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THE CONCEPT OF A SPECIAL CRIMINAL LAW AS A WEAPON AGAINST “ENEMIES” OF THE SOCIETY

1. THE CONCEPT OF “FEINDSTRAFRECHT”

Günther Jakobs developed the concept of “Feindstrafrecht” as opposed to “Bürgerstrafrecht” in 1985¹. The “Feindstrafrecht” (enemy criminal law) aims at curtailing the threat caused by dangerous individuals, which it views as enemies of the society, as sources of danger rather than as citizens. This would refer to anyone whose criminal actions meant the denial of the legal system as a whole, e.g. terrorists. “Bürgerstrafrecht” (citizen criminal law) represents the traditional criminal law which, according to Jakobs, reacts to attacks against the existence of its norms. By punishing the criminal, it defends the existence of the broken law, declaring the norm as still valid. Punishment is a symbolic interaction between the society and the offender, who is still accepted as a person, as a member of the society. If it was not for the symbolic act, punishment would not be necessary².

In 1985, G. Jakobs was rather critical towards the concept of “Feindstrafrecht” and was describing it as a problematic development in criminal law. It should only be legitimate in a state of emergency, if at all. The limitations of state power exerted by liberal criminal law would be constitutive of a liberal state; if they were to be abandoned, so would the liberal state³. Jakobs’ idea of “Bürgerstrafrecht” is particularly influenced by his rejection of the concept that the objective of liberal criminal law is to protect legal goods (“Rechtsgüter”), which is widespread in the German-speaking area. According to Jakobs, criminal law aims

¹ Günther Jakobs (26th of July 1937 Mönchengladbach) is a German criminal law professor emeritus at the University of Bonn, specialized in dogmatic and philosophical aspects of criminal law. He first mentioned Feindstrafrecht in *Kriminalisierung im Vorfeld der Rechtsgutverletzung*, “Zeitschrift für die gesamte Strafrechtswissenschaft” 1985, issue 4, pp. 751–785.

² G. Jakobs, *Bürgerstrafrecht und Feindstrafrecht*, “Höchststrichterliche Rechtsprechung zum Strafrecht” 2004, issue 3, p. 89.

³ F. Salinger, *Feindstrafrecht: Kritisches oder totalitäres Strafrechtskonzept?*, “Juristen Zeitung” 2006, p. 757.

at protecting the validity of norms⁴. Unlike “Feindstrafrecht”, traditional liberal criminal law is aimed at creating spheres of freedom for the citizen; unless they interrupt the (legal) sphere of another citizen, they are free to do whatever they please. “Feindstrafrecht”, on the other hand, intervenes much earlier, even at the preparation stage of a crime, as it is optimized to protect legal goods. Jakobs’ justification for criminal liability is not the formal ability of the perpetrator to cause harm, but his willingness to behave in a certain way. While traditional criminal law observes the possible offender and criminalizes certain signs of behaviour, even very early ones, to prevent crimes, Jakobs suggests looking at the perpetrator himself and his intent.

This changed at the turn of the millennium when Jakobs started to show a much more positive attitude towards the concept of “Feindstrafrecht” and seemed to change from a descriptive to a rather normative point of view. The terror attacks in 2001 led to even more attention for his theories⁵. Jakobs sees these two kinds of criminal law systems as two tendencies which can be found within one legal system. In his newer texts, he makes it clear that he would prefer a separation of criminal law into “Bürgerstrafrecht” and “Feindstrafrecht” so that the state can react appropriately as against the enemies of the state as well as “normal” criminals. Otherwise, elements of both systems would become part of the criminal law and citizens who break the law once would become subject to measures of the “Feindstrafrecht”, while the state would be less effective in combating its real enemies.

