THE CRIMINAL LAW OF THE ENEMY IN THE FEDERAL SUPREME COURT

A CRITICAL ANALYSIS OF THE CONTEMPORARY PRACTICE OF THE BRAZILIAN SUPREME COURT

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Introductory storytelling: the waiting hall and the three visitors

Imagine a vast hall, with a high ceiling, pale walls, and windows opening onto a morning torn between sun and rain. At the center of the hall, three chairs are arranged in a semicircle, facing a simple table. On the table lie three books with distinct covers: one, written in German, bears the name of Günther Jakobs, professor at Bonn; another, in Spanish, bears the signature of Eugenio Raúl Zaffaroni, judge of the Argentine Court; the third, also by Zaffaroni, examines the dark years of Germany between 1933 and 1945. Each book carries within itself a different way of looking at the same phenomenon - the punitive power of the State and its limits before those whom the legal order qualifies as threats.

In the first book, Jakobs describes a cleavage internal to contemporary Criminal Law: on the one hand, the Criminal Law of the Citizen, oriented toward the symbolic reaffirmation of the norm against the offender-as-person; on the other, the Criminal Law of the Enemy, oriented toward the factual neutralization of the dangers represented by subjects who persistently refuse to offer a minimum cognitive guarantee of conduct conforming to law. For Jakobs, both poles can legitimately coexist within the same legal order, provided they are clearly delimited; the problem, in his view, arises when the boundaries blur and the Criminal Law of the Enemy contaminates the legal order as a whole (Cf. Jakobs; Cancio Meliá, 2007, p. 21-49).

In the second book, Zaffaroni opposes this conception head-on. For the Argentine jurist, the legal category of the enemy in ordinary Criminal Law is absolutely incompatible with the constitutional rule of law, since it ontologically belongs to the absolute state. Every admission of this category, however partial and well-intentioned, is the beginning of an erosion of fundamental guarantees; the containment tactic proposed by Jakobs - encapsulating the Criminal Law of the Enemy in a sealed compartment - is "the medicine that kills the patient", since it ignores the expansive dynamics of power. Within the real rule of law there is always an encapsulated police state, which constantly pulses to break free; and the criminal question is the most fragile wall of that containment (Cf. Zaffaroni, 2007a, p. 144-146).

In the third book, Zaffaroni descends into the historical entrails of the Criminal Law of the Enemy taken to its paroxysm: German criminal-law dogmatics between 1933 and 1945. There, the "community of the people" (*Volksgemeinschaft*) became the supreme legal interest; the "will contrary to law" (*Willensstrafrecht*) shifted imputation from external acts to the internal attitude of the agent; the "healthy sentiment of the people" (*gesundes Volksempfinden*) replaced strict legality; the "type of perpetrator" (*Tätertyp*) imputed criminal consequences to identity-based belonging; the People's Court (*Volksgericht*) issued more than five thousand death sentences in three years, under the presidency of the "executioner clown" Roland Freisler. All of this, Zaffaroni warns, was sustained by technically sophisticated dogmatic

constructions, elaborated by jurists who, in their majority, acted with genuine subjective conviction (Cf. Zaffaroni, 2019, p. 88-94, 191-225).

Now imagine that the hall is filled with noises from outside: television newscasts endlessly repeating images of the invasion of the buildings of the Three Powers on January 8, 2023; headlines reporting new decisions in Inquiry No. 4,781, the famous "Fake News Inquiry"; convictions exceeding seventeen years of imprisonment for those who invaded government headquarters; the outcome of Criminal Action No. 2668, in which the former President of the Republic and seven other defendants from the so-called "crucial nucleus" of the alleged coup plot were convicted on September 11, 2025. The three perspectives present in the hall - that of Jakobs, that of Zaffaroni, and that of Zaffaroni-as-historian-of-Nazism - each offer, in their own way, distinct analytical keys for examining what is unfolding outside.

The question that animates this study is therefore simple in its formulation and complex in its implications: can the current practice of the Brazilian Federal Supreme Court be read as an application of the Jakobsian model of Criminal Law of the Enemy? Does it reproduce the structural selectivity denounced by Zaffaroni? Does it bear dogmatic affinities with the Nazi penal constructions reconstructed by the Argentine jurist? Before answering these three questions, it is necessary to establish the standpoint of this analysis, traverse the three theoretical perspectives in their conceptual architecture, and mobilize them critically over the principal STF precedents of recent years.

1. The standpoint: constitutional vigilance, not institutional hostility

1.1. Neither hatred toward the STF, nor defense of coup-mongering

The reading presented in the following pages is, deliberately, severe - and this severity must be understood in its proper nature, lest hasty readings convert it into something it is not. This is not hatred toward the Federal Supreme Court as an institution, nor personal hostility toward its Justices, much less a defense, however veiled, of the antidemocratic acts perpetrated on January 8, 2023, or of the so-called coup plot adjudicated in Criminal Action No. 2668. Such caricatured reductions impoverish the legal debate and dishonor the *garantista* tradition that Eugenio Raúl Zaffaroni represents in all its Latin American breadth.

The Zaffaronian warning operates in a radically distinct register: it is rigorous **constitutional vigilance**, exercised with the analytical detachment that the magnitude of systemic risks demands. Zaffaroni, a Justice of the Argentine Supreme Court for nearly a decade and a judge of the Inter-American Court of Human Rights, never defended coup-mongers, terrorists, or highly dangerous criminals. His personal trajectory - marked by persecution under the Argentine dictatorship and by activism on behalf of human rights - renders any conservative or apologetic reading of his work simply impossible (Cf. Zaffaroni, 2001, p. xvii-xviii).

What is proposed is a methodologically sophisticated exercise: to examine the dogmatic structures mobilized by the organs of punitive power - whichever they may be, in any historical or ideological context - and to *name* their genealogical affinities. This exercise does not

presuppose a moral judgment about the agents who mobilize such structures, but a technical observation about the conceptual tools employed. A surgeon may recognize, with detachment, that two distinct scalpels were manufactured by the same industry, even if one is used to heal and the other to mutilate - and this technical observation does not entail morally equating the surgeon with the torturer (Cf. Zaffaroni, 2007a, p. 5-7).

1.2. The function of the criminal-law scholar: naming dogmatic mobilizations

When a democratic tribunal mobilizes - even in the most sincere institutional good faith - dogmatic structures with an authoritarian genealogy, the function of the criminal-law scholar committed to the constitutional rule of law is, in a Zaffaronian key, to *name* such mobilization. To name means: to identify, in technical-juridical terms, the conceptual provenance of the tools employed, to trace their dogmatic lineage, to expose their structural affinities with problematic traditions, and to warn about the long-term systemic risks that such mobilization entails. This work is not an attack; it is a diagnosis - an intellectual function that befalls the jurist in the public sphere (Cf. Zaffaroni, 2019, p. 22-26).

The good faith of magistrates is, on this point, practically irrelevant to Zaffaronian judgment. As the Argentine author exhaustively demonstrates in *Nazi Penal Doctrine*, the majority of German criminal-law jurists of the Third Reich acted with genuine subjective conviction - they believed they were defending the *Volksgemeinschaft*, the health of the people, the integrity of the community. Edmund Mezger, Georg Dahm, Friedrich Schaffstein, even Karl Larenz and others, were not sadistic monsters; they were technical jurists, with axiological convictions they deemed correct. It was precisely the technical-juridical sophistication articulated with subjective good faith - and not cynical sadism - that rendered Nazi dogmatics historically so devastating (Cf. Zaffaroni, 2019, p. 27-28, 144-148).

The methodological lesson is decisive: institutional good faith does not neutralize the authoritarian structure of the dogmatics mobilized. A judge may be sincerely convinced of defending democracy by adopting elements of the *Willensstrafrecht* against coup-mongers, of analogy *in malam partem* against authoritarians, of the *Tätertyp* against antidemocrats. Such subjective conviction is, in itself, respectable; but it does not cancel the systemic effects of the structures mobilized, which possess their own expansive dynamics, escape the control of the agents who inaugurate them, and tend - by the dialectical nature of the encapsulated police state - to generalize toward unforeseen uses in the future (Cf. Zaffaroni, 2007a, p. 144-146).

