

ON THE CONCEPT OF CULPABILITY AND SOCIAL EXCLUSION

SOBRE O CONCEITO DE CULPABILIDADE E EXCLUSÃO SOCIAL

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ABSTRACT: The present article will focus on the issue of the extent to which the socially excluded citizen may be punished on the basis of an act contrary to the law as if he were a full-fledged citizen. If the person affected by a criminal norm does not have concrete access to positive, fundamental, constitutionally provided basic rights such as health, education, culture, work, quality food, basic sanitation, security and quality habitation, among others, would it be at all fair that these concrete conditions are not considered by the criminal law dogmatics of a crime? The aim of this article is to deal with these conditions in connection with the criminal concept of guilt, and to do so by engaging with Günther's approach.

RESUMO: O presente artigo incidirá sobre em que medida o cidadão socialmente excluído pode ser punido com fundamento em ato contrário à lei como se fosse cidadão de pleno direito. Se a pessoa atingida por norma penal não tiver acesso concreto a direitos básicos positivos, fundamentais e constitucionalmente previstos como saúde, educação, cultura, trabalho, alimentação de qualidade, saneamento básico, segurança e moradia de qualidade, entre outros, é justo que essas condições concretas não sejam consideradas pela dogmática do direito penal de um crime? O objetivo deste artigo é lidar com essas condições com relação ao conceito criminal de culpa, e a partir da abordagem de Günther.

KEYWORDS: Freedom – Guilt – Social Exclusion – Recognition.

PALAVRAS-CHAVE: Liberdade – Culpa – Exclusão social – Reconhecimento.

SUMÁRIO: 1. Introduction. 2. The theory of communicative freedom in Klaus Günther and its consequence for criminal guilt. 3. Problematicization and the criticism: an interpretation of Marcelo Neves' sub-citizenship theory. 4. Freedom and recognition with Honneth. 5. Consequence at the level of the criminal law doctrine of guilt. 6. Concrete example for the dogmatic discussion of Günther's approach. 7. Final remarks. 8. References.

1. INTRODUCTION

This article will focus on the question of the extent to which a socially excluded citizen may be punished on the basis of an act contrary to the constitutional norm, as if he were a full-fledged citizen. If the victim of a criminal norm does not have effective access to positive, fundamental, constitutionally provided basic rights such as health, education, culture, work, quality food, basic sanitation, security, quality habitation, and so on, would it be at all fair that these concrete conditions are not considered by the criminal law dogmatics of a crime in connection with criminal guilt? This is a criminal law consideration regarding the role of the socially excluded citizen before the concept of guilt under criminal law.

We essentially assume that the idea developed within the framework of Klaus Günther's theory of communicative freedom, namely that 'the citizen of the state may legitimately become the object of accusations of guilt under criminal law because he or she has the communicative freedom to "politically participate in democratic procedures of opinion- and will-forming via the setting of legal norms,"² can by no means be reproduced in a context of social exclusion. While the freedom to participate politically as a subjective right within so-called deliberative democracy is indeed *ascribed* to the citizen in a formal and abstract way, the social, material reality, on its turn, has particular features that require an alternative theoretical approach. Social inclusion, in our view, is considered a condition of possibility for political participation in democratic procedures and, thus, a prerequisite for individual freedom and criminal guilt.

1. In this regard, see Klaus Günther, 2005, p. 3 ff. In a similar vein, see: Urs Kindhäuser, *Strafrechtliche Schuld im demokratischen Rechtsstaat*, in: *Festschrift für Winfried Hassemer*. Heidelberg: C. F. Müller, 2010, p. 761.
2. Klaus Günther, 2005, p. 245.

Bearing these considerations in mind, the following theses are presented here for discussion: (1) there must be a clear normative distinction between merely formal and concrete citizenship in a context of social exclusion when justifying an intervention under criminal law; (2) the formal operation of *ascribing* so-called communicative freedom as an abstract characteristic of the citizen, which justifies the criminal accusation of the individual, is to be replaced by a concrete operation of *material recognition*; (3) if a merely formal citizen is punished by the state as if he were a concrete citizen, the question arises regarding the justice of such an approach in the context of criminal law dogmatics. The background to this point is the possible disproportionality between duties and rights in the relationship between the state and the citizen; (4) if a formal, but by no means concrete or material citizen commits an act in violation of the law, then the state is jointly responsible for the crime by way of its deficient material recognition, since a merely formal citizen may not legitimately be treated by criminal law as if he were a concrete citizen – the material social conditions that set apart a merely formal and a concrete citizen must be taken into account by criminal law dogmatics, and this consideration essentially regards the concept of guilt.

The “*sub-citizen*” theory in the so-called “Latin American peripheral modernity” of Brazilian legal scholar Marcelo Neves serves as the key theoretical basis for the construction, in connection with Axel Honneth’s perspective of material recognition, that provides us a “social interpretation” of the individual freedom of the citizen.

2. THE THEORY OF COMMUNICATIVE FREEDOM IN KLAUS GÜNTHER AND ITS CONSEQUENCE FOR CRIMINAL GUILT

Following Merkel’s attribution-doctrine, Günther³ adopts the basic starting point that there is an internal linkage between, on the one hand, the ability to comply with the norm legitimizing criminal responsibility, and, on the other, the democratic legitimation of a legal order or of a criminal justice system.⁴ In this way, Günther argues for the existence of a normative link between the validity of criminal norms and the justification of the guilt-based individualization of their violation within the context of a democratic rule of law.⁵ The bridge between personal responsibility in

3. Cf. Günther, 2005, p. 5-37.

4. Cf. Günther, 2005, p. 245 and p. 253.

5. Cf. Günther, 2005, p. 245 ff.

criminal law (the recognition of a subject's possibility to follow norms) and the legitimate production of norms (the recognition of the subject's possibility to set norms) is built by Günther on the basis of the concept of the deliberative person.⁶ For him, the deliberative person is understood as the citizen⁷ who can be recognized as the "bearer of the right to political participation in democratic procedures of opinion and will formation concerning the setting of legal norms" within the so-called deliberative democracy.⁸

In the democratic process, the validity or binding force of laws depend "on public discourse and decision-making procedures , in which all citizens have the right to participate."⁹ From this comes the central argument of Günther's theory of communicative freedom as the basis of criminal culpability: the unlawfully acting perpetrator, as a deliberative person, is to be regarded¹⁰ not only as the addressee (legal person), but also as the author (citizen) of criminal norms himself – the author of the unlawful act is, by virtue of the institutionalization of democratic procedure, potentially also the author of the criminal norm he has violated by that act. According to Günther, this is the reason for the attribution of his personal responsibility:

"Rather, the obligation to comply with the norm is based precisely on the right that continues to exist vis-à-vis every positively valid norm and on the possibility of bringing the negative opinion to bear in the democratic procedure, i.e., of effectively exercising the role of citizen."¹¹

In this sense, Günther discusses

"The legitimization [of criminal responsibility or culpability] must be of the kind that allows the individually responsible legal persons to shift from the role of norm addressee to the role of citizen in which they participate in the production of legitimate legal norms."¹²

6. Cf. Günther, 2005, p. 253.

7. Cf. Günther, 2005, p. 248 f. On the complex relationship between the concepts of deliberative person, citizenship, and legal person, see p. 253-254.

