

UNITED STATES AND EUROPE AGAINST TERRORISM OF FUNDAMENTALIST ORIGIN: LEGAL MEASURES AND THE SHADOW OF POPULISM

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Abstract: *The United States was the first country to suffer from terrorism of Islamic fundamentalist origin in 2001. Subsequently, several European countries have suffered attacks of the same origin. Legal measures have been enacted on both sides of the Atlantic to combat it. These attacks, and the presence of new religious denominations in some countries, have also led to the increase of populist trends in these territories. This article examines the relationship between Law, politics and populism in the United States and in the European context.*

Key words: *immigration, terrorism, populism, constructive measures.*

1. Introduction

It is known that we live in the era of globalization. This situation produces multiple effects that also touch the Law (Cassese, 2009; Domingo, 2008 and 2018). Some of its effects are the consolidation of the trend of the establishment of democracies, or the respect for human rights that are reflected in different international declarations and covenants and, at least from a formal point of view, in the constitutions of the States. However, other effects associated with globalization also deal with the legal sphere.

This has happened with migratory movements, or terrorism of fundamentalist origin that has also reached a global dimension (Lopez-Sidro, 2021, p. 49-69). Consequently, States and international organizations are forced to react - also by legal means - to them.

In relation to the first issue mentioned - migratory movements - they represent one of the most visible causes of globalization and of the encounter between cultures and beliefs of different signatures.

They will become increasingly important as they are a growing phenomenon. It should not be ignored - as the United Nations (2016, §§ 1 and 64) and the European Union

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(European Commission, 2017a, p. 14. European Parliament, 2017, §§ 39-42 y 71) point out - that events such as the increase in the youth population in Africa, the instability in a few countries - specifically, those in the neighbourhood of Europe -, the flight from armed conflicts, poverty, food insecurity, terrorism, human rights violations, as well as the adverse effects of climate change, will continue to drive individuals and families to seek a better and safer life abroad.

This will be the result unless investments that promote a prosperous and peaceful future are made in the countries of origin. Furthermore, due to their characteristics, these population groups often have particular difficulties in adapting to life in more advanced societies.

These movements continue to be influenced by the migration policies of each country, which must also continue to develop suitable instruments to manage this presence in the best way (Antonini et.al., 2009, p. 29; Sherwood et. al, 2017, p. 171).

These movements produce the establishment of new population groups in each country. As a result new ethnic groups, cultures, customs and beliefs arrive there, and the risk of contrasting with the local ones arises sometimes. This can lead to a feeling of fear and rejection on the part of the host country population. This effect may be increased as a result of terrorist acts from radical Islamic groups. Some populist or social and political movements can manage to take advantage of this circumstance to achieve their ends.

In this article I will focus especially on the populisms that have appeared in the United States, Russia and Europe as a consequence of immigration and the aforementioned settlement of new ethnic groups and beliefs, and terrorism of Islamic fundamentalist origin. These different manifestations of populism have a common denominator which is the cultural and religious element, and that is why I will focus on this aspect.

2. The rise of populisms

Certain groups can react against some of the effects of globalization and invoke them to draw other people to act against them. They can be attitudes of different signs, depending on the effect of globalization on which attention is focused. We will see some of the most significant cases.

On the one hand, the importance of the free market and the consolidation of capitalism has encouraged the appearance of anti-system or anti-globalization groups that usually identify globalization with imperialism and neo-colonialism, and also as a prime mover of the consumer society. They often revive old postulates of economic and political leadership, and they exhort to direct the steps towards an education around values that restrain individualistic tendencies (Figueruelo Burrieza, 2017, p. 15). It is not surprising that their complaints are channelled through "global movements" (Iglesias, 2005, p. 63-93), that is, social mobilizations and collective action or protest.

From another point of view, the strength of the current "global" behaviours or ways of thinking can also arouse the fear of minority groups of being flooded and even extinguished if they do not react in time and they develop - or receive - the mechanisms of timely protection.

