The *Penal Law of the Foe* Revisited

Politically Overcoming Liberalism or Trivially Regressing to State's Glorification?

Charis Papacharalambous[*]

Abstract

The 'Penal Law of the Foe' has already a long history behind it. The present article examines its basic genealogical sources and deals with the quintessence of the critique exerted against it; it is submitted that the wholesale rejection of the concept betrays that a liberal premise as to political constitution of the commons as well as of the nature of criminal system is falsely taken for granted. Crucial instead seem to be the ambiguity of the spiritual heritage of Enlightenment concerning what personhood can imply for the law discourse as well as the normativity inherent in criminal objective imputation within our post-modern condition. It is argued that the very benefit of the concept lies in its implicit political character. This could possibly make it appropriate for a criminal law policy inspired from a democratic republican spirit and aiming at the protection of the most vulnerable, thus tending to strive against the neo-liberal and anti-social erosion of modern societies. This presupposes however that the authoritarian and politically static elements of the concept be clearly displayed as theoretical shortcomings.

Keywords: penal law of the foe, normativity, person, imputation, liberalism.

A Introduction

The so-called 'penal law of the foe' ('Feindstrafrecht') has already a long history behind it. As a concept, it has been established by Günther Jakobs[1] and has caused discussions in a broad scope. They expanded from Central Europe to the Latin American criminal discourse,[2] thereby widening up the scope of controversies as to the analytical power and the legitimizing force of this concept.

* Asst. Prof. in Criminal Law, Law Dept., University of Cyprus; PhD in Penal Law and Law Theory (Goethe University, Frankfurt am Main).

1 *See* indicatively G. Jakobs, 'Feindstrafrecht? – Eine Untersuchung zu den Bedingungen von Rechtlichkeit', *HRRS*, Vols. 8-9, 2006, pp. 289 *et seq.*; G. Jakobs, 'Bürgerstrafrecht und Feindstrafrecht', *HRRS*, Vol. 3, 2004, pp. 88 *et seq.*

2 *See* respectively, K.V. Azofeifa, *Die Rezeption des "Feindstrafrechts" in Lateinamerika*, Diss., Hamburg 2011, passim and especially 240-324 (<http://ediss.sub.uni-hamburg.de/volltexte/2012/5577/pdf/Dissertation.pdf>).

B Genealogy

The use of the term is not new; in the ancient times, it denoted equally the exclusion of the deviant, as it denotes it today. From Plato onwards up to the positivist criminologies and the organicism of the last century, the enemy has been a standard recurrence.[3] The crucial link to the pre-modern discourse is rather the medieval distinction between the notions of 'justa causa' and 'justus hostis', a distinction concerning the law of war. Whereas the Christian war was held as 'just' during the late medieval times and thus the criterion was a substantial-ontological one, it was the Peace of Westphalia in the mid-17th century which marked a decisive turning point; henceforth the criterion became all the more procedural and neutral: important was ever since not the material justification of the war but instead the assumption that the adversary was a legal belligerent. The Peace of Utrecht between the British and the Continental States (1713) established the war as fair duel inside the European world and as unlimited enmity outside it. It is well-known that no other than C. Schmitt has suggested that this change was accompanied by a kind of subversive dialectics: under the pretext of the procedural criterion, substantial distinctions were progressively made, indicating that the non-legal adversary should be treated as 'criminal' and introducing the type of discriminating war, which is also the type of modern wars. In other words, the substantial-ontological distinction between just and unjust causes resurfaced, dressed now in a legalistic vocabulary, which supplied the war making party with the needed higher legitimacy.[4]

C The Critique and Its Aporias

One of the main objections openly and expressively launched against the concept of the 'criminal law of the foe', as it was presented by Jakobs, was exactly its affinity to Schmitt's categories. The critique stressed the totalitarian origin of the concept, as well as its oscillation between the analytical-descriptive value it deems to possess and its normative-affirmative undertone it hardly avoids.[5] The *first* critical point makes things seem better and more transparent than they really are; it is, in other words, an approach which tends to maintain the purist thesis of the 'virginity' of liberalism. Generally seen, analogous zero-sum contradistinctions between liberalism and totalitarianism may implicate, even unwillingly, what has

3 For a brief historical retrospective on the term, *see* K. Ambos, 'Feindstrafrecht', *ZStrR*, Vol. 124, 2006, pp. 2-12, who considers the external foe as more legitimate construct than that of the inner one (*ibid.*, pp. 10-12). *See* also E.R. Zaffaroni, 'Is a Non-Authoritatrian Enemy Criminal Law Possible?', *in* E.R. Zaffaroni & E. Oliveira (Eds.), *Criminology and Criminal Policy Movements*, University Press of America, Lanham, Maryland 2013, pp. 101-102.

4 *See*, on these aspects, M. Koskenniemi, 'International Law as Political Theology: How to Read "Nomos der Erde"?', *Constellations*, Vol. 11, No. 4, 2004, pp. 494-497.

5 *See* a representative approach of this kind of critique in Ambos 2006, pp. 18-19, 23.

