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CRIMINAL LAW OF THE ENEMY AND PUBLIC AND INSTITUTIONAL INSECURITY IN BRAZIL: BRIEF NOTES ON THE LAST THREE DECADES

Jonas Modesto de Abreu
PhD in Social Sciences from: Universidade Federal de São Carlos (UFSCar), Professor of Political Science at: Universidade Federal de Catalão (UFCAT)

Leonardo Aires de Castro
PhD in Political Science from: Universidade Federal de São Carlos (UFSCar), professor of UNA/Catalão

Débora Cristini Silva
Degree in Law from: Universidade do Vale do Itajaí (UNIVALI)

João Felipe Modesto de Abreu
Graduated in Law from UNA/Catalão

ABSTRACT: Accompanying facts, scenarios and contexts of the socio-political entanglement that have been causing changes in legislation and in the behavior of Brazilian legal agents since the 90s of the last century, this article that highlights the insurgency of the Criminal Law of the Enemy, deals with the frequent feeling of insecurity and of threat to the institutions of the Democratic State of Law that, allied to the social feeling of inefficiency of the criminal policies of combat to the crime, seems to be justifying in the course of our last three decades, the exercise of extraordinary and exceptional forms of state coercion, whose end appears to be the protection of democratic institutions and civil society in the face of insurgency by powerful interest groups and sophisticated criminal organizations.
Keywords: Criminal Law; Public Insecurity; Enemy.

THE FORMATION OF THE RISK SOCIETY

From a purely traditional point of view, the risk society, conducive to the development of the theory of the Criminal Law of the Enemy, is the one whose income concentration, allied to the social competition produced by technological advances, ends up marginalizing the individuals and groups most discredited in relation to to the current economic system. Also involved in this scenario, the most benefited feel constantly threatened by the segregated agents, seeing in them a kind of threat to their personal and property guarantees.

From a more up-to-date perspective, the advance of organized crime, drug and human trafficking, economic crime, crimes against humanity and, more recently, political terrorism, has been fostering a society guided by the incessant concern to criminalize and prevent the most diverse types of crimes. As a result of this context, we observe the emergence of a criminal policy guided by prevention which, as described by Moraes (2008), can be filled with open and broad typifications, types of abstract dangers, mere inappropriate conduct and omissions.

From the perspective of Marinho Jr. and Cordeiro (2009), this culture of fear, leading to the adoption of the criminal law of risk, is the result of a punitive social outcry and, at the same time, is an essentially symbolic state response, whose reflexes clearly confront the basic premises of democratic states.

It is a perspective, according to which, in the name of fear and insecurity in the face of the enemy, judicial measures are taken or laws are enacted that violate criminal and procedural rights and guarantees. This criminal policy aimed at combating the enemy is based on the neutralization of potentially delinquent groups of people, with the author of the criminal act being considered as a dangerous entity (MARINHO JR.; CORDEIRO, 2009).

The debate around the risk society gained impetus after the fateful September 11, 2001, when the terrorist attacks on the *World Trade Center* caused an immense wave of insecurity and fear in the American population, a situation that triggered an unbridled search for potential enemies. Since then, the US refusal to participate in the International Criminal Court, combined with the arms race, has left the way open for indiscriminate combat against the enemy, leading to the creation of the *Patriot Act*, which corresponds to a vast anti-terror legislative package, which allowed the violation of a number of individual freedoms and human rights in the United States. By way of illustration, it is possible to mention, as examples of violation of individual freedoms, permission to monitor library records to find out who lent certain types of books (MORAES, 2008). With regard to the violation of human rights,

the *modus operandi* of the Guantánamo prison, created in 2002, is a very didactic example.

A scholar of this scenario, Alexandre de Moraes (2008), points out that this criminal policy of combating the enemy was not restricted to the United States of America, having advanced and conquered the world, conquering followers in the "four corners" of the planet. France, for example, in the same time period, enacted the Law of 10/31/2001, on daily security, which provides for the possibility of police intervention in the sphere of freedom of citizens and extended the competence of the State to intervene and control the communication of possible terrorists.