The philosophical base of Jakobs’ concept is the social contract theory. According thereto, the state is based on a contract and breaking the law means a breach of this contract. Some philosophers, like Rousseau and Fichte, would go as far as excluding anyone who breaks the law from the social contract, making them an enemy of the society, though, according to Fichte, they become part of the contract again after they are punished. Jakobs would not go this far; since the state has an interest in keeping people who committed a crime in the society and since they should have the opportunity or even the obligation to recoup the damages they caused, it is not possible to revoke all their rights. Jakobs finds Thomas Hobbes more convincing: a citizen cannot leave the society by committing a crime, except by joining a revolt or committing treason, as this would be a direct cancellation of the social contract, making him an enemy of the society. Jakobs also cites Kant, who sees a person who is not part of the society, as a constant threat, not because of their actions, but solely because of their “natural”, “unlawful” status

⁴ Whether criminal law protects legal goods or the validity of norms, which were designed to protect legal goods, should not make much of a difference, one would expect. Jacobs seems to consider this differentiation relevant, as the protection of legal goods would justify an earlier intervention of the criminal law, and can therefore only be an objective of the Feindstrafrecht. (L. Greco, *Feindstrafrecht*, Zürich 2010, p. 13).

⁵ L. Greco, *Feindstrafrecht...*, p. 13 *et seqq.*

(*status naturalis*), the lack of predictability of their future actions. Such a person could therefore be forced under the social contract or would have to leave the “neighborhood”. This should apply to anyone who is constantly denying the legal system of the state with their actions and is therefore a source of danger. Because they are neither a citizen nor a legal subject anymore, they become an enemy of the society which can combat them with any measures it deems necessary. Not only is the state allowed to use necessary physical force against them, it is even obliged to do so in order to protect its lawful citizens from the enemy. The state can still limit itself; it does not have to revoke all rights if it is not necessary, especially if the state wants to keep the possibility to make peace with its enemies sometime in the future alive. Unlike punishment against citizens, these measures have no symbolic character; they only aim at preventing enemies of the society from harming its members⁶.

2. ELEMENTS OF “FEINDSTRAFRECHT” FOUND IN TODAY’S CRIMINAL LAW

Jakobs identified three main features of “Feindstrafrecht”: Punishment comes well before any actual harm occurs; it contains disproportionate sanctions, i.e. extremely long imprisonment, and it suppresses procedural rights⁷.

He mentions several elements he would relate to preventive “Feindstrafrecht” in Germany’s current criminal law. Many of these norms can also be found in the laws of most other European countries, including Austria. He seems to relate any measure which limits the (supposed) offender’s rights before the conviction to “Feindstrafrecht” as such measures are preventive rather than a reaction to the violation of a norm. Concerning procedural law, this includes remand or limitation of contact with the attorney. According to Jakobs, a person who respects the law would not try to flee his trial or to suppress evidence; therefore, these laws are aimed at people who pose a threat to legal proceedings, who act as enemies. The same also applies to every investigation method of which the offender is not aware, for example wiretapping and the use of undercover policemen. These actions are only preventive use of force; unlike punishments under the “Bürgerstrafrecht” they are not a symbolic interaction between the society and the offender.

⁶ G. Jakobs, *Bürgerstrafrecht...*, p. 90.

⁷ C. G. J. Diez, *Enemy combatants versus enemy criminal law: An introduction to the European debate regarding enemy criminal law and its relevance to the Anglo-American discussion on the legal status of unlawful enemy combatants*, “New Criminal Law Review” 2008, Vol. 11, No. 4, p. 531.

Laws against terrorism often criminalize actions at a very early stage of the preparation of terrorist attacks. The Austrian law, for example, punishes participation in a terrorist organization as well as financial support of such an organization with one to ten years' imprisonment⁸. This is even the case if the organization has not carried out an attack yet and is only planning to do so in several years. These laws are aimed at preventing terrorists from breaking other laws which would then pose a threat to the state and its people. They are typical of "Feindstrafrecht" as they eliminate an enemy as a source of danger long before they could actually harm anybody. According to "Feindstrafrecht", it is not even the stage of preparation but the intent which makes the reaction necessary. Imprisonment of the offender would then rather be some kind of preventive custody than a punishment. The discussion about these laws has recently become more active with the rise of the IS and Europeans travelling to the Middle East to support it. This has led to the passing of § 89a Abs 2a StGB in Germany, which allows the prosecution of people simply for the fact that they are leaving their home country with the intention to join terrorist training camps.

