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EXERCISE OF IUS PUNIENDI AS A MECHANISM OF SOCIAL CONTROL. THE VISION OF THE ENEMY AND THE UNLAWFUL COMBATANT IN CRIMINAL LAW.

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Summary

The exercise of ius puniendi, to prosecute and punish those conducts whose seriousness threatens the peace and security of society, constitutes a form of formal social control. Our positive law still retains its classic scheme, which enshrines the principle that no one can be prosecuted or punished except for crimes and penalties that are enshrined in legal norms, expressly, allowing no room for interpretation, to ensure legal certainty and the protection of property. In the last 20 years of an accusatory criminal process, it has been observed that even though in its beginnings it pursued the fair and transparent prosecution of the accused, over the years it has become illusory due to the disappearance of procedural guarantees translated into an increase of criminal offenses and penalties

The new paradigm of criminal law is oriented to modify the conception of the legal good and the elimination of the requirement to prove the guilt of the defendant; seeking to protect the norm and establish strict liability, generating an inversion of the burden of proof on the shoulders of the prosecuted. This structural functionalism is based on the conception that whoever attempts against the peace of the sovereign must be considered an enemy of society, understanding that the legal good for the citizens is only so in the face of concrete attacks against the criminal law, advancing the barriers of punishability to moments prior to the injury of the legal good.

Descriptors: Criminal system, enemy, criminalization, structural functionalism, legal persons, businessmen.

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Abstract

The exercise of criminal prosecution, that is, the right to pursue and punish those behaviors whose gravity threatens the peace and security of society, constitutes a form of formal social control. Our positive law still retains its classical scheme, within which the fundamental principle is enshrined without which no one can be prosecuted or punished except for crimes and penalties that are enshrined in legal norms, expressly and strictly, that do not allow no place to the interpretation, considering that this is allowed to ensure legal security and protection of legal goods.

Our penal system covers the set of substantive's and adjective's provisions, that allow to apply the corresponding sanctions against the commission of crimes. In the last 20 years of an accusatory criminal proceeding, it has been observed that even though in its beginnings the same persecuted the fair and transparent prosecution of individuals, this, over the years, has become illusory in the face of disappearance of procedural safeguards and increased repression, resulting in increasing penalties. The new criminal law paradigm, is oriented to modify the conception of the legal good protect and the elimination of the requirement to demonstrate the culpability of the individual. This structuralism is based on the idea that anyone who attacks the peace of the sovereign should be considered an enemy of society, understanding that the legal right for citizens is only in the face of concrete attacks against criminal law, overcoming the barriers of punishability at moments prior to the injury.

Keywords: Criminal law, enemy. criminalization, systemic functionalism, business, businessman.

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Introduction

At the end of the twentieth century, with the signing of a series of international treaties on human rights, which contain a series of procedural norms that require compliance with prosecution guarantees framed within the right to due process, Venezuela, with the support of organizations such as the World Bank and Konrad Adenauer, advanced the reform of criminal procedure, establishing at the end of the last century, an adversarial criminal procedure system, for which the entire infrastructure that would serve for its effective implementation was developed; But with serious failures in the dissemination of its benefits, which resulted in little citizen participation.

Parallel to this, we have been observing how the Venezuelan criminal policy so far in the XXI century, far from complying with constitutionally recognized principles on human rights that should guide the progression of the same towards a criminal system guaranteeing[1] with a minimum use of criminal law, has been incorporating greater criminalization with increased penalties, new crimes and simultaneous imposition of a plurality of criminal penalties, leaving aside the classic and specific legal goods, to deal with general and unspecific legal goods.

These unspecific goods are represented in the future danger, ambiguous goods, which lead to subsume in them any type of conduct that at a given time may be considered at the convenience of the administrator of justice as a criminal threat.