England also gave British police exaggerated powers, including granting licenses to kill based on mere assumptions. The case involving the death of the Brazilian Jean Charles de Menezes in July 2005 fits into this context.

In the course of the first decade of this century, virtually all countries that recorded a large increase in crime ended up adopting more severe criminal policies, with emphasis on the Criminal Law of the Enemy. Brazil also surrendered to this criminal policy of exacerbating penalties and making criminal, procedural and even constitutional guarantees more flexible. Imbued in the scenario of politicization of the Judiciary and judicial activism, the set of actions around the arrest after criminal conviction in the 2nd instance, associated with violations of rights and constitutional guarantees triggered by agents of the judiciary linked to Operation Lava Jato against public actors targeted by political differences, became a practical demonstration of the implementation of the Criminal Law of the Enemy in our justice system.

WHO ARE THE ENEMIES?

According to Luís Gracia Martín (2007), societies have always chosen some individuals as enemies. Although there is no room for a detailed review of this topic at the moment, the idea of excluding so-called enemies from society and from the protection of the State is not new, having been noticed since the cradle of Hellenic civilization.

With regard to the contemporary view of Günther Jakobs, a reference author for scholars of the Criminal Law of the Enemy, enemies must not be considered people. In his understanding, "it is only a person who offers a sufficient cognitive guarantee of a personal behavior, and this as a consequence of the idea that all normativity needs a cognitive foundation in order to be real" (JAKOBS, 2005, p. 45), that is it occurs because without a minimum of cognition, the legally constituted society does not work. This way, in case of absence of this cognitive guarantee or when expressly denied, Criminal Law must, without fail, react against the enemy.

Luiz Flávio Gomes (2009), in line with Jakobs' understanding, indicates economic criminals, terrorists, organized delinquents, perpetrators of sexual crimes and other dangerous criminal offenses as potential enemies, arguing that they are the individuals who, as a rule, they depart permanently from the Law, offering no cognitive guarantees that they will remain faithful to the legal norm.

In this dynamic, Jakobs (2005, p. 36) states that when "an individual does not admit to being obliged to enter a state of citizenship, he cannot participate in the benefits of the concept of person", remaining in the state of nature, that is, in a state of absence of norms, in which "whoever wins the war determines what is the norm, and who loses must submit to this determination."

Gomes (2009, p. 295), arguing about the difference between the criminal citizen and the criminal enemy, states that the essence of the enemy is not having the status of a person and, for this reason, the State must not recognize their rights. Thus, "a legalistic criminal procedure is not justified against him, but a war procedure." According to his thesis, for not being a subject of law, but an object of coercion, the enemy must be punished by means of a detention security measure, unlike the citizen, who must be punished with a penalty.

Within the parameters of this rhetoric, the criminal person must have the penalty fixed according to his or her culpability. The enemy, in turn, must be punished in line with his dangerousness. As what matters most to the State is the danger posed by the enemy in social life, it seeks to prevent future criminal attempts by the enemy, so that criminal law is no longer retrospective, without caring about what the agent did, to be prospective, anticipating criminal protection in order to achieve merely preparatory acts. This means that the State, when we talk about ordinary citizens, reacts punitively after the criminal conduct is externalized. With regard to the enemy, the State always acts preventively, seeking to intercept it before its conduct (GOMES, 2009).

CRIMINAL LAW OF THE CITIZEN AND CRIMINAL LAW OF THE ENEMY

The citizen's criminal law and the enemy's criminal law represent two opposing spheres that, although they are blatantly divergent, coexist in many criminal-legal contexts in the world today, including Brazil.

According to Moraes (2008), the theoretical dichotomy that separates the citizen, including the criminal, from the criminal enemy, conceives society as a "body" divided into two parts: the first, composed of good men, respectful of law and order who, under given circumstances, may be involved in criminal actions, and the second, formed by the bad guys, bandits and vagabonds who represent a frequent threat to social stability or to the order of the State.

