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Public security: functional homicide and its repercussions in the legal system Brazilian

Public security: functional homicide and its repercussion on the Brazilian legal system

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SUMMARY
This course conclusion work analyzes the foundations and justification for the creation of Federal Law No. 13,142/2015, as well as its impact on the Brazilian legal system. From this perspective, the subjects that make up the provisions of articles 142 and 144 of the Federal Constitution will be detailed, exposing all the characteristics that surround the qualifier set out in article 121, § 2, item VII of the Penal Code. Furthermore, doctrinal understandings will be presented in relation to**The**new qualification, that is, functional homicide, expressed in the normative text, as a way to avoid**the practice of**crime to the detriment of public security subjects. Furthermore, the crime of intentional bodily injury committed against public security agents will be briefly exposed, as well as the very serious injuries and death committed against them, with all these institutes included by Law No. 13,142/2015.
Key words: Law No. 13,142/2015. Murder. Penal Code. Qualifier.

ABSTRACT
The present course conclusion paper analyzes the foundations and justification of the creation of Federal Law No. 13,142/2015, as well as its repercussion on the Brazilian legal system. In this perspective, the subjects that make up the provisions of Articles 142 and 144 of the Federal Constitution will be detailed, exposing all the characteristics surrounding the qualifier exposed in Article 121, § 2, item VII of the Penal Code. Furthermore, it will present the doctrinal understandings in relation to the new qualifier, that is, functional homicide, expressed in the normative text, to avoid the practice of crime to the disfavor of public security subjects. Furthermore, the crime of personal injury committed against public security agents will be briefly exposed, as well as the very serious and followed-up injuries committed against them, all of which are included by Law No. 13,142/2015.
Keywords: Law No. 13,142/2015. It's murder. Penal Code. Qualifier.

1 INTRODUCTION

In 2015, Law No. 13,142 was created, which brought a legislative innovation, that is, qualified homicide in cases where the victim is an agent or authority listed in articles 142 and 144 of the 1988 Federal Constitution, as well as members of the Force National Public Security and prison system. Furthermore, this list includes the spouse, partner or blood relative up to the third degree of these public security agents.
Therefore, this is the creation of a new crime, named by the doctrine of functional homicide, being inserted in article 121, §2, item VII, of the Penal Code. The justification for creating this qualification is "[...] to prevent or reduce crimes against people who work in the area of public security, people who work in the*front*in the fight against crime." (CUNHA, 2016, p. 67).
This change in criminal legislation is important to "[...] strengthen the Democratic Rule of Law and the institutions legally constituted to combat crime, especially organized crime, which plans to create panic and lack of social control, when an actor in the fight to crime is a victim of homicide." (CUNHA, 2016, p. 67).
Therefore, the main point of this work is to present the changes created by the aforementioned law. The doctrine endorsed on the subject is used as the basis of the research, which will serve to reflect on the inefficiency of the State in guaranteeing public security effectively. It briefly discusses the requirements necessary to set up this institute, as well as explaining the general and specific aspects of the topic.

2 FUNCTIONAL HOMICIDE BROUGHT BY FEDERAL LAW No. 13,142/2015 AND ITS REPERCUSSION

This research is bibliographical, which is carried out by collecting data on current legislation, doctrine and jurisprudence. Furthermore, the procedure adopted for the research is reflective.

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For a long time, the doctrine questioned the lack of "[...] special protection for state agents, who deal with the country's security. The visible growth of organized crime and its attacks against police agents, among others, meant that this qualification had been added to homicide (Law 13,142/2015)." (NUCCI, 2017, p. 456). This Federal Law No. 13,142/2015 brought a new qualifier to article 121 of the Penal Code (BRASIL, 1940), that is, it added item VII in paragraph 2 of this article, which provides the following:

> Qualified homicide
> § 2° If the homicide is committed:
> VII – against authority or agent described in arts. 142 and 144 of the Federal Constitution, members of the prison system and the National Public Security Force, in the exercise of their function or as a result of it, or against their spouse, partner or blood relative up to the third degree, due to this condition: (Included by Law No. 13,142, of 2015).
> Penalty - imprisonment, from twelve to thirty years.

