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Criminal Law Expansion and the Enemy Criminal Law: It Is Among Us

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Abstract: The present article aims at analyzing what is understood by expansion of the criminal law. This expression was coined by the Spanish penalist Jesus Maria Sanches. We will reflect on the consequences brought by the post-industrial society to the field of criminal law with its evolutions and influences on the punitive system according to its applicability having as a measure the restrictive penalty of law and the flexibility of the citizen's guarantees, whether for more or less, depending on the seriousness of the criminal act committed. In this context we will examine what characterizes the expansion movements and its consequent punitivism that came with the birth of the enemy criminal law theory which was developed by Günther Jakobs. A brief biography of this author will be exposed then we will pass on to the analysis of his penal functionalism in which the enemy criminal law is inserted. We will identify who the enemy is in relation to what the citizen is; how the enemy expresses himself within the criminal law and its reflections in the criminal legislative production, especially the Brazilian one. In order to develop this work we applied the deductive scientific method together with the hermeneutical method and as such it can be classified as an explanatory research because it is a theoretical approach of the proposed theme.

Keywords: Expansion, Law, Criminal, Functionalism, Enemy

1. Introduction

In carrying out this paper, we intend to reflect on the consequences brought by post-industrial society to the area of criminal law with its evolution and influences on the punitive system along with its applicability, taking the restrictive penalty of law and the flexibility of the citizen's guarantees, either greater or lower, depending on the severity of the committed criminal act, as well as investigating the consequences theses influxes bring with the emergence of new ideas and penal systems, so leading to the so-called enemy's criminal law.

To do this, we will firstly analyze what is meant by speeds of criminal, a topic developed by the Spanish Professor Jesús-Maria Sánches and its division into three speeds: the first one focusing on the prison sentence in its classic form; the second one, a relaxation of guarantees in favor of the offender, aiming for a milder penalty as well as restrictions on rights; and the third speed, which is a return of the application of the penalty restricting freedom with relaxation of constitutional guarantees.

Within this context, we will analyze the movements of symbolic criminal law and criminal *punitivism*, which, as proposed by the also Spanish Professor Manuel Cancio Meliá, are consequences of the third speed of criminal law that will lead to penal expansionism, a fertile field for the development of enemy criminal law.

We will now explain the birth of the idea of enemy criminal law. Initially, its emergence took place as criticism and then its acceptance and development as a penal doctrine popped out. Well, let us start with a short biography on its author, the German Professor Günther Jakobs, his academic career and main contributions to modern criminal law, especially the systemic functionalism he taught. We will soon explain what is meant by this system of criminal thought, addressing the philosophical and sociological roots of systemic functionalism, as well as its vision of legal effect and on which the legitimacy of criminal law and the purposes of punishment are based.

After this contextualization, we will finally delve into what is meant by enemy criminal law and its dichotomy with a supposed criminal right of the citizen. The understanding of citizen as different from a person for Jakobs. Who is the

enemy? How does he act? What are the instruments of procedural law and criminal material that express a struggle against the enemy?

Finally, we will briefly discuss the influence of such thinking on the creation of upcoming legislation that aims at combating anew form of crime, called "new *cangaço*", which is the object of a legislative proposal for proper punishment.

2. Objectives

In this article, we will carry out research on what is meant by the expansion of criminal law and the theory of enemy criminal law. The topic is relevant and is the reason for much discussion in national and foreign doctrines, with repercussions on criminal legislative production.

Taking into account the considerations highlighted above, we will seek to characterize the movements of expansion of criminal law, its speeds, its symbolism and criminal *punitivism*, ending with the analysis of the emergence of the enemy's theory of criminal law developed by Günther Jakobs.

From a brief biography on Günther Jakobs, we will analyze the penal functionalism, in which the enemy's criminal law is inserted. We will identify who the enemy is in dichotomy with the concept of citizen, how it is expressed within criminal law, its reflections on criminal legislative production, especially the national one, and analysis of both the national and foreign doctrinal criticisms the theory raises.

With this article, we aim to stimulate studies on the subject, while exposing the problems identified by the doctrine and the reception or not of Enemy Criminal Law by legislation.

3. Methodology

As regards methodology, the research will be exploratory, conducted through bibliographical study relating to the concept of expansion of criminal law, the understanding of penal functionalism and the study of enemy criminal law.

