

ON SECURITY, «FEINDRECHT» AND HUMAN DIGNITY

In a post-2001 reality where the war on terrorism has become a part of everyday life, it is crucial to review the fragile balance between citizens' security and the need to treat a human being in a dignified matter, especially when it comes to criminal law. In continental legal tradition, the function of criminal law is seen to encompass both, the protection of legally protected interests (*Rechtsgüter*) and (human) rights of the defendant [1. P. 49]. However, there are those who emphasize that the citizens' right to security can, even should, sometimes prevail. In this contribution, we will tackle *Günter Jakobs's* theory of «the criminal law of the enemy» (henceforth: *Feindstrafrecht*).

Jakobs's argument concerning the *Feindstrafrecht* rests upon a presumption he shares with *Hobbes*, namely that security of citizens has to be of prime concern to the state. However, citizen's right to security is, *Jakobs* argues, just another name for a right to a *de facto* effective law system. Rights are only useful if they are applied in practice. An advanced legal system serves as a useful orientation for people. It does not merely establish abstract rights, but also the utilisation of law in everyday life. This is why law cannot be merely normative phenomena. The validity of a legal norm depends on its effectiveness [5. P. 290-291; 297; 4. P. 95-97].

He then draws an analogy between the validity of a legal norm on one and a person as a bearer of rights and duties on the other hand. The latter is namely a normative concept as well and cannot be sustained without a cognitive support of the individual. If a human being is to be recognized as what *Jakobs* refers to as a person (also a citizen), her conduct needs to be in accordance with the normative expectation. To be recognized as a person, she needs to conform to the rules regulating the civil society. An individual who does not let herself be subjected to those rules cannot hope to enjoy the benefits that befit a person *sensu stricto*. She opted out from being a part of the civil society and is therefore treated as an enemy («*Feind*») with whom the society is in a state of war in the Hobbesian sense. As the state of war is characterised by the absence of norms, such individual cannot expect to enjoy the same treatment as a person does. She will be treated as an enemy, not as a person, hence not as a bearer of (human) rights [4. P. 99-100]

Jakobs is quick to add that not every single criminal offender becomes an enemy as soon as she violates a legal norm. He leans on *Luhmann* to explain that a legal norm is not effective just when respected, but also when violated. Only in extraordinary cases, when the tie between the norm and the social

reality demands it, a criminal offender undergoes a metamorphosis from a citizen to an enemy [5. P. 291-292]. *Jakobs* offers two criteria to identify a conduct with such far-reaching consequences. First he leans to *Kant* and argues that individuals who repeatedly offend are treated as enemies because they pose a constant threat to others [4. P. 96-97]. Later, he argues that an enemy is not (solely) the enemy of the established rule, but rather the enemy of the freedom-based society. Those are individuals who are a part of solid criminal structures, for example members of terrorist and illegal drug-trafficking organisations, white-collar crime offenders, etc. Furthermore, certain sex offenders who, through their conduct, detach themselves from the law, might also be viewed upon as enemies [5. P. 293; 6. P. 845-846].

As an enemy of the civil society lives in a perpetual state of war with the state and the citizens, the provisions and protections of criminal law cannot apply. Such individuals are subject to *Feindstrafrecht*. And what are its main traits? Firstly, it is primarily an instrument aiming at providing security for law-abiding citizens [5. P. 296]. Secondly, as we already emphasized, the enemy is stripped of his rights. She does not have to be treated as a person. [4. P. 103]. In principle, the state can set limits to its power and authority. These limitations will, however, stem from the need to preserve a certain self-image, not from the need to treat an enemy as a human being [1. P. 297]. Furthermore, such limitations will have to give way should the citizens' right for security demand so [4. P. 103].

Jakobs's theory of *Feindstrafrecht* caused a major uproar in the German legal literature [9. P. 727-730; 8, § 32 Rn. 223-223a]. Due to limited space and time, it would not be possible to even list them, save doing them justice and laying them out properly. Instead, we will here focus on a specific characteristic of the theory of *Feindstrafrecht* – namely that it is not in accord with the prevalent philosophical understanding of the concept of human dignity.

In the course of history, the concept of human dignity underwent a major shift. On one hand, the ancient Greek philosophy emphasized that the mere fact of being human is coupled with a duty to live a life, worthy of a rational being. It is a moral obligation and human beings owe it to ourselves to fulfil this duty. *Aristoteles* was referring to *inflorescence*, blossoming of a person and the fulfilment of one's full potential. With the raise of Christianity, the paradigm of human dignity as a duty shifted to the understanding of human dignity as a fundamental right, a right to be treated as a human being. This development is connected with the idea that the quality of being human, the quality of being a person, does not depend on human conduct. Human dignity arises solely from the fact that an individual is a human being. It comes from within oneself and has therefore been labelled *intrinsic* dignity. A further understanding of the term dignity stems from *Hobbes*: «The publique worth of a man, which is the Value set on him by the Common-wealth, is that which men commonly call dignity» [2]. Dignity is, in this sense, gained from the outside, from the society,

it does not stem from within an individual and has therefore been labelled *attributive* dignity [3. P. 60-66; 10. P. 10-13].

Jakobs tacitly follows *Hobbes* in his understanding of human dignity as value to be attributed by the society. If an individual wants to be treated as a person, as a human being, she needs to gain the trust of society by submitting to its rules and use of coercion. If she does not submit, she is merely an enemy and does not deserve to be treated as a human being, in accordance with human dignity. In certain cases, the need for security outweighs the need to treat an enemy as a human being.

Attributive understanding of human dignity is, however, not compatible with the doctrine of human rights. Universal declaration, in its preamble, recognises that «the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world». We therefore conclude that a state of affairs where a modern constitutional democracy adopts the *attributive* concept of human dignity and subsequently recognises *Feindrecht* should not be advocated. We owe it to ourselves to treat every individual as a human being, as an end to itself [7. P. 79; 87-89]. This is the reason why human rights have to come first, before the citizen's right to security, even in *Jakobs*'s sense.

Literature

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