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TDI and Drug Trafficking: Comparison between Brazilian and Argentine Legislations – Part II

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Abstract**—** *The article analyzes the incorporation of the criminal law theory of the enemy of Gunther Jakobs in the criminal drug policy in Brazil and Argentina,from two main characteristics, pointed out by the doctrine, as Categories: Restriction of criminal and procedural guarantees and punishment as a security measure for the enemy.Qualitative research used the comparative method, between the two drug laws of the countries, with exploratory descriptive interpellation. It was analyzed and confronted the characteristics of both laws with the theory of Jakobs, and concepts of Durkheim.The countries legislated practically in the same way, with similar expressions and sentences, marked by restrictions of procedural and legal guarantees, establishdifferences between people convicted of crimes of narcotics and other criminals and the adoption of safety measures for the chemical dependents. To despise the idea of security, in terms of criminal law, maybe the first step in reinterpreting criminal law, from the perspective of the basic democratic principles of the rule of law, interpreted and implemented in line with the Human rights.*

Keywords**— Criminal Law of the enemy, narcotic, human rights.**

I. INTRODUCTION

This study is the continuity of the comparative analysis between the anti-drug laws of Brazil and Argentina, in light of the theory of the criminal law of the enemy.Thus, two main characteristics were chosen by the doctrine, from Jakobs's theory, as categories:restriction of criminal and procedural guarantees; the enemy must be punished with a security measure.

Starting from these categories of analysis, we sought in both laws, correlated or divergent points, with the premise of the theory of the criminal law of the enemy, and the concepts of Durkheim, among others, the social coercion, understood as power, or strength, with the which the cultural patterns of a society impose on the individuals who integrate it, forcing these individuals to fulfill them.

1.1 RESTRICTION OF CRIMINAL AND PROCEDURAL GUARANTEES

In this category, articles were selected in both laws which restrict, in some way, guarantees provided by criminal law or other sparse legislation, such as a prescription deadline, limits right, such as provisional freedom, among others.

Table 1 – Articles related to the category "restriction of criminal and procedural safeguards".

Themes	**Brazil**	**Argentina**
Destroying crime products	Art. 32	Art. 30
Prohibiting amnesty, Grace, pardon, bail, penalties restrictive of rights	Art. 44	-----
Simplify expertise	Art. 50	----
Infiltrateagent	Art. 53	Art. 31 Bis a
Prohibit recourse in freedom	Art. 59	----
Apprehend and use carefully the goods	Art. 60, 61, 62	Art. 30 e 39
Decreebusiness bankruptcy	Art. 69	Art 10, § 1º
Suspend penal prescription	----	Art.; 19, § 3º
Adopting the figure of the Snitch	41	29, Bis, 29 Terc

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In Brazil, it is foreseen the immediate destruction of illicit plantations, by the police itself, after expertise performed on the site, heard only the public prosecutor, and preceded by judicial order. Look, there's no defense participation here. The same article also provides for the expropriation of property, under the Brazilian Federal Constitution (BRASIL, 2006; 1988).In Argentina, in its art. 30, provides that the judge must order the destruction, by the National Sanitary Authority, of narcotics in breach or elements intended for its elaboration, unless they belong to a non-responsible third party or except those which may be used by the same authority, Expressing the constancy of use to attribute them. Also, it is required expertise, and the destruction must take place within five days after. In addition, it shall be the confiscation of the goods and instruments employed to commit the crime, except when they belong to a person outside the act and the circumstances of the case or objective elements prove that they could not know about this illicit employment. The economic benefit obtained by the crime will also be apprehended (ARGENTINA, 1989).

The fact that is not repeated in Argentina is the prohibition of amnesty, Grace, pardon, bail, penalties restrictive of rights. Nucci (2006, p. 801) says that amnesty is forgiveness through the forgetfulness of facts, granted by the National Congress, by law, founded on criteria of criminal policy.Grace is the individual indulgence, consistent in clemency granted by the president of the Republic, by decree, equally for reasons of criminal policy. Pardon is the collective forgiveness, granted by the President of the Republic, by decree, using criminal policy, the indeterminate sentenced, when they fulfill some conditions.