In preparing this paper, we applied the deductive scientific method together with the hermeneutic method, which can be classified as exploratory research, while being an explanation of the proposed theme.

The research carried out will be of the bibliographical type, through the analysis of books, monographs, dissertations, academic theses and scientific articles that deal in an analytical way on the topic at issue, as well as of the documentary type, with the survey of legislation facing the object of study, further to seeking to systematize the data collected in works and documents dealing in the topic.

4. Speeds of Criminal Law and Their Consequences

Jesús-Maria Silva Sánches, professor at the Pompeo Fabra College in the Spanish city of Barcelona, in his book, *La expanción del derecho penal Aspectos de la política criminal en las sociedades postindustriales*, reports what he understands by expansion and lists the speeds of criminal law, based on a greater or lesser incidence of the prison sentence and procedural guarantees for the accused.

In the aforementioned work, the Spanish criminal lawyer approaches the transformations that have occurred in Criminal Law as a direct result of modern crime, the result of a society shaped by globalization (post-industrialization). The work was launched in 1999 in Spain and attracted attention by analyzing problems that seemed to be distant in time and space, but ended up materializing in society.

The aforementioned author lists what characterizes penal expansionism and the generating phenomena, namely: new social interests; emergence of new social risks; state of insecurity noted by society; discrediting other instances of protection (administrative, civil and so forth).

Such factors would end up generating expansionist phenomena, which are: symbolic criminal law and the emergence of *punitivism*. Within the expansionist movement of Criminal Law, the Spanish author observes the application of criminal law and criminal procedure at different paces, thus creating the theory of speeds of Criminal Law, indicating three types of "marches". In this sense, Sánches write that

> *We previously made the characterization that, in my opinion, would be the speeds of Criminal Law. A first speed represented by the Criminal Law of prison, in which the classic political-criminal principles, the rules of imputation and the procedural principles would be rigidly maintained; and a second speed for case in which, as they are not crimes involving deprivation of liberty, but rather restrictive legal and/or pecuniary penalties, those principle sand rules could experience greater flexibility proportional to a lower incidence of the sanction. Finally, what has to be done is whether we can already admit a third speed of Criminal Law, in which the criminal Law that applies a custodial sentence competes with a broad relativization of political-criminal guarantees, imputation rules and procedural principles* [16].

From this author's perspective, we can explain the speeds of criminal law as per the following analyzed scheme.

The first speed of criminal law tends to give priority to the deprivation of liberty and the application of a prison sentence. All procedural and criminal guarantees are observed to – upon conviction, in the end – impose the prison sentence. It is the clear expression of classical philosophical criminal law.

In a second moment (speed), procedural and criminal guarantees are made flexible, aiming for a quick application of the sentence, but without having a criminal sanction involving deprivation of liberty. It highlights the application of the so-called restrictive penalties. These are minor crimes, of little harm to the community, wherein guarantees are removed in the name of granting and speedy application of the sentence.

In the national legal environment, we can cite – as an example – the law 9.09.95, the one that created special criminal courts and established crimes with less offensive potential, privileging the oral nature of the criminal procedure and consensus, while taking into account the possibility of application agreement between the parties and the extinction

of punishment of the perpetrator of the act upon compliance with the greed terms.

More recently, with the amendment of the Criminal Procedure Code (CPC) by law 13.964/2019, we can include, in this movement, the Non-Criminal Prosecution Agreement (NCPA), which authorizes the Public Ministry to propose the agreement to the person being investigated, when the latter has formally and circumstantially confessed to committing a criminal offense without violence or serious threat and with a minimum of 4 (four) years, as long as is necessary and sufficient for the reprobation and prevention of the crime, under conditions adjusted cumulatively and alternatively, in accordance with Art. 28-A of the CPC.

On the other hand, when talking about the movement of the third speed of criminal law, there is a move-away from procedural and criminal guarantees, aiming at the application of harsher penalties, depriving them of liberty, for agents who commit crimes that are more harmful to society, with their being punished more severely, and not having the right, the prerogative to enjoy, to make use of procedural and material guarantees existing in the Democratic State of Law.

Under these circumstances, we can bring – as an example of the legislative implementation of criminal law in the law 8,072/90, the law of heinous crimes – in the law of criminal organizations, law 12,580/2013, law 13,260/2016, which provides for the crime of terrorism. Such laws include in their provisions a minimization of procedural and material guarantees for agents who engage in typified conduct. As law 8,072/990 did not prohibit progression of regime in heinous crimes, it was later declared to be unconstitutional by the Federal Supreme Court.