1.3. The paradox of defensive democracy

The core of Zaffaroni's warning - and that which renders his work so uncomfortable for all political camps - lies in an apparently simple but dialectically devastating formulation: the democracy that defends itself by abdicating the principles of the rule of law gradually ceases to be the democracy it sought to defend. The paradox is structural: the more the legal order mobilizes authoritarian tools to combat authoritarianism, the more authoritarian it itself becomes, even while preserving the democratic discursive frame. The medicine, in the Zaffaronian metaphor, ends up killing the patient it intended to heal (Cf. Zaffaroni, 2007a, p. 144-146).

This warning strikes all political camps frontally because it disconcerts each side's traditional narratives. To the conservative camp - which tends to see in the STF an agent of selective punitive activism - Zaffaroni refuses any corporatist or moralistic reading and locates the problem in a structural-democratic key. To the progressive camp - which tends to see in the STF the last institutional bulwark against authoritarianism - Zaffaroni refuses complacency with punitive expansion when it strikes "the right enemies", and warns that the abdication of *garantismo* is never selective in its long-term effects (Cf. Zaffaroni, 2001, p. 22-30; Zaffaroni, 2007a, p. 132-141).

Latin American history functions, in Zaffaroni's work, as a permanent operative reminder. The doctrine of national security of the 1970s, which paved the way for the Argentine, Chilean, Brazilian, and Uruguayan dictatorships, began precisely thus: as an exceptional institutional necessity to defend democracy against "serious threats". The jurists who conceived it were not, in their majority, declared fascists; they were technicians concerned with the advance of communism, urban disorder, leftist terrorism. Their constructions were, according to their own authors, defensive, limited, exceptional. History taught what came of them, and the lesson cost tens of thousands of dead, disappeared, and tortured (Cf. Zaffaroni, 2001, p. xvii-xviii; Zaffaroni, 2007a, p. 7-8).

2. Günther Jakobs's theory: the conceptual architecture of the Criminal Law of the Enemy

2.1. The internal polarization of the criminal system and the dual typology

Picture the scene: an individual invades the headquarters of one of the Powers of the Republic, damages public works of art, and shouts slogans calling for the overthrow of the elected government. Another, less spectacular, posts on social media offenses directed at a Justice of a superior court. Both are, in theory, persons; both ought, in theory, to be treated as citizens. The question that imposes itself is whether the criminal-law order offers them the same response. Günther Jakobs maintains that it does not - and it is precisely this asymmetry that the author seeks to *name* (Cf. Jakobs; Cancio Meliá, 2007, p. 21).

The distinction between Criminal Law of the Citizen and Criminal Law of the Enemy is not intended to split the legal order into two isolated branches but to describe two ideal poles of a single juridical-criminal reality. Such ideal types rarely manifest themselves in pure form: the terrorist most distant from the citizen sphere receives, at least formally, the rights of an accused, while the most banal offense already carries anticipatory defense against future risks. We are dealing, therefore, with two opposing tendencies coexisting within a single juridical-criminal context, with a strong tendency to overlap (Cf. Jakobs; Cancio Meliá, 2007, p. 21-22).

A fundamental preliminary caveat is also in order: the expression Criminal Law of the Enemy, in Jakobs, is not necessarily pejorative. It functions as a descriptive tool capable of identifying normative sectors in which the legal order abandons the communicative paradigm - reaffirming the norm's validity against the offender-as-person - and adopts the paradigm of

factual neutralization of dangers. The concept is, therefore, a diagnostic instrument, even if its political-criminal implications are evident (Cf. Jakobs; Cancio Meliá, 2007, p. 22; Cancio Meliá, 2007, p. 53-54).

2.2. The dual function of punishment: contradiction and neutralization

Consider the everyday offender - the one who steals a car, assaults a neighbor, or commits a crime of passion. The legal order, by imposing punishment, does not combat a future threat; rather, it communicatively contradicts the act committed, reaffirming the validity of the norm disauthorized by the conduct. In this logic, the criminal act is treated as the act of a rational person endowed with meaning, and the punishment responds to that meaning while preserving the prevailing social configuration (Cf. Jakobs; Cancio Meliá, 2007, p. 22).

When, however, the legal order encounters subjects who, on principle, deviate persistently - terrorists, drug traffickers, members of stable criminal organizations - the paradigm shifts. There, punishment no longer aims to mean anything: it aims to be physically effective, in the sense of struggle against a danger. There is no communication directed at a person, but combat against the dangerous individual understood as a source of threat. The transition from the deprivation of liberty as a penalty to the safety measure clearly illustrates this turn: while the former contemplates, retrospectively, the past act, the latter is directed at the future, neutralizing a "tendency to commit acts of considerable gravity" (Cf. Jakobs; Cancio Meliá, 2007, p. 22-23).

2.3. The philosophical-legal roots: from Rousseau to Kant

Before Jakobs, the history of legal thought had already rehearsed the thesis that the offender, by violating the social pact, loses the condition of citizen. Rousseau, in the *Contrat social*, holds that any "wrongdoer" who attacks "social right" ceases to be a member of the State, finding himself at war with it. Fichte moves in an analogous direction: he who abandons the citizen contract "loses all his rights as a citizen and as a human being", being converted into a mere thing, "a piece of cattle". Jakobs, however, rejects this radical conception, considering it "too abstract" - after all, the legal order must keep the criminal within the law (Cf. Jakobs; Cancio Meliá, 2007, p. 25-26).

Thomas Hobbes offers, by contrast, a more nuanced position. For the philosopher of the *Leviathan*, the common offender remains, in principle, in the function of citizen. The situation changes, however, when it comes to rebellion or high treason - hypotheses in which the crime configures a "rescission of submission", a true relapse into the state of nature. In such cases, according to Hobbes, the offenders "are not punished as subjects, but as enemies". Immanuel Kant, in his short work *On Perpetual Peace*, formulates a complementary thesis: the one who refuses to enter into a "communitarian-legal state" and constantly threatens his neighbors by the absence of legality of his condition (*statu iniusto*) may be treated, even if not as a person, "as an enemy" (Cf. Jakobs; Cancio Meliá, 2007, p. 27-29).

2.4. The three structural pillars of the Criminal Law of the Enemy

The Jakobsian construction rests on three structural pillars. The first is the **broad anticipation of punishability**: when the legal order encounters the "enemy", punishability takes as its reference point not the act committed, but the future act. The perspective ceases to be retrospective and becomes prospective: preparation, the founding of an association, peripheral participation are criminalized before any harmful result materializes. The place of present harm to the validity of the norm is occupied by the danger of future harm - a regulation typical of the Criminal Law of the Enemy (Cf. Jakobs; Cancio Meliá, 2007, p. 35-37).

The second pillar is the **disproportionality of the penalties prescribed**: although the threshold of punishment is anticipated (which should, in principle, justify a reduced penalty), the legal order of the enemy does not promote such proportional reduction - on the contrary, it prescribes high penalties, equating, in practice, preparatory acts with consummated offenses. This trait breaks the classical logic of the principle of proportionality that structures Criminal Law of the Citizen. Punishment, for the enemy, loses its retributive-communicative character and assumes a combat function, equivalent to a maximized safety measure (Cf. Jakobs; Cancio Meliá, 2007, p. 38; Cancio Meliá, 2007, p. 70-71).

The third pillar lies on the **procedural plane**: classical guarantees of due process are flexibilized or suppressed - expanded preventive detention, secret interception of telecommunications, infiltration of agents, incommunicability, absolute secrecy. The accused ceases to be treated primarily as a procedural subject and becomes treated as a source of risk, against which one proceeds by means of physical coercion. We are dealing, in essence, with the emergence of a state of exception disguised as constitutional normality (Cf. Jakobs; Cancio Meliá, 2007, p. 39-41).

2.5. Real personhood and cognitive guarantee

The central Jakobsian thesis is structural: no normative context - including law - operates on its own. For the validity of a norm to be real, and not merely postulated, the conduct of its addressees must, in its fundamental aspects, cognitively confirm the normative expectation. Without minimum cognitive security, the validity of the norm "crumbles and becomes an empty promise" (Cf. Jakobs; Cancio Meliá, 2007, p. 31-33).

