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The "Enemization" of Criminal Law? An Inquiry into the Sociology of a Legal Doctrine and its Political and Moral Underpinnings

Abstract: The fight against terrorism has undergone major changes over the past thirty years. These changes have often been interpreted as a manifestation of "exceptionalism", a trend that should be criticized for undermining the rule of law. We agree with this diagnosis but want to take a further step by acknowledging that this critical relationship to the developments in counterterrorism is an integral part of the social processes to be studied. To this end, our approach places knowledge production at the heart of the scientific study of the fight against terrorism. We aim to understand how the so-called enemy criminal law – a legal dogmatic undertaking that has been used in various settings to reflect on the issue of counterterrorism – has gradually evolved from an objectivist analysis to a critical resource, without its axiomatics having fundamentally changed. With the help of what is called in France the "*sociologie des épreuves*", we show that this transformation has been achieved through the confrontation of the doctrine with different sociopolitical contexts. We aim to document and help explain this unique trajectory from a sociology of knowledge perspective.

Keywords: terrorism; enemy criminal law; legal doctrine; rule of law; sociology of knowledge.

1. Introduction

The fight against terrorism has undergone major changes over the past thirty years. In this respect, the 9/11 attacks and the ensuing "War on Terror" do not so much constitute a break as they reveal and amplify a series of changes that have taken place since the 1990s (Bigo, Bonelli, and Deltombe, 2008). At that time, narratives began to emerge on the rise of a "new terrorism", allegedly sustained by fanatical religious motivations, as opposed to an "old terrorism", to which societies and governments were supposedly more or less accustomed and which was therefore deemed easier to manage. Regardless of the relevance of this distinction (Duyvesteyn, 2004), the rhetoric of a drastic transformation of the terrorist threat has contributed to the idea that the means to combat it must be updated (Spencer, 2010): this "new terrorism" comes hand in hand with a "new counterterrorism", based on specific forms of expertise as well as distinctive legal instruments and intervention models (Nacos, 2016). This

interconnected set of competences, techniques, regulations, and resources has spread widely, in particular through intense international cooperation on an issue framed as "global" from the outset (Martin, 2007).

This makes it possible to point out some common features of what can be regarded as a general trend. First, to the extent that terrorist organizations take the form of transnational networks disregarding – to some degree – national borders, the measures taken against these organizations also tend to undermine the division between "internal security" and "external security", blurring the lines between what previously fell within the scope of military action and what was within the scope of police action (Deflem, 2010). Second, following a tendency observed in other security-related sectors, public action requires more and more anticipation. Indeed, reacting to the terrorist threat is no longer sufficient: the threat must be forestalled (Aradau and Van Munster, 2007). This imperative explains the extensive use of preemptive measures, and the importance given to early detection of "dangerousness" in combatting terrorism, both within and outside national territories (Zedner, 2007; Delmas-Marty, 2010; Wall, 2016). Third, counterterrorism displays a "punitive drift" (Cochrane and Talbot, 2008). By the human rights standards prevailing in liberal states, the guarantees offered to the individuals involved in administrative and criminal proceedings related to terrorism are decreasing, whereas convictions for terrorist acts are more severe than those for "ordinary" criminal acts of equivalent gravity (Alix and Cahn, 2017). In the field of foreign action, this drift is most clearly expressed through extralegal kidnapping, rough justice, and targeted killing.

These developments provide the coordinates of an "exceptionalism" that counterterrorism is perceived as emblematic of (Neal, 2010): counterterrorism appears to be at the forefront of an ongoing shift towards a type of government and social control that fundamentally departs from the rule of law and is in direct opposition to its core values (Cohen and Atherton, 2008). We acknowledge these analyses and do not dispute their conclusions. But we aim to take a further step by introducing an additional element to the puzzle, in order to refine the diagnosis of the way in which contemporary societies are confronting terrorism. Indeed, while the notion of exception refers to the questionable nature of the means deployed in the fight against terrorism, to the extent that they are viewed as undermining the very foundations of the liberal-democratic life forms, this concern is clearly widespread throughout society and regularly prompts public criticism of the institutions' response to terrorism. The number and intensity of the controversies raised by counterterrorism show that, alongside the demand for security, the commitment to civil rights

and to human dignity persists. Admittedly, over the last thirty years, the balance has been viewed as leaning towards the former. But this has further heightened the tension between freedom, justice, and security. Yet the efforts to gain knowledge on terrorism and counterterrorism – such as those leading to the conclusion that exceptionalism is increasing – are not external to this tension: they are a manifestation of it and must therefore be understood as being in keeping with common social attitudes on these issues[1].

This observation calls for an approach that places knowledge production at the heart of the scientific study of the fight against terrorism. This analytical shift assumes that the reflexivity of the social processes at stake is constitutive of the experience that social actors – including those specialized in knowledge production – have of them. Using the technical vocabulary developed by pragmatic sociology, we can say that this means considering the fight against terrorism as causing "*épreuves*[2]", *i.e.* situations collectively recognized as problematic. Resulting in inquiries and evaluations, such *épreuves* most often lead to disagreements, disputes, and revisions, whose expressions can be analysed (Lemieux, 2011). The knowledge effects stemming from these reflexive social processes are due to the efforts to restore intelligibility in relation to identified common problems and are mediated by specific actors, belonging to identifiable groups, who interpret the concerns and draw conclusions from them. But, as regards social knowledge, these expressions of what we will call here "*épreuves* of (counter)terrorism" cannot be reduced to a mere objectification effort. They involve what Max Weber calls a "value relation" (*Wertbeziehung*) (Bruun, 2008). Only by taking this aspect into account can we understand how the fight against terrorism leads to the above-mentioned frictions between instrumental efficiency and subjective rights. These controversies are inherent in the way in which today's societies are coping with terrorism. Consequently, the social sciences' insights into counterterrorism would remain incomplete if they were limited to the expression of a critical point of view. Indeed, such viewpoint does

[1] This means continuing and generalizing Luc Boltanski's repositioning from a "critical sociology" to a "sociology of criticism". Luc Boltanski emphasizes that "scholarly criticism" and "ordinary criticism" should not be assimilated to each other; instead, they should be addressed together, without postulating an a priori difference in nature (Boltanski, 1990). For a presentation of this approach in the light of ongoing debates in international political sociology, see Gadinger 2016.