From the concepts so far exposed, we observe that from the analysis of the third speed, new penal movements end up emerging, which are penal symbolism and *punitivism* [12].

Manuel Cancio Meliá, full professor of Criminal Law at the Universidad Autónoma de Madrid, teaches that *symbolic criminal law refers to the fact that criminal legislative inflation seeks not only to pursue the objective of giving impression of tranquility of an attentive and determined legislator, but without the manifest will directed towards a real application of the law* [12].

The use of Criminal Law is an instrument to produce tranquility through the act of promulgating norms intended not to be applied.

In characterizing what criminal expansionism is, the Madrid professor explains that *it brings back the resurgence of punitivism, characterized by the introduction of new criminal norms with the aim of promoting their effective application with complete firmness, I; e., there are processes that lead to new norms penalties to be applied – selectively, even in many cases – or there is a tightening of penalties for existing standards* [12].

Following this thought, with *punitivism*, there is a qualitative and quantitative increase in the scope of criminalization as the only political-criminal criterion. This perspective arises from a trend on the part of legislators to react firmly within a range of sectors to be regulated, within the framework of the "fight" against crime, increasing the penalties already provided for. As a very recent national example, we can cite the enactment of law 14,344/2022, which made the crime of homicide qualified and heinous when committed against a minor under 14 years of age, as well as increasing the penalty in certain circumstances.

Faced with this mist of thoughts, Cancio Meliá predicts that *(...) symbolic Criminal Law not only identifies a certain fact, but also (or above all) a specific type of author, but also not defined as equal, but as another. That is, the existence of the criminal norm – ceasing to aside the short-term technical-mercantilist strategies of political agents – pursues the construction of a certain image of social identity through the definition of authors as "others". And, on the other hand, it seems clear that, for this too, vigorous traits of exacerbated punitiveness are on scale necessary, especially when the conduct at issue has already been punished. Therefore, symbolic criminal law and punitivism maintain a fraternal relationship. Next, what arises from their union can be examined: the criminal Law of the enemy* [12].

Thus, in his view, mathematically symbolized, the result of the sum between penal symbolism and *punitivism* is the enemy's criminal law (penal symbolism + *punitivism* = enemy's criminal law) advocated by the German jurist Günther Jakobs.

5. The Birth of the Enemy's Criminal Law

By occasion of the Congress of German criminalists that took place in the city of Frankfurt, in 1985, Günther Jakobs exposed the topic for the first time, when he presented the work entitled *Incrimination of the state prior to the damage to a legal asset*[1].

On that occasion, in final topics, he began to outline some bases of his theories, as is the case of the normatization of the legal effect and the enemy's criminal law, which he treated in a critical way [6], launching unfavorable comments to it, by stating that *the existence of a criminal law is not a sign of the State's strength of liberties, but rather a sign that this form does not exist*, wherein the enemy's criminal law could only be legitimized as an emergency criminal law in its exceptional nature [10].

In 1999, at the Millennium Conference held in the city of Berlin, Germany, Jakobs returned to the subject. And, at this time, no longer making criticisms, but embracing the idea and discussing foundations for its possible applicability and legitimization within the criminal system, *defending a partial criminal law in which whoever behaves like an enemy must be treated as an enemy, as an "unperson"* [6], wherein the other half of criminal law would be focused on the citizen, creating the dichotomy between the citizen's criminal law and the enemy's criminal law.

[1] Original title in German Kriminalisierung im Vorfeld einer Rechtsgustsverletzung

This thought did not resonate immediately, remaining dormant until the terrorist attacks of September 11, 2001, when the issue began to gain relevance.

But before entering directly into the matter, we are moved to make some considerations about Günther Jakobs, its author, as well as the environment of systemic functionalism in which the idea of the enemy's criminal law is inserted.

5.1. Who Is Günther Jakobs

Like every system of thought typical of human sciences, Criminal Law evolves in line with contemporary philosophical movements. Thus, finalism ended up being overcome and we nowadays follow the development of penal dogmatics with the functionalist system.