From this follows the most controversial thesis: only those who offer sufficient cognitive guarantee of personal conduct are persons in the full sense. He who, on principle, does not provide such a guarantee - who conducts himself in a persistently deviant manner - cannot be treated as a citizen without violating the right to security of the other persons. Personhood, although a normative construction, requires cognitive cementing in order to be real (Cf. Jakobs; Cancio Meliá, 2007, p. 34, 45). It is this thesis, especially, that Zaffaroni will attack vigorously, as will be seen below.

3. The Zaffaronian critique: the enemy as an absolutist remnant

3.1. The general hypothesis: punitive power has always discriminated

Now imagine the scene through the lens of the Argentine criminal-law scholar: throughout history, punitive power has discriminated against human beings and granted them treatment that did not correspond to the condition of persons, regarding them only as dangerous or harmful entities. From imperial Rome to the Inquisition, from neocolonial racist biologism to the Latin American doctrine of national security, from "infidels" to "subversives", from "the insane" to "terrorists" - there has always been, in juridical-criminal discourse, a category of human beings deprived of the condition of personhood (Cf. Zaffaroni, 2007a, p. 11-12).

Eugenio Raúl Zaffaroni's central hypothesis is radically more incisive than the Jakobsian reading: the differentiated treatment of depersonalized human beings is proper to the absolute state, which by its essence admits no degrees, and is therefore incompatible with the political theory of the constitutional rule of law. There is, then, a permanent contradiction between the juridical-criminal doctrine that admits and legitimates the concept of the enemy and the constitutional and international principles of the rule of law (Cf. Zaffaroni, 2007a, p. 12).

The legal category of the enemy in ordinary law (criminal or any other branch) within a constitutional rule of law is, for Zaffaroni, absolutely intolerable. Such category is admissible only within the provisions of the law of war and with the limitations imposed by international human rights law in its humanitarian branch (Geneva legislation), since not even this law deprives the bellicose enemy of the condition of personhood (Cf. Zaffaroni, 2007a, p. 13).

3.2. The unfeasibility of Jakobs's static tactic

As to Jakobs specifically, Zaffaroni recognizes two merits and formulates a devastating objection. The first merit is terminological: by openly using the word "enemy", Jakobs unveiled the phenomenon that the entire criminal-law doctrinal tradition, from Garofalo to Welzel, had always concealed beneath technocratic rationalizations (safety measures, dangerousness, social defense). The second merit is diagnostic: he correctly identifies an expansive legislative reality (Cf. Zaffaroni, 2007a, p. 136-137).

The objection, however, is radical: the containment tactic proposed by Jakobs - encapsulating the Criminal Law of the Enemy in a sealed compartment so that it does not contaminate the entire legal order - is unfeasible and produces paradoxical effects. Between Parmenides and Heraclitus, Zaffaroni shrewdly observes, Jakobs chooses Parmenides; he takes a static photograph of reality when he ought to operate with a film camera. In power, everything flows: every space conceded to the police state is used by it to expand toward the absolute state (Cf. Zaffaroni, 2007a, p. 144-145).

The metaphor is striking: the Jakobsian containment tactic is "the medicine that kills the patient". By partially legitimating the Criminal Law of the Enemy in order to prevent its generalization, Jakobs ends up renouncing the ideal model of the rule of law as a guiding element, leaving the juridical power of containment disarmed. The practical result is precisely

the opposite of what was intended: the confusion between the rule of law and the police state advances unchecked (Cf. Zaffaroni, 2007a, p. 145-146).

3.3. There are no limited concepts of the enemy

It might be objected that Jakobs's enemy is more limited than the Roman *hostis* or the Schmittian concept: he would be deprived of the condition of personhood "only to the strict measure of necessity". Zaffaroni replies with demolishing clarity: such a limitation is logically impossible, since for the theorists - and especially the practitioners - of exception, exception always invokes a necessity that knows neither law nor limits (Cf. Zaffaroni, 2007a, p. 139).

Since no one can predict exactly what another will do in the future, the uncertainty of the future keeps the judgment of dangerousness indefinitely open, until the one who decides ceases to consider the subject an enemy. The degree of depersonalization of the enemy will always depend, insofar as real power permits, on the subjective judgment of the one who individuates. The Guantánamo prisoners are, for Zaffaroni, an eloquent example of the loss of the promised limits (Cf. Zaffaroni, 2007a, p. 140).

The consequence is decisive: the distinction between citizens (persons) and enemies (non-persons) is not a gratuitous invention by Jakobs but a necessary consequence of any admission of measures based on dangerousness. The whole of twentieth-century Criminal Law, by admitting that some human beings are dangerous and must therefore be segregated or eliminated, reified them without saying so, ceased to consider them persons while concealing the fact through rationalizations. The scandal, in truth, ought to be directed at this entire tradition, not only at Jakobs (Cf. Zaffaroni, 2007a, p. 140).

3.4. The inevitable rupture of the rule of law

Jakobs's proposal, even if it does not begin with Carl Schmitt, insensibly falls into his logic. When it is asserted that we are dealing with exceptional cases in which the rule of law must fulfill its protective function, and that it is legitimated to do so by necessity - so that no obstacles derived from "an abstract concept of the rule of law" can be opposed to that necessity - it is presupposed that someone must judge about necessity, and this someone can be no other than the sovereign, in a sense analogous to Schmitt's (Cf. Zaffaroni, 2007a, p. 141).

To Schmitt one must respond with regard to his reactionary option for the absolute state; to Jakobs one must criticize the introduction of elements proper to the absolute state within the rule of law without his noticing that this implodes it. Schmitt is coherent in his decisionist option for the absolute state; Jakobs is not coherent in maintaining his option for the constitutional rule of law, since his containment tactic is not only ineffective but produces paradoxical effects: the concept of the enemy, once admitted, admits no limitations; nor does the state into whose law that concept is incorporated (Cf. Zaffaroni, 2007a, p. 138).

The legal admission of the concept of the enemy in law (other than strictly the law of war) has always been, logically and historically, the seed or first symptom of the authoritarian destruction of the rule of law, since it is merely a question of quantity of power, not of quality.

The power of the sovereign remains open and incentivized to incremental growth, starting from the acceptance of the existence of an enemy who is not a person (Cf. Zaffaroni, 2007a, p. 133).

3.5. The dialectic between the rule of law and the police state

For Zaffaroni, every historical or real rule of law is, in essence, the containment of a police state that lives encapsulated within it, constantly pulsing to break free. Rules of law are not monoliths but the result of secular struggles against absolute power - corselets or armors of containment which, to a greater or lesser degree, manage to restrain the authoritarian impulse. The police state, however, never ceases to pulse to perforate and burst the barriers, and the criminal question is the preferred field of these pulsations, since it is the weakest wall of every rule of law (Cf. Zaffaroni, 2007a, p. 146-147).

From this follows the central political function of the criminal-law scholar according to Zaffaroni: to be an agent of containment of the police state. The ideal model of the rule of law - that in which all are equally subject to the law - is never fully realized in the world, but it serves as an indispensable guiding beacon for the perfecting of real rules of law. To renounce the ideal model under the pretext of its "abstract" character is to disarm the juridical power of containment and hand the patient over to the medicine that kills him (Cf. Zaffaroni, 2007a, p. 145-146).

The dialectic is particularly important for Latin America: where real rules of law are already fragile - corrupt police forces, judiciary with little independence, broad social exclusion, weak democratic tradition - one and the same normative measure may represent a most serious injury to fundamental human rights, whereas in a strengthened institutional context the same measure would produce an injury of lesser gravity (Cf. Zaffaroni, 2007a, p. 133-134).