The same risk can be perceived by not so minority groups - even national ones – that feel that they enjoy an identity that may be threatened by other effects of globalization such as migration (about the speeches related to reactions in face of the arrival of Islam in Spain as a result of migrations - Susaeta Montoya, 2018, p. 1179-1242) or the existence of supranational orders that restrict States sovereignty (Fonseca, 2020, p. 4; Mora, 2019, p. 94-103). These are identity populisms that seek to safeguard their essence by appealing to cultural, ethnic, historical, security, and even religious criteria.

Some extreme cases of these identity populisms can be identified with exclusive nationalisms that seek to identify their identity with a nation and, therefore, with the need to organize politically and legally as a State.

It is possible to check that protests arise in different places and reasons of different kinds are invoked from the left to the right. Populists blame people from different origins - also in relation to religious or ethnic features - for inequalities, the identity crisis or whatever effect of globalization.

As a result, when populist movements begin to vie in the political arena, they have an advantage over traditional formations because they are able to manage successfully the unrest of important sectors of the population (Figueruelo Burrieza, 2017, p. 22). The media and social networks also help this.

It should be noted, however, that the crisis that the Law is suffering nowadays caused by the emptying of content and its lack of unity – particular to post modernity, which has also reached legal matters- (D'Agostino, 2018, p. 11-26; Irti, 2004, p. 25-27 and 34-35; Lo Castro, 2017, p. 27-38; Pereira, 2018, p. 293-322; Viola, 2018, p. 9-36) is presented as an important asset for populisms and, in general, for politicians. Indeed, if Law consists –in the framework of the current mentality- in the production of norms, and these can be filled in with any content as long as the procedure established for it is respected, then it is right that the politician - also in the probable variant of populists - can promise whatever you want because it is true that it will be possible to transfer that promise to the Law.

It is the consequence that the Law is the result of strength and power. It has not anymore the function of controlling power, but of being an instrument at its disposal.

In this context, populists are open to multiple possibilities to promise, to act, to propose radical changes in society and institutions and, furthermore, to do it quickly: the time it takes to enact a rule. In all probability, it will happen in this way even if the majority of society does not request or is not prepared to assume these changes.

Nor should it be important that there is time to develop a fruitful social debate. What's more, the faster you act, the better, because the surprise effect itself hinders the ability to react and –on the other hand- the social transformation will be more effective.

Anyway, it seems that the effects of globalization open up new scenarios and opportunities to act for those who perceive some of its effects as a threat. Let us see four specific illustrative cases of this situation that do not hesitate to invoke the migratory or religious phenomenon whenever they consider it necessary.

Three of them display practical features - such as certain legislative measures adopted in the United States, the Russian Federation and neighbouring countries, as well as the emergence of Eurosceptic movements and the measures adopted by the EU to offer

solutions -; another one shows a theoretical aspect, which is the so-called "criminal Law of the enemy".

3. Reactions to the alien and fundamentalism

3.1. USA and the "Patriot Act"

In relation to the first of the statements that I've pointed above, we find that the United States approved in 2001, just after the attacks on the Twin Towers, a controversial Act called the Patriot Act (USA, 2001), enacted "to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes", as it is indicated in its heading.

However, it does not aim mainly to punish illegal conducts, but to prevent them from being committed. A part of the legal doctrine has criticized it because it has been introduced as an exceptional Act that cut back fundamental rights of citizens and sometimes it allows public authorities to exercise functions that are not entirely in line with the Rule of Law (Oberdorff, 2015, p. 365; Zoller, 2015, p. 377-388). Other authors have been more critical in understanding that this Act seeks to justify the commission of illegal acts by the public authorities of this country using as a pretext its defence from possible attacks (Pfaff, 2015, p. 59).

Considering it from this perspective, this rule is accused of allowing secret investigations by the authorities. It would entail a "death of privacy" carried out –among other means- through the "national security letters" that would let the FBI request any company to transfer personal data that are registered in its records, and it must remain silent on this matter (Doherty, 2021, p. 18-19).

Then, the extension of the Foreign Intelligence Surveillance Act (FISA) of 1978 has also been criticized, as sections 206 and 207 of the Patriot Act, allow FISA to cover not only investigations and searches in the field of subjects foreigners, but also it reaches the ordinary criminal ground.