[2] We keep the French word for this central concept of pragmatic sociology (also called "*sociologie des épreuves*") (Barthe, de Blic, Heurtin, Lagneau, Lemieux, Linhardt, *et al*., 2013). To date, no English translation adequately reflects all its nuances. Noortje Marres' (2007) use of the notion of "issue" is similar to the meaning that we attribute to the concept of *épreuve* in this paper.

not lie outside the processes under scrutiny: it is an integral part of them and therefore needs to be explained[3].

In turn, this orientation requires examining the formation and transformation of thought contents in relation to their "value drivenness" (that critical forms of expression remain a key indicator of). From this perspective, we have chosen to focus on the development of the so-called enemy criminal law doctrine. The foundations of this legal dogmatic undertaking have been laid in the first half of the 1980s by Günther Jakobs, Professor of Law at the University of Bonn, based on an analysis of recent trends in West German criminal law and in relation to the counterterrorist instruments developed in the Federal Republic in the 1970s. Relatively confidential at first, the doctrine of enemy criminal law met with unexpected success by drawing attention, from the 1990s on, in the Spanish-speaking world. Indeed, it aroused considerable interest among both academic lawyers and practising officials, who presented it as a response to the challenges posed by the fight against rather disparate forms of violence, which shared the fact that they were presented as "terrorist" in nature. The doctrine then gained renewed significance when the George W. Bush administration launched the "War on Terror". Yet, in the United States, the doctrine of enemy criminal law has had only a minor role in the legal analysis of the fight against terrorism and has been completely absent from public debate. But this is how, in the mid-2000s, it resurfaced in Europe, where, on the contrary, it fuelled the scientific, and increasingly public, discussion on counterterrorism.

Studying this trajectory of the enemy criminal law doctrine offers a number of advantages. First, as we see, this doctrinal undertaking has paralleled the transformations of counterterrorism over the past thirty years and has regularly provided a framework for reflection on the issues of the fight against terrorism. Second, it has been faced with heterogeneous social, political, and legal contexts. From West Germany struggling with small revolutionary groups to post-authoritarian Spain battling Basque separatism, from Colombia and Mexico facing violent guerrillas and fierce drug cartels to the global situation triggered by the attacks that armed organizations carried out in the name of a hawkish image of Islam, it is surprising that the doctrine, although supplemented by the *épreuves* of (counter)terrorism to which it has been brought over time, has remained essentially unchanged in its formal

[3] It is worth noting that this perspective makes sociological criticism neither illegitimate nor superfluous. However, sociological criticism tends to shift according to what, in such an approach, becomes the proper object of sociological expertise – namely, the social organization of deliberation forms – and therefore primarily aims to uncover the obstacles to the expression and impact of criticism.

axiomatics. Except for one aspect – the third reason that makes it worth being examined: in its early formulation, the doctrine consisted in merely *analysing* the transformation of the means devoted to the fight against terrorism; during the 1990s, it was, to some extent, about *justifying* these transformations; and, since the early 2000s, its uses have become more and more *critical*, and it is now almost exclusively aimed at denouncing the new faces of counterterrorism.

This last characteristic makes the enemy criminal law doctrine an atypical case. Considering the literature on the international circulation of ideas, knowledge, and policies, we can see that most empirical examples show that the issues, as well as the groups that mobilize, are equivalent from one context to another. Consequently, it is generally assumed that ideas, knowledge, and policies spread from one setting to another when they tackle *similar problems* and are passed on by groups with *similar interests* – even if the circumstances are different – sometimes resulting in diverging outcomes (Strang and Meyer, 1993; Dolowitz and Marsh, 1996). The case of the enemy criminal law doctrine deviates from this pattern. Over the last thirty years, counterterrorism policies have undergone largely converging developments. However, as one of the most advanced attempts to establish the general meaning of this evolution, the enemy criminal law doctrine experienced a radical reorientation: it went from an objective use, conceived as a way of validating the "need" for the "enemization" – to borrow Cyril Lemieux's (2016) term – of counterterrorist instruments, to a critical discourse on this very evolution, intended to debunk and defeat it. This reversal constitutes a puzzle, which we will document and try to explain[4].

To do so, we will follow the trajectory of the doctrine of enemy criminal law: starting with its first formalization in the Federal Republic of Germany in the 1980s (2), we will then describe how the doctrine was transformed by the *épreuves* met in Spain, on the one hand, and in Latin America (particularly in Colombia), on the other hand (3), in order to understand the circumstances of its return in Europe in the 2000s (4).

[4] This study is based on an extensive text corpus, which outlines the uses of the notion of enemy criminal law and the debates that it has raised. We selected about four hundred texts, from a few pages to several hundred pages long. Mainly academic (books and research articles), the corpus also includes texts intended for the general public (popular science books, newspaper articles) and for activists (archives, brochures, blogs). The corpus can be accessed – and references can be downloaded – here: https://www.zotero.org/groups/163644.

2. Germany, 1980s: Where we learn that the rule of law might not be a mere bill of rights

G. Jakobs outlined his thesis on enemy criminal law for the first time in 1985 (Jakobs, 1985). In short, he suggested that the Federal Republic of Germany's criminal code and criminal procedure code contained certain provisions based on premises so different from the rest of criminal law that it would be better to separate them altogether from the latter. His distinguishing criterion is the principle of culpability, which, according to him, governs most criminal law norms. But a few others depart from this principle: instead of applying to criminal acts that have *already* been committed, these norms apply to criminal acts *likely* to be committed, meaning that the subject's potential dangerousness has to be anticipated. Indeed, for G. Jakobs, these dispositions share a common feature: they no longer serve to prosecute material, external, and public wrongdoings, as criminal law theory states. They punish behaviours pertaining to what he calls the "inner civil sphere" (*interne bürgerliche Sphäre*), people's private and intimate lives. These behaviours often merely amount to the more or less direct and explicit expression of intentions "normally" beyond the scope of public authority's legitimate intervention. G. Jakobs concludes that, as the state slips into this inner sphere, it no longer treats its subjects quite as "citizens" or, as he later says, as "persons" (Jakobs, 2006). Instead, it treats them as "enemies" or "unpersons" (*Unpersonen*), insofar as their behaviours supposedly threaten the normative and cognitive validity essential to social order. In that case, criminal justice intervention consists of preventive actions, directed at subjects suspected of eluding shared social values.