4. The structural selectivity of the criminal system: the thesis of *In Search of Lost Penalties*

4.1. The unfeasibility of programmed procedural legality

In the foundational work *In Search of Lost Penalties* (1989/2001), Zaffaroni demonstrated that the Latin American criminal system structurally operates in a selective, vertical, and arbitrary manner, striking principally the vulnerable sectors of the population. The procedural legality programmed by juridical-criminal discourse can never be fulfilled, since its realization would require criminalizing the entire population several times over - which would provoke a social catastrophe. If all thefts, all instances of adultery, all abortions, all defraudings, all forgeries, all bribes, all assaults, all threats were concretely criminalized, there would practically be no inhabitant who would not be, on multiple occasions, criminalized (Cf. Zaffaroni, 2001, p. 26-27).

In view of this absurd and undesired hypothesis of repeatedly criminalizing the entire population, it becomes obvious that the criminal system is structurally arranged so that procedural legality does not operate but, rather, so that it exercises its power with an extremely

high degree of arbitrary selectivity directed, naturally, at vulnerable sectors. This selection is the product of an exercise of power that lies, equally, in the hands of executive organs. The "formal" system is a mere justifying appendix of the true exercise of power, which takes place at the margin of legality (Cf. Zaffaroni, 2001, p. 27).

4.2. The delegitimation of the criminal system: five axes

The delegitimation of the criminal system operates, according to Zaffaroni, through an articulated series of factors. **First**, its incapacity to effectively protect legal interests - the real criminal system intervenes in a minimal portion of the conducts it abstractly criminalizes. **Second**, its structural selectivity oriented toward the criminalization of the vulnerable and the immunization of the powerful - operating preferentially over the destitute sectors and over "uncomfortable dissidents". **Third**, the real lethality of the system, which kills inside prisons, in "resistance reports", through procedural delay, through assistential neglect - in a volume of deaths that approaches or surpasses that of homicides of "private initiative" (Cf. Zaffaroni, 2001, p. 24-26, 38-39).

Fourth, the falsity of the proclaimed procedural legality - since, as demonstrated, the structure of the system makes it impossible ever to respect procedural legality. **Fifth**, the disciplinarizing and configuring (not merely repressive) character of punitive power - which operates in a camouflaged manner, preventing it from being perceived at the conscious level. For Zaffaroni, juridical-criminal discourse functions as the ideological rationalization of this brutal reality: by presenting the exercise of power of the system as exhausted in the minuscule "formal" segment, it conceals the real, massive, selective, and lethal exercise of punitive power (Cf. Zaffaroni, 2001, p. 24-25).

4.3. The criminal-law scholar as one who renders systemic violence invisible

For Zaffaroni, the criminal-law scholar who confines himself to abstract dogmatics is, even unwittingly, an agent rendering invisible the systemic violence of punitive power. His supposed technical neutrality is, in reality, the ideological legitimation of the existing state of affairs. The political function of the jurist committed to the constitutional rule of law is, on the contrary, to denounce the delegitimation of the criminal system and to work for the reduction of punitive power - never for its expansion (Cf. Zaffaroni, 2001, p. 29-31).

Selectivity is not a conjunctural defect of the criminal system, correctable by piecemeal reforms; it is a structural, ineliminable feature. The criminal question is, for that reason, the privileged terrain of the dialectic between the rule of law and the police state: every expansion of punitive power is a victory of the encapsulated police state; every reduction is a victory of juridical containment. There is no possible neutrality in this dialectic: the jurist who does not reduce, expands, even if only by the technical inertia that validates the existing order (Cf. Zaffaroni, 2001, p. 30-31).

5. The Nazi legacy: dogmatic structures that survived

5.1. The hypothesis of dogmatic continuity

The work *Nazi Penal Doctrine* (Zaffaroni, 2019) offers the most disquieting historical-comparative instrumentation for analyzing contemporary practice. The Criminal Law of the Third Reich was a *Criminal Law of the negated human*: National Socialism did not operate at the margin of law but *through* law, mobilizing a sophisticated dogmatic construction in order progressively to implement racial purification, the exclusion of "strangers to the community", and, ultimately, extermination (Cf. Zaffaroni, 2019, p. 5-6).

The decisive thesis is methodological: the German criminal-law dogmatics of 1933-1945 did not emerge from nothing nor disappear in 1945; its conceptual constructions - elaborated with technical sophistication never matched before or after - continue to feed rationalizations of the inhuman Criminal Law of our day, under less conspicuous garb. The continuity is not moral but dogmatic-structural: the same categories, the same argumentative techniques, the same forms of punitive anticipation, even when mobilized in radically distinct political contexts (Cf. Zaffaroni, 2019, p. 27-28).

5.2. The Volksgemeinschaft and the diffuse legal interest

The central notion of the Nazi worldview was the *Volksgemeinschaft* - the "community of the people" - whose health, purity, and inner fidelity to the *Führer* were to be protected by criminal law. Whoever distanced himself from this community, even by mere ideological dissent, was qualified as a stranger (*Gemeinschaftsfremde*) and, by extension, a natural enemy. The maximum penalty was the loss of peace or exclusion from the community of the people (*Friedlosigkeit*) - whoever proved to be "degenerate", not useful, was to be expelled, not to procreate, to be eliminated, even without guilt, because his mere existence threatened the totality (Cf. Zaffaroni, 2019, p. 41-42).

The protected legal interest was, therefore, a diffuse, axiological, and barely delimitable entity: the community of the people as mystical totality, whose "institutional health" was to be defended with the maximum repressive energy. This typical structure - super-individual legal interest, vaguely delimited - serves the discretionary expansion of typical incidence, since it allows the interpreter to fill freely the content of the protective norm in accordance with the political needs of the moment (Cf. Zaffaroni, 2019, p. 174-178).

5.3. The Willensstrafrecht and criminal law of the will

The operational dogmatic construction of Nazism was the *Willensstrafrecht* - Criminal Law of the Will - developed especially by Roland Freisler: what was punished was the will contrary to law, the internal attitude (*innere Einstellung*), the violation of the duty of fidelity to the people, with radical anticipation of punishability to preparatory acts and equation between attempt and consummation. The core of imputation shifted from the external act to the internal disposition of the agent - configuring, in technical terms, a Criminal Law of the Author (Cf. Zaffaroni, 2019, p. 191-204).

The systemic consequence is decisive: one is punished for *what one is*, and not only for *what one does*. Imputation is anchored in anthropological categories of the author: the "habitual thief", the "born criminal", the "stranger to the community", the "Jew", the "communist", the "degenerate". This structure, known as *Tätertyp* (normative type of the author), was elevated by Edmund Mezger and the young members of the Kiel School (Dahm and Schaffstein) to the central dogmatic category. The type of the author encompassed everything, and dangerousness - assessed by "position in the community of the people" - became the dominant criterion (Cf. Zaffaroni, 2019, p. 204-225).

5.4. The gesundes Volksempfinden and the destruction of legality

One of the most scandalous innovations of Nazi Criminal Law, introduced by the Law of June 28, 1935, which reformed § 2 of the *Strafgesetzbuch* (*StGB*), was the admission of analogy *in malam partem* on the basis of the expression "in accordance with the basic idea of a penal law and the healthy sentiment of the people" (*gesundes Volksempfinden*). The judge was no longer bound by the letter of the law but had to decide in accordance with the "healthy sentiment" of the community - by which the principle of strict legality was abrogated, opening the system to discretionary arbitrariness disguised as popular fidelity (Cf. Zaffaroni, 2019, p. 46, 92-95).

Helmuth Henkel went so far as to maintain that "for the truly just one must replace *nulla poena sine lege* with *nullum crimen sine poena*" - every morally reprehensible act deserves punishment, even without precise typical provision. The inversion of the liberal principle *par excellence* (*nullum crimen sine lege*) is, in a Zaffaronian key, the distinctive mark of the practical destruction of the rule of law: when punishment precedes typification, and when typification is filled by diffuse collective sentiments, the citizen is delivered up to the arbitrariness of the interpreter-sovereign (Cf. Zaffaroni, 2019, p. 92-95).

5.5. The Volksgericht: the concentrated special tribunal

The *Volksgericht* (People's Court) is the historical paradigm of the concentrated tribunal of exception. Created by the Law of April 24, 1934, to try political crimes (high treason, demoralization, enmity to the people), its characteristics were: centralized jurisdiction; direct designation of judges by the regime, outside democratic distribution; summary procedure, with defenses limited to minutes; hybrid composition (career judges plus laypersons with "juridical sentiment"); presidency by a figure politically aligned with the regime (Otto Thierack, then Roland Freisler); absence of broad appeal (Cf. Zaffaroni, 2019, p. 88-94).