We see a boom in this type of protection of *legal property* through the so-called crimes of abstract danger, whose perfection occurs in the Environmental Criminal Law published in

1 The guarantee model was developed by the author Luigi Ferrajoli, in his work, (especially *Rights and Guarantees, The Law of the Strongest* in 1999, Trotta, SA, Madrid *and Law and Reason, Theory of Penal Guarantees* in 1998, of the same publishing house*)* where he describes the growing crisis in the protection of guarantees, observable in 3 fundamental aspects: a. - Crisis of legality linked to the illegality of power and which translates, among others, into disrespect for the legal reserve in punitive matters and in a crisis of constitutionality that deals with the transfer of the limits of *the power of the State*.Crisis of legality linked to the illegality of power, which translates, among other things, into disrespect for the legal reserve in punitive matters and into a crisis of constitutionality that deals with the overstepping of the limits of the exercise of power; b. - Crisis of the social state, which translates into a crisis of the social state, which translates into a crisis of the legal system, which translates into a crisis of the social state, which translates into a crisis of the legal system.Crisis of the social State, which translates into hyperinflation and legislative defragmentation, often through laws that we know as Decree Laws; and c.-Crisis of the national State, which translates into a transfer of the centers of decision making reserved to sovereignty; all of these endanger democracy. Therefore, it is imperative to strengthen the Constitutional Rule of Law.

Official Gazette 39.913, of May 2, 2012, for which the performance of the conduct that the legislator has typified as dangerous is sufficient, without the occurrence of an injurious result.

By virtue of this, as one of the central points of research, it has been considered important to determine the origin of this new trend within criminal law and the political-criminal justification for its implementation.

Content

1.- Background

Considering that our study should not only include an isolated partial consideration of the evolution of the adjective norms and their application, but also the consideration of the penal system as a product of a systematized criminal policy that also involves the substantive provisions, which we see that far from moving from a classical conception to a guaranteeing conception of minimum use of criminal law, become political weapons of control and repression that lead us to the substitution of citizens as subjects of criminal law, who are converted into enemies of the system, based on the structural functionalist doctrine of the criminal law of the enemy.

Although historically the criminal law of the enemy has been in force since the work of Jakobs, in the second half of the twentieth century, what this vision does is to retake the validity of the liberal thinkers of the seventeenth and eighteenth centuries, or the Age of Enlightenment.

Hobbes (1651 and 1998, ps. 144-145) emphasized,[2] that the social contract arises as the need to deliver power to the sovereign, in order to avoid that everything is obtained by force within society and to keep it in a permanent war, hence whoever resists the sovereign wanting to break that state of peace, should be considered an enemy of the sovereign, becoming a stranger and therefore, "enemy". However, as Locke (1688 and 2013) indicated, this criterion must be separated in relation to the monarchies of the old absolutist states or totalitarian states, in which the separation of functions of public power is not respected, such as that of Stalin in the Soviet Union, Hitler in Germany and some Latin American dictatorships, since the oppression of the sovereign leads citizens to claim their rights and in these cases, they cannot be considered as enemies.

Rousseau, early in his work, points out that:

2 In his work *Leviathan: or the matter, form and power of an ecclesiastical and civil republic*, when he refers to the need for the citizen to submit to a social pact in order to reduce the conflict of human passions to hold power, since these passions are contrary to ethics and morality, the state must preserve public order at all costs and the citizen must submit to it.

> *...a State can only have as its enemy another State, and not men, because no real relations can be established between things of different natures...without a declaration of war there are no enemies, only bandits.* (1973, volume I, p 13)

Further on, and in an apparently contradictory manner, Rousseau states that only murderers should be considered enemies under criminal law and be subject to the death penalty, because of the danger they represent. In this sense, he expresses the following:

> *...every wrongdoer, by attacking the social law, becomes by his misdeeds a rebel and a traitor to the fatherland, ceases to be a member of it by violating its laws, and even makes war upon it. Then, the preservation of the State is incompatible with his own, it is necessary that one of the two perish, and when the culprit is executed, it is more as an enemy than as a citizen.* (1973, Book II, p 57).

However, Kant (1795 and 2012), opposes this on the grounds that in case of hostility, rebels should be forced to enter into the contract in order to keep the peace and not annihilate them. [3]

The laws and customs of war, until the mid-nineteenth century, were only a set of legal principles recognized and accepted in the non-contractual field and did not annul or repeal the principles and obligations of non-contractual law or limit the validity of customary international law; as an example we have the Preamble of the Second Hague Convention of 1899, the Russian delegate Fyodor Fyodorovich Martens, proposed a clause[4] which is repeated in the Fourth Hague Convention of 1907 and in which it is expressed:

> *In the hope, therefore, that a more complete code of the laws of war may be proclaimed, the high contracting parties deem it opportune to state that, in cases not covered by the regulatory provisions adopted by them, the populations and the belligerents remain under the protection and under the rule of the principles of the law of nations, such as they result from the customs established among civilized nations, as well as from the laws of humanity and the demands of public conscience.*

3 Kant, in his work "Perpetual Peace", points out that it is our duty that we all contribute to the attainment of a public and universal rule of law, with a view to a progressive approach towards the attainment of perpetual peace.