8. Günther, 2005, p. 245. Cf. Günther, *Individuelle Zurechnung im demokratischen Verfassungsstaat* (Individual Attribution in the Democratic Constitutional State), in *Jahrbuch für Recht und Ethik* (Yearbook of Law and Ethics), 1994, p. 143 ff.

9. Günther, 2005, p. 245.

10. Cf. Günther, 2005, p. 249.

11. Günther, 2005, p. 254.

12. Günther, 2005, p. 1.

This suggests that, for Günther, author and addressee of criminal norms are two constitutive characteristics of the deliberative person attributed to the wrongdoer.¹³

It follows that the deliberative person has not only the general right to participate in the democratic procedure, but also the general duty to obey the norms produced by means of a democratic procedure, since these norms “claim binding force” over the deliberative person as a legal person (norm addressee).¹⁴ Both roles of deliberative persons in the legal democratic procedure – as (active) citizens and as (passive) legal persons – are internally related to their ability “to distance themselves from actions and statements and to be able to take a critical stand.”¹⁵

The deliberative person – as the addressee and author of criminal norms – can

“behave critically with regard to other people’s statements and actions as well as his own. I call an opinion critical if it is based on reasons. A person to whom the capacity for critical opinion is attributed can thus perform the cognitive act of reasoned opinion on utterances and actions.”

Günther goes on to say, “Moreover, she is capable of following the reasons she accepts in each case, that is, of performing a volitive act. Reasons are defined by the fact that they can motivate a person to change his utterance and actions.”¹⁶ According to Günther, both acts, i.e., the motivation of the act and the act itself (change in the external world), belong to the deliberative person’s ability to take a critical stand as a justification of criminal guilt.¹⁷

In this context, a capacity for critical comment (or “deliberative capacity”¹⁸) means a capacity for norm-compliance and, consequently, the capacity for culpability, since Günther presupposes the possibility of the perpetrator – as a citizen – to

13. Cf. Günther, 2005, p. 245 ff.

14. Günther, 2005, p. 251.

15. Günther, 2005, p. 246. For more on this, see p. 248.

16. Günther, 2005, p. 246. On the self-interpretation of the citizen, i.e., on the possibility of the citizen taking a critical position on his own actions, see Günther, *Anerkennung, Verantwortung, Gerechtigkeit* (Recognition, Responsibility, Justice), in: Forst (ed.), *Sozialphilosophie und Kritik* (Social Philosophy and Criticism), 2009, p. 286; Günther, *Die Zuschreibung strafrechtlicher Verantwortlichkeit auf der Grundlage des Verstehens* (The Attribution of Criminal Responsibility on the Basis of Understanding), in: Lüderssen (ed.), *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse?* Vol. I, 1998, p. 319 ff.

17. Cf. Günther, 2005, p. 246 ff.

18. Günther, 2005, p. 249.

be able to participate in the act of producing the norm he violated in the democratic procedure and to be able to criticize the procedure itself. In this regard, whoever can criticize the content of a norm already at the time of its production is, according to Günther, also able (1) to criticize his own acts towards this norm (“reasons”); (2) to obey this norm; and (3) to be held responsible for the violation of this norm. Thus, one can summarize Günther’s chain of justification leading to the basis of criminal guilt. It should then be noted that, for Günther, the ability of deliberative persons to take a critical stand constitutes the content of guilt itself: “The duty to obey the law presupposes in the addressee that he possesses the ability to take a critical stand on his own actions and utterances ... The addressee can choose whether he follows the norm and for what reasons he does so”¹⁹ – for Günther, this is, so to speak, being *able to act differently*.

Yet, the deliberative person’s norm-following ability (the ability to take a critical stance) is linked to two complementary elements. The first functions as the (1) ability to “participate in argumentations.” Since reasons in this context arise from argumentations “about disputed validity claims of explicit or implicit utterances,”²⁰ there is no reasoned critical opinion without the ability to participate in an intersubjective argumentation space or public discourse – the deliberative person “can base her opinion on reasons that she can verify in the role of at least a virtual participant in the discourse, she can follow the reasons she accepts in action, and in this way become the accountable author of her utterances and actions;”²¹ (2) The deliberative person must “[regard] himself as the self-generating source of his action and utterances, and [be] treated as such by third parties.” The deliberative person’s critical opinion must be designated as the subjective source and the cause of his or her actions and utterances. In view of this, the “capacity for critical opinion” becomes, according to Günther, the “attributive cause” of action – it is turned into communicative freedom as the basis of guilt: “If the attribution of the capacity for critical opinion has, among other things, the function of tracing utterances and actions back to a person as their author, then this capacity can be called communicative freedom.”²² In what follows, the communicative freedom

19. Günther, 2005, p. 251-252.

20. Günther, 2005, p. 246-247.

21. Günther, 2005, p. 248.

22. Günther, 2005, p. 247-248, and Günther, *Die Freiheit der Stellungnahme als politisches Grundrecht* (Freedom of Opinion as a Basic Political Right), in Kolller et al. (eds.), *Theoretische Grundlagen der Rechtspolitik* (Theoretical Foundations of Legal Policy), 1992, p. 58 ff.

of the deliberative person is to be analyzed as a consequence of a non-utilitarian attribution-operation²³ in Günther (in contrast to the functionalism of Roxin and Jakobs).

Deliberative democracy hinges on the indispensable condition of its participants' ability to take a critical stand. Such an ability, in turn, presupposes the existence of the democratic procedure as a condition of possibility. Thus, for Günther, there is no deliberative democracy without communicative freedom and no communicative freedom without deliberative democracy. This frame of reference is a circular attribution operation of individual freedom or norm-following ability: "Democratic procedures presuppose a deliberative person and reproduce themselves in the general use of the abilities attributed to a deliberative person."²⁴ In this context, deliberative persons are referred to as authors of the norm, insofar as they can participate in a "public competition" (the democratic procedure) in which their critical opinions can be "argumentatively tested against norm proposals" made by other participants in the intersubjective or communicative procedure."²⁵

Democratic procedures can be seen in this context as a way of manifesting public discourse ("Democratic procedures do allow for the differentiated treatment of validity claims and the argumentative examination of reasons for or against a raised validity claim"), but they are not "identical" with discourses: "Unlike discourses, democratic procedures are organized in such a way that they allow for majority decisions on the positive validity of legal norms within a limited time." The implication is that communicative freedom, or the ability to follow norms, may be ascribed even if the deliberative person has not taken a concrete position vis-à-vis the production of the norm, and even if his or her opinion is rejected "by better reasons": "Legal norms thus apply even to those persons who have not taken a critical position and to those who have not been persuaded despite their critical opinion."²⁶ At issue is the specific characteristic of deliberative persons within the democratic procedure: they are to be understood as citizens who "exercise their participation in

23. Regarding Günther's commanded attribution-operations: "In an emphatic, material sense, attributions are commanded when there are legitimating reasons for establishing a rule that commands an attribution." *Günther, The Attribution of Criminal Responsibility on the Basis of Understanding*, in Lüderssen (ed.), *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse?*, Vol. I, 1998. p. 342.