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been marked as 'ideology' in the good Marxian sense.[6] It is correctly pointed out in this regard that from a fully and strictly liberal viewpoint one should strive for the abrogation of institutions like the criminal security measures as a whole.[7] Analogously, frictions seem endemic in some liberalist attempts to tackle the issue of the prohibition of torture.[8] One may, along the same lines, also encounter the argument that the 'penal law of the foe' disdains the consequences, detrimental to democracy and citizens' rights, it fatally produces. The ironic (yet accurate!) response of Jakobs was that 'anxiety about the consequences' is not a legal term.[9]

The *second* point of the critique is rather misleading; the distinction on which it is based between facts, which can be described, and normative ideas of a deontological/evaluative nature is no more accurate. Even Jakobs himself is not clear enough on this issue, as he deems his theory to be merely 'descriptive', once it is based on the sociology of N. Luhmann, invoking for itself an extreme descriptiveness too; this is perhaps consistent with the constructions of Luhmann, but it is not reflecting sufficiently the peculiarities of the phenomenon of law generally and especially the blurring of the fact-value distinction in modern law philosophy and theory. The latter are no more obsessed with this distinction thesis, at least in its classical positivistic form. Subsequently, if the concept has any diagnostic value, it also must have a normative power. This is actually the case with the construct of Jakobs as it seems. It is a theoretical approach of a clearly 'holistic' nature, which surpasses the fact-value distinction.[10] On the other hand, even if the insistence on the fact-value distinction by overlooking its narrowness cannot succeed in attributing to Jakobs's naturalistic fallacy or confusion of the distinction's poles, the critique against his insistence on pure descriptiveness and so against taking refuge to mere description in the matters of law is insofar correct, as Jakobs does not reflect thoroughly enough on the shortcomings of such stances.[11] Now, this normative power could either enforce an apology of the powerful or, even if indirectly, empower ideological critique.

6 Against the reduction of Jakobs's theory to national-socialist penal thought, *see* also F. Saliger, 'Feindstrafrecht: Kritisches oder totalitäres Strafrechtskonzept?', *JZ*, Vol. 15/16, 2006, p. 761 and at footnote 82. Against the labeling of the 'penal law of the foe' as 'fascist', *see* also Jakobs 2006, *supra* note 1, p. 290.

7 T. Hörnle, 'Deskriptive und normative Dimensionen des Begriffs "Feindstrafrecht"', *GA*, 2006, pp. 92-93. Indeed, the view of an eventual abrogation of these penal institutes, endorses J. Bung, 'Zurechnen-Können, Erwarten-Dürfen und Vorsorgen-Müssen – Eine Erwiderung auf G. Jakobs', *HRRS*, Vols. 8-9, 2006, pp. 318-319.

8 J. Arnold, 'Entwicklungslinien des Feindstrafrechts in 5 Thesen', *HRRS*, Vols. 8-9, 2006, pp. 304, 308-309.

9 Critically to this standpoint of Jakobs, *see* Ambos 2006, p. 22.

10 This point stresses correctly Saliger 2006, p. 757.

11 *See* this critique to Jakobs in L. Greco, 'Über das so genannte Feindstrafrecht', *GA*, 2006, pp. 102-104, 107-110. The one-sided favouring of descriptiveness, of focusing on the pragmatic-empirical level, as well as of the indebtedness to Luhmann, feature, *e.g.*, in Jakobs 2006, pp. 289 (at footnote), 290-291, 294, 297.

D The Model's Progressive Politicization: The 'Trust' Issue

But what is really at stake with the model of Jakobs? Actually, there are *two* models of his theory.[12] In a primary phase (1985), the concept has been received as rather critical; it separated the foe from the imputed citizen and it demanded the reduction of the penal law against the foe in favour of the expansion of the penal law of the citizen, purported to be particularly respectful of the latter's rights and freedoms. Focal points of this critical use of the concept have been the abstract endangerment or the attempt to instigate; the whole approach was rather *doctrinal*.[13] In a later phase (especially after 9/11), the receptive experience was the exact opposite: the 'criminal law of the foe' was now tending to be transformed into a concept acceptable in the 'salons' of mainstream *politics*; the 'criminal law of the foe' could be incorporated in the penal system as an exceptional law set; its exceptional character evoked once more the affinities to C. Schmitt and his glorification of the 'exceptional situation' through his theory of the Political.

Now, one has to consider more closely the cases falling under the concept in its mature form. There is a *shift* from the initial dogmatic categories to those more concerning sociology, criminology, and political theory. Instead of endangerment or the doctrinal subtleties on attempt and participation, the theory now focuses on certain groups of individuals, like quasi irresponsible dangerous recidivists, who have to be incapacitated, religious extremists/terrorists, members of organized crime, and habitual actors with a very negative prognosis as to their respect for protected social values with paramount importance (*e.g.* the case of harmful sexual perpetrations committed against children).[14] This shift reflects, more or less, the replacement of the intra-systematic immanent elaboration of penal dogmatic features through some sort of propositions on modern criminal policy within 'risky' societies, whereby the methods of traditional penal doctrine are transcended. These aforementioned groups have something in common, according to Jakobs, which exactly makes their members 'enemies', 'foes': they cannot be trusted; not in the trivial sense that everybody could become a criminal, but rather in that they are permanently 'distrusted' and thus have to be principally 'excluded' from society.[15] It also follows, even though not expressly admitted by Jakobs, that, among the goals of penal sanctions, retribution precedes prevention, while in parallel negative general prevention overshadows insofar the positive one, as intimidation prevails over enhancement of social trust into the norm.[16]

12 *See* on the developments in the theory of Jakobs on the 'penal law of the foe' and on its reception: Greco 2006, pp. 99-102; Saliger 2006, pp. 757-759; Ambos 2006, pp. 12-14.