In three years (1942-1945), the *Volksgericht* issued between 4,862 and 5,300 death sentences - 1,200 in 1942; 1,662 in 1943; 2,000 in 1944. Among those executed were Sophia and Hans Scholl, twenty-year-old students who distributed pamphlets of the pacifist resistance "White Rose", guillotined in 1943 under the type of demoralization. Freisler, the "executioner clown", pronounced death sentences in restaurant conversations, in casual encounters on trains, in workplaces, basing himself on phrases such as "this is no place for doctoral theses" - a synthesis of Nazi contempt for juridical rationality (Cf. Zaffaroni, 2019, p. 88-94).

5.6. The Unternehmen and the equation of attempt and consummation

Nazi Criminal Law massively expanded the concept of *Unternehmen* (enterprise), originally restricted to high treason: in *enterprise offenses*, "attempt and consummation" were treated as equivalents, eliminating any obligatory mitigation of penalty when the result was frustrated. Freisler projected, in the "Criminal Law of the future", to substitute the concept of action with the general concept of enterprise, rendering "the distinction between attempt and consummation unimportant". With this, the externalized will at any degree of execution was punished - even in remote preparatory acts (Cf. Zaffaroni, 2019, p. 6-7, 191-204).

Originally, the *ratio* of the *Unternehmen* made sense only for high treason: since the crime, if consummated, would remain unpunished (because the successful traitor would hold power), only the equal punishment of attempt and consummation would remain. Nazism, however, expanded this logic to other offenses, generalizing punitive anticipation. The dogmatic result is the practical dissolution of the distinction between attempt and consummation across the entire field of political offenses - a structural feature that resurfaces in contemporary legislation, even democratic, whenever the protection of the political regime is at stake (Cf. Zaffaroni, 2019, p. 191-204).

6. The practice of the Brazilian STF in light of the three perspectives

6.1. The panorama of relevant precedents

To examine the practice of the Brazilian STF in light of the three theoretical perspectives presented, the panorama of relevant precedents must be fixed. Four major jurisprudential blocs deserve attention: (i) Inquiry No. 4,781 (Fake News Inquiry), instituted by Decree GP 69/2019 under the presidency of then-Justice Dias Toffoli, with Justice Alexandre de Moraes as rapporteur; (ii) ADPF No. 572, decided on June 18, 2020, with Justice Edson Fachin as rapporteur, which validated by ten votes to one the constitutionality of Inquiry No. 4,781, with the sole dissent of Justice Marco Aurélio; (iii) the criminal actions arising from the acts of January 8, 2023, among which Criminal Action No. 1060 (rapporteur Justice Alexandre de Moraes, judged on September 14, 2023, the first conviction, with a sentence of 17 years) and Criminal Action No. 2508 (the case of Débora Rodrigues dos Santos, with a sentence of 14 years for the depredation of the statue *A Justiça*) stand out; (iv) Criminal Action No. 2668 (rapporteur Justice Alexandre de Moraes, judged on September 11, 2025), in which the former President of the Republic and seven other defendants of the "crucial nucleus" of the so-called coup plot were convicted by 4 to 1 in the First Panel (with Justice Luiz Fux dissenting).

6.2. Symptoms of the Jakobsian paradigm: the three structural pillars

Examining these precedents through the Jakobsian key, the three structural pillars of the Criminal Law of the Enemy are clearly identified. **First pillar - broad anticipation of punishability**: in Criminal Action No. 2668, conviction was rendered for "attempted coup d'État" (Criminal Code, art. 359-M) and "violent abolition of the Democratic Rule of Law" (art. 359-L) on the basis of preparatory acts not consummated - drafts of a coup decree not published, military plans not executed, conspiracies documented but not materialized in

effective action. The temporal perspective is decidedly prospective (future fact), and not retrospective (consummated fact), in exact consonance with the structure described by Jakobs (Cf. Jakobs; Cancio Meliá, 2007, p. 35-37).

Second pillar - disproportionality of the prescribed penalties: in Criminal Action No. 1060, a penalty of 17 years was applied to Aécio Lúcio Costa Pereira for the trespass-style invasion of empty public buildings, without effective violence against State agents in the exercise of their function. In Criminal Action No. 2508, a penalty of 14 years was applied to the hairdresser Débora Rodrigues dos Santos for the depredation of a statue. In Criminal Action No. 2668, the penalties exceeded 27 years for the principal defendant. Such penalties, applied to preparatory acts or acts of low material harmfulness, configure the structural disproportion characteristic of the Criminal Law of the Enemy, in which the penalty loses its retributive-communicative character and assumes a combat function (Cf. Jakobs; Cancio Meliá, 2007, p. 38).

Third pillar - procedural flexibilization: Inquiry No. 4,781 displays visible signs of this flexibilization - institution by decree of the President of the Court, without the request of the Public Prosecutor's Office; choice of the rapporteur outside the democratic distribution; decreeing of absolute secrecy, in tension with Binding Precedent No. 14; search and seizure in residences; absence of clear delimitation of the investigated parties; concentration of the investigative, accusatory, and adjudicative functions in a single organ. ADPF No. 572 validated this structure on the basis of art. 43 of the STF Internal Regulations, in a decision by ten votes to one (Cf. Jakobs; Cancio Meliá, 2007, p. 39-41).

6.3. Structural selectivity through the Zaffaronian lens

The Zaffaronian reading of *In Search of Lost Penalties*, however, significantly complicates the Jakobsian diagnosis. While the STF dedicates expressive institutional resources to the exemplary punishment of the invaders of January 8, 2023, with penalties exceeding 17 years for the trespass-style invasion of empty public buildings - a condemnable act, but one of circumscribed harmfulness - the Brazilian criminal system continued, in those same weeks, to kill thousands of young Black and peripheral persons in "police resistance reports", without any trial, under the indifference of the institutions of the judicial establishment (Cf. Zaffaroni, 2001, p. 26-27, 38-39).

The structural selectivity denounced by Zaffaroni operates intact in Brazilian practice: the STF mobilizes itself for the symbolic, mediatic, politically useful enemy; it ignores or treats with indifference the daily massacre of the traditional clientele of the criminal system. The Zaffaronian question is uncomfortable: why does this symmetry not operate? Why does the Court that applies 17 years for the invasion of an empty Senate not apply equivalent attention and rigor to cases of systematic police violence against vulnerable populations? The answer, for Zaffaroni, is structural: the criminal system was not made to punish equally but to select; and contemporary selectivity now also includes some "symbolic" enemies, without ceasing to operate its traditional function of criminalizing the vulnerable (Cf. Zaffaroni, 2001, p. 24-31).

The Zaffaronian critique, on this point, frontally rejects the naïve reading according to which the punishment of coup-mongers would be democratic progress. For the Argentine jurist, the expansion of the criminal system is always regressive, even if its current victims may appear ideologically less sympathetic. Democracy is preserved through the reduction of punitive power, not through its selective expansion against certain enemies. Each new dogmatic tool inaugurated to combat authoritarianism expands the authoritarian capacity of the system itself, and that capacity does not disappear when the enemy of the day changes (Cf. Zaffaroni, 2007a, p. 144-146).

6.4. Homologies with Nazi Criminal Law

Examining the practice of the STF through the key of *Nazi Penal Doctrine*, seven axes of structural homology emerge that deserve technical naming. **First**: Law No. 14,197/2021 introduced into the Brazilian Criminal Code the type "violent abolition of the Democratic Rule of Law" (art. 359-L), whose legal interest is, strictly speaking, a diffuse, axiological, and barely delimitable entity - reproducing, even within a democratic frame, the protective logic of super-individual legal interests characteristic of the Nazi *Volksgemeinschaft* (Cf. Zaffaroni, 2019, p. 174-178).