Günther Jakobs and Claus Roxin are the exponents of penal functionalism. Each one having a different aspect, vision of the purpose of criminal law. Roxin works out a teleological perspective, while Jakobs opts for a systemic position. With these peculiarities of thought and despite their converging at the starting point, they diverge on the path and in reaching their conclusions about criminal law, its purpose and legitimacy.

In this sense, Callegari and Linhares write that

> *Functionalism is considered to be a paradigmatic revolution in Criminal Law that cannot be attributed to a single author. Therefore, we cannot speak of just one functionalism in Criminal Law, as there are several variants in this line of thought. However, two authors are considered the main defenders of the paradigm: The German researchers ¨Claus Roxin and Günther Jakobs.*
>
> *From these authors, there are two proposals for functionalist models in Criminal Law. The first model, focusing on the special preventive purpose of punishment, has Claus Roxin and Bernd Schünemann as its main representatives. The second model, represented mainly by Günther Jakobs, gives special emphasis to the theory of general positive prevention of punishment* [3].

As can be seen, these authors are of great importance in the studies of modern Criminal Law.

Penal doctrine books about Roxin, his life and work, placing him as a great representative of functionalism, as well as Hans Welzel's disciple and successor, are silent about Jakobs. There are few authors who talk about Jakobs and his system.

Such a vacuum may be due to Jakobs' thinking, which – unlike what happens with Roxin – is not easily accepted. He is controversial for touching on fundamental points not only of traditional criminal dogmatics, but also on fundamental rights and guarantees. Furthermore, to understand his work a little, we need to understand who he is, his biography and what he developed with his thoughts in favor of penal dogmatics.

Günther Jakobs is a criminal philosopher "for everyone and no-one" [13]. In this sense, we can say that Jakobs is currently the most controversial of the penal scholars.

On writing about Günther Jakobs' first inaugural book edition, Claus Roxin said:

> *This is the boldest and most consequential outline of a purely teleological system existing to date. With it, Jakobs not only elaborated (...) the dogmatic evolution of the last 20 years. The breadth of his work also surprises the reader with an avalanche of original reflections that, in a way, anticipate the next 30 years* [15].

Günther Jakobs was born in Germany, in the city of Mönchengladbach, on July 26, 1937. He is an author of law books, philosopher and professor emeritus of criminal law and Philosophy of Law. He studied Law at the Universities of Cologne, Kiel and Bonn, being a student of Welzel at the latter, where he ended up becoming his follower [1]. In 1971, he presented his doctoral thesis under the guidance of master Hans Welzel, with the theme *The competition between the crimes of homicide and bodily injury*[2].

In 1971, in an attempt to obtain his qualification for a professorship at the University of Bonn, he presented the work, again prepared under the supervision of Hans Welzel, entitled *Studies on the culpable crime of result*[3].

In 1986, he became a professor at the University of Bonn, where he gave classes in Criminal Law and Philosophy of Law. Previously directed by Welzel, Jakobs was director of Philosophy of Law Seminary and co-directed the Institute of Criminal Law at that institution [15].

He is now a retired professor of the University of Bonn, since 2002.

Although the national doctrine tells much more about Roxin as a disciple and successor of the mentor of finalism, Callegari [9] asserts that Jakobs was also a student of Welzel, and he was his true successor, as the Bonn professor was the one in charge of updating and continuing the work of the master and, later on, surpassed the ideas of the finalist school.

The merit of his work at the academic level was crystallized in numerous honorary titles that were granted to him, especially for the uniqueness and brilliance of his thought. Several titles of *Doctor Honoris Causa* were awarded to him by universities around the world, especially in Latin America, such as Argentina, Mexico, Peru and Colombia [15], but he still lacks recognition in Brazilian universities.

Using sociologist Niklas Luhmann's ideas on systems theory, Jakobs moved away from the finalist doctrine and created systemic functionalism based on communicative rationality. He created a system for criminal law based on a re-normatization of criminal legal concepts, aiming to direct them to the function that corresponds to criminal law [15].

Within this functionalism, he developed several theories that are highly appreciated in criminal law, such as: additions to the theory of objective imputation; a new vision of the criminal legal effect and the legitimacy of criminal law; and his controversial enemy's criminal law, as opposed to the citizen's criminal law.