24. Günther, 2005, p. 248.

25. Günther, 2005, p. 248-249.

26. Günther, 2005, p. 249. For more on this, see p. 252.

argumentation in the form of a subjective right to political participation in legally institutionalized procedures of public opinion and will formation.”²⁷

Therefore, the deliberative person – as a citizen of the state – does not have the duty to factually apply the “capacity of critical opinion attributed to him”, that is, the communicative freedom attributed to him. But as a legal person, he still has the duty to obey the norms, since the validity of the law is based “not on the [concrete] approving or disapproving opinion of each individual citizen of the state,” but “only on the procedural coming into being of the norm in the first place.”²⁸ Put differently: The duty to comply with the norm of the deliberative person as a legal entity can be linked to a subjective right (or possibility) to participate in the law-making process by the deliberative person as a citizen, but not to the concrete application of this right.²⁹ The duty of any deliberative person to comply with the criminal norm is based “only on his equal right to publicly exercise his critical capacity and on the legally institutionalized procedure in which this right can be effectively exercised”; for Günther, the subjective right “to exercise this capacity”³⁰ establishes the *for-the-injustice-capability*.

It follows that the ability to comply with norms in criminal law (being *able to stand up for what is wrong*) is attributed to every citizen of the state in an abstract and generalizing way as the positive side of individual freedom and as the justification of criminal guilt.³¹ The ascribed capacity of the citizen to potentially participate in democratic procedures is thereby regarded as the capacity for guilt itself: there is an across-the-board identification in Günther between the subjective right to political participation (as the potential capacity of every citizen), on the one hand, and, on the other, the ascription of individual freedom as the justification of criminal guilt in the context of deliberative democracy.

If an ethical perspective can be detected in the background of Günther’s concept of guilt, it certainly concerns discourse ethics. In a straightforward way, he strives

27. Günther, 2005, p. 250. In this regard, see p. 252. For a differentiation vis-à-vis Rousseau’s model of “self-legislation,” see p. 254.

28. Günther, 2005, p. 250-251, and Kindhäuser, *Strafrechtliche Schuld im demokratischen Rechtsstaat* (Criminal Guilt in the Democratic Constitutional State), *Festschrift für Hassemer*, 2010, p. 769-772.

29. Cf. Günther, 2005, p. 250-251. In this sense, however, “In a pluralistic society, norms are not based on concordant reasoning by all citizens, but result from an opinion-forming process that is aborted by majority decision.” Kindhäuser, *Strafrechtliche Schuld im demokratischen Rechtsstaat*, *Festschrift für Hassemer*, 2010, p. 769-770.

30. Günther, 2005, p. 251.

31. Cf. Günther, 2005, p. 246 ff.

to distance himself from the traditional notions of ethical reproach, moral self-determination, and moral censure (assumptions that come from subject philosophy), that is, to completely distance the legal person from the moral person.³² However, it cannot be argued in this regard that Günther's construction is not based on any ethical perspective. On the contrary, his concept is based on a special ethical approach: the discourse ethics developed by Habermas and Apel – a type of procedural ethics.³³

When the finalist *Anders- Handeln-Können* is replaced by the *Anders-gegen-der-Norm-wahlenkönnen*³⁴ based on the offender's reflexive and critical capacity, Günther successfully de-transcendentalizes the operation of criminal attribution; yet, criminal guilt remains a normative negation of the *non-avoidance* of an avoidable wrong based on the offender's "obligation" to "avoid the wrong"³⁵ (a deontological postulate). For Günther, this negation is, nonetheless, not to be linked to material perspectives on the wrong or to any material value, but to the formal procedure of deliberative democracy itself. Normative negation, or normative guilt, is legitimate in this context because a positive norm has been violated by a perpetrator as a deliberative person who had the potential opportunity to participate in the process of producing that norm.³⁶

From this follows, for Günther: (1) the obligation of the individual is bound to the positive norm as a consequence of a democratic procedure, a kind of public discourse; (2) the ability to avoid the violation of the positive norm, which is bound to the obligation, is, in turn, attributed to the citizen himself on the basis of this democratic procedure; (3) the negation of the violation of the positive norm (guilt) is justified by the fact that the author of the violation could actively participate in this democratic procedure. In other words, the unlawful perpetrator breaks a normative or communicative contract in which he could have participated in some way. In this precise sense, it can be seen that Habermas' notion of a discourse ethics-perspective forms the basis of Günther's linkage between norm-making and norm-following: "Anyone who seriously attempts to participate in an argument implicitly engages in general pragmatic presuppositions that have normative content."³⁷

32. Cf. Günther, 2005, p. 2 and p. 248 ff.

33. Cf. Habermas, 1991, p. 11 ff and p. 119 ff; Apel, *Diskurs und Verantwortung*, 1990, p. 270 ff. On this, see Tugendhat, *Lectures on Ethics*, 1993, p. 161 ff.

34. Cf. Günther, 2005, p. 251-252.

35. Günther, 2005, p. 252-253.

36. Cf. Günther, 2005, p. 255.

37. Habermas, 1991, p. 12-13.

This illustrates Günther's decision for a procedural discourse ethics on the ethical level of the concept of guilt. Under such concept of guilt, the justification of the obligation to obey coincides with the procedural form of deliberative democracy as a qualified type of public discourse. The deontological aspect of Günther's construction stems from a discourse-theoretical interpretation of justice, whereby what is fairly conceived as an imputation is deliberated in a communicative way on the basis of the democratic procedure.

The significant point of discourse ethics in its tension with the so-called "monological"³⁸ perspective of the Kantian tradition "is the replacement of the reflexive examination of moral maxims according to the specification of the categorical imperative by an argumentative redemption of the validity claims of moral norms in a practical discourse."³⁹ Habermas strives for an ethics constructed⁴⁰ intersubjectively beyond "individualism", in which Kant's categorical imperative is replaced by the "procedure of argumentation" between subjects.⁴¹

As a consequence, Günther's justification of the criminal obligation to obey, which belongs to the concept of guilt, to avoid injustice, is not to emerge *monologically* from individual subjectivity, but from the intersubjective space of communication between individuals. Finally, it is a matter of a communicative, intersubjective and reflexive interpretation of ethics, in which argumentation sets the standard:

"... if one realizes that discourses, in which, after all, problematic claims to validity are treated as hypotheses, represent a type of communicative action that has become reflexive. Thus, the normative content of argumentation presuppositions is merely borrowed from the presuppositions of understanding-oriented trade on which discourses rest, as it were."⁴²

According to Günther, the basis of criminal normative guilt, i.e., the offender's obligation to comply with a norm,

"is linked to the legal person's ability to take a critical stand vis-à-vis his own statements and actions. Just as the deliberative person in the role of citizen can take a public stand against a norm, so too, as a legal person, he or she has the general capacity for critical comment vis-à-vis his or her own plans of action."⁴³

38. Habermas, 1991, p. 156.

39. Forst, 2009, p. 306.

40. Habermas, 1991, p. 166.

41. Habermas, 1991, p. 12.

42. Habermas, 1991, p. 17.

The deliberative person's capacity for critical comment on his or her own actions and expressions, which constitutes criminal culpability, is internally related to the deliberative person's capacity for critical comment as a citizen against norms. This can be understood in such a way that the attributed capacity of the deliberative person as a citizen (as author of the norm), in this context, justifies the attribution-operation of the capacity of the deliberative person as a legal entity (addressee of the norm).⁴⁴