13 G. Jakobs, 'Kriminalisierung im Vorfeld einer Rechtsgutsverletzung', *ZStW* 97, 1985, pp. 751 *et seq.* *See* also Azofeifa 2011, pp. 181-204.

14 *See, e.g.*, Jakobs 2006, pp. 293, 296.

15 *See ibid.*, pp. 293, 294.

16 That general prevention is overshadowed through retribution in the posterior work of Jakobs, *see* also A. Sinn, 'Moderne Verbrechensverfolgung – auf dem Weg zu einem Feindstrafrecht?', *ZIS*, Vol. 3, 2006, p. 112 at footnote 55.

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The topic of '*trust*' is part of the problematic distinction, mentioned above, between reality and normative thinking. There are indeed certain problems with this notion. Within such a strongly normative approach, as is this of Jakobs, 'trust' seems an oddity, since it oscillates between normative aspirations and quantifiable social facts. It thus enhances, perhaps involuntarily, a roughly naturalistic attitude. It has been correctly argued in this regard that in the theory of Jakobs the notion of 'trust', christened either as 'flanking norm' ('flankierende Norm') or as 'cognitive minimum guarantee' ('kognitive Mindestgarantie'), while purported to function as anti-sceptical argument, threatens the very coherence of Jakobs's normative theory on imputation, because it introduces a positivist element incompatible with this normativity.[17]

But this should not have become the main problem in the context of this thematization. 'Trust' is a tentative concession of Jakobs to empiricism totally unwarranted in the frame of his entire imputation model. It should not have been necessary for Jakobs to take refuge there, as if the disentanglement from empiricist traces would have rendered the enemy a notion devoid of any content, that is totally 'normative' (in the bad sense of the term). Such is for instance Aponte's respective view, who argues that the foe is not a 'behaviour' but a 'label' and thus product of political decision.[18] Such approaches do not differentiate enough. Definitions on deviance are social constructs and thus in their deep nature surely political ones; yet they are not mere 'labels' devoid of social meaning and given to political relativism according to a strong nominalist thesis. As *normative facts*, these definitions function rather as peculiar social and cultural *'realia'*. But this has nothing to do with empiricism to which Jakobs seems falling victim.

E The Main Problem: Implicitly Politicizing Criminal Law by Filtering Humanity through 'Personhood'

The trust issue is nonetheless a crucial symptom of the main problem, which seems rather to be how the 'penal law of the foe' can avert its own degeneration into an apology of the mighty and the powerful, a danger intrinsic in Luhmann's system. Insofar it is absolutely correct that a democratically *not reflected* 'penal law of the foe' is prone to produce normative inflation, selectivity, and absolute enmity.[19] There are two means to protect the theory from this.

Firstly, the lesson of the imputation doctrine introduced by Jakobs is the emphasis on the law addressee as guarantor of safety of legally protected goods; the stressing of the obligation as opposed to the omnipotence of the 'rights'; the *social protection*, at last, as supreme goal of the penal system. But then, society cannot be reduced to the state or to the power. On the contrary, the state is a

17 J. Bung, 'Feindstrafrecht als Theorie der Normgeltung und der Person', *HRRS*, Vol. 2, 2006, pp. 64-69; *see* also Jakobs 2006, pp. 291-292, where Kelsen's theory is positively valued because of its anti-normative elements.

18 *See* A. Aponte, 'Krieg und Politik – Das politische Feindstrafrecht im Alltag', *HRRS*, Vols. 8-9, 2006, pp. 299-300.

19 Very correct regarding this Aponte 2006, pp. 302-303.

species of the social whole to be protected, ultimately just the best means to fulfill protection and nothing more than that. It follows that the 'penal law of the foe' should not be interpreted in this reductive manner: it stresses the unconditional need of the state, but *it is not a state-centric concept*. The re-connection of the theory of the 'penal law of the foe' with the imputation doctrine can avert thus an 'absolute focus on the foe, which would remain irreparably subjectivist and consequently run contrary to the mainly objective character of criminal concepts.[20] It goes without saying that such one-sidedness would derail the 'penal law of the foe' towards a ruthless apology of State's authoritarianism. Thereby 'penal law of the foe' is used as a vehicle to cut short between phenomena as distinct as for example terrorism and other criminality forms under the common false rubric of a 'tough to crime policy'; under such state-centric expansion of social control, the need for maintaining the axioms of a liberal polity become again self-evident.[21]

Secondly, the systemic approach in penal law can avoid this reductionism only when coupled with the *respect to deeply rooted and 'thick' law principles*, by which it has to abide, such as the human rights or the moral fundaments guiding law and its enforcement.