4 The clause is based on - and owes its name to - a statement read by Professor von Martens, Russian delegate to the Hague Peace Conference of 1899, as referred to by Ticehurst, in an article published on March 31, 1997, in the International Review of the Red Cross, which can be read at the link: https://www.icrc.org/es/doc/resources/documents/misc/5tdlcy.htm.

The current movement of markets at the economic level and the flow of information has led the less developed States -including Venezuela- to implement policies that are not in accordance with the highest aspiration of human beings to develop in an environment in accordance with their dignity, a situation generated by a marked exclusion of markets in these societies, to which is added that the rulers in power are unable to apply mechanisms to achieve the satisfaction and full enjoyment of these rights, having to resort to fear and repression to exert control over society.

2.- Constitutional state and punitive power: The notion of the enemy in criminal law within a functionalist vision of the justice administration system

In Venezuela, constitutionally and developed in positive criminal law, the principle *nullum crimen sine lege scripta, praevia, certa et stricta* governs, by which a person may only be punished for an action that was foreseen as a crime in the Law at the time of its commission; that was perpetrated after its entry into force; that was clearly defined; that was not susceptible to analogical interpretation; and that, in the event of a change in the law before sentencing, the law that is more favorable to the defendant must be applied; that it was clearly defined; that it was not susceptible to analogical interpretation; and that, in case of a change of law before sentencing, the law that is more favorable to the defendant must be applied, a principle contemplated in Article 1 of the Venezuelan Criminal Code (Official Gazette 5768 E, of April 13, 2005).

In order to deal with the subject, we must start from the idea that the legal good is assimilated by the criminal law linked to the criminal norm; and in turn, the latter is linked to the criminal law, so that the content of the principle of legality and the aspects covered by its protection can be clearly identified. Following Mir Puig's conception (2004, p. 134), the legal good as a concept has a criminal political sense or *lege ferenda*, which entails the need for its protection by Criminal Law; and a dogmatic sense or *lege data*, of the object effectively protected by the violated criminal norm, as provided for in the criminal laws. Based on this conception, the legal good is not exhausted in the face of the concrete attack but continues to remain conceptualized and protected by substantive law, in the face of any future attack; Unlike what Jakobs maintains, in relation to the fact that the legal good for citizens is only in the face of concrete attacks against the criminal law, advancing the barriers of punishability to moments prior to the injury of the legal good with high penalties, especially for those crimes committed by individuals or in the business sphere, which in Venezuela has translated into the application of these same criminal norms in an expansionist manner to all those who, for thinking differently, are subject to political persecution, such as, for example, the application to students of the Law against Organized Crime and Financing of Terrorism in Official Gazette 5789 E, of January 30,

2012) or the prosecution of civilians by military courts; and even, persons detained for months without a process against them or detained in disregard of the release order issued by the competent court.

It follows, then, that the international criminal system for the prosecution of those who commit serious crimes against humanity offers greater guarantees of prosecution than our domestic system, since in the international system the persons responsible are punished, either for direct malice or for command responsibility and for failure to act to prevent the commission of crimes by subordinates,[5] in addition to liability for a crime of omission and for a crime of endangerment. On the other hand, reference is made to the principles that govern this law, individual criminal liability and the causes that exclude it.

Baratta (1986) pointed out in his work that the delinquent is a negative and dysfunctional element of the social system, whose behavior generates an integration within criminal law, criminology and criminal policy, of functionalist theories with criminal subcultures, to which belong all categories of excluded persons against whom the State machinery is directed, considering them as enemies in order to justify its actions.