This is reflected, above all, in allowing telephones and email communications to be intercepted without the need to identify a specific device, while increasing the possibility of interference from 90 to 120 days (Siegler, 2016, p. 18-24).

On the other hand, this Act has allowed -until 2020- to follow the trail of people suspected of awaiting terrorist purposes, although there was no certainty of their links with groups of this kind or with foreign governments (Doherty, 2021, p. 19; Podesta, 2002, p. 3).

At the same time, the attention paid by the act to certain groups has allowed some authors to think that racial profiling is being used as a means to combat terrorism. This attitude may lead to discrimination and generate distrust of the population towards these groups, or stereotypes such the identification of Muslims with terrorism (Pitt, 2011, p. 54 ff.), although the Act expressly announces that any discrimination against Arabs and Muslims in the United States is condemned (Article 102). Consequently, it could get at warranting the supervision and even harassment of individuals who simply exercise the rights recognized in the first amendment of the North American

Constitution, relative to religious freedom and the non-interference of the State in religious matters (Podesta, 2002, p. 3).

It has been considered that other amendments to the Constitution such as the fourth, which guarantees the right to privacy and security of their persons and their homes, documents and belongings, could also be damaged (Doherty, 2021, p. 18; Pitt, 2011, p. 54). It might be possible to add that, in the case of foreigners, they could be detained indefinitely even without any conviction, in accordance with sections 411 and 412. This fact has led some people to think (Sinnar, 2003, p. 1419 ff.) that we would be facing the failure of the guarantee of due process recognized in the Fifth Amendment (due process clause).

In any case, after twenty years since it came into force, it is not obvious that America has indeed "strengthened". On the other hand, it has been applied mainly to the prosecution of drug trafficking and other related crimes, rather than to the fight against terrorism. This shows that it has not been such an effective rule as it could have been thought, at least in order to combat terror (Doherty, 2021, p. 17 and 20).

3.2. Russia and the spiritual safety

Russia has enacted since the end of the 20th century a series of Acts that have progressively curtailed the fundamental right to religious freedom. Thus, in 1997 a new religious freedom and religious associations Act was promulgated so that new religious denominations found it more difficult to settle in comparison with the previous permissive Law of 1990.

Since the attacks of September 11, 2001, Russia has enacted other rules aimed at increasing control over religious groups, especially those that the Russian Orthodox Church disapproves of (Combalía, 2020, p. 147-170). It could be said that this process has culminated in the consideration of the concept of "spiritual security" like a new limit to religious freedom, even if it does not have any relation to public security as a legitimate and necessary limit of fundamental rights - including religious freedom.

"Spiritual security" is a term that the Russian Orthodox Church began to use to warn about the growing presence of new religious groups in Russia after the approval of the opening religious freedom Act of 1990 (Combalía, 2020, p. 158-166; Ferrari, 2012, p. 362). Since then, the State has assumed this idea as its own, and it has served to justify several norms that restrict -as it has already advanced- the religious freedom of non-traditional religions. Islamic communities, certain Protestant churches, and new religious movements have been mainly affected.

They have in common that they are denominations of foreign origin and recent roots in the national territory. As well, they have displayed a rather missionary behaviour and proselytizing that leads to invite other people to share their faith. This has been reason enough to make it difficult for them to act. More specifically, they have been accused of deceiving and coercing the population, and distancing them from traditional beliefs.

On several occasions they have been accused of putting national security at risk, arguing that they promote extremism or they favour foreign espionage or, at the very least, that they postulate practices that are not pleasant for the State, such as - in some

cases - conscientious objection to military service -. In short, an attempt has been made to strengthen national identity through the preservation of religious affiliation, which has made it difficult for groups or individuals suspected of constituting a threat of fragmentation or weakening of the latter to act.

3.3. The European Union situation

3.3.1. Euroscepticism

The migratory phenomenon has not only affected the way in which each country has managed the incorporation in its territory of new groups that have arrived, but has also determined - and will do so in a more decisive way in the future - the policies of the European Union. This is a particularly complex and important issue for two fundamental reasons. On the one hand, it is the short effectiveness shown by the Union in managing this issue, especially since the so-called "refugee crisis" of 2015. It is useful to recall that, according to UNHCR (2015) from the beginning to mid-December of the year 2015, more than 911,000 refugees and immigrants had reached European shores.