Gomes, Molina and Bianchini (2007, p. 296), dealing with the same theme, claim that it is essential to differentiate the enemy from the citizen. For him, a citizen is "who, even after the crime, offers guarantees that, despite the crime he has committed, he will behave as a person who acts faithfully to the Law". The enemy is those who do not offer this guarantee.

Jakobs (2005) understands that criminal law must include two types of treatments: one aimed at citizens, which must be provided with guarantees; another aimed at enemies, individuals who permanently attack the State order, this one needs to restrict guarantees, preventing, through coercion, enemies from destroying the legal system and its representative institutions.

This duality of treatment that separates citizens and enemies must be present in prison sentences, which must have a double meaning: symbolic and physical. It is said that a penalty has a symbolic character when it has a preventive, integrative function or a reaffirmation of the norm. This means that, when a citizen commits a crime, he attacks the validity of a certain legal norm. The application of the penalty, symbolically, portrays the irrelevance of the conduct practiced, as the norm remains in force and valid for society, even after being violated. Regarding the physical meaning, the penalty aims to eliminate the danger brought by the enemy. Thus, while in prison, the crime will be prevented, with the enemy temporarily prevented from committing it again (GOMES, MOLINA and BIANCHINI, 2007).

In this perspective, it is understood that the crime, when committed by a citizen, does not exactly mean an offense against the ordered community, representing only wear and tear in relation to it, assuming the face of a correctable slip. This is because, despite the existence of criminal practice, the offending agent still offers guarantees that he will behave like a citizen: a person who will continue to act in accordance with the legal system. The same does not apply to the enemy, since his behavior is not conceived as proper to a citizen, not even a "citizen-delinquent", an agent who ensures that he will remain faithful to legal norms. The enemy is understood as a being hostile to society and the State, whose behavior reflects its lasting distance from the Law. The anticipation of punishment with typification of preparatory acts, creating types of mere conduct and abstract danger; the disproportionality of the penalties; legislation, as in the explicit European cases, which call themselves "laws of struggle or combat"; the restriction of criminal and procedural guarantees; and, certain penitentiary or criminal enforcement regulations, such as the differentiated disciplinary regime adopted in Brazil, are some of the main characteristics of the penal system model directed at enemies (MARTÍN, 2007).

The flexibility of criminal procedural rights and guarantees, such as a generic description of crimes and penalties; the disproportionality between the sentences; greater rigidity in penal execution; the abuse of preventive measures in the fight against crime, such as telephone interception without just cause and breaches of unsubstantiated secrecy or against the law, are flags usually raised by the theory of the Criminal Law of the Enemy. Thus, it is clear that the Criminal Law of the Enemy does not have an action or a criminal fact as its axis, but a certain type of author, who, since he does not present supposed cognitive guarantees, cannot obtain the same rights and guarantees of the pre-established citizen. common (GOMES, MOLINA and BIANCHINI, 2007).

THE CRIMINAL LAW OF THE ENEMY IN BRAZILIAN CRIMINAL LAW

As mentioned by Gomes, Molina and Bianchini (2007), anyone who imagines that the Criminal Law of the Enemy is an ordered set of rules is wrong. On the contrary, it is formed by isolated and sparse manifestations, but frequently introduced through special legislation or *sui generis* interpretations of the legal framework. Thus, the Criminal Law of the Enemy assumes the face of a movement guided by the selectivity of certain agents who are conceived as transgressors or criminals, inflicting on them an emergency and discriminatory law that neglects, totally or in part, their individual rights and guarantees. and procedural. Law no. 8.072/90 is a striking example of this process of choosing enemies that is underway in our country, since from its implementation, the perpetrators of crimes conceived as heinous, began to receive differentiated judicial treatment, being prevented from being benefited for individual and collective pardons. Another example is Law 9.034/95, which expanded the list of enemies by also classifying those convicted of organized crime in the regime of differentiated treatment, denying them the right to appeal in freedom and to count on the benefit of provisional release, when they have intense participation in the crime. The amendment produced in art. 52 of the Penal Execution Law, through Law 10.792/2003, also created a new range of enemies by allowing differentiated treatment to prisoners considered to be at high risk to society's security or who reveal well-