The prohibition of provisional Freedom in this law, became reasons for jokes, because by prohibiting the granting of provisional freedom with or without bail for these offenses, remained the contradiction: whoever is arrested in the act of heinous or equaled crime, cannot obtain in Justice to provisional freedom, however, if you are at liberty and are prosecuted or arraigned, the decree of preventive detention is not mandatory. In short, a smart drug dealer does not let himself be arrested in the act, a message left by Brazilian law, whose corrections are expected to be made in internal jurisprudence.

As for bail is the legal impossibility of establishing the benefit of provisional freedom through the payment of money or another real guarantee, delivered to the state to ensure the attendance to all procedural acts, under penalty of losing the amount deposited. Interpreted restrictively this article, this seal is incoherent with art. 310 of the Code of Criminal Procedure, since the Brazilian legislator admits the granting of provisional freedom without bail, provided that the requirements for preventive detention are absent.

It is also forbidden the sursis, innovation in the Drug Law of 2006, whose concept is defined in the art. 696 of the Code of Criminal1 procedure, the conditional suspension of the penalty imposed on the agent. The judge may suspend the fulfillment of the private penalty of liberty imposed on the defendant, if the same suit the requirements of the law, and undertakes to comply with the conditions that are inflicted upon them.

Another article without correspondence in Argentine legislation is the simplification of expertise in art. 50, since the Brazilian law says that the forensic examinations must be formulated by two official experts. In the absence of these, it should be done by two suitable persons, with diplomas of higher course, preferably with a qualification in the area related to the nature of the crime. For the observation of the provisional report, there is no need for so much formality, just being a suitable person.

Both laws understudy foresee the figure of the undercover agent in Argentina called a covert agent. Pray art. 53 of the Brazilian law that at any stage of the investigation, the police authority may represent by the infiltration of its agents into criminal groups, heard the prosecution, and decided by the judge of the cause, in order to identify and punish the largest number of people as well as the major traffickers (BRAZIL, 2006). The Argentine law also foresaw the judicial authorities to act on this agent, provided that it is to obtain the identification or detention of the authors, participants or coverers, or to obtain and guarantee the necessary means of proof, and it is not possible to obtain the proof in another way (ARGENTINA, 1989).

It is to be said that the Argentine legislation has further detailed the role of the undercover agent by

[1] CPP - Art. 696. The judge may suspend, for a period of not less than 2 (two) or more than six (6) years, the execution of imprisonment and detention sentences not exceeding two (2) years, or, for a period of not less than 1 (one) or more than three (3) years , the execution of the simple prison sentence, provided that the sentenced:
I-have not suffered, in the country or abroad, condemnation unappeable by another offence the penalty of deprivation of liberty, except the provisions of the single paragraph of art. 46 of the Penal code;
II-The antecedents and the personality of the convict, the motives and circumstances of the crime authorize the pretion that will not make the Delinqugo.
Single paragraph. If the beneficiary is prosecuted for another offence or contravention, the deadline for the suspension of the penalty until the definitive judgment shall be deemed extended.

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establishing the way in which these people should act, way of identification, punishment for the possible crimes committed, even predicting Retirement in some special situations:

(a) They are introduced as members of criminal organizations with the purpose of commissioning the offenses provided for in this law or article 866 of the Customs Code, and

b) Participate in the realization of any of the acts provided for in this law or in Article 866 of the Customs Code.

The designation shall include the true name of the agent and the false identity with which he will act in the case, and shall be reserved outside the proceedings and with due certainty.

The information that the undercover agent is achieving will be immediately brought to the attention of the judge. The appointment of an undercover agent must be kept strictly secret. Where it is absolutely essential to providing as evidence the personal information of the covered agent, the person shall declare as a witness, without prejudice to the adoption, where appropriate, of the measures provided for in Article 31-year.

Article 31 Ter.- The undercover agent shall not be punishable if, as a necessary consequence of the development of the action entrusted, he has been compelled to commit a crime, provided that it does not imply a certain danger of endangering the life or physical integrity of a person or the imposition of serious physical or moral suffering on another.

Where the undercover agent has been charged in proceedings, he shall make known confidentially to the intervening judge, who is a reserved manner shall collect the relevant information from the appropriate authority.