But here is the point, where a *crucial dilemma* is arising. Isn't it the whole traditional concept of Enlightenment which the systemic approach is confronted with? And if yes, how should the moral principles of law be construed if they are considered as emanating from the spirit of Enlightenment? It is namely obvious that the holistic theory of Jakobs on imputation runs contrary to the abstract universalism of this spirit. However, Enlightenment is not that much 'one-dimensional' as its traditional connection with abstract humanism and liberalism insinuates. Besides Hobbes's authoritarianism, it was Kant who promoted austerity and moral rigour in penal matters, and it was according to Hegel's apotheosis of the State that concrete ethics (*'konkrete Sittlichkeit'*) were destined to replace abstract morals; finally, penal sanction was envisaged as retribution. Both Kant and Hegel tended to reject the foundation of human rights in the mere physical-biological entity called 'man' and to rather bring them closer to what especially Kant himself has called 'person'. Jakobs refers his theory back to this 'dark' herit-

20 This point is accurately pointed out by Saliger 2006, p. 761. That there is an inner tension and tentative compatibility between imputation theory and foe-construct within Jakobs's œuvre is thematized also by Azofeifa 2006, pp. 274-282.

21 *See* the related harsh but justified critique of K. Malek, 'Feindstrafrecht – Einige Anmerkungen zur Arbeitsgruppe "Feindstrafrecht – Ein Gespenst geht um im Rechtsstaat" auf dem 30. Strafverteidigertag 2006', *HRRS*, Vols. 8-9, 2006, pp. 316 *et seq.*, as well as R.A. Duff, 'Responsibility, Restoration, and Retribution', *in* M. Tonry (Ed.), *Retributivism Has a Past. Has It a Future?*, Oxford UP 2011, p. 67, and R.A. Duff, 'Responsibility, Citizenship, and Criminal Law', *in* R.A. Duff & S.P. Green (Eds.), *Philosophical Foundations of Criminal Law*, Oxford UP 2011, pp. 143-148. On the fatal combination of foe-construct and the 'war on terror', *see* also M. Jahn, *Das Strafrecht des Staatsnotstandes*, Vittorio Klostermann, Frankfurt am Main 2004, pp. 234-236, as well as M. Kraus, *Rechtsstaatliche Terrorismusbekämpfung durch Straf- und Strafprozessrecht*, Peter Lang 2012, pp. 142-160. *See* also finally C. Papacharalambous, 'The Penal Law against the "Enemy": EU-Arrest Warrant, Terrorism, and Extraordinary Counter-Terrorism Legislation in the USA (in Greek)', *Criminal Justice*, 2002, pp. 189 *et seq.*

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age of Enlightenment.[22] According to his theory, the person is not the mere individual but the bearer of legal obligations, in the first place; the person is not a dissolute singularity; it is member of a quasi 'organic' whole. Now (and this is the decisive departure from the harmonizing universalism usually attached to Enlightenment), this social whole gains its identity *only through contrast with the non-identical*, through its 'exclusion'.[23]

If so, penal law ought to 'war' on the 'enemies', that is on those fundamentally denying elementary social bonds (or, in order to avoid deontological prejudices, 'must' do so). Insofar, *Jakobs's theory makes humanism concrete, morals legally effective, and legalism political.* This is, it seems, the cornerstone of the 'penal law of the foe: it is (though tacitly) a *political theory of penal law.*[24] Its rejection might still be possible and easy only with the cost of stripping criminal law discourse entirely of any notion of political conflict implied to it. One may for instance hold that the Jakobsian notion of the person is 'totalitarian', but thereby a monolithically liberalistic (and thus politically undifferentiating) interpretive reception of the Enlightenment brings about this well-known 'mainstreaming' inflation of the term.[25] Or, of course, one can reject Jakobs's notion of the person by using traditional Kantian transcendental arguments; this may syllogistically be still coherent enough, though one has to admit that such arguments are nowadays rather obsolete.[26] Be it as it may, the political character of the theory cannot be denied.

It was not accidental in this respect that in Latin American penal theory, the concept has been received as political penal law,[27] and it has been thus interpre-

22 *See, e.g.*, Jakobs 2006, pp. 292-293, 295. Bung 2006, pp. 69-70, concludes that, to a certain degree, Jakobs rightly refers back to Hobbes; although, following the liberal interpretation of Kant's work, he rejects the plausibility of Jakobs's references to the latter. On the ambiguous stance of Enlightenment as to the citizen-enemy relation, *see* Zaffaroni 2013, pp. 94-100. *See* though a remarkable attempt to attest a certain proclivity towards positive prevention to the classic German idealism, undertaken by J.-C. Merle, *Strafen aus Respekt vor der Menschenwürde*, De Gruyter, Berlin 2007, passim.

23 *See, e.g.*, Jakobs 2006, pp. 293-294 (whereby there is admittedly an inconsistence as to whether society excludes the foe or the foe is self-excluded from society). *See* also as to the nexus among the notions of person, subject, individual, lawbreaker, and foe, passim, in G. Jakobs (Ed.), *Norm, Person, Gesellschaft. Vorüberlegungen zu einer Rechtsphilosophie*, Duncker & Humblot, Berlin 1999. On the 'non-person' and its reception in Germany *see* also Azofeifa 2011, pp. 90-99.

24 Only by neglecting this notion of Jakobs's theory, one is necessarily led to the conclusion that the theory is totally redundant; *see, e.g.*, Greco 2006, pp. 110-113.