Aware of this, we draw scholars' attention to the importance of studying the works of this German author, who develops a fruitful and in-depth study of criminal dogmatics, based on the

[2] Original title in German Die Konkurrenz von Tötungsdelikten mit Körperverletzungsdelikten

[3] Original title in German Studien zum fahrlässigen Erfolgsdelikt.

most modern aspects of society's behavior.

Jakobs should not be forgotten, but rather studied and understood. Criticized by his possible flaws and exaggerations. But no doubt, he has a legacy to be cultivated and explored not only in academic field, but also in the practice of the courts, in legislation, and – within this legacy – his systemic functionalism is a subject that must be understood for a good analysis of his work.

5.2. The Systemic Functionalism

The systemic or normative functionalism advocated by Günther Jakobs is not a common subject in criminal literature, especially in the domestic one.

In general terms, systemic functionalism aims not only to explain the legal system, but also to compose a global analysis of the entire social system, with the objective centered on human action [17].

This ideology starts from a conception of society as a harmonic organism in which each of the members that makes it up performs a specific function that allows for a coordinated system, so that the Law no longer has to delimit or protect certain values, but only to ensure the structure of the social system and to guarantee its functional capacity, finding its basis in the fact *that actions are governed by expectations, which find their delimiting marks in the systems, correspondingly to several variables, one of which would be constituted by legal norms* [17].

Within the criminal sphere, functionalism is inserted in a methodological context in which legal constructions must be consciously guided by certain values and purposes which – provided by a criminal policy of the Social Democratic State of Law – adds a function of subsidiary protection of legal assets to criminal law, through general and special prevention, always respecting constitutionally guaranteed rights.

Functionalist currents of thought defend a finalist intervention according to normative concepts, aiming to build up a penal model that is more porous to political-criminal remodeling, structuring the illicit in light of the function of criminal law.

It is exactly at this point that the two great exponents of criminal functionalism get separated, as they diverge on what the function or legitimacy of Criminal Law would be.

In systemic or normative functionalism, the conceptual content is extracted exclusively from the function of the social system under appraisal. Its conception of Criminal Law adapts to criminal policy, assuming the modernizations of Criminal Law. Functionality of the system in force.

Already in the first paragraph of his work *Society, norm and person,* in which he lays the foundations of his system, Günther Jakobs adds that *criminal-legal functionalism is conceived as that theory in according to which Criminal Law is oriented to guarantee normative identity, guaranteeing the constitution of society* [10].

And, to guarantee society, Jakobs takes the idea of the systems theory advocated by Niklas Luhmann, the German jurist and sociologist, as a starting point, because, for him, this teaching is the most enlightening exposition, having consequences for the legal system [14].

All in all, the systems theory seeks a unification of social activities, thus generating a notion of systems, communicative structure, symbolizing the organization within an information process [17]. And, within this ideology, Luhmann proposes the study of the legal system. He understands society as a communication network composed of several subsystems, with Law being one of them, wherein it acts in a closed way, self-producing and reproducing, autopoiesis, with its relationships, communications analyzed through a binary code, legal/illegal [5].

The function of law is found in the sense of this communication, as the relevance of the legal system resides in all forms of conduct encompassed and regulated by law, since *the material objective of the legal norm is the human conduct projected in space and in time, and what we have in mind is the expectation of this conduct* [17].

With such thoughts mattering the legal-criminal science, Jakobs innovates in functionalism. Devoid of culture, the idea of criminal law and its normative system are an integral part of society, whilst also being a required function to maintain the system.

In systemic functionalism, the purpose of criminal law is the protection of the rule violated by the commitment of the crime and its validity.

In Jakobs' opinion, the function of Criminal Law is to ensure the validity of positive values of action of an ethical-social nature, obtaining material legitimacy from its need to guarantee the validity of essential normative expectations (those on which the configuration or identity of society depends) in face of the conduct that expresses a rule of behavior incompatible with the corresponding norm and, therefore, poses a question as a general model of guidance in social contact.

In the author's words:

> *The service that Criminal Law performs consists of contradicting – in turn – the contradiction of the norms that determine the identity of society. Criminal law therefore confirms social identity. The crime is not taken as the beginning of an evolution, nor as an event that must be resolved in a cognitive way, but as a failure in communication, this failure being attributed to the perpetrator as his fault. In other words, society maintains the norms and refuses to conceive of itself in any other way. Under this conception, it is not just a means to maintain social identity, but it already constitutes that identity itself* [10].