If the case corresponds to the provisions of the first paragraph of this article, the judge shall decide without revealing the true identity of the accused.

Article 31 Quarter - No Law Enforcement officer may be required to act as an undercover agent. The refusal to do so will not be regarded as an unfavorableinterposition for any purpose.

Article 31 Five- Where the security of the person who has acted as an undercover agent is at risk of having revealed his true identity, he shall have the right to choose between remaining active or moving into retirement, whatever the number of years of service he had. In the latter case, you will be recognized as a retirement credit equal to the one that belongs to the one who has two more grades than he has.

As soon as it is compatible, the provisions of Article 33a (ARGENTINA, 1989) shall apply.

Brazil has committed itself internationally to using the technique of infiltration of police or intelligence agents, through Decree 5.015/2004, which promulgate the United Nations convention against transnational organized crime.

Another restriction on the rights found only in Brazil is the restriction of freedom to appeal (art. 59), to those convicted in crimes of illicit drug trafficking, and typified offenses of art. 34 to 37, unless the defendant is a primary and good antecedent (BRAZIL, 2006). It can be seen that the legislator extracted a standardized form for all the accused, without individualizing the conduct, in clear adherence to the criminal law of the author, not the fact.

As for the assets of the accused, both laws foresee restriction on the full exercise of the right of ownership, legitimizing both the police authority and the Public Prosecutor's Office to propose, still in the police investigation phase the seizure and other measures and immovable property, of persons accused of offences provided that they are products of the crime, or obtained from criminal practice. See that in Brazilian law, after the decree of the measures of apprehension, is that the accused subject may manifest in the sense of proving the lawfulness of the product, well or value object of the decision. Only after the proof of the lawful origin is that the judge will decide on the return, preceded by the personal attendance of the accused in court.

Another relevant fact is the seizure of vehicles, vessels, aircraftand any other means of transport, machinery, instruments, and objects used in the practice of crimes, which will be under the responsibility of the judicial authority, which may Including, use these products. There is still a prediction of the loss of these assets in favor of the state.

Argentina also brought as an effect to the accused of trafficking, the confiscation of the goods and instruments employed to commit the offense, except when they belong to a person outside the act and the circumstances of the case or objective elements prove that they could not know about this illicit job. The economic benefit obtained by the crime will also be apprehended. The judge of the cause does not have to wait until the final sentence of the criminal prosecution to decide the fate of the seized assets and the economic benefits earned, which will be destined to combat illegal narcotics trafficking, its prevention, and rehabilitation by

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consumption. The fines will have the same destinations (ARGENTINA, 1989).

Again in this topic, the legislator does not consider the hypothesis of acquisition of the accused, along the criminal instruction, to expropriate his assets, and much less a minimum amount of narcotics to generate this effect, which leads to the conclusion that just a small quantity, and if considered trafficking, the loss of goods will occur, without observing any proportionality as to the quantity, quality, personal condition of the accused, or even of the goods. In the words of Rusconi (1995, p. 163) for those who, without proportionality, the functioning of the penal system is not feasible, not only through the idea that the insignificant cannot be punished, but because the totality of the dosimetric system of distribution of threats of feathers is founded on it.

Brazil has predicted the bankruptcy decree of companies or establishments that possess, commercially or deal in any form with narcotic and related substances (BRASIL, 2006). The country in comparison predicted that in the case of business places, where there are criminal practices related to narcotics, there will be an ancillary penalty of inability to exercise trade at the same time of the penalty, which will be increased to double the same If it is a business for fun, including in a preventive decision, there may be the closure of the premises (ARGENTINA, 1989). In this respect, the laws are also convergent. An interesting fact and not replicated in Brazil, is the creation, in foreign law, of a suspensive cause of prescription, while the accused is subjected to treatment for detoxifying (ARGENTINA, 1989).