25 *See, e.g.*, Saliger 2006, p. 762; I have elsewhere in detail argued against such approaches: *see* C. Papacharalambous, *Naturalism and Normative Approach. Causality and Objective Imputation as Foundations of the General Theory on Wrongdoing* (in Greek), Athens-Thessaloniki 2003, pp. 187-201.

26 *See*, for instance, Greco 2006, p. 105, who trying to overcome this objection is recurring to less ambitious, so-called 'rhetoric' arguments (*ibid.*, pp. 106, 107); *see* further Ambos 2006, pp. 26-29 and (similarly also) Arnold 2006, pp. 304-307.

27 *See*, for example, Aponte 2006, p. 299; this is somehow unwillingly contradicted by the author himself, as long as he considers the democracies based on stable consensus as more 'vulnerable' to succumb to the 'penal law of the foe' (*ibid.*, p. 298 footnote 2); the contradiction is that if these forms of state damp down the political penal law, as it is indeed the fact, then the 'penal law of the foe' cannot be identical with the latter, since this bears no serious danger to 'stable democracies'.

ted especially by the judiciary in Colombia, a state representative of social decomposition and flourishing criminality.[28] Nonetheless, the theory of the 'penal law of the foe' is thus misunderstood, because a political theory of penal law is not tantamount with political penal law; the latter intends to remain a traditional legal discipline, whereas the concept of Jakobs indicates the possibility of going *beyond* legalism and its deceiving purism. Thus, considering de lege ferenda terrorism (deemed to typically exemplify the law against the foe) as identical to high treason, it misses the crucial point of Jakobs's theory.[29] Symptomatic is also that the 'penal law of the foe' has been linked to the 'zero tolerance' model of anti-crime policy. In fact, this model (its consistency and effectiveness put aside) denies overtly deliberation and consensual attitudes in criminal policy; it conceives of itself as war strategy and proceeds technically promoting operational viewpoints instead of 'stagnating' in 'idealistic fallacies'. In sum, the 'penal law of the foe' is a kind of, say, *'genetic nihilism'*: the 'legal' is emerging out of an intrinsically abrupt *'polemological' Political*, which stands opposed to 'dialogical politics' of everyday juridical normality, marked by stability serving iterative tautologies and alleged 'all-inclusiveness'.[30]

F Tracing and Healing Shortcomings

It is true that the concept is insofar partly *redundant*, as some issues like preemptive penal legislation or the trend to make the notions of agent and victim all the more 'thin', or, further, cases where culpability seems somehow collective, could be worked out in the traditional doctrinal terms.[31] It is also correct that the concept shows sometimes a lack of differentiation, for instance, also such behaviour is subsumed under the rubric of the 'enemy', which is evidently illegal as such, that is as *profoundly immoral and not as merely extremely 'risky'*: the 'core crimes' of international criminal law like genocide, crimes against humanity, war crimes, aggression, and torture are thus insufficiently reflected in the concept; nevertheless, these perpetrators can be easily considered as foes, as long as they are already traditionally held as 'enemies of the human race' (*'hostes generis humani'*). More generally: grave breaches of fundamental social values can be taken account

28 *See* respectively Aponte 2006, pp. 301-302. On the declaration of certain repressive provisions as unconstitutional in Colombia, as well as on similar declarations in Great Britain and the United States, *see* also Sinn 2006, pp. 109 (and at footnote 29), 110-111.

29 *See* thus though Sinn 2006, pp. 116-117. As to the rest, regarding the contradictions and frictions in subsuming terrorism under the traditional notion of political crime, *i.e.* under the crimes against the State, *see*, at a doctrinal penal law level, C. Papacharalambous, *Das politische Delikt im legalistischen Rechtsstaat. Beitrag zu einer Theorie der illegalen politischen Kommunikation*, Peter Lang, Frankfurt am Main 1991, pp. 352-357, 360-366, 404-435.

30 The frictions of the procedural-dialogical model of Habermas, *e.g.*, are pointed out also in Koskenniemi 2004, p. 506; *see*, in favour, apparently, of 'all-inclusiveness', Sinn 2006, p. 114 and at footnote 70, who subjects any kind of exclusion to a presupposed prior 'communication'.

31 *See, e.g.*, on the traditional notion of dangerousness, analogously Saliger 2006, p. 760. *See* also in the same spirit the 'pragmatic' arguments against the 'penal law of the foe', presented by Greco 2006, p. 106.

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of, at least in the form of *breaches of social 'taboos'* according to the legal *realism* inherent to the concept of the 'penal law of the foe'. Regarding this point it has been argued by Bung that Jakobs follows a legal realist standpoint, which may avoid the 'normative fallacy', yet giving in to affirmations of factually prevailing force and violence; that one, instead, should start with axioms, questioning taboos at a higher theoretical level when thinking legally, namely normatively.[32]

This is fully correct and is aligned with the thesis submitted here. But one can present this argument also the other way around: the systemic approach can namely be conceived of as a *realist backing* of axioms, unquestionable in themselves, since they are *strongly morally founded, albeit culturally conditioned*. Insofar, the foe features as the profound denier of these axioms, and the legitimacy of the struggle against him is not undermined through scepticisms demanding answers, which are impossible (qua essentialist). Of course, this is appalling to purist liberal thinking, odious to the mobility inherent to the Political, which inevitably permeates cultural achievements. Noteworthy is, however, that Bung's conclusions are concerning stiff-necked criminals, not that much far from those of Jakobs's, with the exception perhaps of the suggestion that recourse be taken rather to social care measures than to foe-provisions;[33] still, can the notion of a care treatment of mass murderers, human traffickers, torturers, or children's abusers be held as *intelligible*? We provide a more detailed account of this below.