From this analysis, G. Jakobs concludes that two kinds of criminal law should be distinguished, depending on the type of subject being targeted: "citizen criminal law" (*Bürgerstrafrecht*[5]) and "enemy criminal law" (*Feindstrafrecht*). In the first case, the subjects are identified as members of the legal-political community. As such, they are allowed certain procedural guarantees – including, if charged, the right to a fair trial and, if found guilty, the fair measure of punishment. By contrast, in the second case, the subjects are considered outcasts. If need be, they can be deprived of the rights that they could have enjoyed had they remained loyal citizens. In a few words, according to G. Jakobs, citizen criminal law corresponds to the humanistic criminal law doctrines. Except that it refers only to *citizen*

[5] Jakobs did not use this notion in 1985. However, as he later explained, it had been logically implied by his definition of enemy criminal law from the outset (Jakobs, 2004).

rights – not *human* rights – whereby G. Jakobs inserts a conditional clause in the rule of law: the protection of fundamental rights is conditional on the loyal adhesion to political society. Enemy criminal law applies whenever this criterion is not met. It involves proactive legal and police measures that target hostile intentions. From this perspective, procedural guarantees are privileges: they can be granted to a subject but can also be taken away, if necessary.

Most examples illustrating G. Jakobs' thesis come from the legal arsenal that the Federal Republic has built up since the early 1970s within the frame of the fight against terrorism – the kind of terrorism practiced by the so-called urban guerrilla (*Stadtguerrilla*) groups, including the well-known *Rote Armee Fraktion*. The purpose of these laws was to make it possible to incriminate the membership of criminal organizations, the intention, or preparation of criminal acts, or even the mere incitement to commit them. G. Jakobs used them precisely to shed light on the anticipation logic that, following his diagnosis, was increasingly at work in criminal law. Clearly, although somewhat discreet[6], his contribution was not only theoretical; it also aimed at taking part in the controversies that the fight against terrorism had provoked and that still agitated the lawyers' community in the mid-1980s.

In order to understand the stance that G. Jakobs intended to take in these controversies, we must briefly consider their dynamics over the prior fifteen years. When armed groups formed in the immediate aftermath of the "German May" and began to carry out their attacks, the German state responded by approving a series of measures to strengthen its capabilities against terrorism (Kunath, 2004). Criminal law did not escape this *Aufrüstung*, and important changes were made in that area (Berlit and Dreier, 1984). At that time, the rule of law was a sensitive question in the Federal Republic. It was perceived as an essential pillar of the West German polity, and any infringement of its principles was met with acrimonious disapproval (Schram, 1971). Yet the measures taken against terrorism were quickly seen as breaching the legal order and triggered an ongoing criticism. Legal experts, including law scholars, played a leading role in these mobilizations.

But not all law scholars shared this impulse. A characteristic aspect of the formation of the postwar German *Rechtsstaat* must here be considered. This process was at the heart of the political construction of the Federal Republic because it reflected the break with the Third

[6] Jakobs' analysis is not only based on the provisions used for the fight against terrorism; it also refers to some provisions against organized crime, economic criminality, and sexual crime. Yet what organizes the other references around a certain definition of the enemy is doubtlessly the context of terrorism in 1970s and 1980s Germany.

Reich. However, at the same time, the shortcomings of the Weimar Republic had not been forgotten. And criminal law experts commonly attributed these deficiencies to the excessive legal formalism of the Weimar Constitution. For this reason, the postwar German criminal law community attached particular importance to "material truth" (*materielle Wahrheit*) (Eicker, 2001). Certainly, the two dimensions, the formal and the substantial, were not thought of as exclusive to each other: a balance was sought. But the determination of the equilibrium was the subject of a heated debate. Those whose positions were perceived as overly formalist were held responsible for tying the state down and preventing democracy from defending itself (Thiel, 2009). Those who seemed to grant too much importance to the material dimension of criminal law were blamed for challenging the absoluteness of procedural rights that criminal justice should guarantee. In the latter case, it was easy to point out the similarity between this reasoning and that of Nazi legal experts (Müller, 2014).

This historical background helps understand G. Jakobs' argumentation. The law scholar takes up the anti-formalist stance that has never ceased to be operative in the legal science of democratic Germany and, while shifting its terms, pushes for a more "efficient" understanding of criminal law and a more "realistic" conception of civil rights. From this point of view, it is significant that, long after 1985, when the enemy criminal law doctrine had become a matter of scandal, it was often rejected as an expression of the return of the anti-liberal tradition, the reference to Carl Schmitt being the most common and widespread. However, this interpretation fails to clarify G. Jakobs' exact position. Indeed, while the latter bears witness to a form of "conservatism", it does not imply a break with the ideals underlying the formation of the Federal Republic.

G. Jakobs was much more concerned about what he viewed as the excesses of the generation of May 1968 and the devastating effects of its mobilizations (Schmoeckel and Mayenburg, 2008). According to him, the events of May 1968 promoted a sort of hysterical individualism, unable to understand individual rights other than as abstract attributes of the person. G. Jakobs wanted to challenge this view of the individual and contrast it with a concrete – in his own words, "sociological" – view of the individual, according to which being a member of the legal-political community is considered to be the source of individual rights. But this membership must be "effective": it has to be reflected in conducts conforming to the rules that it implies. Individuals can therefore exclude themselves from society by behaving in a way that breaks with basic social conventions and commonly expected attitudes. For G. Jakobs, such citizens change their status and become "enemies". As we see, this notion is not defined in military or partisan terms; it does not refer to an individual or a

group stirring up an armed confrontation for strategic purposes – even if that could be a consequence. The enemies are basically portrayed as *disloyal citizens* who, because of a radical ideology or deranged urges, break with their membership of political society in thought – if not in deed.