Both countries also predicted the figure of the whistle-blower, that is, the accused subject, who voluntarily collaborated with the investigations and/or the criminal process in identifying the other co-authors or participants of the crime, and in the even partial recovery of crime products, you may have your penalty reduced to two-thirds. In Argentina, there is also the possibility of penalty exemption, as long as the conspiracy is revealed before the execution of the act. When there is a revelation of the identity of the other participants, with the processing of the accused, or significant advancement of the investigation, the penalty may be reduced to half of the maximum, or even exempt from it. Therefore, both countries reward the enemy who is faithful to the norm, because when granting exemption from penalty or even its decline under the pretext of collaborating with justice and law enforcement, a naked man is guaranteed to punish this citizen.

The legislative option for restriction of fundamental criminal and procedural safeguards, with different penitentiary or criminal enforcement regulations for criminal subjects related to drug trafficking, remains evident. By prohibiting the exercise of a right to freedom of appeal, prohibiting the granting of criminal benefits, such as bail, amnesty, grace or even substitution of custodial sentences for restrictive rights, the legislative option for the penalty remains evident. Private freedom as a political fact, without any justification, in a progression of punitive power.

It jumps to the eye that this disproportionate increase of punishment for unique and unique intimidating purposes not only offends the principle of proportionality but also generates in society a sense of injustice, obstructing the process of social adherence to the norm.

Toledo (2008) clarifies that it is not benevolence with a crime, because no one reasonably could be. It is about how to contain it, within socially tolerable limits, in a serious and truly efficient way, with laws that extrapolate the role and that sentences are fulfilled, for the reasons mentioned or for lack of appropriate penal establishments. In Durkheim's thinking, it is about maintaining the social order, since, for him, social rules and discipline are part of the social organization, which, far from being alienating, is integrative and is part of mental health.

1.2 THE ENEMY MUST BE PUNISHED WITH A SECURITY MEASURE

With this category comes to the height of the question: is the individual who commits crimes related to the drug, an enemy to be restrained by society? To what extent is containment supposed to act? It is highlighted that the security measures, in general, constitute a state response to authors of Deviant conducts, but without the necessary discernment to understand the illicit character of the facts.

> Safety measure is all criminal, detention or non-detention reaction, which binds to the practice, by the agent, of a typical illicit fact, has as assumption and principle of measure its dangerousness and aims for social defense purposes linked to special prevention, be in the form of safety, whether in the form of resocialization (DIAS *apud* LEVORIN, 2003, p. 161).

In this tuning fork, it is perceived that the safety measures have a preventive nature of new occurrences of offenses, insofar as the subject is presumed dangerous for his deviant conduct, and, in order to protect the society of this person, must be restrained. Within the meaning of Durkheim (1978, 2003) that all morals are coercive and

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collective, the coercion is exercised by the whole of society and the laws, preventive or punitive, so only reflect the morals defended by social groups in power, to protect themselves.

In the law of drugs, both in Brazil and Argentina, there is a clear application of this modality of criminal response to the user of narcotics, who commits some offense provided by the laws.

The traffickers will receive a security measure, only to confess to being chemically dependent, and they want it, otherwise, they will receive only custodial imprisonment of freedom, in general. It is also possible to extend the therapeutic measures to the relatives of the accused, as described below.

Table 2 – Articles related to the category "The enemy must be punished with a security measure"

Theme	**Brazil**	**Argentina**
User treatment	5º, 22, III and IV, 23-A, 26 and 26-A, 28, 45, p. Only, 47	16, 17, 18, 19, 21

The countries under study also predicted in the internal planning, therapeutic treatment policies for the dependent chemist and his family (penalty passes from the person of the convict), even when he is in prison, and in both, constitutes a crime the use of narcotic substance, however in Brazil, subject to a warning penalty on the use of drugs and measurement of attendance to program or educational course (BRAZIL, 2006).

Differentiation factor is that Argentina predicted, in addition to the penalty, treatment of detoxification for convicts in any of the crimes defined in the anti-drug law, and rehabilitation for the time necessary for these purposes, which will cease by judicial resolution, by a prior opinion of experts advising him (ARGENTINA, 1989). Argentina also establishes the suspension of the penalty to subject the condemned to a measure of curative safety, for the time necessary for detoxifying and rehabilitation and provides preventive treatment to the defendant, provided that he consents or when there is a risk of damaging himself or others, without detailing what these possible losses would be.