In any case, the reduction of the 'penal law of the foe' to *risk management* does not appear necessary. Thus, the standpoint holding that encountering social risks through penal law and 'penal law of the foe' are synonymous is correctly rejected.[34] It is therefore also correctly stressed that the 'penal law of the foe' is a highly symbolic type of penal law, which cannot be equated with risk prevention, whereby it is to be said, however, that a symbolically imbued penal law does not necessarily imply inflexible penal austerity.[35] Instead, taking as point of departure the identification between penal law of the foe and risk prevention must lead to the denial of the very possibility to characterize international core criminals as non-persons, since principal must become the need to restrain wide penal prevention.[36]

On the other hand, some modern crime types are tackled more appropriately when considered under the terms of the 'penal law of the foe'; money laundering, human trafficking, grave violations of environmental conditions committed on lucrative purpose are here indicative candidates. By all these crimes, the respective criminal provisions hardly protect well-defined traditional values and goods, like liberty, property, public order, the justice system, and so on; rather, they are presentations of *'combat norms' ('Bekämpfungstatbestände')* against foes of society, that is norms substituting for legal interests turned universal, collective, or spiritualized.

32 Bung 2006, pp. 317-318, 320-321.

33 *Ibid.*, p. 321 (at footnote 29).

34 *See* so contra Prittwitz: Saliger 2006, pp. 759-760.

35 Hörnle 2006, p. 84, but *see* also *ibid.*, p. 94.

36 From such identification between penal law of the foe and risk prevention seems to start Arnold 2006, pp. 307 *et seq.*, 315.

From a *post-modern deconstructionist viewpoint*, it can be argued further, that the 'penal law of the foe' is tautological and 'self-deceptive' due to its alleged 'ideological' and rationalizing tendencies; a Marxist objection could also be presented along these argumentative lines, aiming at dismantling the concept, held as obscuring power politics and conflicts between classes. Concerning such arguments, it has again to be stressed that the 'penal law of the foe' is a political theory of law. As such, it focuses appropriately upon the phenomenon of the conflict without 'in depth' questioning about issues referring back to social ontology or to post-ontological hyper-reflectivity; social ontology tends to *reduce* the Political to the Social and Economical, while post-modern deconstruction is *intrinsically de-politicizing* as long as it is identical with a kind of an infinite spiral motion of signs, which, notwithstanding the fact that it cannot be simply labeled as vicious circle or as Hegel's *'false Infinite' ('schlechte Unendlichkeit')*, remains still adverse to the quintessence of the Political, namely to the formation of frontally conflicting lines.

But at the end of the day, post-modern critique proves rather beneficial to the foe-construct in helping rectifying its shortcomings as to its political self-understanding. Let us here be more concrete: is it indeed appropriate to consider as persons heinous criminals like those mutilating the genitals of young girls? Are abductors and torturers of children 'persons'? Further, is 'tolerance' bearable in favour of paedophiles, sadists, and murderers of minors? Is it appropriate towards traffickers?[37] On top of that, are hard forms of investigation under pressure of time to be steadily and inflexibly considered as unjustified, even if these forms are the only means to eventually rescue high-ranking values, demanding protection beyond any calculation, or proportionality caveats?

Beginning with the last question, thus put, it does not in any way anticipate an answer in favour of violating *outright prohibitions of torture*; especially when innocents become candidates of torture or killing, any discussion must reasonably cease; generally speaking, one is here mostly confronted with what is labelled 'tragic moral dilemmas', whereby either the subjective imputation may be at stake or the law is impotent to give a persuasive response; *under both options, no justification is available within our legal civilization.*[38] What also must be held as obvious is that the State as such should *not* be considered as a 'high-ranking value'. Insofar, utilitarian or 'organicist' approaches of our post-modern normative state of affairs cannot be accepted as long as the differentiation of society from State is irrevocable and the deontological minimum in a democracy ruled by law and human rights is incompatible with them. It can also persuasively be argued (at

37 I have elsewhere argued that it is not: *see* C. Papacharalambous, 'From the Client through the Group to Society: Defending Rights Seriously against Prostitution and Human Trafficking', *'CRIMSOC' The Journal of Social Criminology* (published by Waterside Press), *Crimsoc Special Report 2013 (3)*, at subchapter 7 a, c, d (<http://crimsoc.org/2-uncategorised/86-charis-papacharalambous>).

38 *See*, on this spirit too, G.R. Sullivan, 'The Hard Treatment of Innocent Persons in State Responses to the Threat of Large Scale, and Imminent Terrorist Violence: Examining the Legal Constraints', *in* G.R. Sullivan & I. Dennis (Eds.), *Seeking Security. Pre-Empting the Commission of Criminal Harms*, Hart, Oxford and Portland 2012, pp. 305-322.