Observing what the professor has taught, we understand that the legal criminal asset becomes the norm and the legitimacy of criminal law resides in its functionality. That is, criminal law is legitimized to enforce the validity and application of the criminal law. The asset to be protected is the firmness of essential normative expectations, in face of the disappointment that has the same scope of validity as the norm put into practice. From now on, this asset will be called a legal criminal asset.

The author explains that the validity of the norm is a legal

criminal asset. Its maintenance passes directly through the penalty. The value included in the standard and normally cited as "legal asset" – life, liberty, patrimony etc.) is, in fact, a motive, the search for an objective for now, indoctrinating that:

> *According to this, the legal asset – as a motive for the norm or representation of an end – has sufficient force in itself. This happens because, together with the asset to be protected, there come the author's interest in liberty (also a legal asset) and society's interest in not hindering, but rather enabling development* [11].

Quoting and drawing on the teachings of his master Hans Welzel, he predicts that *the real meaning of law does not consist in removing all the harmful effects of legal assets idealized as unharmed, but in choosing and prohibiting incompatible with the existence of an ethically organized community* [11].

That said, we note that Jakobs makes the distinction between penal legal asset and legal asset. The first is the validity of the criminal law and the second one refers to the objects on which the criminal applies. He concludes by stating that it is not any object of the normative regulation that is a legal asset, but only that which has to perform some function for society or for one of its subsystems.

For Jakobs, a criminally relevant action is the objectification of the lack of recognition of the validity of the norm, the expression in the sense that the norm at issue is not the guiding principle [10].

Crime is the contradiction of the determined norms of society. And the penalty finds its need in the maintenance of society, which consists of confirming this social identity, while contradicting the criminal conduct of the agent and reestablishing the normative validity.

Thus, the sanction contradicts the world project of the violator of the norm, whereas he claims the non-validity or the case at issue, but the sanction confirms that this statement is irrelevant. Therefore, the function of the penalty within systemic functionalism is the preservation of the norm as a model of guidance for social contracts [10].

Within this scenario, the Bonn professor plants his first seeds for the development of his idea of enemy criminal law. He begins to differentiate between person and subject to follow the path and construct the concept of the enemy, distinguishing him from the citizen.

6. What Is the Enemy's Criminal Law *(Feindstrafrecht)*

When outlining some philosophical Jus sketches on the topic, Günther Jakobs recalls that the philosophers Thomas Hobbes and Immanuel Kant already knew about different sanctions for citizen and people who deviate from principles.

In his book *Leviathan*, Hobbes changes the high-treason defendant's character as – in principle – he denies the existing constitution. In *Metaphysics of Morals*, Kant understands that he is not dealing with a person who constantly threats the system, who does not accept to be forced to become a citizen, so putting the citizen's legitimate right to security at risk [12].

The human being and the citizen (person) are conceptualized in different ways, with the former being the result of a natural process (birth), while person represents or is the representation of a role of socially understandable competence. As participants in a society, individuals – creation of an objective world – are defined by that fact that, for them, the objective world is valid, *id est*, they accept and comply with the established norms, representing them [10].

A person is only he who offers a sufficient cognitive guarantee of personal behavior, and this as a consequence of the idea that all normativity needs a cognitive cementation in order to be real [12]. Therefore, a person is a social product inserted in a context (socio-political-normative), holder of different rights. The enemy is unaware of this duty, especially the respectability of laws.

In short, a citizen is the result of the unity of rights, duties and cognitive-behavioral guarantees.

In conclusion, we perceive that the aforementioned philosophers already distinguished a citizen's criminal law, using it against people who did not commit persistent crimes, from an enemy's criminal law against those who did not deviate in principle [12].

Faced with this scenario, Jakobs weaves the foundations of his enemy's criminal law, together with the citizen's criminal law as two poles of the same world.

For the German jurist, there must be a clear separation of both so that there is no danger that it could infiltrate through a systematic interpretation, or by analogy or any form of influence of the second on the first one. There must be a limitation on the Enemy's Criminal Law.

Citizen criminal law *(Bürgerstrafrechet)* is characterized by the fact that the perpetrator is a citizen *(bürger)*. It is a criminal law applied to everyone, aimed at the offender who deviated from his conduct and committed a crime, but which does not endanger the State or institutions, which, after the application of penalty, will conform to the law. For him, the penalty is a sanction for acts committed and the recognition of the validity of the norm. And there is a requirement to observe the rights and the criminal guarantee and the criminal procedural guarantee.