From the deliberative person's capacity for critical comment – as the addressee of the norm – two things follow for Günther's understanding of the imputation of an unlawful act: (1) The unlawful act is imputable to the criminal law system only if the legal person "had the capacity for critical opinion with respect to his own and others' statements and actions." In this case, the act is treated in the criminal law system "as if its origin lay only in the use of this capacity;" (2) "The duty" to avoid wrongdoing is justifiable in criminal law only if the legal person "had the capacity to take a critical view of his own and others' statements and actions."⁴⁵

Thus, the generalized attribution to every citizen of the ability to take a critical stand is considered "the general criterion for the sanity of the legal person" as a deliberative person.⁴⁶ In this context, the formal and general attribution of the capacity for critical opinion is to be understood as the positive side of the individual freedom of the criminal (the *being-for-the-wrong*). Likewise, this attribution-operation can be understood as the justification of the criminal law-obligation to follow the norm and the content of guilt.⁴⁷ In this precise sense, Günther states: "With the right to participate in democratic procedures of norm-setting and the possibility of each individual to bring his negative opinion to bear in such procedures, the legal person may be expected to follow the norm in his actions and to avoid injustice."⁴⁸

With regard to the negative side of individual freedom belonging to the concept of guilt as a limitation of criminal guilt, for Günther it is the "citizens of the state themselves who have to tread this path."⁴⁹ For the justification of criminal guilt (positive side of individual freedom), the question is about the possibility of individual

43. Günther, 2005, p. 254.

44. Cf. Günther, 2005, p. 254 ff.

45. Günther, 2005, p. 254 f.

46. Günther, 2005, p. 255-256.

47. Cf. Günther, 2005. p. 255 ff.

48. Günther, 2005. p. 255.

49. Günther, 2005, p. 256.

freedom as the object of criminal guilt itself – What kind of individual freedom should be the object of criminal guilt? –, while the question about the limitation of criminal guilt (negative side of individual freedom) is: When is the measure of the individual freedom of the criminal exceptionally insufficient to justify an accusation of guilt, if the positive side of individual freedom is ascribed roughly to the criminal? At that point, the matter is the delimitation of the conditions under which an accusation of guilt can be rejected, i.e., the definition of exculpation rules or grounds for exclusion of guilt in the broad sense: sanity in the broad sense, error of prohibition,⁵⁰ excusable state of necessity, excess of necessity⁵¹ and unreasonableness of behavior in accordance with the norm.⁵²

According to Günther, all these criteria for criminal attribution as an answer to the question regarding the negative side of individual freedom are to be determined by the citizens of the state themselves “in the way of democratic legislation.” The criminal significance of the negative side of individual freedom as a limitation of criminal guilt or imputation is generated in this theoretical landscape (as is the case with the positive side of individual freedom) on the basis of the procedure of the democratic process as a qualified public discourse of deliberative persons.⁵³

3. PROBLEMATIZATION AND THE CRITICISM: AN INTERPRETATION OF MARCELO NEVES' SUB-CITIZENSHIP THEORY

The suggestion made by Klaus Günther leads to other problems not addressed by his theory. Since citizens self-determine criminal attributions among themselves via legislation with respect to a constitutional democratic state and negative individual freedom, this leads to issues regarding the realization of citizenship under certain social conditions, as well as to the general realization of civil rights as an equal basis for the ascription of criminal attributions. Günther's proposal is pertinent in the sense of linking the state's punitive prerogative to the institutional reflexive course of the constitutional democratic order. However, as Habermas has noted, following Marcelo Neves, it is also possible that “social reality controverts

50. In this regard, instructive Hans-Joachim, *Unrechtsbewusstsein, Verbotsirrtum und Vermeidbarkeit des Verbotsirrtums*, 1969; Ross, *Die Vermeidbarkeit des Verbotsirrtums...*, 2000. p. 359 ff; Löw, *Die Erkundigungspflicht beim Verbotsirrtum ...*, 2001.

51. Motsch, 2003. p. 29 ff; Fischer, 1971. p. 37 ff.

52. In this regard, an instructive contribution is Momsen, *Die Zumutbarkeit als Begrenzung strafrechtlicher Pflichten*, 2006. p. 36 ff.

53. Cf. Günther, 2005. p. 256-257.

the validity of norms that cannot be implemented for the lack of material preconditions and the necessary political will.”⁵⁴ In this sense, the privileged historical and social-economic conditions of the West and of most OECD countries must be considered. The hazards of a ‘façade’-reflexivity of the constitutional project should not be overlooked, because, also following Habermas, such façade-reflexivity could become a problem even for the “established democracies of the West.”⁵⁵

Here, Günther’s circular theoretical presupposition is to be problematized, which states that the deliberative citizen already possesses that communicative freedom which, however, legitimates the attribution-operation of communicative freedom as a justification of criminal guilt in the first place. In this sense, the intersubjective-reflexive perspective of discourse theory makes a double assumption/attribution regarding individual freedom: One ascribes/assumes that the member (citizen) of the speech community (deliberative democracy) already possesses that potential for critical comment (communicative freedom) which, in turn, only justifies the ascription/assumption operation with regard to the potential for critical comment as justification of criminal guilt.⁵⁶

This means that Günther’s construction presupposes a formal type of citizenship as a justification for criminal imputation, in which the following constitutive features are attributed to citizens in a formal way: (1) the ability to participate in the deliberative, democratic process of lawmaking; and (2) access to the positive, social benefits of statehood. The second characteristic is a prerequisite of the attainment of the first. Considering that within the “socio-political conditions of current democracies, the democratic-liberative justification of criminal law itself is problematic,”⁵⁷ point (1) can be already questioned: “The populist, technocratic, and partisan context”⁵⁸ “in which laws are produced, makes the idea that they are the result of a

54. Habermas, 2003. p. 210.

55. Habermas, 2003. p. 210.

56. For this, see the reconstruction of section A. I.

57. Our translation, *in verbis*: “... under the socio-political conditions of the current democracies, the democratic rationale for punishment is, in itself, problematic.” Cigüela Sola, El ciudadano y el excluido frente al Derecho penal, InDret 2, 2017. p. 13.

58. Our translation, *in verbis*: “populist, technocratic and partocratic” Silva Sánchez, Presupuestos socio-políticos de la atribución de responsabilidad, LH-Suárez Montes, 2013. p. 717. For a critique of Günther’s concept of culpability, see Pawlik, Der Bürger möchte bestraft werden, FAZ 14/03, 2005; Cigüela Sola, Derecho penal y exclusion social, Isonomía 43, 2015, p. 136 ff; Feijoo Sánchez, La culpabilidad jurídico-penal en el Estado democrático de Derecho, ADPCP 15, 2012. p. 111 ff.

rational, spontaneous, and inclusive deliberation of citizens of the state difficult to defend.”⁵⁹ Indeed, the role of citizens of the state in democratic deliberation (the presupposition of Habermasian discourse theory) is often minor compared to what is idealized as being attributed to citizens of the state.⁶⁰ In any case, Günther’s argument that the offender’s norm compliance obligation is not based on his concrete participation in the democratic deliberation about the violated norm, but is linked solely to the subjective right and, thus, to the potentials of this participation,⁶¹ can be seen as an answer to this problem.