Jakobs mentions preventive custody as a typical measure of "Feindstrafrecht"⁹. It does not look backwards at the crimes the offender committed, but forward at the damage he is likely to cause in the future. In this case detainment is only physical force to protect other citizens and is not intended to have any symbolic meaning. The Austrian law has a similar institution for repeated offenders who were already sentenced to imprisonment at least twice and kept committing serious crimes¹⁰. Institutions for mentally abnormal offenders also aim at protecting the public. Austrian law requires the offender to be convicted of a crime which can be punished with more than one year imprisonment. In addition to that, the law requires a high probability that the offender will continue committing serious crimes. His custody can then be prolonged unlimitedly, if necessary¹¹. Austrian law also allows the compulsory accommodation of mentally ill people in mental institutions even though they have not committed a crime yet. This is only permissible if the person poses a threat to themselves or others and only pursuant to a court order. This compulsory accommodation is not part of criminal law¹².

The prime example of Austrian "Feindstrafrecht" is the "Verbotsgesetz". It was implemented in 1947 to prevent National Socialistic actions. The "Verbotsgesetz" penalizes the foundation or support of NS organizations as well

⁸ See § 278b for participation in terrorist organizations and § 278d StGB for the financial support of terrorism.

⁹ G. Jakobs, *Bürgerstrafrecht*..., p. 89.

¹⁰ "Unterbringung in einer Anstalt für gefährliche Rückfallstäter" (accommodation in an institution for dangerous repeated offenders), § 23 StGB.

¹¹ "Unterbringung in einer Anstalt für geistig abnorme Rechtsbrecher" (accommodation in an institution for mentally abnormal offenders), § 21 StGB.

¹² Unterbringungsgesetz § 3.

as National Socialist propaganda and glorification of the NSDAP. If the act or the offender is particularly dangerous, the punishment is increased considerably. That the dangerousness of the offender is especially important for the amount of punishment demonstrates the preventive character of this law¹³.

The punishment is extremely severe and seems out of proportion when compared to laws against other terrorist organizations. Even lesser crimes, like glorification of the NSDAP, are punished with one to ten years' imprisonment, or up to twenty, if the offender or the act are especially dangerous. The punishment for the foundation of a NS organization is comparable to the punishment for murder and even lifelong imprisonment is possible. Until 1992, punishment under the "Verbotsgesetz" was even more severe. Such a disproportionate punishment would normally infringe the Austrian constitution. To avoid this, the "Verbotsgesetz" was accorded constitutional status. Since even the accumulation of NS propaganda material is punishable, the "Verbotsgesetz" criminalizes behaviour even earlier than most laws against terrorism. Not only does the "Verbotsgesetz" show these three characteristics of "Feindstrafrecht". It was also historically designed to combat the remaining National Socialists after they were defeated by military means during World War Two. Even though it was introduced as "Feindstrafrecht", the "Verbotsgesetz" is not used this way by today's judiciary. The punishments are usually close to the minimum penalty¹⁴. There is also no special procedural law for proceedings under the "Verbotsgesetz".

3. "FEINDSTRAFRECHT" IN LEGAL POLICY AND POLITICS

The terms used in current legislation as well as in political discussion already suggest that some groups of criminals should be "combated" or they should be "waged war" against. This can even be found in EU framework decisions "on combating trafficking of human beings" or "on combating corruption in the private sector". This is not new; Germany passed a law to combat business crime as early as in 1976, though this language has recently become more widespread. This kind of legislation (and the jurisdiction executing it) often employs higher than usual imprisonment sanctions, makes the preparation of crimes punishable at an earlier stage or deprives the offender of some procedural rights¹⁵.

¹³ R. Lässig, (in:) F. Höpfel, E. Ratz (eds.), *Wiener Kommentar. Verbotsgesetz*, 2nd ed., Wien 2015, p. 1 *et seqq.*

¹⁴ Courts are even using "extraordinary mitigation of punishment" (§ 41 StGB) liberally to impose sentences below the regular minimum penalty (see Austrian Supreme Court decisions: 110s92/89; 140s163/93; 130s122/95; 150s175/97).

¹⁵ C. G. J. Diez, *Enemy combatants versus enemy criminal law...*, p. 556.