Second: in the votes of the rapporteur in the Criminal Actions arising from January 8, the centrality of imputation lies, repeatedly, in the "intent to overthrow the democratically elected government", in the "coup-mongering will", in the "antidemocratic purpose" - subjective elements that precede and ground the criminal qualification, more so than the materially harmful acts effectively practiced. The very figure of "multitudinous execution" reinforces the displacement from the external act to the shared will of the group, in a structure analogous to the *Willensstrafrecht* (Cf. Zaffaroni, 2019, p. 191-204).

Third: the reiterated invocation, in STF decisions, of "institutional indignation", "democratic consensus", and the "clamor for the defense of democracy" as material sources justifying extensive interpretations of criminal types reproduces the structure of the *gesundes Volksempfinden* - appealing to a diffuse collective sentiment in order to flexibilize legality. The axiological difference is evident, but the dogmatic structure is the same (Cf. Zaffaroni, 2019, p. 92-95).

Fourth: the operative category of the "coup-monger", the "antidemocrat", the "digital militiaman" is identified - figures whose explanatory force does not derive from precise typical definition, but from an anthropological typology constructed by the media and the courts. When the STF refers to defendants as "members of a coup-mongering criminal organization" or "advocates of military intervention", it operates, in dogmatic terms, with the structure of the *Tätertyp* - punishing the defendant both for what he is and for what he has done (Cf. Zaffaroni, 2019, p. 217-225).

Fifth: Inquiry No. 4,781 presents a structural procedural homology with the *Volksgericht* - centralized jurisdiction; direct designation of the rapporteur outside democratic distribution; procedure concentrated in a reduced Panel; concentration of the investigative, accusatory, and

adjudicative functions. There is no moral equivalence, evidently - the STF does not condemn to death, operates in a democratic context, is subject to institutional control. But the procedural architecture is, in a Zaffaronian key, structurally equivalent to the historical paradigm of the tribunal of exception (Cf. Zaffaroni, 2019, p. 88-94).

Sixth: a hermeneutic flexibilization of the open criminal types of Law No. 14,197/2021 operates that produces effects analogous to analogy *in malam partem* - types of open wording ("abolition", "violent", "Democratic Rule of Law") are filled discretionarily by the interpreter-judge, with diffuse axiological grounding. The deliberate typical vagueness of Law No. 14,197/2021 is, in a Zaffaronian key, a symptom of the same strategy of fragilizing legality that Nazism took to its paroxysm (Cf. Zaffaroni, 2019, p. 92-95).

Seventh: in the reasoning of Criminal Action No. 2668, convictions for "attempted coup" and "violent abolition" were applied to acts whose consummative efficacy was far from being concretized, with penalties close to those of the consummated crime - reproducing the structure of the Nazi *Unternehmen*, in which attempt and consummation were treated as equivalents in political offenses. The genealogy of the Brazilian criminal type is traceable: the legislator of 2021 reproduces, even without historical consciousness, the genetic logic of the Nazi expansion of the *Unternehmen* (Cf. Zaffaroni, 2019, p. 191-204).

6.5. The essential difference: gradient, not structure

Having established the seven axes of homology, the fundamental difference between contemporary STF practice and Nazi Criminal Law must be named with Zaffaronian precision. The difference is one of degree, not of dogmatic structure: the Nazi regime took each of these elements to absolute paroxysm - judicial massacre, total derogation of legality, biological demonization of the enemy, physical elimination of "strangers". The Brazilian STF operates, at the present moment, very attenuated versions of these same structures - within a preserved constitutional frame, with custodial penalties (not death), with some residual institutional control (Cf. Zaffaroni, 2019, p. 27-28).

The difference of degree, however, does not neutralize the structural homology - and it is precisely in this that the Zaffaronian alarm resides. Dogmatic structures, once accepted, possess their own expansive dynamics: the Criminal Law of the Enemy, in Zaffaroni's diagnosis, admits no stable limitations, since the judgment about who is the enemy, how dangerous he is, and how much exception is necessary, remains in the hands of the sovereign - here, of the STF itself. The Argentine and Chilean history of the 1970s teaches that the passage from the attenuated gradient to the extreme gradient can occur with astonishing speed, especially in fragile institutional contexts (Cf. Zaffaroni, 2007a, p. 144-146).

The final warning is, perhaps, the most uncomfortable: the Brazilian STF, by adopting (in democratic good faith, to be sure) structural elements of the Criminal Law of the Enemy to combat the acts of January 8, 2023, opens a precedent whose future extension escapes its own control. The dogmatic weapons today wielded to "defend democracy" will tomorrow be available to hands of radically different ideological configuration. In a Heraclitean dialectical

key, every concession is a structural victory of authoritarianism, even when disguised as institutional defense.

7. Reasoned answers to the three central questions

7.1. Has the Brazilian STF adopted Jakobs's model of Criminal Law of the Enemy?

Yes, partially, and with clear symptoms. The analysis of the most relevant precedents of the Court (Inquiry 4,781, ADPF 572, the criminal actions of January 8, Criminal Action 2668) reveals the simultaneous presence of the three structural pillars of the Criminal Law of the Enemy described by Jakobs.

The broad anticipation of punishability is clearly manifested in Criminal Action No. 2668, in which convictions for "attempted coup" and "violent abolition of the Democratic Rule of Law" were applied to preparatory acts not consummated - drafts of decrees not published, plans not executed, conspiracies documented but not materialized. The temporal perspective is decidedly prospective, in exact consonance with the Jakobsian structure (Cf. Jakobs; Cancio Meliá, 2007, p. 35-37).

The disproportionality of the prescribed penalties appears in the penalties of 17 years (Criminal Action No. 1060, Aécio Lúcio Costa Pereira), 14 years (Criminal Action No. 2508, Débora Rodrigues dos Santos), and more than 27 years (Criminal Action No. 2668), applied to acts whose effective material harmfulness is frequently disproportionate to the severity of the criminal response. Punishment, there, loses its retributive-communicative character and assumes the function of exemplary combat (Cf. Jakobs; Cancio Meliá, 2007, p. 38).

The flexibilization of procedural guarantees is evident in Inquiry No. 4,781 - institution by decree, direct designation of the rapporteur, absolute secrecy, indeterminacy of the investigated parties, concentration of functions - validated by ADPF No. 572 with the sole dissent of Justice Marco Aurélio. The procedural architecture approaches, structurally, the Jakobsian model of a procedural subject reduced to a source of risk (Cf. Jakobs; Cancio Meliá, 2007, p. 39-41).

There are, however, important caveats. First: adherence to the Jakobsian model is neither total nor official - the STF does not identify itself as practicing "Criminal Law of the Enemy", and preserves a significant portion of the classical *garantista* discourse. Second: the category of the "enemy" is not applied in a theoretically assumed manner but operates functionally and symptomatically - reproducing the structure without naming it. Third: the internal divergence within the STF itself (the vote of Justice Luiz Fux in Criminal Action 2668, the dissenting vote of Justice Marco Aurélio in ADPF 572) demonstrates that the Court is not monolithic and that the tension between paradigms coexists within it.

The reasoned conclusion is: the Brazilian STF has adopted, in actual practice, structural elements of the Criminal Law of the Enemy described by Jakobs, even without explicit theoretical recognition and within a democratic discursive frame. The adoption is partial, symptomatic, and internally contested, but dogmatically identifiable.

7.2. Has the STF adopted the selective model denounced by Zaffaroni?

Yes, flagrantly so - and with a particular aggravating factor: the Court keeps intact the traditional selectivity against vulnerable populations and, simultaneously, adds to it a symbolic selectivity directed at politically useful enemies.

Traditional selectivity continues to operate fully: the Brazilian criminal system, under the supervision (or indifference) of the STF, continues to operate massively against Black, poor, and peripheral populations, with incarceration rates among the highest in the world (more than 800,000 inmates), systematic procedural delay, degrading prison conditions, "police resistance reports" on a frightening scale. The Court, save for punctual decisions (such as ADPF 347, which recognized the "unconstitutional state of affairs" of the prison system, in 2015), does not structurally address this selectivity (Cf. Zaffaroni, 2001, p. 24-27).