Meanwhile, in the criminal law of the enemy *(feind)*, this is an individual who – through his behavior, his professional occupation and his connection to a criminal organization – forsakes the law in a supposedly lasting way and not in an incidental one [16], with him being the source of danger.

Such criminal law applies to the subject who denies the system of respectability to the norms, and – by not respecting the established norms – an antinormative behavior is exposed, making other people's expectation of safety vulnerable.

The enemy's criminal law seeks to combat dangers and, as already mentioned, the subject himself is the source of danger. This leads to criminalize preparatory acts, with punitive criminal anticipation. The penalty is aimed at security in face of future events, with flexibility of criminal and procedural rights and guarantees, while also being an expression of the

third criminal law speed, listed by Jesús-Maria Silva Sánches.

Some examples of measures that express the enemy's criminal law are already found in our legal system and we can cite them, separating measures of criminal nature and those of procedural nature. In the first case: creation of crimes of abstract risk, without offensiveness or dangerousness; criminalization of preparatory acts; aggravation of sentence without proportionality between the gravity of the fact and the sentence; conception of punishment as a way of guaranteeing security; legislative nomenclature to indicate combat/war (laws combating criminal organizations etc.).

As examples of procedural measures, we have: restriction of guarantees and rights; extension of deadlines and scope of possibilities for preventive and temporary detention; extension of investigative and detention deadlines "for investigative purposes", inversion of the burden of evidence; generalization of exceptional investigative methods; penitentiary law standards with recrudescence and classification of prisoners (DDR) [4] ; limitation and/or prohibition of regime progression.

As mentioned before, the enemy's criminal law receives the most varied censure. Manuel Cancio Meliá [12] points out that the enemy's criminal law cannot be classified as law. It is a contradiction in its terms, being something different from what is normally called criminal law. He emphasizes that the enemy's criminal law is the author's law, what makes it illegitimate in face of violation of the liberal principle of true criminal law, which rejects criminal responsibility for the subject's mere thoughts and way of life.

Following the same line defended by Muñoz Conde, André Luís Callegari and Nereu José Giacomolli [12] also make their criticisms by stating that – even after reporting the crime – the offender does not lose his status as a citizen, and cannot be stripped of the inherent constitutional guarantees to this condition, with criminal law having to preserve, at its core, substantial and formal constitutional guarantees at the risk of not being legitimate. Like Meliá, they conclude that it could be a criminal right of the author.

There are also those who argue that the existence of a criminal law against the enemy could only occur in a totalitarian state, in a non-democratic society [8], even comparing it with the project of the Nazi regime, developed by Edmund Mezger [7], a comparison that we understand to be very distant and unfounded.

Aware of such criticisms and the development of ideas, whether we like it or not, it is a unanimous decision that the enemy's criminal law is typified among us and is sometimes exposed in various legislative expressions, both nationally and abroad.

As an example, we can mention the law on heinous crimes, the law on criminal organizations, law 9,614/1998 called the slaughter law, among others, further to bills that are under consideration of the National Congress, such as the bill nr.5.365/20 [4] which criminalizes the so-called "new *cangaço*".

Every day, television news and information sites on the Internet broadcast the activities of these criminal organizations, bringing fear and insecurity to the cities of our country. They are not limited to certain regions. On the contrary, they are engaged in all regions, from the North-Northeast to the South. There is no city with a bank these criminals do not operate.

They stand out for their behavior, with highly military power, making use of heavy weapons, sometimes only intended – within legal terms – for the armed forces. They take cities hostage and, sometimes, as human shield, aiming to succeed in the criminal enterprise, because of the inability of the civil and military police to act and impunity with cinematographic escapes.

This criminal movement ended up being called "new *cangaço*" by the media.

Aware of what had happened, and entrusted with their legislative role, plus the view to the necessary observance of the principle of legality, the people's representatives in the Chamber of Deputies approved a bill to create criminal measures in order to punish this new type of organized crime, more severely.

This bill nr. 5,365-A of 2020, which brings changes to the Criminal Code to classify crimes of cities domination and violent intimidation, as well as amending law nr. 8,072/90 in Art. 157-A of the Criminal Code, the law of heinous crimes, so that the crime of domination of cities – which would be typified in Art 157-A of the Criminal Code – is classified as heinous.