founded suspicions of involvement with organized crime. In this particular case, the differentiated treatment is applied due to the dangerousness presented by the prisoner, punishing him for what he is and not for what he did, characterizing an accentuated example of Criminal Law of the Enemy.

Based on these references, it is possible to state that Brazil has become a kind of symbol of legislative hypertrophy, a negative reference in which laws are created or reformed both to meet new criminal demands and to combat the diverse spectrum of organized crime.

CRITICISM OF THE ENEMY'S CRIMINAL LAW

The attempt to understand the process of building enemies by various state orders over time allows us to say that Western history is rich in examples. Selecting only the historical periods considered indispensable to the promotion of the modern penal framework, the critical observation clearly demonstrates that the Era of Christianity, whose state power reflected a set of interests that united the Catholic Church to the absolutist kings, was notable for the permanent appointment of enemies of State. Heretics, sorcerers, healers, thinkers in conflict with theocentric interpretations and social protesters began to be described as "enemies of Christ". This dire status situation set them apart from common sinners/criminals. Public death, through cruel procedures, fulfilled the social function of reaffirming his status as an enemy.

During the 19th century, when the natural sciences, driven by Charles Darwin's "Origin of Species", began to influence new branches of nascent scientific knowledge, Cesare Lombroso's criminology, supported by a mistaken thesis that associated crime to flaws in the evolutionary process of the criminal, ended up inserting the enemy into the realm of inferior beings. The born criminal is described as a kind of wild animal, an incorrigible enemy.

Dealing with this same historical scenario, specifically highlighting the economic conflicts arising from the contradictions that involve the interests of capital and work at the heart of the emerging capitalist society, Zaffaroni (2007) points to the emergence of a new type of enemy arising from the criminalization of the struggle between Social classes. In his understanding, the rich, intimidated by the possibility of having their personal and property guarantees suppressed by the poor, created the police institution with the aim of neutralizing the resistant miserable, as well as domesticating them for industrial production.

Both the enemy described as a born criminal, pointed out by the Lombrosian theory, and the criminalization of poverty, resulting from the "wild capitalism" of the phase prior to the creation of labor rights in the early days of the Industrial Revolution, were not phenomena restricted to the European reality.

Dealing with these two aspects in Brazil, a country inserted in the context of late capitalism, Abreu and Ferrari (2011) draw attention to the possibility that Brazil may be the only example of a country in the world that entered political and legal modernity by creating the Criminal Code before the Constitution. For the authors, a Nation that is first concerned with saying what the crimes are and only later on saying what the rights of the citizen are, must face serious social and public security problems. In the understanding of the national elites, this was the case of Brazil in the first years of the Republic.

It is necessary to remember that this moment in Brazilian history was marked by serious social problems, mainly resulting from the lack of governmental sensitivity to

mitigate the great process of economic and racial exclusion produced by the abolition of slavery in 1888.

In the understanding of jurists at the time, such as João Vieira de Araújo, professor at the Faculty of Law of Recife, the Criminal Code of 1890, due to the existence of historical, racial and social particularities in Brazil, must not adopt the principle of legal equality. For the new penal legislation that must treat unequals unequally, the theory of the born criminal, which promotes physical stereotypes that facilitated the identification of criminals, was perfectly adapted to the needs of the national elites (ALVAREZ, 2002).