A historical example can be seen in the United States of America, starting with the events of 2001, when Congress invested the President with special powers and attributions to combat terrorism and Bush presented the Federal Law known as the *U.S.A Patriot Act*,[6] (Public Law 107-56-Oct. 26, 2001), which regulates a series of governmental actions to restrict the rights of those suspected or accused of terrorism detained by the forces of order or pointed out as possible aggressors, or as potential witnesses. Under this exceptional circumstance, it was authorized to use all necessary and appropriate force against nations, organizations or persons determined by the U.S. Executive to have planned, authorized, committed or assisted in the terrorist attacks that occurred on September 11, 2001, or to have harbored organizations or persons, in order to prevent any future acts of international terrorism against the United States by organizations, nations or persons; Within this body of special rules, the status of *enemy combatant* or *unlawful combatant,* as opposed to *lawful combatant*, is created, referring to anyone who represents a danger to society. This definition could include civilians under arms, militias, guerrillas, armed bands, irregular forces, independent antagonists, saboteurs, spies or other types of belligerent elements that respond to a unified or fractioned command, in search of the same general objective; and that, to obtain it, use the force of arms against the opposing regular armed forces in battle or in covert hostile actions. It is noteworthy that even an immigrant who violates any immigration regulations, may be detained indefinitely or when

5 Rome Statute of the International Criminal Court. 1998. In its Article 1

6 Uniting And Strengthening America by Providing Appropriate Tools Required to Intercept And Obstruct Terrorism (Usa Patriot Act) Act of 2001, PUBLIC LAW 107-56-OCT. 26, 2001. At: https://grants.nih.gov/grants/policy/select_agent/Patriot_Act_2001.pdf

his activity is considered dangerous, without his conduct having been qualified as terrorism and the prosecution will proceed to review it every 6 months, according to section 412 of the law.

As a complement, in 2003, the *U.S.A., Victory Act*,[7] and, in the reform of the two aforementioned acts in 2004, the extensive financial and economic regulations applicable as from 2005 are highlighted, covering from article 301 to 377, referring to the control of money laundering and financial crimes, both at territorial and extraterritorial level, pointing out, among other aspects, that according to the International Monetary Fund's estimation, money laundering affects the transparency, reliability and security of financial entities, brokerage firms and large and medium-sized companies, which harms the security of American citizens by providing funds for *foreign* terrorist attacks, and by virtue of this, the State must safeguard Americans and the *integrity of American financial institutions (*Section 302). Similarly, in line with the new functional structuralism, in the *U.S.A. Patriot Act,* there is an increase in the length of corporal penalties, including those related to the crimes of counterfeiting currency, which were previously up to five years of imprisonment, being raised to twenty-five years of imprisonment (Section 375) or the criminal liability of legal persons for financial crimes (Section 363) or the smuggling of money to or from the United States (Section 371)

As can be seen from the previous example, these provisions do not reflect as a tutelary purpose the protection of society against terrorist attacks, but rather, from their development a different purpose emerges, such as the protection of the financial interests of the nation, inside and outside its borders, losing the sense of belonging between the law and the space of application, and the citizenship cannot grasp the legislative message. Similar to this regulation are the provisions of the last Decrees with the Rank, Value and Force of Law, issued by the Venezuelan Executive in the last decade, such as the Decree with the Rank, Value and Force of Organic Law of Fair Prices, published in Extraordinary Official Gazette No. 6202 dated November 8, 2015, the Decree with Rank, Value and Force of Law of Exchange Regime and its illicit published in Official Gazette 6210 E, dated December 30, 2015, already repealed, the Decree 1434 with Rank, Value and Force of the Organic Tax Code published in Official Gazette 6152 E of November 18, 2014, which establishes the imprescriptibility of the criminal action to prosecute 3 of the crimes that attempt against the treasury, Decree 1410 with Rank, Value and Force of Law Against Corruption published in Official Gazette 6155 E, of November 19, 2014 or Decree 1402 with Rank, Value and Force of Law of the Banking Sector Institutions, published in Official Gazette 40.557 of December 8, 2014, which evidence a distancing from

7 Senate of United States of America, *Vital Interdiction Criminal Terrorist Organizations Act,* September 25, 2003. Introduced in the 118th session of Congress on July 30, 2003 and approved in September, it creates a new category of crimes called: Narco-Terrorism, expressing as its object*: To combat narco-terrorism, to dismantle narco-terrorist criminal enterprises, to disrupt narco-terrorist financing and money laundering schemes, to enact national drug sentencing reform, to prevent drug trafficking to children, to deter drug-related violence, to provide law enforcement with the tools needed to win the war against narco-terrorists and major drug traffickers, and for other purposes*. At: https://www.sourcewatch.org/index.php/VICTORY_Act

the criminal legal dogmatic; resulting evident from the conceptualization of the legal good, that it is indispensable to establish the conduct or conducts that in the specific terms cause injuries to the protected interests, to avoid the breach of legality, bearing in mind which is the devalued conduct and its relation with the injury to the legal good that is intended to be protected; Hence, the lack of concordance between the two senses of the concept of legal good is lost, being displaced by a conception of symbolic protection that produces the sensation of necessity of the rule in order to avoid a future danger.