At this point, it should be clarifying that it brings an oscillating picture, the situation of Argentina has changed substantially from the percent of the Supreme Court of Justice of the country, in the famous case "Arriola, Sebastian and others/resource in fact" of 25 August 2009, in which the unconstitutionality of art was declared. 14-second paragraph of Law 23,737. In this decision, the Argentine High Court, argued that the pragmatic and utilitarian reasons invoked in previous precedents of the same court deserved to be revised, for nineteen years ago, criminalizing consumers proved to be a Failure. It was also demonstrated through reports of information, which incriminate a drug holder does not allow to combat the conduct of drug trafficking, in which, the light of statistics and investigations, had grown remarkably.

On the basis of the judgment, the Argentine court reproduced and discussed the arguments ofFallo:"Bazterrica" (Failures: 308:1392, the year 1986), emphasizing the achievement of the dignity of the human person, and the right to personal autonomy. This, we added the convenience of pursuing the consumer and thus, to have state resources to repress the conduct of drug commercialization.

Look at this.

"Thus, international treaties, in their texts, recognize various rights and guarantees provided for in the National Constitution of 1853, including – and in what is of interest here – the right to privacy that prevents people from being subjected to arbitrary interference or abusive in their private lives (article 11.2 of the American Convention on Human Rights; Article 5 of the American Declaration of the Rights and Duties of Man; article 12 of the Universal Declaration of Human Rights and article 17.1 of the Covenant International Civil and Political Rights). With regard to this right and its link to the principle of "personal autonomy", at the inter-American level, it has been noted that "the development of the human being is not subject to the initiatives and care of the public authority. From a general perspective, he possesses, retains and develops, in more or less broad terms, the ability to lead his life, to solve on the best way to do so, to use means and instruments for this purpose, selected and used with autonomy — which is a pledge of maturity and condition of freedom—and even legitimately resist or reject the misconduct and aggressions directed at him. This exalts the idea of autonomy and discards oppressive temptations, which could be hidden under an alleged eagerness to benefit the subject, establish his convenience and anticipate or enlighten his decisions" (IACHR in the case Ximenes Lopes vs. Brazil, on July 4, 2006, paragraph 10 of judge Sergio García Ramírez's vote). These principles are in line with the provisions of "Bazterrica".

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In the same sense, art 18 ° says:

"That the principle of the dignity of man, proclaimed in the international human rights system (Preamble to the International Covenant on Civil and Political Rights, and the American Convention), is also more compatible with the solution proposed in " Bazterrica." Indeed, such a principle of dignity which consecrates man as an end in itself precludes him from being treated only."

In particular, Minister Zaffaroni punctuated:

"That despite the results described, this type of criminal generates innumerable inconveniences and limitations to the individual freedom of the inhabitants who carry out conducts that do not harm or endanger the legal property of others, without the processes originating come to an end in the way that all criminal proceedings are supposed to do. At the same time, a huge disputing of the effort, money and time of the police forces, inappropriate in criminal political proceedings, as evidenced by the nearly twenty years since this Court reversed the jurisprudence sat in the case "Bazterrica" (Failures: 308:1392), with the dictation of the judgment "Montalvo" (Failures: 313:1333)".

For this added that:

"Similar considerations can be made with respect to judicial work. Both police and judicial activities distract efforts that, with healthy criminal political criteria, should be devoted to combating the trafficking of toxics, especially those that are most harmful to health, such as those that are now circulating among the sectors poorest and younger people in our society, with lethal results of very short term and with a high likelihood of neurological sequelae in children and adolescents who manage to recover. That the processing of users, on the other hand, becomes an obstacle to the recovery of the few who are dependent, because it only stigmatizes them and reinforces their identification through the use of the toxic, with clear prejudice to the advancement of any detoxification therapy and behavior modification that, precisely, the reverse objective is proposed, that is, the removal of that identification in pursuit of their self-esteem on the basis of other values".

From another approach, the Argentine Court had especially considered that:

"As regards demand containment, in addition to the persecution of supply, States are required to prepare their public health apparatus, assistance, and education, so as to ensure that addicts can receive physical and psychological treatments to heal the self-addictions."