The reasons for this may also be political or psychological. When citizens feel threatened by something, politicians will deem it necessary to find something that makes them feel safer. Whether these measures are in fact helpful to contain the actual danger is not the most important aspect. If they strengthen the citizens' trust in their government, they are still considered to be successful. Not only from the point of view of the politicians who are more likely to get reelected – trust is also important for the stability of a state and its economy.

Apart from being not effective at containing the actual threat, this symbolic legislation also has its own risks¹⁶. The least dangerous symbolic laws are those which are meant to show the values of the legislator without directly forcing the citizens to change their behaviour. Examples for this are some environmental laws which are rarely applied and meant to raise consciousness as far as environmental matters are concerned. But symbolic legislation can also lead to the introduction of laws with characteristics typical for “Feindstrafrecht”. The aforementioned German § 89a Abs 2a StGB is an example of such a law as it allows punishing people at a very early stage of the preparation of a crime. This kind of legislation also creates vague laws and lowers legal certainty. In Austria, for example, the law against criminal organizations led to the prosecution of a group of environmental activists. The group was later discharged and the norm reformed, but these proceedings caused bad echo in the media¹⁷.

4. TO WHOM SHOULD “FEINDSTRAFRECHT” APPLY?

It remains somewhat unclear what crimes exactly would lead to the loss of legal personality under Jakobs' theory. On a philosophical level, Jakobs would require the criminal to reject the legal system and its norms. On a more practical level, the offender would have to be a constant source of danger who cannot be expected to respect legal norms. Therefore, according to Jakobs, someone who kills their uncle to get his heritage sooner would still remain a legal subject. They do not reject the legal system, not even the norm which prohibits murder, since they still do not want himself or anyone, except their uncle, to be killed. The maxim of their action is inconsistent; such a crime would pose no danger to the state¹⁸.

¹⁶ P. Kaufmann, D. Lalissidou, *Präventivstrafrecht versus Feindstrafrecht*, “Juristische Rundschau” 2016, issue 4, pp. 163–167.

¹⁷ See <http://derstandard.at/2000001711934/Tierschuetzer-Prozess-Alle-Freisprueche-rechtskraeftig> (visited October 26, 2016).

¹⁸ G. Jakobs, *Bürgerstrafrecht*..., p. 92.

As an example of someone who should be subject to the “Feindstrafrecht”, Jakobs mentions people who commit crimes regularly, who are part of a criminal organization or, especially, terrorists. His definition of the subjects of “Feindstrafrecht” makes it considerably difficult to decide to whom it would really apply. This is even the case for his examples. Someone who makes a living out of pick-pocketing for years is for sure someone who is constantly breaking a norm and also a constant source of danger for other people’s property. Still, viewing them as an enemy of the society who needs to lose all their rights seems out of proportion. White collar criminals, on the other hand, who are causing considerably more economic damage with corruption, market manipulation and tax evasion have a serious interest in our legal system not changing because it is the base of the economic system they are operating in. Even organized criminals like drug and arms traders want *others* to abide by the law and the social and legal system in general to stay the same. Terrorists, on the other hand, often do want to change the political and legal system. Many of them, especially suicide bombers, plan on carrying out only one attack, though. Therefore, they are only a source of danger before they first commit a crime. This would make it considerably difficult to apply “Feindstrafrecht” to them.

5. PRACTICAL PROBLEMS CAUSED BY “FEINDSTRAFRECHT”

Jakobs declares “Feindstrafrecht” und “Bürgerstrafrecht” to be different ideals within the scientific discourse. In reality, none of them occurs in its pure form. Since he moved to a rather normative perspective, he argues for the existence of two separated systems, but within one legal system. The “Bürgerstrafrecht” would then be addressed at “normal” citizens who break a norm but are in general law abiding, while enemies of the society would be subject to “Feindstrafrecht”. The practical application of such a system of two criminal laws would lead to numerous problems.