In the debate between material and procedural justice, the turn of the 1980s clearly tipped the balance in favour of the latter. G. Jakobs' 1985 analysis undermines this liberal consensus that had developed in the German criminal justice community, a consensus that, in the words of the Minister of Justice himself, consisted in considering procedural rights to be the "*Magna Carta* of the rule of law" (quoted *in* Vinke and Witt, 1978: 27). However, while G. Jakobs opposed this consensus, the situation forced him to do so cautiously and to cultivate equivocation. This explains the lukewarm reaction to his 1985 presentation. G. Jakobs' analysis departs from the idea that the enjoyment of rights must be considered unconditional. In this respect, it would not have been surprising that the idea of enemy criminal law raised strong objections. It did not, though (Gropp, 1985). Overall, his analysis was considered quite relevant and legitimate – provided that it be used to *criticize* the most reprehensible evolution of the German state's protection system. Predominately, the first formulation of the enemy criminal law doctrine was thus *perceived* as being in line with the prevailing *doxa*.

The scandal of enemy criminal law did not break in Germany until over a decade later, in the late 1990s, when G. Jakobs presented his views again at a major scientific event. On this occasion, not only did he reaffirm the existence of enemy criminal law, but he also stressed its *necessity*. Since the number of enemies would increase rather than decrease, he considered that "a society aware of the risks cannot simply put this issue aside; nor can it solve this issue exclusively with police resources. That is why there is no obvious alternative to enemy criminal law". (Jakobs, 2000: 53) According to most commentators, the German legal community's indignation originated in this shift. G. Jakobs' idea of enemy criminal law was perceived not only as a way of analytically describing (and, implicitly, normatively condemning) certain penal norms and practices, but also as a way of advocating their merits when ordinary criminal law procedures, which recognize and respect the subjects' rights, do not allow society to defend itself. This stance seemed outrageous to G. Jakobs' critics. For them, indeed, this justification of enemy criminal law would pave the way for the implementation of penal policies based on the principles that the doctrine claims to have uncovered.

3. Spain and Latin America, 1990s: Where we learn that rule of law and state sovereignty might challenge each other

The concern raised by G. Jakobs' opponents was not unfounded considering the way in which the enemy criminal law doctrine had shifted between the mid-1980s and the late 1990s. To understand these changes, we have to take into account the *épreuves* of (counter)terrorism to which the doctrine has been subjected when it has been received and discussed in the Spanish-speaking world. Since the early 1990s, the law scholar's work has been published in Spanish. G. Jakobs has often been invited to Spain and Latin America, especially to Colombia, where he has become a well-known figure in the legal scholars' community. In this new context, the enemy criminal law doctrine has developed aspects which explains both G. Jakobs' hardened stance in the late 1990s and the reactions that it triggered.

The translation, in the mid-1990s, of the book in which he presented his "theory of objective imputation" decisively contributed to making G. Jakobs a reference in criminal law science in Spain and in Latin America (Jakobs, 1996). It contains a prologue by Manuel Cancio Meliá, a professor at the Autonomous University of Madrid and one of the main actors who introduced the enemy criminal law doctrine into the Spanish-speaking world. He undertook in-depth research on the subject, leading to the publication, in collaboration with G. Jakobs himself, of a work entitled *Derecho penal del enemigo* (Jakobs and Cancio Meliá, 2003). M. Cancio Meliá's featured research topics include terrorism offences. In Spain, this criminal field became quite extensive. With the return of democracy, terrorist acts have been incorporated into criminal law again (whereas they had been mainly under military jurisdiction until then). Since the beginning of the 1980s, the gradual intensification of counterterrorist policies, with the fight against ETA as a backdrop, has led to incessant changes[7]. It is the pressing issue of the legal treatment of terrorism, along with the Spanish government's choice of a clandestine means to counter ETA (Guittet, 2008), that led

[7] Initially targeting the Franco regime, the action of the Basque organization changed in strategy with the abolition of the dictatorship. In 1982, talks took place between ETA and the Spanish central government, leading to the renunciation, by parts of ETA, of clandestine violent means of action, but also to a split within ETA, a so-called military branch wishing to continue the armed struggle for the independence of the Basque Country. This split resulted in continuing attacks and assassinations; the murder, by the active members of ETA, of a number of former members of the organization who had agreed to benefit from the amnesty; and the creation, in 1983, of the *Grupos Antiterroristas de Liberación* (GAL), a paramilitary organization that carried out targeted strikes against ETA members on behalf of the Spanish government.

M. Cancio Meliá to look into G. Jakobs' enemy criminal law doctrine[8]. But while the former considers himself a disciple of the latter, as he embraces the principles of the functionalist legal theory, M. Cancio Meliá's take on the doctrine differs from G. Jakobs' original intention on one crucial aspect. Whereas the German law scholar assumes that a legally codified coexistence between enemy criminal law and citizen criminal law is possible, the Spanish legal expert considers that enemy criminal law is *fundamentally* incompatible with the rule of law, so that its justification cannot be legal but only *political* (Jakobs and Cancio Meliá, 2003: 89 and following).

This shift greatly influenced the debate triggered by the reception of the enemy criminal law doctrine in Spain sparked in universities in the late 1990s and early 2000s. For instance, citing this same argument of incompatibility between enemy criminal law and the rule of law, Francisco Muñoz Conde (2008), a professor of criminal law at the University of Seville, took a public stance against tougher prison sentences. Conversely, other academics found in G. Jakobs' writings the conceptual tools that helped them justify the use of means that are considered contrary to the liberal principles of criminal law, but that may well be a "lesser evil", a "sort of 'law of war' by which society refuses […] to bear the costs involved by freedom of action" (Sanchez, 2001), traditionally guaranteed by criminal law.