With regard to point 2, however, the concept of citizenship presupposed in discourse theory and the reflexive-intersubjective (formal) idea of individual freedom linked to it are even more problematic,⁶² since they encompass the role of the socially excluded citizen in the context of the social constitutional state – point 2 is a condition of possibility of the ability of point 1. Social exclusion is understood here as the condition of citizens of the state who have no actual material access to positive state benefits:

“The excluded is defined by the fact that he lives under conditions of inequality in his relation to the deliberative citizen, as well as under conditions of limited material freedom, while the difficulties of access to certain rights and goods (education, health, culture, socialization, etc.) limit the free realization of his personality and his interaction with third parties.”⁶³

59. Our translation, *in verbis*: “... in the context in which the laws are produced, it is difficult to conceptualize the result as something that emerges from a rational, inclusive and spontaneous deliberation by the citizens.” Cigüela Sola, *El ciudadano y el excluido frente al Derecho penal*, InDret 2, 2017. p. 13. On this point, see section A. III – a).

60. “Even at the level of communicative requirements, one can observe an insurmountable gap between deliberative citizens and the many real citizens.” Our translation, *in verbis*: “... also at the level of the communicative requirements, we find an unsurmountable distance between the deliberative citizen and many real citizens.” Cigüela Sola, *El ciudadano y el excluido frente al Derecho penal*, InDret 2, 2017. p. 15.

61. Cf. Günther, 2005, p. 245.

62. Cf. Cigüela Sola, 2017, p. 14.

63. Our translation, *in verbis*: “Under these conditions, the excluded individual is defined precisely by living in conditions of inequality vis-à-vis the deliberative citizen, and under restricted conditions of material liberty, inasmuch as the difficulties to obtain access to certain rights and goods (education, health, culture, socialization, and so on) restrict the free fulfillment of his or her personality and interactions with others.” Cigüela Sola, *El ciudadano y el excluido frente al Derecho penal*, InDret 2, 2017. p. 15.

Through this, Günther's reference to the *potential state in the form of a subjective right* cannot be interpreted as a response to the realization or non-realization of positive social benefits, since the constitution⁶⁴ establishes a democratic and social constitutional state, which requires not only the formal subjective right, but also the materialization⁶⁵ of positive state benefits with respect to the concept of citizenship: for citizenship to be understood as a prerequisite of the duty of the individual (i.e. the duty to comply with the norm in criminal law), it must necessarily be about material citizenship! And this presupposes a normative interrelation between duties and rights of the individual, on the one hand, and duties and rights of the state, on the other.⁶⁶

Individual freedom as the basis of criminal guilt within the democratic and social constitutional state must be conceived in such a way that it can be linked to a material conception of citizenship. Individual freedom as a prerequisite for the citizen's ability to participate politically in the democratic process and, thus, as the basis of criminal guilt within the democratic and social constitutional state must be material.

The Brazilian legal scholar Marcelo Neves basically assumes that the recognition of the individual as a concrete citizen within the framework of the democratic and social constitutional state in the so-called "Latin American peripheral modernity"⁶⁷ cannot be identified with the formal determination or precondition of positive law.⁶⁸ On the other hand, in "Latin American peripheral modernity", there is even a tendency for the material recognition of the individual as a citizen – with access to all the basic rights provided for in the constitution – not to exist in reality:

"One of the most problematic variables in the difficulty of the identity construction of the sphere(s) of legality in Latin American peripheral modernity is the generalization of relations of sub-integration and super-integration. In this case, inclusion is not realized as simultaneous access to and dependence on positive law."⁶⁹

64. When we refer to the constitution, we are bearing in mind both the German and Brazilian constitutions, which establish a democratic and social constitutional state.

65. In the sense that the democratic and social rule of law is a substantive rule of law, see the instructive contribution of Ladeur, *Die Regulierung von Selbstregulierung und die Herausbildung einer Logik der Netzwerke*, *Zeitschrift für Verwaltungsrecht und Verwaltungswissenschaft*, 2001. pp. 59-60.

66. On this, see Cigüela Sola, *El ciudadano y el excluido frente al Derecho penal*, *InDret* 2, 2017. p. 18.

67. Neves, 2003. p. 130 ff.

68. Cf. Neves, 2007. p. 68 f.

69. Neves, 2003, p. 141.

In regard to the “sub-integration”, the so-called “sub-citizens” – as formal citizens – must comply with the norms of the state, but have no material access to the fundamental social state benefits:

“On the side of the sub-integrated, concrete relations are generalized in which they do not have access to the benefits of the legal ordering, but depend on their uncertain prescriptions ... Nevertheless, they lack the real conditions to exercise their constitutionally declared fundamental rights, and are not liberated from the demands and responsibilities imposed by the coercive state apparatus, radically subjecting them to its punitive structures ... For the sub-integrated, the constitutional apparatuses have relevance almost exclusively in their restrictive effects on liberties.”⁷⁰

On the one hand, “sub-citizens” in Latin America suffer from insufficient access to positive fundamental rights; but on the other hand, they remain subordinated to duties, responsibilities, and restrictive custodial penalties: “sub-citizens” are not *de facto* concrete citizens, but have the formal citizenship provided for in positive law, which imposes on them all the usual duties of a citizen:⁷¹

“The lower classes, marginalized in various degrees and respects (i.e., most of the population), are integrated into the system as obligated, accused, etc., not as entitled, claimants, etc.; they depend on it [on the legal system], but without having access (in the positive sense) to its benefits.”⁷²

A clear-cut asymmetry appears, in this case, between the rights and duties of citizens in their normative relationship with the state. Such asymmetry, in our opinion, causes the injustice of the state’s punishment of the individual, following an unjust accountability of the individual as a criminal. Günther’s theory of communicative freedom is problematized in this context by the fact that “sub-citizens” are considered deliberative citizens after all, although they cannot be recognized as concrete citizens. Since the formal citizen is treated on the basis of the attribution-operation of individual freedom as if he were a concrete citizen, Günther’s theory cannot do justice to the concrete situation of the “sub-citizens.”

The communicative freedom of the deliberative citizen is merely illusory in the case of the “sub-citizens” in Latin America, as is equality among citizens:

70. Neves, 2003, p. 141.

71. Cf. Neves, 2014, p. 182.

72. Neves, 1991, p. 94.

“The institutionalization of freedom of communication, and even more so the idea of equality before the law, become illusory when one considers that broad sectors of the population are *socially handicapped from* integrating positively into the constitutional system.”⁷³ Thus, the capacity for critical comment of deliberative citizens is nothing more than a formal assumption that is not materially and positively ascertainable among “sub-citizens.” The fact is that the capacity for critical comment of citizens who concretely do not have access to fundamental basic rights such as food security, health, work and culture, among others, cannot or may not be formally attributed by the state.