The main problem would be to identify the enemies that should be addressed by “Feindstrafrecht”. This would have to be done by a fair trial, respecting the guarantees of Article 6 ECHR, since before being convicted, every citizen has still all his civil rights, including the right to be presumed innocent. This would make it impossible to apply measures of “Feindstrafrecht” to a (supposed) offender during investigation and trial. It would limit the efficiency considerably, especially since even detention while awaiting trial is only justified under “Feindstrafrecht”. This would make it necessary that one could become subject to “Feindstrafrecht” only partly, if a judge decides that they are probably an enemy of the society and can therefore be detained. The same would apply to other investigation methods which can only be justified against enemies, like technical observation, which

in some cases would need to be arranged by executive organs to be effective. Therefore, judges in accelerated proceedings and even executive organs would have to decide whether someone is (partly?) considered an enemy and loses some (or all?) of their rights. This would mean a considerable risk that regularly “normal” citizens would have their legal personality, including their civil rights, revoked due to inevitable mistakes. Even though today’s courts already make mistakes, the consequences would be much more severe. Therefore, the increase in efficiency in investigation and trial would be limited or there would be a serious risk for innocent civilians of losing all their civil rights.

“Feindstrafrecht” would also mean that as far as convicted enemies are concerned, preventive measures would take the place of punishment. This would allow for unlimited imprisonment or even execution of these people, as they have lost all rights, including basic human rights. Since most dangerous criminals who commit serious crimes already face long imprisonment, the additional use is questionable. Especially terrorists, who aim at killing people, will already face lifelong sentences in prison if they get caught alive. However, criminals who only support terrorist organizations would face much more severe consequences under “Feindstrafrecht” than under “Bürgerstrafrecht”. The same would be the case for people who join such organizations without taking part in attacks or who are still in the planning stage. The last two cases are probably also the reason why anti-terror-laws with the characteristics of “Feindstrafrecht” were introduced.

6. PHILOSOPHICAL ARGUMENTS AGAINST “FEINDSTRAFRECHT”

As mentioned, Günther Jakobs’ “Feindstrafrecht” is based on social contract theory. However, there is not only one social contract theory and Jakobs does rather agree with Thomas Hobbes and Jean-Jacques Rousseau than John Locke. Especially Hobbes has a rather pessimistic idea of man – he is antisocial and egoistic – and therefore assumes that every human would be at war with everyone else in the natural state. To escape this, people create a social contract, found governmental structures and subordinate themselves under a sovereign. Hobbes’ theory seems to be of a quite authoritarian character and to be heavily influenced by the absolutistic era it was developed in.

In Rousseau’s theory, the social contract is based on common welfare. Every citizen has to give up all his egoistic interests and enter the civic state. Since Rousseau states that people are often unable to recognize what would be best for them, this creates the danger of a totalitarian determination of the common welfare. John Locke has a much more positive picture of humans and the natural state. In his *status naturalis* there is no war, but natural law, even though there

is no state to guarantee it. The social contract is created to protect these natural rights and liberties¹⁹. Therefore, Jakobs' theory of a constant war of the society against its enemies would not be consistent with every social contract theory, because, according to Locke, people outside the society contract would not be enemies without rights but would still have natural rights, even if they may not be guaranteed by a state.

Even more important is the question whether the social contract theory is still suitable to describe modern societies²⁰. It was developed during the "Aufklärung" when a real international community and universal human rights did not exist. This leads to the question of how the social contract theory works with the idea of a global citizenship which guarantees basic human rights²¹. The first question is: which society forms the social contract? Historically, every national state would form its own social contract. Today, with international organizations like the UN and even supranational organizations like the EU which can create their own laws, this seems questionable. Therefore, to maintain the social contract theory, one possibility would be to assume that people are still only citizens of their national states, which are connected to other states by contracts and therefore only have the rights these contracts (like the ECHR) guarantee them. Therefore, if they are no longer part of the social contract of their national state, they also lose all rights these contracts give them. Many conventions on human rights apply *erga omnes*, though²². Therefore, violating the human rights of a non-citizen would still be an infringement of international contracts, even though not a violation of the rights of that person.

Another possible concept, which I would prefer, would be to assume that everybody is a party to two or more social contracts, a national and an international, possibly also a European one. In this concept, it becomes questionable whether a national state can exclude a citizen from the global contract. I have to admit that neither concept can reflect reality totally. One of the reasons why

¹⁹ M. Tebbit, *Philosophy of Law*, 2nd ed., New York 2005, p. 94 *et seqq.*

²⁰ There is, of course, a lot of criticism on the concept of a social contract per se. As it is a theoretical concept, rather than a real event, it has its flaws and contradictions. How can there be a contract in a pre-legal society? Would the contract need the institutions it creates to already exist? John Rawls has created a new concept of the social contract in the 20th century, which I find more convincing than older theories, even though it cannot abolish all their flaws; it was not used by Jakobs, though.

