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THE APPLICATION OF ENEMY CRIMINAL LAW AND SOME CONSEQUENCES IN THE LEGAL SYSTEM

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ABSTRACT

The purpose of this article is to demonstrate the possible consequences that may occur in the Brazilian legal system when the application of the criminal law of the enemy is used. The philosopher Günther Jakobs is considered the creator of the Theory of Criminal Law of the Enemy, whose primary objective is to treat criminals within society differently. According to Jakobs, there are 2 (two) types of offenders: common criminals and criminals who are enemies of the State. The first refers to those who commit any type of common crime, unlike the second, in which the crime directly affects the democratic and constitutional order of the State. Therefore, common criminals have the prerogative to use all procedural resources inherent to the process guaranteed to citizens, but the same does not apply to criminals considered enemies of the State, since they have become merely objects deprived of any type of constitutional rights and are no longer considered citizens.

Keywords: Crime Theory, Application in the Legal System, Enemy Criminal Law, Penalty, Federal Constitution of 1988.

INTRODUCTION

The main objective of this work is to directly and indirectly try to explain how the application of the criminal law of the enemy occurs and its consequences before the Brazilian legal system. Furthermore, for the purpose of writing this article, the dogmatic method will be used primarily and its construction will be based on the Theory of Crime, the Theory of the Criminal Law of the Enemy, the Penal Code and the Federal Constitution of 1988.

It is well known that since the emergence of humanity on Earth, crime has been present in various forms and under various pseudo-justifications. Criminal Law, a branch of law that helps teach the application of the law regarding crime, aims to act, among other segments, from the perspective of the state's punitive field. Man, then, no longer has the right to punish, thus passing this responsibility to the State. Criminal Law is, therefore, linked to Public Law and constituted by various special laws, however, today its main basis originates in 1940, through the Brazilian Penal Code (CPB). On the other hand, over the years, around 1985, the Theory of Criminal Law of the Enemy developed by the German scholar Günther Jakobs emerged. The main characteristic of the theory is that punishment is based on the perpetrator and not on the severity of the act performed or even on any possible omission.

The theory in question focuses on the application of jus puniendi in a differentiated manner when the reference is to highly dangerous criminals, differently from what would occur with the application of the penalty to the common person, that is, the common criminal, considering that for common criminal law, the law based on all the norms and guarantees provided for in the Federal Constitution of 1988 would not be able to act satisfactorily for subjects considered to be highly dangerous, and, therefore, those who commit crimes considered to be cruel, namely: crimes of terrorism, sexual crimes, crimes of criminal organizations, among others, are treated as enemies of the State, and therefore, they must necessarily, according to the theory of enemy criminal law, have the application of the strictest legislation when compared to the common citizen, where the latter will have the prerogative to enjoy the benefits of substantive law and procedural law.

In Jakobs' view, the enemy theory of criminal law is a specific branch that has a place in law and its main scope is to combat a certain class of criminals, that is, it refers to that class of crimes considered serious. On the other hand, Professor Fernando Capez, with his singular brilliance, teaches us that:

> [...] disapproval is not established based on the seriousness of the crime committed, but on the character of the agent, his lifestyle, personality, background, social conduct and the reasons that led him to commit the criminal offense. Thus, within this conception, there is a culpability of character, culpability for life conduct or culpability for life decision. (CAPEZ, 2005, p. 115).

Thus, it is concluded that the Criminal Law of the Enemy is considered as the exception to the traditionally known law, where its objective is to decimate those who pose a risk to society through highly dangerous crimes, having as a basis for justification the character of the agent, his lifestyle, his personality, his background, his social conduct, in addition to the reasons that caused the agent to commit the aforementioned criminal offense.

In other words, unlike traditional law that values the maintenance of the legal system, enemy criminal law does not offer a guarantee, even a minimal one, so that the offender (the one considered an enemy of the State) can be treated at least as a person holding rights.

DEVELOPMENT

The characteristics of the Theory of Crime and its application in the legal system

The doctrine and jurisprudence explain that criminal law is made up of a set of legal norms that establish the regulation of the state's punitive power. The State, through criminal law, is also responsible for defining crimes and linking penalties or security measures to crimes committed, as well as acting in the imposition of sanctions established in legislation, which do not allow for a possible life imprisonment, since there is no point in having a law that determines that something is considered a crime, but does not make it clear what that is amount of the penalty imposed. In this regard, criminal legislation was responsible for defining what is considered a crime and what is not a crime.