3. The punitive power of the state as a security policy. A perspective through the criminalization of legal persons

In our country, according to the classic criminal doctrine set forth in the Venezuelan Criminal Code (Official Gazette 5768 E, of 04-13-2005), it is impossible to punish a legal person, since the same lacks the will and maturity to carry out a punishable conduct, since it cannot be motivated by the same, for which reason, until the end of the 20th century, it was impossible to think of making someone other than a natural person criminally liable, since it was not feasible to exercise against him a judgment of reproach that would link his guilt; However, in 2001, the Law on Computer Crimes was enacted (Official Gazette 17.313 of October 30, 2001) which establishes corporal penalties for natural persons and criminal fines for legal entities that incur in the commission of such crimes.

This criterion that arises in the present century, is reinforced from the judgment 834[8] issued by the Constitutional Chamber of the Supreme Court of Justice on June 18, 2009, file 03-0296 (Constitutional Chamber. www.tsj.gob.ve) with report of Judge Carmen Zulueta de Merchán, by which, replacing the traditional principle: *Societas delinquere non potest*, -corporations cannot commit crimes- established the criminal liability of legal entities. In this sense, she stated, among other things:

> *...Such a position, in the face of a lax conception of criminal liability, allows reorienting the concept of imputation in the theory of crime, fracturing the ontological structures of Criminal Law to conclude that legal persons hold the capacity of criminal culpability -imputability-, since culpability is no longer conceived as an eminently personal judgment of reproach but as a judgment that -as a social function- preventively protects legal property, being that criminal protection covers all persons, whether natural or legal; to accept the contrary and to cling to the traditional principle societas delinquere non potest would imply -in*

8 Known as Corpomedios case, by virtue of nullity actions filed by RCTV and Globovisión in file 03-0296. The dissenting magistrate Pedro Rondón Haáz was dissenting in the dissenting vote. In: www.tsj.gob.ve.

the face of new forms of criminality- giving impunity to collective entities and thus turning them into germs for society....

Subsequently, the aforementioned Decrees with Rank, Value and Force of Law issued between 2014 and 2015 stand out, among which the Decree with Rank, Value and Force of Organic Law of Fair Prices, published in Official Gazette No. 6202 of November 8, 2015, and Decree 1402 with Rank, Value and Force of Law of Institutions of the Banking Sector, published in Official Gazette 40.557 dated December 8, 2014 among others, with the justification of defending the citizens and the State from the alleged "Economic War" and other laws such as the Environmental Criminal Law published in Official Gazette 39.913 dated May 2, 2012 or the Law against Organized Crime and Financing of Terrorism published in Official Gazette 5789 E, dated January 30, 2012

The other outstanding aspect is the establishment by executive means of the socialist regime in the political and economic spheres, as for example is expressly established in the Decree with Rank, Value and Force of Organic Law of Fair Prices, published in extraordinary official gazette No. 6202 dated November 8, 2015, violating constitutional provisions and contravening the principles embodied in Article 299 of the Constitution, being unconstitutional any legal provision or of such rank that seeks to establish a political and economic system different from the free market in a social and democratic State of law and justice, based on political and economic freedom, as well as the right to private property. In addition, corporal penalties and criminal fines are applied simultaneously by the organ of administration of justice for crimes such as speculation, hoarding or boycott, in violation of the *non bis in idem* principle that prohibits the imposition of more than one criminal sanction for the same act, as is evident from articles 49 to 63 of the referred Decree-Law.

Likewise, an indeterminate legal concept is incorporated as an aggravating circumstance to establish the application of penalties in its upper limit when the purpose is *destabilization*, which allows the interpreter -whether called Prosecutor or Judge- to subsume any conduct in this assumption, when the purpose is to exclude from the political or economic sphere whoever is considered an obstacle or represents a "danger" by qualifying him as an enemy. This is evident, for example, in the food policies carried out by the State, when, for example, exercising a dominant position in the market, it has exercised coercive measures against private businessmen, forcing them to sell their companies to the State or to deliver part of their products, with the threat of being prosecuted and of occupying their companies, in frank unfair competition, since the State becomes an absolute entrepreneur and employs officials, including military officials, to carry out these activities.