Consequently, the interest in the enemy criminal law doctrine in Spain lies mainly in the potential benefit for the political legitimation of counterterrorist measures. As in the Federal Republic, it is the question of the limits of the rule of law that has been raised in Spain. But the conclusions drawn by Spanish legal experts are different from those of their German colleagues who adhere to the enemy criminal law doctrine: for the former, the doctrine reflects the *politicization* of law, which necessarily calls into question the universalistic conception of criminal law and the inclusive idea of the rule of law it is based on. As such, the doctrine becomes a matter of political analysis rather than of legal science: it expresses the mere sovereign claim of the state to protect itself. Here we should remember the important differences between terrorism in Germany in the 1970s and 1980s and terrorism in Spain in the 1980s and 1990s. Terrorism in the Federal Republic was carried out by a few dozens of radical activists, who were aware that it was delusional to try to defeat the State by armed

[8] As he puts it, "enemy criminal law's moment of truth resides in special criminal law and, more precisely, terrorist acts" (Cancio Meliá, 2010: 21).

force alone and basically intended to confront it by "provoking" it[9]. In Spain, ETA's actions were incomparably deadlier[10]: coinciding with a transition from a political regime to another, they were meant to unleash an insurrectional situation likely to prompt a separation of the Basque Country. We may add that the doctrinal entrepreneurs were not in the same ideological configuration in Germany and in Spain. While G. Jakobs responded with his doctrine to the "exaggerations" of the rule of law, his Spanish counterparts were faced with a situation marked by a dual imperative: consolidating the rule of law after decades of dictatorship and ensuring the unity of the Spanish state against violent separatism, including through clandestine and illiberal actions. The circulation of the enemy criminal law doctrine in Spain expressed this dilemma.

The introduction of the enemy criminal law doctrine into South America corresponded to another sequence of *épreuves* of (counter)terrorism, during which the doctrine was confronted with contexts even more different from the German situation. In this context, the political interpretation, as it has emerged in Spain, was even further strengthened, and the enemy criminal law doctrine was firmly anchored in a perspective of "state protection". As in the Spanish case, the category of terrorism made it possible to transpose the enemy criminal law doctrine from one context to another. G. Jakobs stated this doctrine was indicative of a "pacification deficit" (*Befriedungsdefizit*). If true, the latter was obviously quite limited in the case of Germany. This was what the shift to Latin America showed. There, the "terrorists" – in G. Jakobs' terms, the "enemies" – are guerrilla organizations, paramilitary groups, and drug cartels. They can hardly be considered as "disloyal citizens" who take advantage of the guarantees associated with privacy to carry on hostile intentions. Although they may resort to clandestine action strategies, the members of these groups form powerful organizations. They often control wide territories and are able to confront the states on equal terms. In these contexts, the "pacification deficit" bears no relation to what may be observed in any advanced liberal democracy.

As in Spain, M. Cancio Meliá played an important role in spreading the enemy criminal law doctrine in Latin America. Born in Mexico, the scholar published his first articles on the theory of objective imputation in Spanish and Latin American journals. His first publication

[9] The conflict, over more than twenty years, resulted in a total of 46 casualties, including 16 members of the armed groups.

[10] Over a similar period, the number of casualties in Spain was twenty times higher than in Germany, with a death toll of 829.

on G. Jakobs' enemy criminal law doctrine dates back to 1996 in Spain and was republished in Argentina in 1997. Over the following years, he organized and published the transcripts of criminal law conferences with G. Jakobs in Argentina, Peru, and Colombia. At that time, work by G. Jakobs had already been published in Colombia. A lecture given by the German professor in Colombia was edited by Eduardo Montealegre Lynett, the author of a book in the form of a tribute to G. Jakobs (Montealegre Lynett, 2003) and the director of the *Centro de Investigaciones de Derecho Penal y Filosofía del Derecho* (CIDPFD), a main entry point for German legal theories in Colombia. In the 1990s and 2000s, G. Jakobs was regularly invited, and his writings were often translated and published thanks to the support of the research centre. While the enemy criminal law doctrine reached Colombia through the latter, the Colombian judicial system soon became interested in it as well, especially through E. M. Lynett, who, in addition to be the director of the CIDPFD, was also a magistrate of the Constitutional Court of Colombia in the 1990s.

G. Jakobs' enemy criminal law doctrine was imported into Colombia during a major reorganization of the Colombian judicial system and a profound transformation of legal classifications and criminal procedures, with a view to fighting "criminal organizations", whose scale and power bear no relation to Germany's RAF or Spain's ETA. From this point of view, the doctrine of enemy criminal law was faced with a context whose specificities shift its very meaning. As M. Cancio Meliá suggests, the concept of enemy criminal law changes radically when applied to a state with a ninety percent criminal impunity rate and whose very existence depends on its ability to overcome armed organizations with equivalent or even superior resources (quoted by Víquez Azofeifa, 2011: 244). In such case, according to Alvarado Reyes (2006), the only realistic alternative to enemy criminal law is not the full realization of the rule of law; it is the withdrawal, perhaps even the disappearance, of the state itself.

To deal with this dramatic situation, a series of measures were taken during the 1990s, including the "Statute for the Defence of Justice" (*Estatuto para la Defensa de la Justicia*), also known as "Faceless Justice" (Nagle, 2000). These measures explicitly aimed to align the judicial and police system with the military goals of the fight against groups for whom the state was merely a faction in an armed conflict. As Farid Samir Benavides (2015) points out, these measures bear the mark of the enemy's criminal law doctrine. Its influence on the legal transformations was so strong that some Colombian lawyers have been using the phrase "constitutional law of the enemy" (Abad, 1999: 136 and following). Thus, the idea of enemy criminal law became a legitimation resource for political and administrative actors eager to

justify actions whose compliance with the principles of the rule of law mattered less than their efficiency at winning a war.

Alejandro Aponte (2004; 2006) offers a sharp analysis of the uses of the enemy criminal law in Colombia[11]. According to him, there are fundamental differences between what happens in Western countries and in Colombia. Western countries are not in a state of war. On the other hand, the state of war is sufficiently consistent in Colombia to describe the latter as a country where war and peace have been coexisting for over fifty years. As such, the Colombian case can be viewed as symptomatic of the overall reception of the enemy criminal law doctrine in Latin America. In short, because Latin America societies in the 1990s are characterized by high inequality and authoritarianism, they experience such a low degree of integration and high level of violence, compared to European societies, that the disloyal citizen figure suggested by G. Jakobs is only marginally relevant there. Thus, the idea of the enemy criminal law doctrine comes to be based on a distinct enemy figure, somewhere between the *subversive activist* and the *seditious criminal*. This figure outlines a very different continuum, which no longer goes from revolutionary militants to white collar offenders and sexual predators, but from guerrilleros to militiamen and from paramilitary forces to drug traffickers.