The Peruvian psychoanalyst Rabanal’s opinion, based on an empirical study in miserable regions in Latin America, goes in this direction, according to which there is a connection between material poverty and the inability to develop an autonomous personality.⁷⁴ Those who do not have concrete access to positive basic rights cannot properly develop the ability to take a critical stance toward themselves and toward others. Rather, in order to develop such abilities, the material positive state benefits would have to be concretely available. Thus, this would no longer be a purely formal attribution operation regarding the individual freedom of the citizen, but a material and positive recognition of individual freedom by the state, i.e., material freedom instead of formal freedom as a precondition of criminal responsibility or imputation. This summarizes, concisely, the theoretical proposal of this study.

4. FREEDOM AND RECOGNITION WITH HONNETH

In his work *The Law of Freedom*, Axel Honneth takes the position that individual freedom is the normative core and axiological goal of justice in modernity.⁷⁵ In his theory of justice, he argues that the decisive prerequisite for the realization of human self-determination is the historical process of mutual *recognition*.⁷⁶ There are basically three different interpretative models competing for the concept of individual freedom in modern societies: *negative idea*, *reflexive idea*, and *social idea*.⁷⁷

73. Neves, 1991, p. 95-96. In this direction see the critique Luhmann, Quod Omnes Tangit, in: Rosenfeld/ Arato (eds.), Habermas on law and democracy, 1998. p. 157-172, especially p. 170.

74. Cf. Rodriguez Rabanal, 1990, p. 29 ff.

75. See Honneth, 2011, p. 38: “[...] not the will of the community, not the natural order, but individual freedom forms the normative cornerstone of all conceptions of justice.”

76. In this regard, see Honneth, 2011, 35ff, 122ff and 81-86.

77. Honneth, 2011, p. 43.

According to Honneth, the first two ideas are nothing more than mere formal conceptions of individual freedom, which can only be realized through the *social idea*. Only the social idea can create material conditions for the realization of individual freedom within the framework of an institutional anchoring of relations of recognition.⁷⁸

Honneth's concept of freedom is characterized by a normative reconstruction of immanent, justified values in the historical development of modern societies.⁷⁹ At the core of such values stand intersubjective relations of mutual recognition. The socio-ethical essentiality of these relations overcomes both the merely formal, negative idea, and the reflexive idea of individual freedom – for instance in Habermas.⁸⁰

The negative idea of individual freedom is related to the liberal idea of justice, which grants the subject a sphere legally protected against the power of the state. But the idea of such a sphere amounts to a merely formal approach to individual freedom. It is not sufficient for the realization of freedom, because self-determination and the finality of action cannot be fulfilled with it. From an external perspective of the subject, one overlooks the subjective elements of intentionality, motivation and behavioral purpose that are essential for the idea of individual freedom and exist independently of causal processes.⁸¹

Individual freedom understood on the basis of the negative idea provides an interpretative pattern that does not allow for the individual self-establishment of the finality of action. In such a way, the possibility of self-determination is assumed in a merely formal way and subjected to an external causal chain. The negative idea provides an explanatory model that restricts the relation between the individual and the norm to a negative aspect. That is, it allows for an understanding of the individual as the addressee of the norm, but not as its author. According to Honneth, this implies a pathological asymmetry for the justification of the legal order.⁸²

78. Honneth, 2011, p. 124: “[...] what it means for the individual to have individual freedom necessarily implies naming the existing institutions in which he can experience recognition in the normatively regulated interaction with others”, see also 86 and 122ff.

79. The methodological path of Honneth's theory of justice is probably characteristic of the social philosophy of the Frankfurt School. With Honneth, it is neither a sociological methodology in the sense of a mere empirical descriptive of social facts, nor a philosophical methodology in the sense of the assumption of metaphysical ideals. Rather, it is a social fact that carries a historically immanent normativity. This is basically Honneth's designed solution to the gap between being and ought. On this, see Honneth, 2011, p. 230.

80. Honneth, 2011, 69ff, 81ff, 119ff and 221ff.

81. Honneth, 2011, p. 56-57, 129ff.

82. Honneth, 2011, p. 56-57, 129ff and 221ff. According to Honneth, Hobbes, Locke and Sartre are significant authors in the construction of this view.

With the reflexive idea, individual freedom is filled with the subjective consideration of self-determination, in such a way that the possibility of realization of the human will be determined by its self-finality is presupposed. Only with this one could distinguish autonomous from heteronomous behavior. In a first phase, however, the reflexive idea refers to the subject's internal relation with himself, presupposing that the individual's behavior is a product only of his own motivation.⁸³ This monological understanding-phase of individual freedom on the basis of the reflexive idea is subsequently superseded in the context of an intersubjective reformulation.⁸⁴

If a *lack of subjectivity* arises from the negative idea of individual freedom, it can also be said that the monological phase of the reflexive idea produces a *lack of objectivity*. The intersubjective phase of the reflexive idea regains the objectivity of individual freedom, as the reflexive idea leaves the space of internal subjectivity as a given element and is then generated by the communicative action of the subject within a speech community, which presupposes intersubjectivity.⁸⁵ The social institution of discourse is presented in this conception as an operation from which the meaning of individual freedom emerges, and without which the notion of self-determination would not be possible. Thus, an attempt is made to conceive of the individual not only as a norm addressee,⁸⁶ but also as a norm author.

Although this second phase of the reflexive idea already aims at a social idea of individual freedom, it remains in a reflexive space as a merely formal conception without being able to provide sufficient conditions for the realization of individual freedom. Thus, the concrete intersubjectivity-operation in the construction of the meaning of individual freedom is not yet realized. In this regard, one can say that the communicative interpretation of the reflexive idea is still purely formal, in the

83. Honneth, 2011, 58ff.

84. According to Honneth, Aristotle, Rousseau and Kant are important authors for this. In the transformation of intersubjectivity Apel and Habermas play a significant role. It should be emphasized that both authors were deeply influenced by the so-called linguistic-philosophical turn. On individual freedom and its de-transcendentalizing process, see Axel Honneth, *Das Recht der Freiheit. Grundriss einer demokratischen Sittlichkeit*, 2011, 69: "What hitherto was supposed to be the achievement of a lonely, self-referring subject is interpreted by such a linguistic-philosophical turn as a communicative production of the members of a linguistic community." See also 58ff; On this, Karl-Otto Apel, *Transformation of Philosophy. Das Apriori der Kommunikationsgemeinschaft*, 1973; Jürgen Habermas, *Moralbewusstsein und kommunikatives Handeln*, 1983.

85. Honneth, 2011, p. 69 and 81ff.

86. Honneth, 2011, p. 81.

sense that intersubjectivity is only assumed, so to speak.⁸⁷ Since the formal conception is not able to offer a non-instrumentalizable historical normativity or ethics, it does not yet provide the adequate basis for the socio-ethical foundation of criminal guilt sought here.

Honneth makes a point precisely in this sense, that discourse theory is incapable of concretely realizing the meaning of individual freedom because it lacks historical concreteness. The idea that the meaning of individual freedom could be captured within the framework of a discourse produced in a speech community is a merely formal one; it carries insufficient historical normativity for the institutional realization of individual freedom.⁸⁸ Indeed, individual freedom can claim a procedural objectivity only through the social idea. Such objectivity is created through historically institutionalized, intersubjective relations of mutual recognition.