3.1.-The businessman in the new Venezuelan political-criminal paradigm

In the context of the perpetration of conduct that may be considered unjust on the part of legal persons linked to the business sphere, it must be taken into consideration whether, in order to satisfy the political and criminal need, for example, for compensation for damages, it is essential to resort to criminal law as a last resort; or whether the same or a better result can be obtained through other types of sanctions, for example, of an administrative or civil nature.

In principle, when an event is caused by the negligent or wilful misconduct of third parties or by the unconsulted conduct of any of the directors or managers of a company, a prohibition of return by strict liability on the legal entity would be unacceptable; that if there is an express delegation, as occurs for example in cases of labor accidents in which the legal entity has registered in the National Institute of Labor Prevention, Health and Safety (Inpsasel) a person responsible for industrial safety; if there is no express indication as to who is responsible for such liability, in a joint and several manner, among others, the employers, as provided in the Law of Prevention, Conditions and Environment of Work, published in Official Gazette 38.236 of July 26, 2005, article 127:

> *Intermediary Companies, Contractors and Subcontractors The contracting or principal company shall be jointly and severally liable with the intermediaries, contractors and subcontractors for non-compliance with the occupational health and safety regulations, of the obligations imposed by this Law in relation to the workers who work in the workplaces of the contracting or principal company.*

However, it is still under discussion the *culpa in eligendo*, for the case of having placed in office a person who does not meet the requirements to carry out such functions; understanding that criminal liability can be imputed by organization applicable to all citizens, being all responsible for their conduct does not exceed the permissible risk; or by violation of the duty of care, with respect to those who play a tutorial role, on whom rests a trust that obliges them -due to their special qualities- to avoid violating that duty, ensuring the validity of the legal property object of protection, whether or not they have control of the fact.

As Rosales points out, the justification for the expansion of criminal law into areas other than the mere protection of the essential legal rights of individuals is taken as a reference:

> (...) *in the understanding that several of the legal and juridical processes that are being experienced today have much to do with another of the tensions derived from Globalization that we have interpreted as a sort of subrogation of state political powers by powers of other orders, These "other powers" may contribute to the collapse of the constitutional states which, with all their redefinitions and*

> *questionings, mediate in social life and are potentially capable of protecting citizens, seen individually and societies as a whole, from crude power relations.*
>
> *In other words, constitutional states are today more than ever a real tool for the protection of communities that are simply dispersed in their diffuse interests, often considered tiny or insignificant, seen in their individuality, in the eyes of the great economic powers that can spare no effort in their quest for profit and seriously undermine the rights of entire populations based on "small" interests and rights of individuals blurred in the social complexity.* (2007, p. 10).

In the order of the above ideas, the existence of a constitutional State is the greatest guarantee for minority groups, whose interests at risk in the face of political and economic power interests, see in this guarantee a brake against a possible lack of protection or undermining of their rights; However, this excuse opens a floodgate that cannot justify departing from the security provided for any defendant by adjusting the criminal law and the performance of the justice administration system to the parameters of criminal legal dogma, respect for human rights and the establishment of fair trials. Thus, according to Rodriguez (2008), it *violates the basic and regulatory principles of classical criminal law, violating fundamental Constitutional guarantees and rights, in* order to ensure the validity of the rules, and consequently, to ensure that people act with respect to their role in society.

The National Executive has supported the use of this paradigm based on the alleged existence of an unconventional economic war for which it intends to hold certain sectors of the private business sector responsible; for example, alleging that since television or radio stations generate incorrect information, they generate false expectations about the low production due to lack of raw material, which in its opinion generates the disappearance of a certain product, causing the long lines that are observed daily in front of the commercial establishments to purchase the products; However, the Executive does not point out the way in which, through the administrative control entity, the merchants are pressured to sell the products immediately when they enter the establishment, preventing the companies from having an inventory to respond to the demands of the citizens.