To traditional selectivity, however, has been added in recent years a symbolic selectivity directed at the so-called "enemies of democracy" - coup-mongers, antidemocratic activists, digital militiamen. This new selectivity does not replace the previous one but adds itself to it, generating the Zaffaronian paradox in its most acute form: the criminal system punishes with 17 years the trespass-style invasion of empty buildings and systematically absolves police officers who kill young Black persons under the euphemism of "resistance reports" (Cf. Zaffaroni, 2001, p. 24-31).

This double selectivity is, in a Zaffaronian key, a decisive symptom of the delegitimation of the Brazilian criminal system. The Court that purports to be the guardian of the Constitution operates, simultaneously, as an agent of punitive expansion against the enemies of the day and as structurally omissive regarding the systemic violence of the criminal system against the traditional vulnerable. The political function of the criminal-law scholar, in contemporary practice, ought to be to denounce both faces of this selectivity - without falling into the symmetrical error of defending the current symbolic enemies as if they were victims of political persecution (Cf. Zaffaroni, 2001, p. 29-31).

The reasoned conclusion is: the STF integrally reproduces the selective model denounced by Zaffaroni and aggravates it by adding to traditional selectivity a symbolic selectivity directed at politically useful enemies. The double selectivity is the most visible feature of the contemporary delegitimation of the Brazilian criminal system under the Court's supervision.

7.3. Has the STF made use of practices from the "Nazi Criminal Law" exposed by Zaffaroni?

Yes, in dogmatic structure, but not in axiological content. The answer demands maximum methodological precision: this is structural homology, not moral equivalence. Clarifying this distinction is the minimum intellectual care owed to the magnitude of the topic.

In a moral and political sense, evidently **NO**: the Nazi regime produced more than five million judicial or paraprocedural deaths, tens of millions in extermination camps, a war of annihilation against civilian populations, institutionalized biological racism, the Holocaust.

Nothing of the kind finds parallel in the contemporary practice of the Brazilian STF, and any reading insinuating such equivalence is analytically false and ethically irresponsible.

In a dogmatic-structural sense, however, **YES**: in the contemporary practice of the Court, attenuated versions of the same conceptual structures that Nazi dogmatics took to paroxysm can be identified. The diffuse legal interest "Democratic Rule of Law" reproduces, within a democratic frame, the protective structure of the *Volksgemeinschaft*. The centrality of "coup-mongering will" reproduces the *Willensstrafrecht*. The invocation of "institutional indignation" reproduces the *gesundes Volksempfinden*. The operative category of the "coup-monger/antidemocrat" reproduces the *Tätertyp*. The architecture of Inquiry No. 4,781 reproduces, structurally, the *Volksgericht*. The extensive interpretation of the types of Law No. 14,197/2021 reproduces the effect of analogy *in malam partem*. The punitive equation between attempt and consummation reproduces the *Unternehmen* (Cf. Zaffaroni, 2019, p. 88-94, 174-225).

Each of these homologies does not authorize moral equivalence but demands technical naming. Zaffaroni is categorical about this: the dogmatic continuity between Nazi Criminal Law and contemporary rationalizations is a serious research hypothesis - not a moral imputation. The majority of German criminal-law jurists of the Third Reich acted with genuine subjective conviction; it was precisely the technical sophistication articulated with good faith that rendered Nazi dogmatics historically devastating. The democratic good faith of Brazilian magistrates does not, in a Zaffaronian key, neutralize the authoritarian structure of the dogmatics mobilized (Cf. Zaffaroni, 2019, p. 27-28, 144-148).

The decisive warning is: dogmatic structures have their own expansive dynamics, escape the control of the agents who inaugurate them, and tend to generalize toward unforeseen uses. The dogmatic weapons today wielded by the STF to defend democracy will tomorrow be available to hands whose ideological configuration may be radically different from that of the magistrates who inaugurated them. In a Heraclitean key, every concession is a structural victory of authoritarianism, even when disguised as institutional defense (Cf. Zaffaroni, 2007a, p. 144-146).

The reasoned conclusion is, therefore, twofold: (i) **NO**, the STF has not made use of Nazi Criminal Law in a moral, axiological, or political sense - such an assertion would be false and unjust; (ii) **YES**, the STF mobilizes, in its actual practice, dogmatic structures with a genealogy traceable back to Nazi Criminal Law, in attenuated versions and within a democratic frame, but dogmatically identifiable. To name this mobilization is not a political accusation but an exercise of rigorous constitutional vigilance - precisely what Zaffaroni considers the primary function of the criminal-law scholar committed to the rule of law.

Logic of the Theme (Consolidated Synthesis)

The consolidated analysis of the three perspectives - Jakobs, Zaffaroni-of-the-enemy, Zaffaroni-the-historian - converges on a conclusion structured at three articulated levels. At the **dogmatic-descriptive level**, the contemporary practice of the Brazilian STF reproduces, to a

significant extent, the structural traits of the Criminal Law of the Enemy identified by Jakobs (anticipation of punishability, disproportionality of penalties, procedural flexibilization), without the Court recognizing itself theoretically within that paradigm. The reproduction is partial, symptomatic, and internally contested (dissenting votes, jurisprudential oscillations), but dogmatically identifiable.

At the **critical-Zaffaronian level**, this reproduction is structurally regressive, not progressive. The punitive expansion against politically useful enemies does not replace, but is added to, traditional selectivity against vulnerable populations - configuring the paradox of double selectivity that characterizes the contemporary delegitimation of the Brazilian criminal system. The Court that severely punishes the trespass-style invader of the Senate is the same Court that tolerates, with structural indifference, the daily massacre of young Black persons under euphemisms such as "resistance reports". This inverted symmetry is, in a Zaffaronian key, a decisive symptom of the STF's subordination to the expansive dialectic of the police state.

At the **historical-comparative level**, structural dogmatic homologies are identified between Nazi constructions (1933-1945) and contemporary Brazilian practice: *Volksgemeinschaft*/diffuse Democratic State; *Willensstrafrecht*/coup-mongering will; *gesundes Volksempfinden*/institutional indignation; *Tätertyp*/coup-monger; *Volksgericht*/Inquiry No. 4,781; analogy/extensive interpretation; *Unternehmen*/equation of attempt and consummation. The homologies are structural, not moral; naming them is an exercise of constitutional vigilance, not political accusation. The democracy that defends itself by abdicating the rule of law gradually ceases to be the democracy it sought to defend - this is the core of the Zaffaronian warning, and the reason for its productive discomfort for all political camps.

- **Overview Table**

Item	Explanation
Criminal Law of the Citizen	Jakobsian paradigm of treating the offender as a rational person; punishment with the function of communicative contradiction; retrospective perspective; integrally preserves the status of citizen; first speed of Criminal Law in Silva Sánchez.
Criminal Law of the Enemy	Jakobsian paradigm of treating the offender as a source of danger; punishment with the function of factual neutralization; prospective perspective; flexibilizes or suppresses guarantees; third speed of Criminal Law in Silva Sánchez.
Three Jakobsian pillars	(i) Broad anticipation of punishability to preparatory acts; (ii) Disproportionality of the prescribed penalties; (iii) Flexibilization or suppression of procedural guarantees.