The CPB, to date, does not include, in all its material, any reference to the provision of a concept of crime. With this information, criminal law professor Rogério Greco (2016 p. 195) asserts that only the Introductory

Law to the Penal Code in its article 1 was the norm that presented a criterion for analyzing the incriminating criminal type and a way of distinguishing the crime from a misdemeanor.

According to the doctrinaire Greco, below is the aforementioned Law of Introduction to the Penal Code alluding to the aforementioned article:

> Article 1: A crime is considered to be a criminal offense for which the law imposes a penalty of imprisonment or detention, either alone or alternatively or cumulatively with a fine; a misdemeanor is a criminal offense for which the law imposes, alone, a penalty of simple imprisonment or a fine, or both, alternatively or cumulatively (BRAZIL, 1941).

From the excerpt from the article above, it is clear that the Brazilian legislator took due care in conceptualizing crime and, more than that, took care to differentiate it from the so-called criminal misdemeanor. So much so that this differentiation can be found in what is consistent with the moment of application of the penalty, therefore, the application of the penalty for criminal offenses considered as crimes and for those criminal offenses considered as criminal misdemeanors is different.

To be certain of this distinction between the two types of criminal offenses, it is necessary to carry out an analysis of the conduct of the perpetrator of the act, in addition to verifying that all the elements that regulate the constitution of a crime are met. After going through all the procedures of this analysis using the theory of crime, it is possible to state whether or not the conduct of the agent was considered criminal. The criminal doctrine, upon realizing that the legislative power created in the legal system a concept of crime making a difference with criminal misdemeanor, began to explain the concept of crime in a doctrinal and legal manner. Professor Guilherme de Souza Nucci (2014 p. 137) in his criminal law manual gives the following explanation: "the concept of crime is artificial, that is, it is independent of natural factors, verified by a judgment of sensory perception, since it becomes impossible to classify a conduct, ontologically, as criminal".

The theory of crime, in its analytical aspect, adopts the tripartite system where crime is the combination of a Typical, Illicit/Unlawful and Culpable Fact. The scholar Cezar Roberto Bitencourt (2012 p. 101) asserts that "the general theory of crime did not originate through a sentence construction, on the contrary, it is the result of a long process of preparation that accompanies the epistemological advancement of Criminal Law and is still in development today."

To this end, the crime, from an analytical perspective, is evidenced by having 3 (three) characteristics which are used for analysis and for the proper application of the penalty. The combination of the aforementioned assumptions corroborates the emergence of the so-called tripartite theory.

As can be seen from the lessons listed by the scholar Bitencourt, in order to solidify the theory of crime currently used, it was necessary to go through several years. This long time span makes perfect sense given the various changes that have occurred in criminal law, which inexorably corroborated the institution of the theory of crime currently adopted.

The article by Patrick Assunção Santiago (2020) categorically states that the tripartite theory is without a shadow of a doubt the most famous theory among those listed on the subject. He also adds that the scholars Nelson Hungria, Juarez Tavares and Cezar Roberto Bittencourt defend this theory. It cannot be forgotten that the majority doctrine adopts the tripartite theory.

It is also important to highlight the lessons of Eugenio Raúl Zaffaroni and José Henrique Pierangeli, who explain how one should act when faced with a situation where one has to determine whether a given act is a crime or not:

> Indeed, when the judge, the prosecutor, the defender, or whoever it may be, finds themselves faced with the need to determine whether there is a crime in a specific case, such as the conduct of a person who took possession of a jewel in a jewelry store, and is responsible for determining whether or not this conduct constitutes a crime, the first thing they must know is what character a conduct must present in order to be considered a crime (ZAFFARONI and PIERANGELI, 2011 p. 338).

The doctrinaire César Bitencourt tries to explain what the doctrine adopts in cases of criminal conduct and what its characteristic elements are.

> The clear majority consensus of the doctrine that punishable conduct presupposes a typical, unlawful and culpable action, in addition to possible requirements specific to punishability,

> is the result of the construction of systematic categories of crime — typicality, unlawfulness and culpability — which will be analyzed individually. The content, meaning and limits of each of these categories, as well as the way in which they relate, have been and continue to be debated from different theoretical points of view (BITENCOURT 2012 p. 101).

Professor Fernando Capez has the following understanding: "crime can be conceptualized under material and formal or analytical aspects" (CAPEZ, 2011 p. 134). It is precisely about these aspects that the aforementioned jurist discusses clearly below:

> Material aspect: this is the one that seeks to establish the essence of the concept, that is, why a certain fact is considered criminal and another is not. From this perspective, crime can be defined as any human act that, intentionally or carelessly, harms or endangers legal assets considered fundamental to the existence of the community and social peace (CAPEZ, 2011 p.134).