4. Europe, 2000s: Where we learn that the rule of law might not depart from human rights

The circulation of the enemy criminal law doctrine in Latin America has no doubt influenced G. Jakobs' later conception of it. The enemy figure he had in mind in 1999, when he spoke again in front of his German colleagues, was no longer the one that had informed his initial analysis. At that time, the enemy criminal law doctrine had clearly become relevant wherever armed groups called for state interventions in which the legal system served security and military objectives.

But another aspect must be brought in. His 1999 talk took place at a time when the perception of terrorism was undergoing important changes in Western societies. We do not know for sure whether G. Jakobs had considered the growing threat of violent Islamism when

[11] A. Aponte's work has decisively contributed to the diffusion of G. Jakobs' enemy criminal law doctrine in Latin America, although A. Aponte claims that he stayed clear of – and even in part objected to – G. Jakobs' stance.

he spoke before the Berlin-Brandenburg Academy of Science[12]. However, it is undeniable that, by the time the September 11 attacks happened, the measures taken by the United States and, under its leadership, by other countries had become an object of great interest and reflection for the doctrine's users (Jakobs, 2006; Polaino-Orts, 2009). They were quick to stress how relevant the doctrine was to the analysis of the counterterrorist strategies in the "War on Terror" context. The development of the enemy criminal law doctrine in relation with this new *épreuve* of (counter)terrorism rests on analogical reasoning, based on the thought – hereafter formulated by Carlos Gómez-Jara Díez (2008: 531) – that "the situation in Guantánamo and the enemy combatants' debate does present similar issues to the ones raised by enemy criminal law".

This parallel is enough to lead to a new shift in the doctrine. The nature of the change becomes apparent if we consider the fact that, at least in the beginning of the "War on Terror", the provisions adopted by the US on the treatment of "unlawful enemy combatants" may potentially have been applied to anyone, with the notable *exception* of US citizens, who had to be subjected to procedures in compliance with the rules of the US criminal law system, regardless of the charges brought against them[13]. Thus, assuming that the counterterrorist instruments implemented by the United States actually operate on principles similar to those revealed by the enemy criminal law doctrine, the concerned subjects – the "enemies" – are still formally exterior to the US political society (Cole, 2003). In this case, the doctrine outlines a criminal law oriented towards the *outside* of the US political society, towards citizens of other states, against whom the American state resorts to means that it would not use against its own. Moreover, this criminal law is not supported by police and judicial

[12] Although it is unlikely that he did not do so in view of a series of events that he could hardly have ignored. For example, consider the Algerian situation and its repercussions in France, or the attacks on the Khobar towers in Saudi Arabia, on the American embassies in Nairobi and Dar-es-Salam, and then on the USS Cole in Aden, which already testified to the rise of Al-Qaeda – not to mention the Taliban's takeover in Kabul and the widespread idea, since the late 1990s, that Afghanistan had become the new "sanctuary for terrorism".

[13] We can mention the case of John Phillip Walker Lindh, the "American Taliban". He was captured in 2001 in Afghanistan and detained at Qala-i-Jangi fortress, where he took part in uprisings that claimed the life of a CIA officer, among others. Later, he was repatriated. But he was not taken to Guantánamo. He was brought to trial before a federal grand jury. He pleaded guilty and was sentenced to twenty years in prison (Fischer and McDonald, 2005: 636-37).

institutions; it is supported by the classical instruments of external intervention, like the army and the secret services.

This reasoning leads to the idea that the enemy criminal law doctrine can also apply to foreign activities, carried out by armed forces and oriented towards enemy aliens. However, such activities are traditionally referred to as war. And, as such, they are supposed to obey certain rules, in particular regarding targets as well as legal and illegal means. Yet these operations demonstratively do not follow them (Engeland, 2011). From this perspective, the enemy criminal law doctrine no longer concerns what would otherwise be a sort of complement to domestic criminal law. It tends to turn enemy criminal law into an alternative to the law of war, capable of giving legal meaning to certain forms of armed intervention at international level, opening up an unprecedented political and legal space, where the guarantees offered by both liberal criminal law and international humanitarian law are simultaneously suspended.

The enemy criminal law doctrine has never received significant attention in the United States. But, as its supporters claimed that it was able to shed light on the new counterterrorism arsenal, it came back to Europe with the public controversies triggered by extraordinary rendition and Guantánamo, by the Patriot Act and waterboarding, by PRISM and targeted killings. But from then on, the enemy criminal law doctrine has predominantly been picked up from a critical standpoint. With this move, its diffusion has attained an unprecedented scale. It has reached its greatest extent in Germany, where hundreds of contributions can be found on a wide variety of media, both academic and for the general public – with the proximity between advocacy organizations, professional legal groups, and law scholars being at its highest, echoing the situation at the turn of the 1980s. Due to the early reception, quite a similar diagnosis can be made about Spain since the beginning of the 2000s, when the enemy criminal law doctrine was no longer considered in relation to Basque terrorism, but in relation to the evolution on the "War on Terror" front. In France, Italy, or Belgium, the critical reception of the enemy criminal law doctrine began later and has remained more limited, rarely reaching the mainstream public space. But the confluence of academics, legal professionals, and activists, clearly visible in Germany and Spain, can also be found.

