Regularisations of Irregularly Staying Migrants in the EU - A Comparative Legal Analysis of Austria, Germany and Spain" provides a refreshingly new perspective by moving the focus from return to regularisation.

From the outset, *Hinterberger* highlights the important and often overlooked fact that just like "legality" and "illegality",[3] the terms "regularity" and "irregularity" in migration law do not refer to pre-legal factual circumstances, but are the result of norms created

1 See the various legislative measures under the EU's New Pact on Asylum and Migration, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en (last accessed on 7 November 2024); for an assessment of current EU migration policies regarding access to the territory, see *Bast/von Harbou/Wessels*, Human Rights Challenges to European Migration Policy, Baden-Baden 2022, pp. 28-39.

2 We Have to Deport People More Often and Faster, Der Spiegel, https://www.spiegel.de/international/germany/interview-with-german-chancellor-olaf-scholz-we-have-to-deport-people-more-often-and-faster-a-790a033c-a658-4be5-8611-285086d39d38 (last accessed on 7 November 2024).

3 *Tobias Klarmann*, Illegalisierte Migration. Die (De-)Konstruktion migrationsspezifischer Illegalitäten im Unionsrecht, Baden-Baden 2021.

by the state itself (p. 27). Furthermore – and in stark contrast to the public discourse on migration policy –, the author does not focus on irregular entry, as the respective numbers are way lower than often portrayed, with most irregular migrants being so-called visa-overstayers (p. 32). Instead, the core hypothesis of the book is that the most effective way to combat irregular migration is the tool of regularisations as a supplement to current return policies, which have proven to be inefficient (p. 33). This leads to the three subquestions that are addressed in the study: What are the regulations on regularisation in Austrian, German and Spanish immigration law? How and to what extent could regularisation be used to combat irregular stays? And does harmonisation at EU level offer any advantages over domestic rules?

The detailed introduction succeeds at clearly carving out the research interest and convincingly limiting the scope of the book. Here – and throughout the entire volume –, it is very clear how the study contributes to the state of the art and why the author chose to make certain decisions. Methodologically, *Hinterberger* applies a critical-contextual approach, which takes a functional method of comparison as a starting point and adds additional layers by emphasizing both the socio-political context in which norms are situated and – following *Frankenberg* – the potential to use comparison in a hegemony-critical way (pp. 38-42). These methodological considerations show that the comparison is conducted on a firm theoretical basis, which is closely linked to the Critical Legal Studies movement. From this theoretical background stems the decision of the author to take a migrant-centered perspective (pp. 42; 51-52). This statement of positionality is highly valuable for reasons of methodological reflectivity, given the necessarily political nature of migration law.[4] Unfortunately, the relationship between the critical-contextual method of comparison, critical legal theories and the specific power-relations in migration law remain slightly underdeveloped. Thus, it remains unclear how precisely the migrant-centered perspective features in the comparison and how it influences the outcome.

Chapter 1 clarifies the key concepts of the book and provides a definition of the term regularisation which forms the basis for the comparison in the following chapters: "Regularisation is [a] decision by an administrative authority (or a court) which grants irregularly staying migrants a right to stay provided certain minimum requirements are met" (p. 58-59). This chapter is particularly worth reading as it goes far beyond a mere prerequisite to set up the comparison. Instead, the discussions of the various elements of the definition provide remarkable conceptual contributions in their own right. *Hinterberger* meets his objective to propose a definition that serves "to structure and depict a legal phenomenon that has not received sufficient attention in current research" (p. 59) and that "may be used for other (scholarly) studies" (p. 59). The same holds true for the conceptualisation of the right to stay, especially the different nuances of regular and irregular stay and the analysis on how the concept of "toleration" fits into these categories (p. 82). Toleration

4 See *Anuscheh Farahat*, Human Rights and the Political: assessing the Allegation of Human Rights Overreach in Migration Matters, Netherlands Quarterly of Human Rights 40 (2022), p. 199.

of irregular staying migrants – existing as a statutory status in Austria and Germany (p. 80) and as an unregulated *de facto* situation in Spain (p. 228) – does not meet the definition of regularisation, as it (only) suspends deportation without granting a right to stay. While all the concepts presented here are later referred to in the comparative work, this conceptual work is relevant beyond the three jurisdictions analysed in the book and even beyond the context of regularisation.

In the following chapter, *Hinterberger* analyses the competence of the EU concerning irregular migration and regularisation under Art. 79 (2) TFEU. Turning to secondary law, the author points out that Art. 6 (4) of the EU Return Directive not only explicitly envisages regularisation as an alternative to the return of an irregularly staying third-country nationals (p. 96); it can even be argued that said provision provides for a "right to regularisation" in situations of permanent non-returnability (pp. 99-111). Here again, a certain tension surfaces regarding the instrument of toleration as, by definition, toleration is neither regularisation nor return. While the Return Directive in principle allows for the postponement of removal (Art. 9), so-called 'chain-tolerations' ("*Kettenduldungen*") over long periods of time are concerning from the perspective of EU law (pp. 97-98). The author goes on to argue that the EU is competent to enact a hypothetical 'EU Regularisation Directive': The objective to "combat irregular migration" requires reducing the number of irregularly staying migrants by whatever means (p. 113) – an objective that is effectively met through regularisation. While this argument is very convincing, structurally speaking it is not relevant for the comparison of the domestic regulations and therefore could have been shifted to the final chapter of the book where the proposal for an 'EU Regularisation Directive' is discussed in detail (see below).