Thus, Brazilian born criminals of that time had particularities in common, the most striking of which was their skin color, black. Readers of "O cortiço" by Aluísio Azevedo, a renowned work of Brazilian literature, will have no problem realizing the difficulties of inserting the freed black, seen by the authorities as the born enemy, to the society of republican Brazil. Based on this approach, Lícia do Prado Valladares (1990) tries to describe the reality of this significant population contingent that, after the abolition of slavery, moved to large urban centers and began to live in tenements and survive from activities practiced on the streets.

As the author points out, the unhealthy life of the former slaves in the tenements made the government authorities trigger a series of actions aimed at evicting and removing the inhabitants of the tenements to the urban perimeters, giving rise to what is conventionally called peripheries. The most striking example of these actions was the sanitation plan for the city of Rio de Janeiro known as "Reforma Pereira Passos", which provoked, in addition to the destruction of tenements to promote the remodeling of the city center, the "Vaccine Revolt" in 1904.

As well as unhealthy housing, activities to earn a living on the streets was another problem that worried the representative agents of the Brazilian State. In this sense, one of the main objectives of the Criminal Code was to establish order in the streets, punishing offenders with labor sentences. This code considered vagrancy a crime, the police arrested those who violated the rule. The new law considered all those who did not have an "honest" occupation to be vagrants. The criminal law that forced "loafers" to look for "decent work" served to meet the immediate interests of industry, as work considered worthy was factory work. The Criminal Code, through the exercise of social control by the working class, aimed to transform the free black into a salaried worker.

In the contemporary period, the Cold War, starting with the Truman ideology in 1947, extending until the disintegration of the Soviet bloc in 1991, defined the communist as the enemy to be fought. McCarthyism in the United States of America in the 1950s and the violations of human rights practiced by Latin American dictatorships between the 60s and 90s of the last century are part of this context.

According to Zaffaroni (2007), the end of the Cold War motivated the creation of an enemy that justified the maintenance of high levels of state repression. In this scenario, drug traffickers and government actions of the "war on drugs" emerged. The inclusion of the character Pablo Escobar in the list of international enemies is a very representative case of this phase.

However, the illicit narcotics market was not strong enough to become a "good enemy", filling the void left by the Soviet implosion. However, the events of September 11, 2001 in New York ended up being decisive for the construction of the most prominent enemy today, the terrorist.

The appearance of the enemy defined as a terrorist, which created a strong stereotype against the Arab or Muslim population, triggered a series of repressive measures by the government of the United States of America, such as preventive wars of unilateral intervention, and authoritarian legislation with exceptional powers. The war against Iraq in 2003, the creation of the Guantánamo prison in 2002, the anti-terrorism law of 2001, known as the USA *Patriot Act* and the process of tightening the US immigration law are examples of this new scenario.

Western history has shown that the penal system is always in search of new enemies, which are the portrait of the historical context experienced, usually in emergency situations, characterized by risk societies (GOMES, 2009). In Brazil, the terrorist enemy of the moment has political ties with anti-democratic groups that, constantly encouraged by government authorities, promoted violent predatory attacks against the physical installations of the three powers of the State in the last month of January.

Sharply, the critical view demonstrates that the Criminal Law of the Enemy is not convenient for Democratic States of Law, as it moves away from rationality insofar as it legitimizes torture or undermines human rights. It is widely known that exceptional measures almost always invoke a supposed necessity that knows no law and no limits. As a rule, the admission of an emergency criminal policy, such as the Criminal Law of the Enemy, is typical of non-democratic societies and authoritarian states (ZAFFARONI, 2007).

The Democratic State of Law, marked by submission to the rule of law and respect for human rights and fundamental freedoms, cannot accept the denial of the status of a person and the affirmation of the situation of enemy to anyone. All must be conceived as citizens and must have their fundamental rights respected.

Evidently, the offense to the principle of equality begins in the very terminology used, which elevates the enemy to an entity that does not deserve respect and assistance from the State. Finally, it is inadmissible and demoralizing for the penal system to distinguish the powerful criminal from the weak, to the point that the State only protects criminals seen as weak (MORAES, 2008).

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