There are two main trends in this critical momentum. The first one tackles the enemy criminal law doctrine itself, pointing out its underlying ideological inspiration. These contributions stress the idea that G. Jakobs and his followers rekindle the specifically German anti-liberal legal tradition, embodied by Carl Schmitt (Stübinger, 2015). This conceptual genealogy comes with a search for historical legal forms foreshadowing the kinds of measures

and instruments that the enemy criminal law doctrine thinks out. The most obvious historical reference is the Third Reich. But other, more or less unexpected, precedents are mentioned, ranging from the repression of witchcraft in early modernity (Jerouschek, 2007) to the GDR's criminal justice system (Vormbaum, 2018). This critical approach to the enemy criminal law doctrine holds that the doctrine, which relates both to the most dubious aberrations of legal thought and to the darkest times of Western history, must be viewed as *erroneous* from the standpoint of legal science, as it violates the letter and the spirit of modern criminal law institutions and the prevailing legal culture. Accordingly, it can neither really be conceptualized nor, as such, be practiced (Crespo, 2006).

The second trend of this critical momentum is different. While it fears the legitimation effects of the enemy criminal law doctrine, it does not so much level its criticism at the doctrine as at the measures and instruments that it addresses, which can be criticized precisely because they show enemy criminal law "at work". These criticisms are jointly formulated by scholars, law practitioners, and human rights activists (Uwer, 2006; Sullivan and Hayes, 2010), who examine the issues of counterterrorism in Europe as well as the recommendations made by European institutions (for instance, Gössner, 2009).They scrutinize a series of provisions – suspension of terrorist groups' assets, extension of prerogatives of the judges in charge of counterterrorism, security detention, new surveillance practices, de-radicalization and "punitivity" – to shed light on the general logic behind them, a logic that the enemy criminal law doctrine enables them to *name*.

These two trends form the two sides of the same critical enterprise. This is only possible on one condition: a limit, initially set by G. Jakobs, who has always refused – first by dodging, then blatantly – to overstep it, had to be lifted. As we have said, G. Jakobs wanted the enemy criminal law doctrine to be strictly descriptive: any other consideration, in particular any kind of evaluation, was considered both outside the realm of science and outside the realm of law. However, this attitude has encountered a lot of incomprehension: to confine oneself to providing objectivity to the law when the law is enemy criminal law supposes that one refrains from establishing that this law does not fit with the ideals of justice; even worse, to say that indeed it *is* law amounts to validate and legitimate the possible injustice resulting from it being, precisely, the law – as opposed to it being an infringement of the law, which would be possible to say if we were to adopt a normative concept of law. As Tatjana Hörnle (Hörnle, 2006) has shown, the explanation of the normative dimension of the enemy criminal law doctrine has been the prerequisite for the critical taking over of its concepts. Only then has it become possible to identify and study legal realities that are both

consistent with the principles of enemy criminal law, which the doctrine of the same name has uncovered, and at variance with the ideals of justice to which these legal realities should conform in order to be consistent with the historically acquired conception of the rule of law.

The way in which the enemy criminal law doctrine became a subject of debate in the French context is enlightening. The first mentions of the doctrine appeared shortly after the adoption of the security detention law in 2008, which authorizes the continued detention of persons convicted of murder, rape, or torture who have already spent at least fifteen years in prison, if they are likely to present "a particular dangerousness characterized by a high probability of recidivism". In that respect, enemy criminal law has been considered to be a sign of – and a vehicle for – a broader transformation of the modern penal rationality, from an offence-centred model towards a perpetrator-centred one. Geneviève Giudicelli-Delage emphasizes that the German counterterrorist legislation, one of the areas of criminal law G. Jakobs claims to have studied, is nothing more than a case – surely paradigmatic, but still – documenting the broader change every law scholar, as a jurist, *has* to fear and oppose (Giudicelli-Delage, 2010). In the same vein, the issue of the *Revue de science criminelle et de droit comparé* dedicated to enemy criminal law described G. Jakobs' doctrine as a relativist theoretical attempt to oppose the expansion of international criminal law. Indeed, according to Mireille Delmas-Marty, it can be understood as a response to (terrorist, but also non-terrorist) massacres, which tends to justify the use of violence against the perpetrators, in contrast to what she calls a "criminal law of inhumanity" (Delmas-Marty, 2009), which would be the legal path to pursue these perpetrators. The junction between these importations of enemy criminal law relies on what both G. Giudicelli-Delage and M. Delmas-Marty consider to be the deep antagonism between the doctrine and the humanist principles underlying modern penal rationality. Indeed, in order to elaborate the central argument of the enemy criminal law doctrine, G. Jakobs needs to rule out the notion of humanity of persons to the benefit of the concept of "juridical person" (Alix, Jacquelin, Manacorda, and Parizot, 2016).

At this intersection where academia and social movements meet, it is clear that the normative – that is, *necessarily* critical – conception of the enemy criminal law doctrine has prevailed not only in France but in all European countries, including Germany, where G. Jakobs has been marginalized. It is perhaps more interesting to observe that, at least once, this issue was also decided in court, so that G. Jakobs' position was in some way not only scientifically and morally, but also *legally* invalidated. This invalidation resulted from a decision of the highest Spanish Court. In a judgement that overturned a conviction for terrorism, the magistrates based their decision on the fact that the information leading to the

conviction of the accused had been obtained while he was detained in Guantánamo by Spanish police officers, who had not clearly notified him of their professional status. In a lengthy justification for the decision, the court pointed out that confirmation of the conviction would be tantamount to legalizing the use of methods contradicting the principles of criminal law. But the magistrates *explicitly* added that this would mean recognizing the legal validity of the enemy criminal law doctrine. Yet the judges asserted, this was legally impossible because

> "the State cannot defend the values of freedom, coexistence, plurality, and human rights through initiatives characterized by the violation of the values it claims to defend. […] For this reason, enemy criminal law would, more precisely, mean denying criminal law, insofar as it seeks to deprive its potential recipients of something specific and non-derogable: their status as citizens of the 'polis'." (Tribunal Supremo, 2006)