More than 75% of those who reached Europe had fled persecution and conflict in Syria, Afghanistan or Iraq. The European Union brings to 1.2 million the number of people who arrived in Europe that year (European Commission, 2017b, p. 11). It has led to a certain discredit of its actions and, in a parallel way, it has brought on the distrust of a good part of the citizenry. On the other hand, it is a field in which particular tensions between the Member States arise when they have to decide on the Union's common policy on immigration and asylum. Let's see, albeit in a brief way, the reasons that support these claims.

Faced with the way of managing the wave of immigrants who arrived on European shores in 2015, the Commission itself has recognized that the Union had not fulfilled the expectations, both at that time (European Commission, 2015, p. 2) and years later, as problems persist that have not yet been resolved (European Commission, 2017b, p. 11. 2019, p. 2. European Parliament, European Council, European Commission, 2017a, §§ 39-42 and 71).

The intense debate on solidarity and responsibility between Member States increased (González Enríquez, 2020; Ferrero Turrión, 2021, p. 114-120). It has also raised more general questions about the future of border management and free movement in Europe (European Commission, 2017b, p. 11).

As a result, a few topics of debate have emerged and they substantiate the lack of reaction from the European institutions and the absence of agreement between the States that could even lead to undermining the foundations of the Union.

Beyond the humanitarian issue, which is undoubtedly a priority as human rights and even the persons' dignity are being touched, more general doubts have been raised about the future of border management and free movement in Europe (European Commission, 2017b, p. 11). From this perspective, it can be verified that border control and surveillance remains in the hands of each State; that FRONTEX supports surveillance work, but it does not have its own means, and that non-border countries could limit the

Schengen Area (Goig Martínez, 2015, p. 208).

This has provided the dissemination of approaches based on the fact that the national interest must prevail over the common ones. This attitude has led to the growth of Eurosceptic parties and has fuelled populist discourses (Fanjul & Moltó, 2019, p. 4-5). This is confirmed by the European Commission (European Commission, 2014, p. 2; European Commission, 2017, p. 22; European Commission, 2017b, p. 11-12) when it states that nationalist and populist rhetoric and a disaffection of citizens with respect to the European Union and the national authorities have been encouraged by the insecurity among citizens as a consequence of terrorism caused by Islamic fundamentalism, as well as the migratory pressure from Africa and the Middle East, and the failures in the integration of existing minorities.

This trend has alerted the institutions of the European Union, which have warned that they will strive to meet the expectations of citizens, "showing great courage to challenge the simplistic solutions of extremist or populist political forces" (Council of the EU, 2016, p. 2).

Below the European Union's reaction in the face of this situation will be shown. It has indeed deployed constructive proposals that increased the credibility and confidence of the Member States and abroad.

3.3.2. Constructive measures

Since immigration and, on the other hand, Islamic terrorism, have raised such challenges, the European Union has developed a series of policies that aim to achieve stability and peace in our societies, as well as respect for people's fundamental rights. It has also tried to increase its credibility and prevent the advance of populist and Eurosceptic movements that do not hesitate to appeal to immigration and religious fundamentalism.

On the one hand, the Union has endowed itself with a series of instruments that aim to prevent illegal immigration, as well as to offer more guarantees for the legal one (González-Varas, 2020a). In this last sense, it has tried to offer an attractive situation for highly qualified workers, as well as for others who are ready to carry out other kinds of tasks that do not use to require high skills or qualification, and that Europeans sometimes disdain. This is also intended to compensate for the continent's demographic deficit.

On the other hand, The European Union has established suitable mechanisms to prevent the proliferation of fundamentalist terrorism. Preventive and repressive measures can be distinguished in this topic (González-Varas, 2020b). Within the first set -the preventive measures- can be counted the measures that try to avoid the financing of terrorist groups, which were initiated above all in 2005 and which have gained even more importance since 2015. Along with this, it has sought to reinforce institutional collaboration between the Member States' security systems at different levels. This has happened with the visa information net, the exchange of traveller data, or mutual aid aimed at reinforcing external borders.