²¹ C. G. J. Diez, *Enemy combatants versus enemy criminal law...*, p. 559.

²² The UN Universal Declaration of Human Rights (1948) was created to guarantee its rights to *all humans*. Though it was not binding, it was the base for the European Charter of Human Rights. The same is therefore true for the binding ECHR, even though it does not stress universality as much (C. Tomuschat, *Human Rights*, Oxford 2003, p. 30 *et seqq.*). ECHR jurisdiction is essentially territorial, though within its territory, it is not limited to citizens of member states (A. Aust, *Handbook of International Law*, 2nd ed., Cambridge 2005, p. 216 *et seqq.*).

I prefer the second one is that the first one can lead to gaps in international human right protection, since it would rely solely on public international law contracts.

Since Jakobs refers to the enemy which is at war with the state as someone who has no rights, the question arises whether they are not subject to the law of war at least. Since *ius in bello* is tailor-made to cover military conflicts, it does not protect terrorists, organized criminals and other groups which would be subject to “Feindstrafrecht”²³.

7. “FEINDSTRAFRECHT” IN ACTION: COLOMBIA AND THE JUDGE WITHOUT A FACE

While “Feindstrafrecht” is usually discussed as a theoretical concept or a tendency within a legal system, in the 1990s Colombia had a criminal law specifically designed to combat its enemies, especially organized criminals. Colombia also has a history of constantly being at war with some of its own citizens²⁴. In the 19th century, Colombia experienced 14 civil wars and an even higher number of regional armed conflicts. Most of them were fought between members of the liberal and the conservative party²⁵. Therefore, in 1861, Colombia integrated international public law into its constitution, including the law of war. Rebels were rather seen as subjects to international law than criminal law. Even today, international humanitarian law is stated as a limit on the power of the government in case of a state of emergency²⁶.

In the 20th century, violence was still omnipresent. During the first half of the century constant fights for land took place, while the second half experienced a constant war against social-revolutionary guerillas. The situation became even worse with the raise of the drug trade in the 1980s. The state was unable to convict and punish members of drug cartels and paramilitary groups, as they would murder or bribe policemen and judges. Between 1989 and 1990, more than 100 government officials, especially judges, were killed. This led to the “Statute for the defence of the justice” in 1990. If someone was charged under this statute because they belonged to a “dangerous” group, there was no public trial. They did not know who the prosecutor, the judge, the witnesses were. The police had

²³ A. Aust, *Handbook of International...*, p. 216. This is especially relevant in the case of the Geneva Convention. Even though it was enlarged to cover irregular fighters, it still demands fighters to openly carry their weapons and be under proper command. It is in no way able to cover most organized or white-collar criminals who could be pushed into a “state of war” by Feindstrafrecht.

²⁴ A. Aponte, *Krieg und Feindstrafrecht*, Baden-Baden 2004, p. 38 *et seqq.*

²⁵ *Ibidem*, p. 38.

²⁶ *Ibidem*, p. 43 *et seqq.*

considerably enlarged competencies. This system was aimed at efficiency, and efficiency meant to produce as many convictions as possible. It achieved this goal, at the expense of procedural rights²⁷. High-ranking members of drug cartels and paramilitary groups were still able to escape justice. The system led to the conviction of a considerable number of innocent people and was abused for political goals. It proved most effective against smaller criminals. However, becoming subject to the special trials and severe punishments supposedly did not lead to their social reintegration but rather made them real enemies of the state. Colombia, especially its constitutional court, has recently been removing some of these norms²⁸.

The limited success of the “Statute for the defence of the justice” shows that “Feindstrafrecht” is not very effective, even if there is a real threat to the state. Unlike in Colombia, in most western states the existence of the legal system is not threatened – even terrorism is far away from being as dangerous for European states as organized crime and paramilitary groups are for Colombia.