Furthermore, this qualification was added to the list of heinous crimes set out in Law No. 8,072/90. Therefore, this crime does not admit pardon or grace, and is non-bailable. Furthermore, for regime progression it is necessary to serve 2/5 (two-fifths) of the sentence, if the defendant is a first-time offender, and to serve 3/5 (three-fifths) of the sentence if he is a repeat offender. In summary, this qualification the doctrine has called functional homicide. Well, the commission of this crime against any of the public security subjects, in the exercise of their function or because of it, as well as against their family members, qualifies the crime as homicide and increases the time spent serving the sentence in comparison to simple homicide of the*caput*of article 121 of the Penal Code.

Furthermore, let us see that the passive subjects of this qualification are present in articles 142 and 144 of the Federal Constitution (BRASIL, 1988):

> Art. 142. The Armed Forces, constituted by the Navy, the Army and the Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and are intended to defend the Homeland, to guarantee constitutional powers and, at the initiative of any of them, law and order.
> [...]
> Art. 144. Public security, the duty of the State, the right and responsibility of all, is exercised to preserve public order and the safety of people and property, through the following bodies: I - Federal Police;
> II - Federal highway police;
> III - federal railway police;
> IV - Civil police;
> V – Military police and military fire departments.

Therefore, "this is a blank criminal rule, as it must be complemented by articles 142 and 144 of the Federal Constitution, which indicate some of the public security agents whose homicide triggers the qualification [...]" (CUNHA, 2016 , p. 67). Thus, both the police authorities, as well as all other subjects of public security that are part of the Civil Police of the States and the Federal Police, as well as railway police officers and federal highway police officers, members of the Fire Department and any military police officers, and Furthermore, municipal guards, agents responsible for road safety, prison system agents and agents working in the National Public Security Force are authorities or functional agents of public security.

Furthermore, the aforementioned law, regarding the crime of homicide, sought to delimit not only the authorities or agents who perform a public function linked to the defense of the State, but also included the spouses, partners or blood relatives up to the third degree of these servants (children, grandchildren, great-grandchildren, parents, grandparents, great-grandparents, brothers, uncles and nephews), when killed because of the aforementioned activity carried out.

In this way, the legislator covered an extensive list of subjects for inclusion in the classification of the crime of qualified functional homicide. In other words, its scope can be presented as a characteristic present in criminal symbolism, as it leaves several questions and gaps regarding the aforementioned people and the probability of being classified as functional homicide.

Regarding the gaps, it is noted, from the analysis of the classification of functional homicide, that item VII, paragraph 2, of article 121 of the Penal Code, leaves flaws in its elaboration, as it does not include kinship by affinity (in-laws, brothers-in-law, sons-in-law and daughters-in-law), as well as kinship through adoptive ties. There is discrimination here between kinships, contrary to the provisions of article 227, §6° of the Federal Constitution, let us see:

> Art. 227. [...] § 6 Children, whether or not there is a marriage relationship, or by adoption, will have the same rights and qualifications, any discriminatory designations relating to filiation being prohibited. (BRAZIL, 1988).

As for the active subject of the commission of this crime, it can be any person, as long as the crime occurs in the exercise of the function or as a result of it. In this way, inactive public agents can be classified as victims, as long as the commission of the crime is motivated by the function that the public servant performed before the inactivity.

Rogério Sanches Cunha (2016, p. 67) reinforces this idea, stating that

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> [...] the homicide of a retired security officer may be included in this category, depending on the specific case. Initially, we emphasize that in the event of a homicide against someone "in the exercise of their function", it is impossible for the retired agent to appear as a victim, as, in this case, he is evidently no longer part of the public body. Even if the former civil servant is performing a similar function in the private sector, the qualification will not apply due to the prohibition of the in malam partem analogy. In the case of homicide that occurs "as a result of the function", it is possible to include a retired civil servant as the victim, since, as is well highlighted *BITENCOURT*, nothing prevents a police officer, after having retired, from being recognized (or even persecuted) by a criminal whose arrest was under his responsibility, and who, in revenge, kills him. It is undeniable that, in this situation, the homicide occurred as a result of the role that the security officer had performed until his retirement. (emphasis added).

Furthermore, as this qualification is considered subjective, the privileged Homicide contained in article 121, § 1, of the Penal Code (BRASIL, 1940) must be excluded. Let's see that

> [...] one cannot imagine the possibility that someone would kill a public security agent in the exercise of their function or as a result of it, or even that they would kill a family member of that agent due to their kinship status, and do so for reasons of relevant social or moral value. It is unthinkable that this homicide is driven by the maintenance of the interests of the community (in fact, it is quite the opposite) or by feelings of pity, mercy and compassion. (CUNHA, 2016, p. 69).