Last - but not least, since the stability and cohesion of the societies of the Member

States comes into play - it should be mentioned the interest of improving immigration management and the right integration of different ethnic groups, religious or cultural living in the same place.

As well, it takes advance to avoid the outbreaks of the Islamic fundamentalism. Indeed, it is known that a large part of the radicalized people come from environments of social exclusion who find in radicalism an identity and goals in life, and a sense of belonging. It has also to be said that the right integration of cultural, ethnic and religious minorities can be achieved with greater success through the development of appropriate educational policies.

Access to education for these groups of population is shown as an appropriate vehicle for the knowledge of the norms, culture and fundamental values of Europe, as well as that the recipients are aware of their duties and rights. To sum it up, they can participate in social life in an active way.

This is a particularly interesting measure for the integration of second and third generations of immigrants, so that they feel real participants in the life of the host country (European Commission, 2016a, pp. 5 and 8; European Commission, 2016b, p. 11)- or of which they are already nationals because they were born in it - and they do not produce dysfunctions between the culture and beliefs that they have received within their families, and that of the majority society (Combalía, 2016, p. 17-44; Domingo Oslé, 2016, pp. 14-35).

In the field of repressive means to prevent illegal immigration, discrimination on ethnic and religious grounds, hate crimes, and the commission of terrorist acts, the Union has proposed to the Member States the harmonization of the crimes. The attention has focused currently and mainly on further newer topics. A whole explanation about it would be long-winded. In this moment, it is enough to point out the deep concern for prisoners who are known for their radicalization.

A tight control is carried out to prevent them from capturing other prisoners. Attention has also been focused on the situation of Europeans who have travelled to third countries - particularly in a war situation, such as Syria - and who, once trained, return to attack.

Finally, it should be noted that in September 2020 the Commission presented a New Pact on Migration and Asylum (European Commission, 2020; González-Varas, 2021). It would be presumptuous to attempt to expose its content and scope. It is enough to clarify that it has tried to offer a comprehensive approach to policies that are closely related, such as migration, asylum, integration, and border management and security. Its main objective is to reduce unsafe and irregular routes, and promote safe and sustainable legal pathways for people who need protection.

The Pact is aware that no Member State should assume a disproportionate responsibility. Quite the contrary, every country must contribute to solidarity. Document objectives are laudable and, moreover, it has taken on the symbolic character of showing a consensus document of the Union and the Member States that reinforce the image of cohesion. Even so, it has not been a text free of some criticism. Specifically, there have been persons (Pasetti, 2020; Pinyol –Jiménez, 2019, p. 72) who have understood that it is delving into the furrow that it had been digging since the previous

years of focusing attention on strengthening external borders and preventing illegal immigration, leaving on a secondary plane what refers to the authorization of channels for legal immigration and integration.

4. The revitalization of the enemy's criminal Law

It is also possible to find some theoretical constructions such as the "Criminal Law of the enemy", proposed by the German jurist Günther Jakobs in the 80s of the last century. He distinguishes the citizens' criminal Law from that one applicable to the enemy. In the first case, the citizen deserves sanction after verification of the commission of a crime.

However, in the case of those who do not behave as citizens, the criminal law of the enemy must be applied. It lies in punishing them for dangerousness even if there has been no illegal action, to preserve security in the State. In the latter case, it is intended to anticipate the danger, so that a behaviour can be punished for criminal indications or the purposes that the subject seems to intend, because "it shows an openly criminal stance" that allows observing that "the subject can commit more crimes" (Jakobs, 2008, p. 4), even if you have not yet carried out any specific action. "Therefore, criminal Law knows two poles or tendencies.

On the one hand, dealing with the citizen, in which it is waited until he expresses his fact to react, in order to confirm the normative structure of society, and on the other, dealing with the enemy, who is intercepted very soon in the previous stage and the one that is fought for its dangerousness" (Jakobs, 2006a, p. 43).