It is not discourse that generates the meaning of individual freedom, but historical relations of mutual recognition.⁸⁹ The understanding of individual freedom as a product of concrete, intersubjective relations of mutual recognition with social-ethical content constructed in the course of the historical development of modern societies breaks the formal circularity of discourse. The individual self-determination required by the normative concept of guilt can create objectivity only from such a historically institutionalized movement.⁹⁰ Since the other two views of individual freedom (negative and reflexive) are merely formal ideas, Honneth calls them parasitic, as they create pathologies that not only prevent the realization of individual freedom but also distort its meaning as the ethical core of the conception of social

87. Cf. Honneth's critique of this construction: Axel Honneth, *Das Recht der Freiheit. Grundriss einer demokratischen Sittlichkeit*, 2011, 69: "We will see later, however, that even such an extension of the "I" to the "we" of self-legislation is not yet sufficient to actually grasp the idea of an intersubjective freedom in its full scope." See also 81ff, 119ff and 221ff.

88. On this, again, cf. Axel Honneth, *Das Recht der Freiheit. Grundriss einer demokratischen Sittlichkeit*, 2011, 78: "Discourse" is understood in discourse theory either as a transcendental event or as a meta-institution, but never as a particular institution in the multiplicity of its social manifestation; it lacks the resolution to historical concretion that would still need to be added to the initial thesis of communication theory to draw insight from it into the institutional foundations of freedom. Thus, even though Apel' and Habermas' approach points to it in every way, it has not yet reached beyond this threshold into a social concept of freedom."

89. Honneth, 2011, 81ff, 119ff and 221ff.

90. At this point, it should be emphasized that the concern of the present study is to find a model of justification that achieves objective individual freedom without the need to or even the possibility of instrumentalizing or objectifying the subject.

justice.⁹¹ In fact, these two ideas of individual freedom are nothing more than assumptions/attributions that do not allow for an epistemologically grounded step beyond procedural conceptions of freedom.

Honneth, with his social idea of individual freedom, fills the intersubjective, communicative process with historical and normative elements (the ethical relationship of mutual *recognition*), which restricts the deliberative scope of the concept of freedom distinctive of a speech community.

5. CONSEQUENCE AT THE LEVEL OF THE CRIMINAL LAW DOCTRINE OF GUILT

The positive side of individual freedom is the question of the offender's ability to comply with norms in the broad sense (being *able to stand up for the wrong*), which justifies the accusation of guilt under criminal law as a *negation of the material wrong*. In contrast to Günther, the ability of the criminal as a citizen to take a critical stance toward criminal norms does not depend here on a formal attribution-operation, but on a material recognition operation linked to the conception of the concrete citizen. The ability to take a critical stance is first produced here on the basis of state-mediated material relations of mutual recognition. This means: the state produces either the ability to follow the norm or the ability to avoid injustice in an individualized and material way through its positive benefits (social conditions, e.g., health, food, work, culture, education, socialization and so on). Only thus is a democratic and social state empowered to individually reproach a concretely recognized perpetrator of an act contrary to the law.

The protection of individual freedom is understood here as the guiding value of criminal law. In this line of reasoning, the material wrong means the non-recognition of individual freedom by a citizen recognized by the state. Consequently, the criminal charge or normative guilt – following the Hegelian theory of crime⁹² – assumes the meaning of a negation of the non-recognition of individual freedom: criminal guilt presupposes the recognition of individual freedom both on the side of the criminal (individual freedom as a *precondition of criminal guilt*) and on the side of the value protected by criminal law. The value is then promoted on the basis of the negation of its violation (recognition of individual freedom as the *goal of criminal guilt*).

The positive side of individual freedom, which establishes criminal guilt, is the material, individualized, realized and positive social freedom in the sense of

91. Honneth, 2011, p. 221.

92. Cf. Hegel, 1821, § 99.

Honneth, achieved by means of a mutual and institutionalized recognition, which makes possible the ability of the criminal to take a critical stand as a concrete citizen in the form of an ability to recognize the recognized (*being able to stand for the wrong as being able to recognize the-other-as-citizen*). The possibility of indetermination of the criminal's behavior in relation to the wrong arises only from the realization of his individual freedom through social recognition. *No punishment without guilt – nulla poena sine culpa* – means here *no punishment without recognition – nulla poena sine recognition* –, since, for us there is no guilt without material recognition.

After answering the question of what kind of individual freedom should be the object of criminal guilt (positive side of individual freedom), we turn now to the analysis of the measure of this freedom (negative side of individual freedom). This involves the analysis of the so-called exculpation rules or grounds for exclusion of guilt in the broad sense, in the context of which the measure of individual freedom of the criminal appears, in exceptional cases, to be insufficient for an accusation of guilt or at least for a full accusation of guilt.

There are achievements in the history of criminal law that command the promotion of the socio-ethical purpose of recognizing individual freedom and, thus, the non-objectification of the individual. In our context, these are, above all, sanity in the narrow sense, the error of prohibition, excusable necessity, excess of necessity, and unreasonableness. Despite the guiding value of these principles, however, the judge can be offered neither calculations nor formulas for verifying the exact measure of individual freedom. Since the individual liberty that criminal culpability presupposes is not a subjective but an intersubjectively constructed reality, it is, rather, a matter of applying historically materialized *socio-ethical standards* that promote the protection and recognition of individual liberty. The history of the theory of crime is about the development of dogmatic criteria that continuously show the direction of the protection of individual freedom. In this context, the establishment of different rules of exculpation in criminal law dogmatics is considered to be the consideration of certain conditions in the analysis of the crime, under which the presence of an accusation of guilt or a full accusation of guilt constitutes a weightier violation of individual freedom than the wrong itself.

These *socio-ethical standards* are to be constructed within the framework of the intersubjective tension of mutual recognition between citizens in a historical perspective; they possess a material nature or material content and establish historical *points of no return* for criminal law dogmatics. These socio-ethical standards cannot be relativized by the so-called preventive politicization of criminal law. They are opposing values to prevention, are considered a normative space of unavailability for criminal policy, and are a social-ethical guarantee of the individual against

positive law and criminal policy. For the practical examination of criminal guilt in individual cases, the previous remarks have the following consequence: the functional needs, which constitute the basic idea of general prevention, are not a valid criterion for the examination of the rules of exculpation or the degree of guilt in the application of the law, due to their instrumental nature (with respect to the subject).

The theoretical proposal, here, for understanding the concept of guilt under criminal law has the practical-dogmatic consequence that the state bears shared responsibility for wrongdoing if it does not enable the offender to realize individual freedom in a positive and social sense.⁹³ Then an exclusion or at least reduction of the intensity of the accusation of guilt under criminal law becomes necessary. The ability of the offender – as a citizen of the state – to take a critical stand in relation to his own behavior and toward the norms of criminal law may not be formally and indiscriminately attributed to every citizen, but should be recognized by the state in a material, individualized and positive way, in the case of a deficit of recognition of the offender as a concrete citizen of the state. The lack of social conditions corresponding to dignity, such as health, food, work, culture, education and socialization, turns the production of a criminal accusation of guilt and a full criminal accusation of guilt into a legitimization-issue. What is missing is the material individual freedom that establishes criminal culpability in the first place. It is in this sense that Cigüela Sola, in a critical reflection on Günther's remarks, argues that an exclusionary state in a democracy is not legitimized to make an accusation of guilt against the excluded citizen (the formal but, by no means, concrete citizen), even if the latter is a perpetrator acting in violation of the law according to the facts.⁹⁴

Since there is an internal connection between the material recognition of the individual freedom of the offender as a concrete citizen and the recognition of the offender's capacity for critical comment or capacity for guilt, criminal guilt then loses its justification within the framework of the democratic and social constitutional state if the offender acting in violation of the law suffers from a recognition-deficit in the sense of positive and social performance. Just as the existence of material recognition on the positive side of individual freedom is epistemologically accessible, the non-existence of such recognition – on the negative side of individual freedom – can be epistemologically traced. The eventual failure of the state to fulfill its constitutionally mandated social obligations in respect to the criminal can be empirically established.