In this way, that is, it is through the material aspect that a definition of what a crime is can actually be made. Matter is everything that exists, has a construction, has content. Based on this premise, if the agent has committed something considered criminal, there is no need to discuss whether or not it is a crime.
Once the concept of the material aspect of crime has been explained, it is important to differentiate it from the formal aspect:

> Formal aspect: the concept of crime results from the mere subsumption of conduct to the legal type and, therefore, everything that the legislator describes as such is considered a criminal offense, regardless of its content. Considering the existence of a crime without taking into account its essence or material harm violates the constitutional principle of human dignity (CAPEZ, 2011 p.134).

It can be inferred then that regarding the formal aspect, it will only be considered a crime if the conduct is already defined by the legislator; if it is not defined, it cannot be considered a crime. In other words, for example, if the penal code mentions that the act of instigating or even assisting someone in committing suicide is considered a crime, there is nothing to discuss. Therefore, the conduct in question is considered a crime based on the concept of the formal aspect.

As mentioned above, the aspects of the crime are not restricted to the material and formal aspects, and the doctrine also recognizes the so-called analytical aspect of the crime. This analytical aspect envisions the possibility that the judge

have to carry out a study of everything that has been practiced by the agent/author. The investigator, judge or person in charge will analyze what the real intention of the agent's conduct was, especially whether or not there was in fact a will to practice that conduct, and its intensity may also be analyzed in the background.
Renowned professor Fernando Capez teaches us how to differentiate between the aspects of the crime. Below is an excerpt from his work conceptualizing the analytical aspect.

> Analytical aspect: this is the one that seeks, from a legal perspective, to establish the structural elements of the crime. The purpose of this approach is to provide the correct and fairest decision on the criminal offense and its perpetrator, making the judge or interpreter develop his reasoning in stages. From this perspective, a crime is any typical and unlawful act. Thus, first of all, the typicality of the conduct must be observed. If so, and only in this case, it is verified whether it is unlawful or not. If the act is typical and unlawful, the criminal offense already arises. From there, it is only necessary to verify whether or not the perpetrator was guilty of its practice, that is, whether or not he should be subject to a judgment of disapproval for the crime he committed. Therefore, for the existence of a criminal offense, it is necessary for the act to be typical and unlawful (CAPEZ, 2011 p. 134).

Greco explains: "The function of the analytical concept is to analyze all the elements or characteristics that make up the concept of criminal offense without attempting to fragment it" (GRECO, 2016 p. 198).

> Crime is, certainly, a unitary and indivisible whole. Either the agent commits the crime (a typical, unlawful and culpable act), or the act committed by him will be considered a criminal indifferent act. The stratified or analytical study allows us to clearly verify the existence or not of the criminal offense, hence its importance (GRECO, 2016 p. 198 and 199).

Therefore, criminal law can be considered as a group of legal rules and norms that aim to regulate and establish limits to the punitive power of the state, giving rise to the definition of crimes, the penalties

associated with crimes or even security measures. Finally, criminal law also has the task of imposing sanctions. In this sense, criminal law is considered to be responsible for defining the crime.

Criminal Law of the Enemy and Penalty

Enemy Criminal Law is considered as a form of author criminal law. In other words, enemy criminal law has the action and scope labeling, tagging and even stereotyping selected people who are contrary to the greater interest of society.

The theory of Enemy Criminal Law is the most important of the movements for the expansion of Criminal Law inherent in the global risk society (CLEMENTINO, 2020).

Julio Urena, in his work, teaches that the enemy is the one who does not submit to the rules:

> An enemy is someone who, in addition to not wanting to adapt to the norms imposed by society, does not offer guarantees that he will remain faithful to the law, being- presumably - this state of delinquency is permanent. An enemy, therefore, is that person who, unlike the citizen, does not offer the cognitive guarantees that they will comply with the norm, not accepting the rules of the Rule of Law, and not being able to enjoy the benefits that it offers to legitimate citizens (URENA, 2019).

The theory of enemy criminal law was created, more or less in the 1980s, by Gunther Jakobs (systemic, radical or monist functionalism) at the time when the unification of Germany was confirmed, and the western part was somewhat "concerned" about East Germany.

In this sense, Prates (2019) explains that the theory of Enemy Criminal Law had its first debate in a lecture given at a Criminal Law Seminar held in Germany in Frankfurt, adopting a descriptive stance on the theory. The first publication of the theory was in 1985.

The theory of enemy criminal law has gained strength for its applicability in issues related to terrorism. A great example in which scholars called for the application of the theory of enemy criminal law was the attacks of September 11, 2001 in the United States.