8. THE USE OF “FEINDSTRAFRECHT” FOR THE SCIENTIFIC DISCUSSION

Even if we reject “Feindstrafrecht” as a normative category, it could still be useful within the scientific discussion²⁹. First of all, it could be descriptive, to identify norms or a legal system as “Feindstrafrecht”. The problem here is that the language employed by Jakobs (and others) to describe “Feindstrafrecht”, which became inherent to the concept, tends to cause polarization. The concept itself is so radical, labels groups as enemies, talks about “war”, that the use of its vocabulary tends to make discussions emotional. The other use could be critical. It could point out tendencies towards “Feindstrafrecht” in our current legal system so they can be avoided. However, we are facing a similar problem here: the strong negative connotation of “Feindstrafrecht”. If a theory is labeled as “Feindstrafrecht”, its supporters are likely to feel offended. They may even consider this an attack on themselves and an accusation.

Another question is whether the introduction of “Feindstrafrecht” as a category is necessary. Norms which show the characteristics of “Feindstrafrecht” could be as well described by other, more precise terms. Instead of criticizing laws against terrorist organizations as Feindstrafrecht, it would be better to dis-

²⁷ *Ibidem*, p. 66 et seqq.

²⁸ A. Aponte, *Krieg und Politik – Das politische Feindstrafrecht im Alltag*, “Höchststrichterliche Rechtsprechung zum Strafrecht” 2006, issue 8–9, p. 302.

²⁹ L. Greco, *Feindstrafrecht...*, p. 53 et seqq.

cuss the problems linked with criminalization at such an early stage. Therefore, the use of “Feindstrafrecht” for the purposes of scientific discussion is limited. This does not mean that there is no use for it. Especially because it is so radical, “Feindstrafrecht” shows how our criminal law system would probably look like if we started to label groups as enemies and revoked their rights.

9. IS THERE AN ALTERNATIVE TO “FEINDSTRAFRECHT”?

There are many negative aspects of “Feindstrafrecht” as a normative concept. This is the case for the dual system of “Feindstrafrecht” and “Bürgerstrafrecht” as well as for the tendencies of “Feindstrafrecht” found in current legal systems. Should the main objective therefore be to point out such norms and abolish them? The case is not as easy as it sounds. Most of these norms were created to deal with real challenges and would rather have to be replaced than abolished. If we take Jakobs’ wide definition of “Feindstrafrecht” into consideration, then it seems rather impossible to abolish all provisions that can be identified as “Feindstrafrecht” without changing the law substantially.

If we removed remand from our legal system, many criminals would flee their trial or commit further crimes. This is similar as far as anti-terror-laws are concerned. What should we do if we find out that somebody is planning a terror attack or acquiring accomplices to do so? Should we just let them go into hiding until they carry out an attack in another country? The laws against terrorist organizations are often the only possibility to stop them. We probably should try to either solve these problems with other means or try to minimize the negative side-effects of these laws. In my opinion, it is not possible to remove remand from our criminal law. We can only try to minimize it and grant appropriate compensation to victims of unjustified remand. Despite philosophical arguments against it, its existence still benefits our society. Pointing out that it is “Feindstrafrecht” is of little use. However, the effects of detaining a possibly innocent person, on the one hand, and the function of the justice, on the other hand, need to be taken into careful consideration.

Laws against criminal or terrorist organizations are an even more complicated matter. They lead to severe prison sentences and are actually designed to stop an “enemy of the society”. I would prefer to “combat” such dangerous people with police law wherever it is possible. If this does not prove to be sufficient, holding on to preparatory crimes could be the only valid option. Whether this would be legitimate depends on our understanding of criminal law.

Summary

In Günther Jakobs' terminology the term "Feindstrafrecht" (enemy criminal law) means a special criminal law designed to fight enemies of society. Unlike traditional criminal law, it is not aimed at regular citizens but at those who deny the legal system, e.g. terrorists and organized criminals. The idea of declaring some people to be enemies of the society leads to new legal, political and philosophical questions: Who are these enemies? How can we identify them? Can these enemies be deprived of their human rights? Answers to these questions need to be found, since elements of "Feindstrafrecht" already exist in today's criminal law.

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SŁOWA KLUCZOWE

prawo karne obcych, prawo karne obywateli, Jakobs, wrogowie społeczeństwa