Incoherence withthehighestArgentine court, in unanimous form, after leaving expresslyclarifiedthatthe decision was taken "in modesomelegalizingthe drug "highlighted "the inescapablecommitmentthatshould assumeall institutions or fight drug trafficking".

As a consequence, it resolved: "To urge all public authorities to ensure a State policy against illicit drug trafficking and to adopt preventive health measures, with information and education deterred from consumption, focused mainly on the most vulnerable groups, especially minors, in order to provide adequate compliance with international human rights treaties underwritten by the country".

The aforementioned precedent reduced the criminal process against drug users in Argentina, however, there are no indications that the actions necessary to address drug trafficking control or the assistance of drug users have been fulfilled in an upward spiral.

Law 23.737 was not modified in Argentina.

Recapitulating, both legislations see the user as a lower subject, little evolved and unable even to take care of his own health and therefore must be obliged to do so, through the state which acts by means of a "penalty". The criminal law arises as to the necessary and unique instrument for the containment of the masses of chemical dependents, subject to be punished according to their dangerousness and not affected by what they have done.The laws do not consider for the fixation of these measures, time of chemical dependence, which substances, or even personal conditions of the subject. It only determines the treatment measure for which it should be forwarded, for an indefinite period in Argentina, and in Brazil for 5 months if primary, 10 months if repetitive, with the sanitary authorities, the determination of its dosage, in an inaccuracy of the standard , without legislative technique for a criminal law, and mainly, without observance of basic principles such as the offence, the externalization of the fact, the objective imputation.

The drug user is not perceived here as a citizen who holds rights and duties, because these transgressors cannot even decide whether to receive treatment, are labeled as enemies and do not possess certain fundamental rights inherent to the person. Thus, this criminal law is based on the classical idea of the dignity of the human person, grounded in the democratic State of law, with freedom, especially about himself. The medical-sanitary discourse is reinforced and the drug user has seen and treated as the victim of evil, the patient infected by the "plague", the moral issue was seen as a public health problem, and the drug consumer ceases to be bad to be seen as a D Who needs help from the whole society, reinforced by the effective legislative changes in 2019, by Law N. 13,840, amending some articles of law 11.343/2006.

From the viewpoint of Nilo Batista (1997), perhaps the most respected researcher on the anti-drug criminal

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policy is from the decree that ratified the International Opium Convention that Brazil adopts a "sanitary model", or rather a sanitarian discourse of Control that gains breath with the consolidation of penal laws of 1932. Maierovitch (2006), cited by Flavio Augusto Fontes de Lima (2009, p 172) considers the US arrogant when imposing the model of treatment in Latin America, because:

> Therapeutic justice is, in fact, a euphemism, a pleasant way to talk about an unpleasant theme created by the Brazilian government. It is a euphemism because it represents a form of authoritarian solidarity, false solidarity, improper and inadequate. This is all for a democratic state of law. They opened a breach in the criminalizing law, establishing the following: The one who is surprised by drug possessions and is primary, has the possibility, as if it were a "favor" of the state, to choose between the chain and the mandatory treatment. Evident to those who have a minimum of critical sense, that is not an option, it is coercion. Brazil, in turn, adopted this same policy and called it therapeutic justice.

The policy of combating drugs selects the enemy and the right of Jakob's structure in the legal field the segregation and neutralization of this enemy, in the present case, the user of narcotics.The legislator of the two countries did not bother to know the social facts motivators of drug trafficking, and much less the consumption of these substances, limiting themselves only to banning them and criminalizing them, therefore, opted to treat drug users on the sidelines of society, and only accepts them if they stop consumption, in a clear option for the harm reduction policy. It is to be said that Brazil and Argentina are developing countries, but with high rates of unemployment and little harmony in the distribution of income, socially motivating factors in the pursuit of profit and struggle for survival.

Even after more than twenty years of drug prohibition in both countries, subsequent legislative changes were taken following the same line of punitive, symbolic discourse, without even knowing how the application of their predecessors was given. Thus, in the analysis of Durkhein, founder of the Sociological School of Law, the object of legal sociology, which in this case is to investigate how the legal rules were built real and effectively, and the way legal norms work in society does not fulfilled.