The decision of the Spanish Supreme Court can be understood as the obstacle that the enemy criminal law doctrine comes up against when pressed. Considering the whole movement, the socio-historical trajectory of the enemy criminal law doctrine *could* be summarized as follows: forged by a positivist study of West German criminal law, the doctrine strives to take into account legal reality only, although, through contact with various *épreuves* of counter(terrorism), it has become a normative doctrine that, in the name of law, legitimizes legal provisions widely criticized from the point of view of the defence of legal humanism. But the Spanish decision shows that this interpretation is not quite accurate. G. Jakobs repeats it over and over again: he has been, and still is, a law scientist, and nothing in his analysis deviates from the analysis of the facts. Simply, by analysing the facts in a strictly positivist manner, G. Jakobs is obliged, by the very nature of his scientific approach, to offer the legislators justified reasons to produce the law that they produce. The positive presentation of the legal provisions constituting the corpus of enemy criminal law does therefore not imply that they fulfil its normative foundations; it merely implies that we consider that, once law is produced, it is indeed law. This is what the Spanish decision is most strongly opposed to. It is a strong reminder for G. Jakobs that there is no such thing as a strictly positivist version of the law if, by this, we mean a purely formalist conception of the law; on the contrary, it states loud and clear that the law is intrinsically normatively oriented by *ideals,* and that it is illusory to think that a law scholar can analyse law texts by ignoring this *fact.* In democratic societies, to be law, law must be in accordance with a set of shared

principles. As the law of these societies cannot be a law that validates any dissociation in the treatment of the citizens whose relations it governs, consequently, enemy criminal law cannot be law. In a way, the Spanish Supreme Court explains to G. Jakobs what his profession is all about: if he wants to produce a positivist analysis of the law, he must embrace its normative foundations. This is what the return of the doctrine in Europe – that is, a return as a critical means – teaches: the trajectory of enemy criminal law is not that of a doctrine that is positivist first and that later on becomes normative; rather, it is that of a doctrine whose normative content is expressed differently, as it has been confronted with various *épreuves* of (counter)terrorism, to reach a point where its normativity appears to contradict the normative foundations that makes the law the law.

5. Conclusion

This study sought to solve a puzzle: how can a doctrine, whose wording barely changes, change so much? How is it possible that, in 1985, the doctrine of enemy criminal law expressed a cooled-down, objectivist experience of West German counterterrorism norms, while it expresses now, some thirty years later, a highly critical experience of the legal developments in a context of concern about contemporary counterterrorism? Following the example of Gilles Deleuze, when he reworked the notion of "jurisprudence" (Deleuze, 1995), we wanted to examine this strange phenomenon: not much change (in the doctrine), and yet everything changed (in what it expresses). The key to solving this enigma lies in the type of understanding of the circulation of the enemy criminal law doctrine that we defend in this article. We argue that it is necessary to move away from the opposition between two approaches conceived as mutually exclusive: one that considers the content of a given thought undertaking to be irreducible to its sole contextual uses; and the other that, on the contrary, only takes into account the historical and social contexts that alone would give meaning to this thought undertaking, but thus leads to neglecting its content (Shapin, 1992). The sociology of *épreuves* approach never strives to dissociate the content from the context, considering that the two are reproducing themselves through reflexive processes "in the making" (Latour, 2005).

In this sense, from a sociological standpoint, the value of the enemy criminal law doctrine is that it reveals a highly controversial orientation in the perception and treatment of certain acts of violence, which terrorism has come to epitomize since the first decade of the twenty-first century. This is why we have sought to shed light on the relevance that certain

actors have, over time, granted to the enemy criminal law doctrine. We have followed the successive changes in the relation to this doctrine since the mid-1980s, through different *épreuves* of counter(terrorism), in which the problem of terrorism was embodied in specific contexts guiding the way in which certain groups – not equivalent from one context to another – reoriented it. At the beginning, in 1980s Germany, the enemy criminal law doctrine was supported by a small group around G. Jakobs. They defended a heterodox and provoking stance in a debate focusing on the legal means of the fight against a specific type of revolutionary terrorism. In the following decade, the enemy criminal law doctrine has been taken up in several Hispanic countries. This resulted in numerous translations, studies, and publications. At that time, the situations that the doctrine was faced with in these new environments were incomparable with the original context. The doctrine thus incorporated aspects that had been until then beyond its scope and became a tool for thinking about near-war situations. At the same time, the doctrine moved away from the sole academic sphere, being promoted as government knowledge by persons and groups acting as intermediaries between the scientific world and public institutions. Finally, in the 2000s, a new context emerged as the world was faced with the threat of Islamist terrorism. States resorted to unprecedented counterterrorism techniques, which seem to precisely conform to the enemy criminal law doctrine. While G. Jakobs and some of his South American colleagues were quick to point out the relevance of the doctrine in order to shed light on the rationale behind these techniques, others saw it as a way of expressing what they considered the debatable nature of these developments in counterterrorism. This critical stance has become dominant in Europe, to the extent that, in some cases, the enemy criminal law doctrine as such has become an explicit focal point of the public debate sparked by the fight against terrorism. As shown, this axiological reversal nevertheless took place at a cost: as the critics turned the enemy criminal law doctrine around, they also gave it a new lease of life. To denounce the legal provisions that the enemy criminal law doctrine recognized and, furthermore, supported, the critics paradoxically conceded the existence and relevance of the doctrine. This new life of the doctrine led the integration of the critical version of enemy criminal law has been integrated into the legal field itself, as the 2006 Spanish court decision showed. In some way, we have come full circle: in 1985, G. Jakobs wanted the enemy criminal law doctrine to remain exclusively in the legal domain; in 2006, the Spanish court argued that enemy criminal law could simply not claim to belong to the legal system of democracies.

Nothing changed in the doctrine; yet, it changed entirely, with an important clarification of what kinds of internal links connect the legal form of the law to its normative content. In a

sense, one could say that things could not be different: despite G. Jakobs desperate disclaimers, the first formalization of the enemy criminal law doctrine was immediately perceived as a critical point of view, precisely because of these inevitable internal links between the legal form and the normative content of the law. This aspect became increasingly obvious, to such an extent that the enemy criminal law doctrine forced a normative choice: one had to be "pro" – as was mainly the case in Latin America – or "con" – the latter option having become predominant in Europe since the early 2000s. It is therefore not surprising that whenever the doctrine-inspired legislative measures seem to triumph, not only are these legal provisions criticized in the name of the diagnosis produced by the doctrine, but they are also criticized as being *non-legal* in the light of the normative principles of the law in democratic societies.

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