This is clearly seen from the statements issued on several occasions by the President of the Republic, for example, on the occasion of the establishment of the Local Supply and Production Committees -CLAP- when he stated: *We are facing a monster with a thousand heads: the economic war, because the distribution system and the commercialization system of the whole country, 95%, is in the hands of private distributors and there are four or five distribution groups in the country that control everything that is the metabolism and the distribution mechanism (*Agencia Venezolana de Noticias, August 15, 2016*).* (Agencia Venezolana de Noticias, August 15, 2016).

3.2.-.-Criminal policy rationale

The functionalist theory raised by Roxin, within the conception of a Social and Democratic State of Law and Justice, with the so-called Alternative Project of the German Criminal Code of 1966[9] (Cano, 2016, ps. 73-120), produced the reform of criminal law in Germany in 1969,[10] including in these the political-criminal thought of minimum use of criminal law, according to which, among other changes, the non-applicability of corporal punishment in minor offenses is established, the use of alternative formulas for serving sentences that allow for social reintegration by not separating the individual from his social sphere, the incorporation of criminal types related to economic crimes, environmental protection, the fight against terrorism and the application of prevention criteria, based on a position according to which punishment would be justified *(...)* as a necessary resource for the social reintegration of the individual, and the incorporation of criminal types related to economic crimes, environmental protection, the fight against terrorism and the application of prevention criteria*.) as a necessary resource for the fulfillment of the protective and preventive mission of criminal law*. (1982, pp. 5 to 27)

Jakobs, contrary to Roxin, attributes greater importance to the aggravation of punishment as a preventive function, together with the reduction of procedural guarantees; and it was Luhmann (1983), who throughout his work, makes the theoretical justification of applying in a symbolic way, new criminal types within the criminal policy of expansion of Criminal Law, based on excessively high penalties, taking into account, to qualify these new criminal types, the risk or danger of damage of its future social expansion, which according to Jakobs, would even justify the unnecessary respect for human rights and procedural guarantees of the people that results in the social exclusion of the individual; being the object of protection *(...)* the firmness of the essential normative expectations of the criminal justice system, which is the only way to protect the individual's social exclusion*.) the firmness of the essential normative expectations in the face of disappointment, firmness in the face of disappointments that has the same scope as the validity of the norm put into practice*, and not what until now has been called the criminal-legal good. (1997, p.65). The psychic linkage to the *expectations of behavior socially demandable to the author* is raised, that is, instead of criminal law protecting legal goods, its framework of protection is the criminal norm itself, for the preservation of the State, which serves any type of political system, including totalitarian regimes, entering to speak of *the injury of duty*, for which it must be analyzed if the author acted as a guarantor or omitted that socially expected behavior,

9 Cano, 50 years later, exposes the fundamental features of what constituted the Alternative Project of the German Criminal Code of 1966, which marked a change in German Criminal Policy, incorporating the decriminalization of petty conducts or their punishment by administrative means, among other changes that were novel for the time, incorporating criteria of objective imputation for the fair resolution of criminal proceedings and minimum criminal intervention.

10 In this regard, Beristain cites the intervention of the then German Minister of Justice Horst Ehmke, who stated that the reform represents a *scientific rethinking of punitive law with a humanitarian and resocializing political-criminal orientation, which leaves the traditional retributive mission in the background* (1969, ps. 1-2).

which generated a legally disapproved *risk* that was reflected in the result. In conclusion, for this position, being the norm a guaranteed expectation, criminal law allows maintaining the validity of the norm and not the protection of legal property.

This conception of the abstract legal good of protection of a general feeling of security is opposed to the criterion that no democratic State can admit that the perpetrators of unjust acts lose their status as persons or are reduced to the condition of perpetual outcasts or marginalized persons, linked to crimes of dissident conscience, In these, the person who commits them feels the necessity of his conduct as an imperative of his conscience, responding to a closed and complete system of values or disvalues, experiencing the penal condemnation more than as a reaffirmation of his convictions, as an occasion to exhibit them and put his self-affirmation in them to the test.

For this, the only way to combat this behavior is to create social conditions that reduce the anomie or social and cultural dislocation of the individual and teach him to face reality through reason, redefining the social conditions that may be generating this type of behavior; therefore, objectively, the imposition of punishment will not always produce in the individual a regenerative function, as systemic functionalism intends to propose, as Soler already indicated at the beginning of the twentieth century (1929, p.67). Thus arises the vision of the enemy, which according to Jakobs is evident in the rules established in the current criminal law, since there is a situation that although it is not an actual war, it implies the *potential possibility* of war, which affects the symbolic plane and forces to reinforce the feeling of normality and greater effectiveness.