Cognitive guarantee	Central Jakobsian thesis according to which only one who offers sufficient cognitive confirmation of conduct conforming to the norm is a person; its persistent absence would legitimate treatment as an enemy.
Central Zaffaronian critique	The category of the enemy in ordinary law is incompatible with the constitutional rule of law; it belongs to the absolute state; admissible only in the law of war; every admission is the seed of democratic erosion.
Static tactic as medicine that kills	Zaffaroni's critique of Jakobs's proposal; the Parmenidean encapsulation of the Criminal Law of the Enemy is unfeasible in face of the Heraclitean dynamics of power; renouncing the ideal model disarms juridical containment.
Inexistence of limited concepts of the enemy	Zaffaronian thesis according to which limited depersonalization is logically impossible; the uncertainty of the future keeps the judgment of dangerousness open; Guantánamo is the empirical evidence of the loss of limits.
Dialectic of rule of law / police state	In every historical rule of law there lives encapsulated a police state pulsating to break free; the criminal question is the weakest wall of that containment; the ideal model serves as a guiding beacon.
Structural selectivity	Thesis of *In Search of Lost Penalties*; the programmed procedural legality is physically unrealizable; the "formal" system is a justifying appendix; the criminal system operates arbitrarily against the vulnerable.
Structural lethality of the system	The Latin American criminal system kills on a scale approaching that of homicides of "private initiative"; deaths in prisons, "resistance reports", procedural delay, assistential neglect, conditioning for subsequent violent death.
Volksgemeinschaft	Nazi "community of the people" as diffuse legal interest; protected with maximum repressive energy; strangers to the community are *Gemeinschaftsfremde* and lose juridical peace.
Willensstrafrecht	Nazi Criminal Law of the Will, developed by Roland Freisler; punishment of the will contrary to law, of the internal attitude, of the violation of the duty of fidelity; radical anticipation of punishability.
Gesundes Volksempfinden	Nazi "healthy sentiment of the people"; introduced by the Law of June 28, 1935, into § 2 of the *StGB*; allows analogy *in malam*

	partem; replaces strict legality with discretionary arbitrariness disguised as popular fidelity.
Tätertyp	Nazi normative type of the author; developed by Mezger and the Kiel School (Dahm and Schaffstein); imputation anchored in anthropological categories of the author, not in external acts; Criminal Law of the Author.
Volksgericht	Nazi People's Court, created on April 24, 1934; presided over by Roland Freisler from 1942-1945; issued between 4,862 and 5,300 death sentences in three years; centralized jurisdiction and summary procedure; convicted the Scholl siblings of the White Rose.
Unternehmen	Nazi concept of enterprise; equates attempt and consummation in political offenses; originating in high treason; expanded by Nazism to other political types; punishment of externalized will at any degree.
Good faith does not neutralize	Methodological Zaffaronian thesis; the majority of German criminal-law jurists acted with genuine subjective conviction; technical sophistication articulated with good faith is precisely what makes dogmatics historically devastating.
Paradox of defensive democracy	The democracy that defends itself by abdicating the principles of the rule of law gradually ceases to be the democracy it sought to defend; medicine that kills the patient.
Function of the criminal-law scholar	Agent of containment of the police state; one who names problematic dogmatic mobilizations; rigorous constitutional vigilante; defender of the rule of law against its own erosion by institutionally legitimated hands.
Latin American operative reminder	The doctrine of national security of the 1970s converted opponents into "internal enemies" through a process of juridical disqualification; Argentine, Chilean, Brazilian, and Uruguayan dictatorships; the lesson cost tens of thousands of lives.

Table of Precedents (STF)

Item	Explanation of the Precedent
ADPF 572/DF	Court: STF, Plenary; Rapporteur: Justice Edson Fachin; Judgment: June 18, 2020; Publication: DJe-271, November 13, 2020. *Ratio decidendi*: by ten votes to one (Justice Marco Aurélio dissenting), declared the constitutionality of Decree GP 69/2019 and of Inquiry No. 4,781, affirming the extraordinary and atypical function of the

	STF to investigate real or potential injuries to its institutional independence, on the basis of art. 43 of the STF Internal Regulations. The dissent maintained that this article was not received by the Federal Constitution of 1988, since it violated the accusatory system and the competence of the Public Prosecutor's Office.
Inquiry No. 4,781/DF	Court: STF; instituted by Decree GP 69/2019, signed by then-President Justice Dias Toffoli; designated rapporteur: Justice Alexandre de Moraes. *Ratio decidendi* (in successive monocratic and collegiate decisions): legitimates the investigation of fraudulent news, threats, calumnious denunciations, and attacks on the Justices; applies measures such as search and seizure, blocking of social media accounts, preventive detention, and incommunicability; designation of the rapporteur outside free distribution, absolute secrecy, indeterminacy of the investigated parties.
ADPFs 704, 719, 721, and 877	Court: STF; Rapporteur: Justice Edson Fachin; *Ratio decidendi*: extinction, without judgment on the merits, of actions that again challenged art. 43 of the STF Internal Regulations and Inquiries Nos. 4,781 and 4,828, on the ground that the constitutional controversy had already been resolved in ADPF 572 and that any individual injuries should be challenged by the proper appellate route.
Criminal Action No. 1060/DF	Court: STF, Plenary; Rapporteur: Justice Alexandre de Moraes; Reviewer: Justice Nunes Marques; Judgment: September 14, 2023; Defendant: Aécio Lúcio Costa Pereira. *Ratio decidendi*: first conviction relating to the acts of January 8, 2023; penalty of 17 years (15 years and 6 months of imprisonment and 1 year and 6 months of detention) and 100 day-fines, for armed criminal association, violent abolition of the Democratic Rule of Law, attempted coup d'État, qualified damage by violence and serious threat, and deterioration of listed cultural heritage. The reviewer dissented, finding the elements absent for the crimes of coup, abolition, and association.
Criminal Action No. 2508/DF	Court: STF, First Panel; Rapporteur: Justice Alexandre de Moraes; Defendant: Débora Rodrigues dos Santos. *Ratio decidendi*: conviction to 14 years of imprisonment for the depredation of the statue *A Justiça*, by Alfredo Ceschiatti, located in front of the STF headquarters building, on January 8, 2023; application of the types relating to the Democratic Rule of Law and to listed cultural

	heritage. Paradigmatic case in the critique of the disproportionality of penalties.
Criminal Action No. 1231/DF	Court: STF, Plenary; Rapporteur: Justice Alexandre de Moraes; Judgment: virtual session concluded in May 2025. *Ratio decidendi*: conviction to 2 years and 5 months of detention, with the thesis of "multitudinous execution" - a crime of collective authorship in which all contribute to the result through joint action - a foundation employed by the rapporteur in various Criminal Actions of January 8.
Criminal Action No. 2668/DF	Court: STF, First Panel; Rapporteur: Justice Alexandre de Moraes; Concurring: Justices Flávio Dino, Cármen Lúcia, Cristiano Zanin; Dissenting: Justice Luiz Fux (acquitted); Judgment: September 11, 2025. *Ratio decidendi*: conviction, by 4 to 1, of former President Jair Messias Bolsonaro and seven other defendants of the "crucial nucleus" of the coup plot, for five crimes (armed criminal organization, attempted coup d'État, violent abolition of the Democratic Rule of Law, qualified damage, and deterioration of listed cultural heritage), with penalties exceeding, in Bolsonaro's case, 27 years of imprisonment. Central foundation: anticipation of punishability to preparatory acts.
HC 152.752/PR (Lula case)	Court: STF, Plenary; Rapporteur: Justice Edson Fachin; Judgment: April 4, 2018. *Ratio decidendi*: by 6 to 5, denied habeas corpus and validated the possibility of provisional execution of the sentence after conviction at the second instance; paradigmatic precedent of the STF's punitivist drift, subsequently revised.
ADCs 43, 44, and 54	Court: STF, Plenary; Rapporteur: Justice Marco Aurélio; Judgment: November 7, 2019. *Ratio decidendi*: the Court reaffirmed the presumption of innocence until the final judgment of the criminal sentence, revoking the understanding of HC 152.752; reveals the internal dialectic within the STF itself between the *garantista* paradigm and the combat paradigm.
ADPF 347/DF (unconstitutional state of affairs)	Court: STF, Plenary; Rapporteur: Justice Marco Aurélio; Judgment of provisional measure: September 9, 2015. *Ratio decidendi*: recognition of the "unconstitutional state of affairs" in the Brazilian prison system, with massive and generalized violations of fundamental rights; paradigmatic precedent in which the Court recognizes, even if in a limited way, the structural delegitimation of the criminal system denounced by Zaffaroni.

HC 165.704/DF (collective habeas corpus)	Court: STF, Second Panel; Rapporteur: Justice Gilmar Mendes; Judgment: October 20, 2020. *Ratio decidendi*: granting of collective habeas corpus to provisional detainees in conditions of prison overcrowding, recognizing systemic violation of rights; approaches the Zaffaronian key of denouncing the lethality of the criminal system.

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BRAZIL. Federal Supreme Court. Criminal Action No. 2508/DF. Rapporteur: Justice Alexandre de Moraes. First Panel. Brasília, DF, 2025.

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