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least principally) that even where human dignity and life collide, the former seems to be preferable.[39] A different issue is however in how far the routinization of officials' conduct in these cases may imply the nascency of a quasi-customary 'excuse' of some kind. The answer should be rather negative; more coherent were anyway the strict maintenance of 'acoustic separation' in trials of offending officials, so that society gets the right message (that torture is absolutely prohibited) and the defendant's treatment remains sufficiently individualized.[40]

As to the former questions: the concept of the 'penal law of the foe' stresses merely the fact that *limitless liberalism sidesteps fundamental problems and turns (indirectly) violent* by disarming society's self-defense, by promoting acquaintance with evil, and by offering to the humiliated victim condolences ('support') but no justice. Irrespective of the eventual validity of ad hominem accusations of Jakobs as conservative thinker,[41] the 'penal law of the foe' can indicate that there must and should be set a limit to the traditional liberal penal law, a limit all the more obvious in the face of the horrendous realities of mass crimes, criminal economies, criminally accountable corporations, even criminal 'cultures'; the argument, related to the latter, that Jakobs's penal law of the foe tends to demonize the cultural 'Other', is of course to a significant degree correct;[42] it should however not be so construed that any notion of conflict, namely the genuine element of the Political, might be overshadowed through a liberalism based on purely negative freedoms.

This limit teaches us that the protection of human dignity comes first and that liberty cannot do without effective protection of fundamental institutions. If human rights are to be defended effectively – and that means politically – then *it has to be fought for making them universal*; but fought for them can be only by fighting against their foes, namely against the products of a social system based on capitalist economic totalitarianism, global networks of lucrative bestiality, and the predominance of pseudo-liberal, mass-hedonist cultural patterns. If defence of human rights means defeat of these enemies, then the latter are to be held as moral outcast to be socially excluded, in Jakobs's words: 'mere nature', which the 'norm' can impossibly have something to share with. Post-modern (but simultaneously duly politically reflecting) philosophy is very insightful into the contextual character and the potentially political nature of the universalism of human rights discourse. As long as human rights universality has to exist concretely, it has to disrupt violently the preceding legal-political edifice, as Žižek puts it.[43] This edifice is, according to what is submitted here, exactly the anti-republican anomie propelled by capitalist neo-liberalism, of which the fundamentalist intol-

39 *See* along these lines Jahn 2004, pp. 523-551.

40 On this issue, which cannot be dealt with here, *see*, among others, M. Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law', *in* P. Robinson, S.P. Garvey & K.K. Ferzan (Eds.), *Criminal Law Conversations*, Oxford UP 2009, pp. 3-11 (and the related discussion, *ibid.*, pp. 12-28).

41 Against the use of ad hominem arguments, *see* correctly Bung 2006, p. 64.

42 *See* Ambos 2006, p. 17.

43 S. Žižek, 'Against Human Rights', *New Left Review*, Vol. 34, 2005, pp. 125 *et seq.*

erance is just the 'other part'; *both of them are politically legally republicanism's antipodes*.

This means of course that the 'law universe' cannot remain integer; besides, integer wholes can impossibly exist once the political dimension is appropriately considered. This aspect has been abundantly and correctly stressed by the postmodernists and deconstructionists in the sense of an intrinsic schism inside every discourse, allegedly deemed 'integer'.[44] The foe-construct cannot do otherwise. But despite that (or because of that) it displays useful potentialities and connotations which are sometimes duly dealt with within the critical law discourse, as the example of Sack's work shows.[45] The author rightly unmasks the liberalistic ideological silence concerning the growing authoritarianism since the 1970s and underlines the apt connection made by Jakobs between degeneration of the socio-political institutions and omnipotence of market economy. This unmasking effect is acknowledged also by other scholars, irrespective of their eventually strongly critical approach to Jakobs's theory on the foe.[46] As it has been correctly put, Jakobs's enemy is a rather *narrow* expression of a more widened trend to 'securitization' within modern risk-sensitive criminal law pattern.[47] The democratic-republican utilization of this accurate description of 'what is going on' is the crucial challenge, what is really at stake. In Zaffaroni's words, the challenge is to supersede the static mode of dealing with the socio-political background of crime, which is of dialectical nature, to go beyond the fatalism of 'securitization', and thus to dismantle the 'parmenidic vision of the punitive power'.[48]

G Legal Dilemmas and a Conclusion

Last issue: how to deal with the foe legally? If penal law should remain law and avoid rough state's authoritarianism as well as populism, then it should abandon the pure liberal paradigm in favour of *a democratic penal system of social protection*. This has to be founded on militant republican political values and be discerned from pragmatist viewpoints exposed to criticism as to their lack of a due philosophical justification.[49] Since the force legitimating an acceptable 'penal law of the foe' should be the democratic/republican political values, the political formalism of Schmitt's distinctions, namely their lack of commitment to certain political

44 This is overlooked by Saliger 2006, p. 762.

45 *See, e.g.*, F. Sack, 'Feindstrafrecht – Auf dem Weg zu einer anderen Kriminalpolitik?', *in* <www.cilip.de/presse/2005/sack_druck.htm>. *See* also L. Zedner, 'Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment', *in* K.F. Aas & M. Bosworth, *The Borders of Punishment. Migration, Citizenship, and Social Exclusion*, Oxford UP 2013, p. 50.