> With the attacks of September 11, 2001, the issues of terrorism and organized crime came to the fore, which greatly demonstrated the ineffectiveness of Criminal Law in containing such crimes, and, with that, the pendulum swings towards a Criminal Law with reduced guarantees, known by the name "Criminal Law of the Enemy" (PRATES, 2019).

In light of the sad scenario that occurred on September 11, 2001, the former US president made the following proclamation:

THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim September 11, 2016, as Patriot Day and a National Day of Worship and Remembrance. I request all departments, agencies, and instrumentalities of the United States to fly the flag of the United States at half-staff on Patriot Day and a National Day of Worship and Remembrance in honor of the individuals who lost their lives in the attacks of September 11, 2001. I invite the Governors of the United States and its territories, and interested organizations and individuals, to join in this observance. I urge the people of the United States to participate in community service in honor of those our nation has lost, to observe this day with appropriate ceremonies and activities, including remembrance services, and to observe a moment of silence beginning at 8:46 a.m. Eastern Daylight Time to honor the innocent victims who died as a result of the terrorist attacks of September 11, 2001 (U.S.A., 2001).

Therefore, for the theory of enemy criminal law there is a need for stricter procedural and criminal treatment. The theory of Enemy Criminal Law provides for stricter criminal and procedural treatment for those individuals considered as "enemies", and not as "citizens".

Federal Constitution and Criminal Law

Criminal Law can be considered as a branch that has close ties with the Magna Carta, given that this, being considered the nation's highest law, has the power to be the first legal manifestation of the criminal political sphere, giving rise to new criminal legislation.
Lopes explains in his work:

> The relations established between Criminal Law and the Constitution can be studied from three perspectives: that of the constitutional principles of Criminal Law; that of the correlation between specific principles and institutes of Constitutional Law and the operationalization of Criminal Law; and, lastly, that of the theory of constitutional crimes (LOPES, 2000, p. 35).

There are 02 (two) concepts of Constitution well accepted by the doctrine that are closely linked to Criminal Law, which are presented by Canotilho and Hesse. According to CANOTilho, "Constitution is a systematic and rational ordering of the political community, embodied in a written document, through which fundamental rights are guaranteed and political power is organized, in accordance with the principle of the division of powers" (1995, p. 12).

The doctrinaire HESSE teaches that:

> The constitution is the fundamental legal order of the community. It determines the guiding principles according to which political unity must be formed and state tasks to be performed. It regulates procedures for resolving conflicts within the community. It orders the organization and procedure for the formation of political unity and state activity. It creates the basis and normalizes fundamental features of the total legal order. In all, it is the fundamental structural plan, guided by certain principles of meaning, for the legal configuration of a community" (1998, p. 37).

In view of the concepts mentioned above by the two authors, Canotilho and Hesse, the author Lopes asserts: "the concepts proposed by Canotilho and Hesse contain all the indispensable elements in understanding the relational phenomena between the Constitution and Criminal Law, as they base the concept of Constitution on basic elements that are also common to the premises of ordering and development of the penal system" (2000, p. 59).

It is undeniable and unquestionable that there is a very close relationship between these two legal institutes. The Constitution directly influences Criminal Law by establishing the scope and limits of jus puniendi, in view of the fundamental rights and guarantees of the citizen. The conditions established are of two classes: formal, which refer to the external aspects of punitive intervention; and material, relating to the content of criminal norms (LOPES, 2000, p. 179).

CONCLUSION

Through this scientific article, it is clear that in order for a crime to exist, it is necessary to investigate the material and formal aspects of the conduct carried out by the agent. Furthermore, the doctrine mostly adopts the Tripartite Theory, which considers a crime when the act is typical, unlawful and culpable.

In 1985, German Gunther Jakobs presented his theory regarding the criminal law of the enemy and its due applications in a lecture. There is no consensus on its application; quite the opposite, there are still several discussions about the application of such theory. However, it is generally considered not to be applicable, given that the Citizen's Charter states that everyone, without exception, has rights to be enjoyed. Therefore, it is impossible to ignore the guarantees set forth in the Constitution, even if the agent's conduct is considered a very serious crime and he is an enemy of the State.

Still on the subject of criminal law for the enemy, for many this topic has to be compared and used in human rights guidelines, considering that despite being considered the worst of enemies, they will still have the right to enjoy some rights, regardless of the crime that the perpetrator has committed.

Even though for many in society there are good justifications for adopting enemy criminal law, the Brazilian legal system does not adopt the theory of enemy criminal law.

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