Again here we have a negative factor of efficacy of the norm, because the laws, while providing treatment for the drug user, including their relatives, in the material plane there is omission of the authority in applying the law, because the judges have nowhere to forward users for treatment, triggering in the lack of structure for this application, because not only do not exist these treatment sites of the chemical dependents, free of charge, and in all places of the territories, there is not even knowledge of how it is the treatment of chemical dependents in the public health system by the operators of law. Two non-communicable instances, the judiciary, and the health team.

The growing number of consumers in this narcotic market demands a new action by the legislator, which cannot be grounded in symbolism, in populism, under penalty of making life more difficult in collectivity. The legislative power, unfortunately, is limited by the social force that elects it (real factors of power), ideological, political, economic, professional, religious, cultural and moral factors that cannot prevail over this performance. This crime associated with drug use has as its main victim the collectivity, because the damage is diffuse, with increased criminality, damage to life or the health of the collectivity.

The social institutions, like the legislative power, did not advance scientifically, and the imbalance between the knowledge sciences and the social institutions further aggravated the social problems, because there are no transformations in the social life due to the Worsening of social problems, due to the loss of its main objective, man, insofar as the legislative power tries to dominate the human being (in this case the user of narcotics), without considering his individualities (reasons why he uses certain Substance, type, quantity, among others), its notion of lawlessness or not on the consumption of narcotic drugs, allowing a climate conducive to the struggle of classes, domination, ideological shocks, increased criminality and prison population related to the trafficking of narcotics.

From the marginalized, the punitive selectivity is seen because drug traffickers are poor in low schooling. They are reserved for the rigors of penal law and the proximity to the current defended by the germanpenalist, Gunther Jakobs, entitled criminal law of the enemy (MORAES, 2006).

At this point, it is appropriate to bear in mind the scope of the principle of the act, whereby only the externalized manifestations of the will are punishable. This precept seems weakened by the anti-drug legislation analyzed, since the permanence offenses are based on the expression "Tener", which does not describe any conduct such as Rusconi and Kierzenbaum correctly argue, citing Struensee (2016, p. 42).

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This component introduces a well-founded objection of the constitutional angle to the regulations examined. Secondly, one should not lose sight of the objections surrounding the crimes of the abstract danger of the requirements of the principle of lesivity and the voluminous critical doctrinal of which they are tributaries. (Rusconi, 2009, p. 20 y ss.).The above table shows the exception note of the legislation related to the control of narco-criminality and its constitutional bases. In short, this scenario demonstrates the tensions to the state of constitutional law caused by the policies of drug control, its lack of control and the tendency to naturalize the exercise of criminal power and its effective efficacy.

Thus, this chapter concludes that Brazil and Argentina opted for the criminal law of the enemy, defended by Jakobs, which results from the sum of the factors of the expansion of criminal law, the emergence of symbolic criminal law and the resurface of punitivism, whose goal is to maintain the vigilance of the norm, combat dangers, working with the criminal law of the author, assuming the dangerousness of the agents users, traders, drug producers, or even agents who possess for these activities. This right is not concerned with consumed or attempted conduct, as it must anticipate criminal guardianship, to punish preparatory acts (criminal Law of danger).

II. FINAL CONSIDERATIONS

The criminal law, throughout history, was and continues to be reissued, with old legal logic send the updated constantly: violence, inaccuracy, and exceptionality are all aspects of a logical of modern law. The obsession with security guides decision-making in the legislative aspect, fostering practices within the penal sphere that signify the development of criminal policies guided by this ideal, converting the criminal policy into security policy. It is lost in view of the fact that the level of conflict of a society depends on the result of basic public policies and that the last resource is criminal policy because it is the violent tool by definition (Angriman 2017, pp. 170 and segs.).

This study explored the criminal law theory of the enemy within the criminal drug policy (Argentina and Brazil) which is fully incorporated, and subjecting it to criticism of human rights, it is possible to establish, that this theory has as one of its pillarsrestriction of penal and procedural guarantees, and prediction of punishment of the enemy with security measure, which served as categories to compare the drug laws of Brazil and Argentina.