46 *See, e.g.*, the remarks of Arnold 2006, pp. 307-309. A thorough analysis on the hidden (and silenced) violent (qua power-related and finally political) element of liberalism itself is contained in Žižek 2005, pp. 117 *et seq.*, especially at pp. 121 *et seq.*

47 *See* respectively Ramsay, *The Insecurity State. Vulnerable Autonomy and the Right to Security in the Criminal Law*, Oxford UP 2012, pp. 192-193, 230.

48 Zaffaroni 2013, pp. 105-106.

49 On this lack, characteristic of the current liberalistic faith, *see* Koskenniemi 2004, pp. 504-505.

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values, cannot be accepted.[50] Besides, it must, in any case, be stressed that Jakobs distances himself from Schmitt in that he identifies the foe with, in Schmittian terms, the 'inimicus' rather than with the 'hostis', a notion reserved for the cases of civil wars, themselves resting (allegedly) outside the law; thus, the construct of Jakobs avoids *principally* to let the value of democratic principles be questioned and insofar can serve as democratically conceived legitimization basis.[51]

Of course, there are no ready recipes for the needed transformation, which has rather to develop in the course of time; some issues can be noted as indications, though, such as: (a) the revival of the *security measures*, like the expansion of secure custody in Germany for the violent harmful juvenile delinquency, as well as of the British 'Imprisonment for Public Protection' since 2005, marking an unabashedly anti-liberal turn;[52] (b) the differentiated expansion of *preemptive* criminal legislation (in fields like organized crime, money laundering, violations of environment, hate crimes, racism, discrimination); (c) the creation of law-sets *abandoning more or less well-defined universal legal goods/interests*, where the recourse to such goods/interests proves impossible: whereas *e.g.* such recourse is still possible like in the case of environmental crimes, it is impossible in the cases of organized crime or money laundering; (d) the growing *disconnection of participation from the wrongdoing of the principal actor*, especially in the context of multi-causality and macro-criminal situations; (e) *correctional law austerity* in the form of selective incapacitation or the reduction of 'elasticity' of the custodial mode of serving the sentence in specific fields like habitual crimes or recidivist maltreatment of minors: no probation, prohibition of permits for leave from jail, obligatory therapy measures;[53] (f) extended collaboration of the public with the police in the framework of a *synergetic context* marked by vigilance and community policing; and (g) the establishment of *independent authorities* investigating sensitive crime types (like money laundering), thus indicating the formation of nests of *'commissarial democracy'*. This notion is indicating the transformation of parliamentarianism into a post-constitutional, authority-based, and pragmatically proceeding 'democracy' in the face of which universal values and the notion of the people, as allegedly striving for a state of freedom beyond the State, turn out to

50 For such an evaluation of Schmitt's works, *see* B. Rüthers, 'Carl Schmitt als politischer Denker des 20. Jahrhunderts', *ZRph*, 2002, pp. 66 *et seq.*

51 *See* respectively Jakobs 2006, pp. 294-295.

52 P. Ramsay, 'A Political Theory of Imprisonment for Public Protection', *in* M. Tonry (Ed.), *Retributivism Has a Past. Has It a Future?*, Oxford UP 2011, pp. 140-141, 144-146.

53 On the nexus among dangerousness, just deserts, and incapacitation, all brought under the 'chapeau' of the enemy, *see* also A. Ristroph, 'Terror as a Theory of Punishment', *in* M. Tonry (Ed.), *Retributivism Has a Past. Has It a Future?*, Oxford UP 2011, p. 161. At a more profound level *see* also the analysis of J.E. Kennedy, 'Monstrous Offenders and the Search for Solidarity through Modern Punishment', *in* P. Robinson, S.P. Garvey & K.K. Ferzan (Eds.), *Criminal Law Conversations*, Oxford UP 2009, pp. 253-262, tracing the turn to harsh punishment back to the needs of solidarity seeking anxious and fearful social monad; to this *see* also a psychological mirroring of this process in J. Ainsworth, '"We Have Met the Enemy and He Is Us": Cognitive Bias and Perceptions of Threat', *ibid.*, pp. 264-276.

be nothing more than nonsensical modernist residues subdued to erosion and disillusionment.[54]

Here is the crucial point: the tenacity of penal law of the foe can come only out of its democratic legitimacy pure and simple; its all-encompassing protective function; its reference back to fundamental social values like human rights and norm stabilization understood as primary social virtues, namely back to a field where radical democracy gets rid of 'commissars' or where preemptive legislation helps healing the social harm caused by systemic crime and not, for example, underpin xenophobia by ex ante equating irregular immigration with genuine crime.[55] If it succeeds in this it will become a vehicle for a democratically legitimized social control of crime; otherwise it will degenerate into another form of state-based formalized tyranny.

54 This is the way this situation is described by A. Carrino, 'Die Demokratie nach der Verfassung. Zurechnung und Verantwortung im Verfassungsstaat', *in* M. Kaufmann & J. Renzikowski (Eds.), *Zurechnung als Operationalisierung von Verantwortung*, Frankfurt am Main 2004, pp. 163 *et seq.* (especially at 168 *et seq.*).

55 *See* on this 'crimmigration' effect the correct critique of Zedner, 2013, pp. 51-54, claiming a post-nationalist and cosmopolitan openness of the notion of the law subject conceived of as bearer of rights.

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