This project was already approved in August 2022, in the house of origin, and forwarded to the Federal Senate, the review house, for its due approval and future sanction or presidential veto.

Analyzing the aforementioned bill in detail, we can observe the influence of the enemy criminal law included in this new legislation. By typifying such conduct, the legislator labeled the authors of such conduct as enemies, detecting them by their way of life, reiteration of conduct, those who will not respect the norms, laws or the system. They put the entire society at risk, not offering a sufficient cognitive guarantee of personal behavior, aimed at normative respectability.

In the preparation of the project, it was verified – through the Legislative Power – that the State so far sees such individuals as concrete threats and that they must be prevented from destroying the legal system, through coercion [12] to be subjected to more severe laws. The concept of enemy indoctrinated by Jakobs fits perfectly into this approach.

We can also observe more expressions of the enemy's criminal law, discussed above, in the aforementioned bill. Such crimes would have heavier penalties, in abstract, typified in criminal legislation, reaching up to 40 years when the action results in death (Art. 157-A § 2nd II). The equation proposed by Manuel Cancio Meliá [12] thus comes to fruition, a symbolic criminal law added to *punitivism*, resulting in the enemy's criminal law.

Another latent sign of the enemy's criminal law is the punishing capability of the preparatory acts. Evading the rule

[4] Differentiated Disciplinary Regime.

of the principle of criminal law *cogitationes poenam nemo patitur*[5] and lesivity (offensiveness), the project brings with its scope the criminalization of preliminary acts by disciplining that *preliminary acts to the crime established in this article will be punished with the corresponding penalty to the completed crime, reduced from ¼* (one fourth) to *⅓* (one third) (Art. 157-A § 3rd, Art. 288-A § 4th) [2].

And finally, we have that – once it becomes law – such crimes will be qualified as heinous crime, bringing with it all the procedural and material consequences foreseen in it *corpus*, which, for some authors, is already a legislative expression of the criminal law of the enemy.

This way, when we analyze this upcoming legislation, we can identify – in its nature – the DNA of Professor Günther Jakobs and the fingerprints of his creation, the enemy's criminal law. Despite the criticism suffered and in face of the growing crime statistics, this system is sometimes well received by those looking – within constitutional guidelines – for more severe way to punish and prevent crimes, preventing commitment and providing greater sense of security for society.

And as Jakobs puts it, *a clearly delimited criminal law of the enemy – from the perspective of the Rule of Law – is less dangerous than interwining the entire Criminal Law with fragments of regulation, specific to the enemy's Criminal Law* [12].

Imbued with this spirit, the ordinary legislator proposes such an addition to the Criminal Code and – if there occurs the presidential sanction, in the episodes to come – we expect its arrival at the Federal Supreme Court to study out the constitutionality of the changes and how the doctrine will be viewed of the enemy's criminal law from the perspective of the ministers who will be there.

7. Conclusion

Finally, we observe that the post-industrial society was responsible for several social and cultural phenomena, many of which ended up being reflected in human and legal sciences, including criminal law.

Aware of such changes, Jesús-Maria Sánches identified different behaviors of the punitive system which, depending on the method of application of punishment, combined with the flexibility of constitutional guarantees, are called criminal law.

With the third speed, there occurs the application of the prison sentence combined with flexible procedural guarantees. On pursuing a better implementation of the system against more serious crimes, two aspects could be observed: expansionism and symbolism, giving rise to enemy criminal law, a doctrine taught by Günther Jakobs and inserted into his systemic functionalist system.

The dangers of society and the growing of organized criminal societies put the security system in a tightening condition. Thus, attentive legislators end up producing law that attempt to punish such criminal conduct more rigorously.

In this scenario, enemy criminal law has been gaining ground, having its DNA in several legislations already in force, or else in analysis processes, as explained, which – despite the criticism it suffers from specialized doctrine – has been growing. Its insertion in the system will fit or not. This will depend on its analysis by the Judiciary, who will do it through constitutional courts, in face of the legislation that embraces the enemy's criminal law, respecting the principles of legality and other guarantees. Whether or not it is removed from the arrangement will depend on this analysis. This attitude shows respect for the Democratic State of Law and guarantee of the correct punishment for criminals who are dangerous for society.

Conflicts of Interest

The authors declare no conflicts of interest.

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