93. Along these lines, see Tadros, Poverty and criminal responsibility, *Journal of Value Inquiry* 43, 2009, p. 391-413.

94. Cf. Cigüela Sola, 2017, p. 16.

The mentioned social failure justifies the state's co-responsibility for the injustice in case of a lack of recognition of the offender. It is a constellation in which the state does not recognize the offender's ability to take a critical stand with respect to his own behavior and vis-à-vis the norms of criminal law (the content of criminal guilt as the *Den-Anderen-as-Staatsbürger-Ahnkennen-Kennen*), i.e., the guilt-creating material individual freedom in fact. In other words: in the course of a deficit of recognition, the state does not produce, by means of its institutions, the possibility of indetermination of the criminal (material freedom) vis-à-vis injustice, which it should produce by virtue of the constitution, and which would make the individualization of responsibility for injustice possible in the first place.

The state's co-responsibility for injustice due to the material recognition-deficit of the offender takes on additional weight in the Latin American context, because in Latin America and the new democracies, or "peripheral modernity"⁹⁵, the asymmetry between state support and the degree of criminal law intervention is considerable. In this context, one can speak of a "maximum criminal law", on the one hand, and of a "minimum welfare state", on the other.⁹⁶ Now, precisely the opposite is proposed here: a minimal criminal law with a maximal welfare state. In the absence of state social benefits, the aforementioned asymmetry, in turn, leads to a further asymmetry between rights and duties in the relationship between the state and the individual – i.e., a hyper-responsibility of the individual or a hyper-individualization of responsibility for injustice. This creates nothing less than a freedom deficit in the criminal justice system of the democratic and social constitutional state – a deficit that cannot be eliminated with the help of a functional (Roxin/ Jakobs) or procedural (Günther) concept of guilt. The prevention-centered perspective even increases such unjust asymmetry – unjust, because individual freedom is neither developed, nor promoted.

The recognition-deficit may eventually lead to a full exclusion of the criminal wrongfulness-charge, or to a reduction of its degree. The judicial decisions issued in this way must be justified on the basis of an empirical analysis of the concrete social conditions of the offender: the greater the lack of worthy social conditions, such as health, accessibility to food, work, culture, education, socialization, and so on, the lower should be the degree of criminal accusation for the constituent unlawful act. Such empirical analysis shall still draw a comparison between the degree and nature of the criminal's recognition-deficit, on the one hand, and the degree of

95. Neves, 2003, p. 125.

96. Cf. Neves, 2003, p. 130 ff.

*offensiveness*⁹⁷ of the act and the nature of the legal good protected by the violated norm, on the other.

6. CONCRETE EXAMPLE FOR THE DOGMATIC DISCUSSION OF GÜNTHER'S APPROACH

Let us take the following set of facts as a concrete example of Günther's dogmatic problematization of the concept of guilt: Perpetrator A is a young man (23 years old) who has lived since birth in a marginalized area (so-called *favela*) in the city of Rio de Janeiro in Brazil. Despite his status as a formal citizen since birth, he has no material access to the positive state services provided for in the Constitution, such as health, education, culture, quality food, basic sanitation, quality transportation, security and quality housing. The perpetrator commits the theft of a car in the city of Rio de Janeiro. He acted in accordance with the facts, unlawfully and also without any of the other grounds for exclusion of guilt or excuses (imputableness; error of prohibition; excusable necessity; excess of necessity; unreasonableness of conduct in accordance with the norm).

It can be asked here: To what extent is Günther's theory of communicative freedom able to conceive of this concrete situation in all its social complexity and to offer a solution that is just within the democratic and social constitutional state? Since Günther's theory does not take into account the material social conditions of the offender in the attribution-operation of individual freedom, it cannot, in our opinion, consider this concrete situation in all its details and consequently cannot provide an adequate solution. According to Günther's concept of guilt, the perpetrator would be understood in the quality of a formal citizen as a deliberative citizen, who consequently possesses the ability to take a critical stance toward himself and toward others. The solution to the present facts, according to Günther's theory, would be the following: perpetrator A would be held wholly and solely responsible (without the state's co-responsibility for the wrong) for the act that violates the law by virtue of his perfect autonomy, or culpability, as a deliberative citizen (consequence of the presupposition or ascription of an intact capacity for critical opinion).

97. On the so-called *principle of offensiveness*, see Mantovani, *Diritto penale*, 2013. p. 208; Mantovani, *Il principio di offensività ...*, *Rivista Italiana di Diritto e Procedura Penale*, v. 40/ n. 2, 1997. p. 313 ff; D'Avila, *Ofensividade em direito penal*, 2009. p. 76 f; Grosso/ Pelissero/ Petrini/ Pisa, *Manuale di diritto penale*, 2013. pp. 52-64; Cadoppi/ Veneziani, *Elementi di diritto penale*, 2004. pp. 83-94; Ramacci, *Corso di diritto penale*, 2007. pp. 85-96; Manna, *Corso di diritto penale*, 2012. p. 63-67.

Since Günther does not consider the fundamental difference between the merely formal and the concrete citizen – the existence of “sub-citizens” is in fact not an issue for him at all – the perpetrator would be treated as if he were a concrete citizen and then punished by the state in the same way. Although the offender clearly belongs to the group of so-called “sub-citizens” in Neves’ sense, Günther’s concept of guilt does not reach his concrete social reality. Here, it is argued that a concept of guilt must be developed within the framework of criminal law dogmatics that encompasses the concrete social situation of offenders of this type. The phenomenon of “sub-citizens” is nowadays considered a reality not only in Latin America, but worldwide in the context of the so-called new democracy and also in the context of the new wave of immigration in Europe. In this scenario, the criminal law of the democratic and social constitutional state must presuppose a real positive and material rather than a mere formal individual freedom as a justification or legitimation of imputation. Criminal law as *ought must* not overlook these aspects of social reality (*being*) in the sense of justified imputation in the context of the democratic and social constitutional state.

7. FINAL REMARKS

The central idea of this paper can be summarized as follows: the proposal of an epistemologically achievable (intersubjective) and, at the same time, not merely procedural perspective of individual freedom, related to the justification of criminal guilt within the framework of the democratic and social rule of law. In other words: We propose (in contrast to Günther) a material ethics of recognition rather than a formal ethics of discourse as the normative precondition of criminal culpability in the context of the democratic and social rule of law, in which an asymmetrical relationship between the (criminal) duties and the (social) rights of the citizen vis-à-vis the state is considered unjustifiable.

8. REFERENCES

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