Throughout the discussion, it remains evident the integral adoption of this purely punitive model in its internal drug policy, which is copied from the United States, without further study of criminology by the Latin American legislature on the subject. The international treaties ratified by the two countries demonstrate this option.

Likewise, the common terms found in the laws of the States, the criminalization of conducts practically in the same way, with very similar expressions and sentences, marked by restrictions of procedural and legal guarantees, establishing Differences between people convicted of crimes of narcotics and other criminals, high feathers, and especially the adoption of safety measures for the chemical dependents leave no doubt about it.

It was also demonstrated that in the legislation of the nations under study, there are other traces of the adoption of the criminal law of the enemy. However, in retracing the policy of the previous century and analyzing the current postures against terrorism, a modern policy inclination to expose the state of exception as a model of government, shifting provisional and extraordinary measures for techniques of public administration.

The indivisibility between the powers characterizes the constancy of the state of exception, generates a pernicious circle in which the absolutist measures legitimated for the defense of the democratic constitutions are those that destroy it because there is no institutional protection able to ensure that emergency powers are effectively used in order to safeguard the Constitution. This characteristic is present in both Brazil and Argentina.

The criminal labels are paradigms for the action of the agents of persecution, and also of the policies, and conduct judicial reasoning in the choice of numerous factors between the hypotheses of condemnations or absolutory and the determination of quantity, quality and kind of punishment.

In Latin countries, because of the uncertainties of the perception of terrorism, organized crime in drug trafficking makes room for the adoption of the justifying emergency criminal law. Thus, recalls Alejandro Aponte (2004) to be the modification of the practical criminal spectacle perceptible:

Combating narco-trafficking and organized crime, in the theory of the enemy's criminal law and the fixation of the state of permanent exception, obstructions the boundaries between security policies and criminal law. The obstacle, starting from the perspective of ensuring, is that the right and criminal proceedings must be the measures to contain the constant violence from the instruments of repressive policy. Otherwise, if they act on legitimation and not in the delegitimation of violence, the tendency is the spreading and loss of control of power.

The contradiction between security and assurance, in this tuning fork, is possibly one of the biggest illusions

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served to the public consumer of criminal law. There is no bifurcation between the maintenance of individual rights and guarantees and the creation/maintenance of democratic systems of crime control. The conflict in conception can only be concrete if you opt for authoritarian pursuers models.

The widespread Ghana of punishment accomplishes the connivance of the perception that the process of constructing democracy is slow and sagacious, implanting, in the raw reality of repressive programming, a surface democracy captured by punitive density.

The current conjuncture can be interpreted from the prevailing belief in science (penal) and in the desire for the reason logos punitive. The confidence in the ability of criminal science to solve outstanding issues in humanity since the most remote beginnings, such as drugs (criminal narcissism) obtains the growth excessive generalization of repression.

The social institutions, like the legislative power, did not advance scientifically, and the imbalance between the knowledge sciences and the social institutions further aggravated the social problems, because there are no transformations in social life as a result of the worsening of social problems, due to the loss of its main objective, man, insofar as the legislative power tries to dominate the human being (in this case people related to the trade of narcotics), without considering their individualities (reasons why it uses a certain substance, type, quantity, local or regional trade, funding agent, among others), its notion of lawfulness or not about the consumption of narcotics, allowing a climate conducive to the struggle of classes, domination, shocks Crime and prison population related to trafficking.

In relation to the contributions to the understanding this problem in the light of the criminal Sciences and the democratic State of law and for studies on the criminology and legislative process of the countries of the Southern hemisphere and the agreements International standards for this issue, it can be recommended that the penal system be occupied, as "*última ratio"*the investigation and possibly sanction of severely harmful conduct. The healthy coexistence, the recovery of public spaces, the claim of security as an integral and constructive end of the state through the prediction of sanitary, educational, work, environmental, health, among others, especially freedom and respect for the other, the preventive and restorative intervention of the rights affected, are proposed for the criminal policy to really occupy itself.

Despising the idea of security in terms of criminal law may be the first step in reinterpreting criminal law in respect of the basic democratic principles of the State of law, interpreted as implemented in line with the rights of human beings, whose conquest stems from enlightenment. To return to darkness and practices that contradict and deny the rule of law, is to violate secular achievements.

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