Jakobs (2003, pp. 19-56), defines the enemy as: *A citizen who, because of his position, way of life or perhaps his membership in an organization, has left the law, not incidentally but permanently, and who, being outside the system, has no rights as a person.* He also indicates that the Criminal Law of the Enemy contains three elements:

a.- An advance of punishability, since it is based on a possible future event and not on an act committed;

b.- The penalties are excessively high;

c.- Certain procedural guarantees are relativized and even eliminated.

The criminal policy of expansion of criminal law is reflected in the intense legislative activity in criminal matters during the last decades, which has introduced aggravated and qualified types of common crimes already existing in the positive legislation, under new criminal figures, with assumptions of criminalization in a state prior to injuries to legal goods, but implementing for these subtypes, excessively high penalties and restricting and even suppressing the procedural

guarantees and the fundamental rights of the persons, by handling the vision of the *Criminal Law of Danger* or *Criminal Law of the Putting at Risk* sustained by the functionalist doctrine.

It is said that the Criminal Law of the positive-legal Enemy has a symbolic effect, inasmuch as by prosecuting these facts and imposing high penalties, it intends to produce a feeling of imminent danger and timely response by the State, before such a serious social risk, and therefore, the punitive rigor must be even greater, since, according to Jakobs, it supposes a *(...) combat reaction* of the legal system against especially dangerous individuals, which means nothing, since, parallel to security measures, it supposes only a dispassionate, instrumental processing of certain especially significant sources of danger *(1997, p. 1*).*) combat reaction of the legal system against particularly dangerous individuals, which means nothing, since, in parallel to security measures, it supposes only a dispassionate, instrumental processing of certain particularly significant sources of danger* (1997, p. 65). 65). In these situations, the political forces will be in charge of generating the "favorable" response that the population demands and its purpose will be complemented by the meaning that punishment may have as a preventive mechanism for future actions.

Bello, points out that in Venezuela the use of the Criminal Law of the Enemy in the Venezuelan penal system is evident and in this respect he points out:

> *At an abstract level in Venezuela we place it as a political-criminal tendency. Linked to the loss of the preventive capacity of the state and the need to contain a general control in the social sphere, using coercion and fear as state policy in the face of an eminent loss of legitimacy with a predominant tendency to leave aside the democratic conception that draws the economic framework for the development of the person in the constitution and the principle of freedom (*Bello, C. .2006)*.* (Bello, C. .2006).

Here, the traditional military term "enemy" loses its genesis and is extended to offenders of the criminal law, identifying them as the source generating a *state of danger*. It is no longer a criminal law of the fact, but a criminal law of the author, which translates into arrests against businessmen and lawyers of companies, such as the situations produced with companies such as Día a Día, Kreisel and the Yaracuy headquarters of Polar companies; cases in which the persecution has not been against criminals but against sectors that do not agree with the economic policies applied by the Executive in contravention of the free market economic system enshrined in the Constitution.

Conclusions

Although there is a serious crime problem, crime has not been reduced despite the increase in penalties, which, as is known, implies the elimination, albeit partially, of a series of rights; however, these penalties should be used sparingly, since it has been demonstrated that increasing penalties does not lead to less crime, but rather must be combated with other procedures.

In Venezuela, criminal law is used beyond its primary function of protecting essential legal rights with a breach of the guarantees inherent to the social and democratic rule of law, leading in consequence to an excessive criminalization of certain conducts and an increase in the legal consequences derived from the crime.

It also proceeds to label certain groups or individuals, natural or juridical, to qualify them -through smear campaigns- as "enemies", as occurs with businessmen or political groups, to distract the attention of society from the problems that really afflict it, attributing to those it intends to exclude, all the ills that afflict the population, in an alleged effort -of the rulers- to retain power.

The criminal policy of the last two decades of Venezuelan governments, in terms of crimes and penalties, combines criminalization with aggravation of penalties, leaving aside the classic and specific legal goods, to deal with general and unspecific legal goods, represented in the future danger, describing them in an ambiguous way that with them can justify any type of criminal threat and structuring the protection of those *legal goods* by means of the so-called crimes of abstract danger, for which the realization of the conduct that the legislator has typified as dangerous is enough, security being at the service of the prevailing political, philosophical or economic -not legal- ideology.

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