Moreover, "the State can proceed in two ways with criminals: it can see in them people who commit crimes, people who have made a mistake, or individuals who must be prevented by coercion from destroying the legal order" (Jakobs, 2006a, p. 47). The typical case is that of terrorists (Jakobs, 2006b, pp. 57-83), people with a hostile attitude towards the Law and society and who are active, although they have not yet committed a purely violent act, but have given indications of it - for example, creating an association in which terrorist aims are appreciated.

They should be punished not for the action they have already perpetrated - at most their conduct has affected public safety, but so far there has been no injury - but for the current danger. In correspondence with these criteria, the procedural guarantees will also be different, diminishing in the case of the enemy, since "the State abolishes rights in a legally ordered manner" (Jakobs, 2006a, p. 45).

It is a theory that has been spread both in Europe and America, especially since the attacks of September 11, 2001 in New York. However, it does not mean that it has been found without criticism (there is a revision about these comments in Cancio Meliá, 2006, footnote 41, p. 112 and f; also Polaino Orts, 2008, p. 65-82).

In fact, the Spanish Supreme Court - in one of the few decisions of the jurisdictional bodies that has mentioned this theory, decision of the Second Chamber, nº 1140/2010, December 29, 2010) - has referred to it in terms that do not think highly of it. In any case, it is a sample of the arguments of different kinds that have been elaborated beyond the purely political field - we move in the field of legal doctrine - as a reaction to

this effect of globalization that is identified with the presence in the middle of our societies - putting them at risk - of those who used to be distant and lived in places with which there was hardly any contact.

5. Concluding remarks

I. It is not difficult to detect that populisms find more and more arguments and topics that are useful to feed and expand. Some of the main ingredients that they have found in recent years have come from the hand of globalization in which the entire planet is immersed.

The establishment of new ethnic groups, beliefs, cultures and customs in our territories - caused largely as a consequence of immigration - has brought about distrust, and even hostility, in different social sectors. Populists have been able to take advantage of it.

Something similar can be said of the fear produced by Islamic fundamentalist terrorism. We are, therefore, faced with perceptions of ways of life previously alien to us, but nowadays settled in our countries. It may be thought –from some perspectives– that they threaten the cultural identity of the host countries, or even their security and stability.

It is interesting to add that, in some cases - as has happened in Europe - populist movements have gone one step further: some of them have used the opportunity to try to undermine the foundations of the European Union. This organization has been accused of being ineffective, of not being able to protect the interests of the Member States, and of having contributed to the arrival of these elements that threaten the cultural identity and peace in each country.

On the other hand, some academic proposals about the enemy's criminal Law have been rescued. Although they have been criticized, they have proposed their own way of eradicating these problems that, in some cases, have coincided with the measures applied in some places.

II. Countries and international organizations cannot remain unaware of these realities: immigration, terrorism and the establishment of new cultures and beliefs, as well as - on the other hand - the emergence of reactionary movements against them. The European Union has recognized that, on a few occasions such as the 2015 refugee crisis, it was not worthy of the circumstances. It has checked that Euro-sceptic populists' movements have spread.

In order to curb these trends and to ensure social order, cohesion in the Union and respect for fundamental rights, the Union has proposed in recent years a series of preventive and repressive measures. It is clear that the right integration of ethnic and religious minorities emerges as one of the keys to manage the arrival of immigrants to Europe and ensure social peace. A large part of its effort is being devoted to this. However, perhaps this endeavour is not yet enough.

On the contrary, it seems that the Union's main priority used to be to focus attention on strengthening external borders, preventing illegal immigration and, in any case, attracting those groups of people that may be necessary for Europe through a calculated legal immigration.

Even so, the Union and her Members are not facing yet such curtailments of fundamental rights or excesses in the exercise of power as they have been carried out in other contexts.

III. In other places, such as the United States and Russia and some neighbouring countries, the governments themselves have promoted some initiatives actually protectionist of national identity; or they have even developed preventive measures whose constitutionality is doubtful.

In effect, the fear of possible threats has led them to enact Acts that have touched some fundamental rights, such as religious freedom, assembly, privacy, or effective legal protection. They have been at risk, which should not have happened.

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