Furthermore, Federal Law 13,142/2015 also introduced the crime of intentional bodily injury committed against public agents, as well as adding very serious injuries followed by death against them, let's see the provisions:

> Art. 129. Offending the bodily integrity or health of others: [...]
> § 3º If death results and the circumstances show that the agent did not want the result, nor did he take the risk of producing it: [...]
> § 12. If the injury is committed against the authority or agent described in arts. 142 and 144 of the Federal Constitution, members of the prison system and the National Public Security Force, in the exercise of their function or as a result of it, or against their spouse, partner or blood relative up to the third degree, due to this condition, the sentence is increased from one to two thirds. (Included by Law No. 13,142, of 2015) (BRASIL, 1940).

Therefore, these legislative innovations meet the appreciation of public agents and the need to discuss public security policies, given the neglect that we face.
State prevention by public security bodies has not effectively prevented the commission of crimes, which, as far as it is concerned, causes a very large and continuous demand for cases for judicial police institutions, increasing difficulties, as that there is a lack of resources for an effective criminal investigation of most crimes, which results in the absence of punishment.
Furthermore, direct confrontation between public security agents and criminals occasionally leads to deaths, both of criminals and public security agents, as well as victims or citizens who were in the vicinity of the confrontation.
However, the performance of public security agents must be authentic and legal, as it must be carried out in strict compliance with the legal duty, with a view to preventing criminal action in the act of committing a crime or capturing the criminal who is being sought by the courts and, subsequently, , must be protected by the exclusion of the illegality of self-defense or that of a third party due to unjust aggression by criminals subject to State action.
Therefore, the public security agent, who is a representative of the State, must act within the law and only use force proportional to the unjust aggression carried out by the offender. In this sense, in addition to seeking to defend their physical integrity, they must protect the lives of everyone, both citizens and victims, who are exposed to the criminal act, even the delinquent who caused the crime.
Furthermore, the high and prominent indicators of murdered public security agents show a logic of conflict still present in public security policy in Brazil. Therefore, Rogério Sanches Cunha (2016, p. 67) states that the approval, by the National Congress, of this new qualification in the crime of homicide attempts to

> [...] prevent or reduce crimes against people who work in the area of public security, people who work in the *front* in combating crime. The change, according to the House of Laws, is crucial to strengthen the Democratic Rule of Law and the institutions legally constituted to combat crime, especially organized crime, which plans to create panic and lack of social control, when an actor in the fight to crime is a victim of homicide.

Therefore, in addition to trying to put an end to old omissions by the State, mainly in education and the lack of expectations regarding social improvements, there is also a lack of discussing, with technique and austerity, the current political options of an illicit nature, marked by fraudulent economic interests and restricted to violence and mere incrimination. These measures, instead of actually defending the legal interests requested to support their legitimacy, encourage other serious problems in society, such as violence against public security agents.
Finally, it is of great importance to state that the crime of functional homicide is the responsibility of the State Court, through

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of the Jury. Furthermore, there are exceptions, for example, the crime committed against a federal public agent, as long as the crime is related to the exercise of the public function performed, the Federal Court will have jurisdiction.

CONCLUSION

Based on what was exposed in this work, it is concluded that the function performed by public security subjects is, at all times, being re-examined, as crime has been increasing a lot, for example, due to weapons and drug trafficking, as well as the existence of organized crime.

Furthermore, the violence committed against public security subjects has been the subject of analysis for years, given the constant attacks against the lives of these public servants, which is why legislative insertion, the subject of this research, is justified.

Therefore, the creation of Federal Law No. 13,142/2015 added item VII, in paragraph 2, of article 121 of the Penal Code (BRASIL, 1940), that is, the so-called functional homicide, which is the commission of this crime against one of the agents of public security, in the exercise of his function or because of it, as well as against his family members.

Therefore, due to the growth of crime, the State is not always able to effectively fulfill the right that is requested by the population. Thus, crime has public security agents as one of its main victims, and in order to prevent the commission of the crime of functional homicide, there was a need to provide for the qualifier under analysis.

Thus, with the legislative creation of functional homicide, the legislator considered promoting the Democratic Rule of Law. This legislative innovation undoubtedly attempts to meet society's desires, given the increase in violence against public security agents, as well as the fundamental right to security, provided for in the Federal Constitution, which is the duty of the State.

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