The following Chapters are dedicated to the comparison of Austrian, German and Spanish law on regularisation. In line with the emphasis on contextual comparison, a significant part of the book (pp. 133-225) provides the necessary context on the respective legal orders, the historical developments of each state's migration law, the different authorities, their competences and systems of judicial review. While these explanations – by their very nature – are not necessarily the most captivating to read, they are nevertheless well written, very detailed and thorough. It is evident that *Hinterberger* handles the context as an integral component of the comparison. Remarkably, all three jurisdictions receive almost exactly equal attention both in space and in level of detail, echoing the author's declared objective "to adopt an (almost) objective position" (p. 47) towards each of them.

The actual comparison of regularisations is conducted in Chapter 4. Instead of presenting separate national reports, the volume chooses an integrated approach, meaning that all different regularisations are categorised, compared and assessed based on their purpose. Additionally, the different forms of regularisation are not just described, but also reviewed in light of their compatibility with the relevant provisions of international law (meaning mostly the ECHR) and EU law. In this regard, *Hinterberger* also manages to organically weave in the jurisprudence of the European courts into the comparison (see e.g. pp. 229; 334). Overall, the integrated approach provides for a very pleasant reading experience,

as it strikes a fine balance between clarity, precision, and readability. The six purposes of regularisation identified are non-returnability (pp. 227-258), social ties (pp. 259-270), family unity (pp. 271-287), vulnerability (pp. 288-318), employment and training (pp. 319-339) and other national interests (pp. 340-350). The analyses of the regularisations for reasons of non-returnability are particularly noteworthy, as they best underline the general argument of the book: Political and public discourse on migration policy frequently refers to the number of irregular staying migrants and the necessity of more effective enforcement of returns. If one, however, acknowledges the fact that a large proportion of this group is non-returnable for legal and/or factual reasons, it becomes clear why regularisation in many cases is the only effective means to tackle irregular stays (see also pp. 245-255).

One key finding of the comparison is that all three member states have differentiated systems of various regularisation provisions. Regularisation therefore is nothing extraordinary but a well-established part of the 'toolbox' of contemporary migration management at national level (p. 358). At the same time, the analysis reveals several obstacles, as the requirements for regularisation are often very difficult to meet in practice, making some of them – for example the Austrian 'residence permit in particularly exceptional cases' practically "near-irrelevant" (p. 352). As a third key insight, the comparison highlights a large degree of fragmentation across the three states (p. 359) with a number of various legal institutes – some more effective in practice than others – that all aim at serving the same purposes listed above.

Finally, and based on these findings, Chapter 5 provides an outlook by proposing an 'EU Regularisation Directive' (pp. 355-367). Without ignoring political realities (p. 356), *Hinterberger* draws conclusions for how regularisation could be harmonised across the EU and what the core content of the necessary regulations should look like based on the insights from the comparison of Austrian, German and Spanish law.

It is highly welcome that this important book, which had previously been released in German,[5] is now available open-access for an even wider audience in an updated English version. It is worth reading not only for the detailed and exhaustive examination of regularisations in the three jurisdictions, but also for the broader conceptual contributions on regularity and irregularity in migration law and for sparking discussions about the future of regularisation as a tool of EU migration policy. Above all, the book serves as a much-needed and timely reminder that when it comes to pursuing an active and efficient policy of migration management, there are other options available besides closing borders, lowering standards, and demanding to return the 'non-returnable'.

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5 *Kevin Fredy Hinterberger*, Regularisierung irregulär aufhältiger Migrantinnen und Migranten. Deutschland, Österreich und Spanien im Rechtsvergleich, Baden-Baden 2020.

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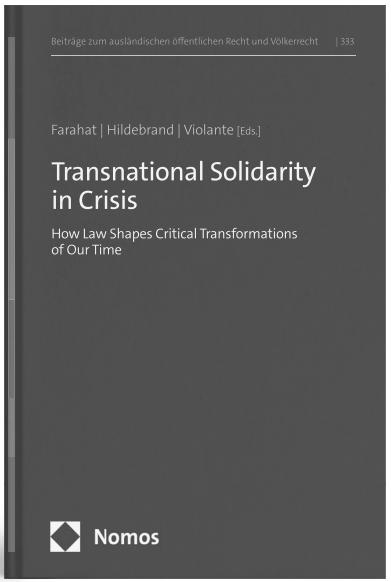
When Push Comes to Shove



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Crises are privileged moments of solidarization and desolidarisation. On one hand, solidarity-based institutions are often at issue in times of crises. On the other hand, solidarity is invoked to mitigate or overcome crises. This puts political and legal authorities, in which solidarity is negotiated, under pressure. This book analyses the impact of such dynamics from a legal and political science perspective by focusing on three societal crises of our time: economic crises, migration crises, and pandemics. The authors combine theoretical and empirical analysis with legal considerations to highlight the role of institutions and law in shaping the dynamic between solidarity and crisis.