THE INTERNATIONAL COUNTER-TERRORISM RESPONSE AND ITS IMPACT ON SPANISH CRIMINAL REGULATION

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Main topics

Analysis of the most conflicting aspects of the international anti-terrorist regulation.

Verify whether the CoE and EU regulations are effectively limited to such obligations.

Main consequences for the enforcement of sentences in Spain

Main hipothesis

- **Anti-terrorism regulation after 9/11**
  - Increase in the number of conducts classified as crimes of terrorism
  - Advancement of punitive barriers

Based on:

Urgency
+
Perception of insecurity

International obligations

What do we mean when we talk about terrorism?

- **Evolution of the concept:** the current terrorist phenomenon. significantly **broadens its classical conception.**
- Both in qualitative and quantitative terms:
  - With 182,000 deaths in terrorist attacks between 2010 and 2019: **deadliest decade.**
  - **From territorially limited risk to a global security problem**

Old terrorism

Vs.

New terrorism

- The factors that distinguish terrorism today: respond to the attempt to obtain the **maximum benefit from the special features of the "globalized world"** in which they operate.
- Gives them a particular idiosyncrasy, mutable and adaptive to the environment in which they operate.

9/11 Destabilized the mechanisms of power at the global level.

But, what about ...

The opportunity to **strengthen international cooperation relations** between states under the guarantees of the rule of law?
Find out the causes behind this new modus operandi?

How the world is dealing with this global phenomenon?

However, the reality is different.

Priority: find a solution that achieves the most effective results in **neutralizing the threat**, rather than a response that **addresses its causes**.

How the world is dealing with this global phenomenon?

United Nations Security Council:

Resolution 1373 (2001) of September 28

- Impose a series of obligations on States with regard to terrorism.
  - Criminalization of the provision of funds that could be used to perpetrate terrorist crimes;
  - The freezing of financial resources of those who commit or could commit such crimes;
  - The prohibition of the possibility of providing financial services to those who commit or could commit such crimes.

The basis for further regulations.

How the world is dealing with this global phenomenon?

Resolution 2178 (2014) of September 24

Prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality ***for the purpose of*** *the* ***perpetration, planning, or preparation*** *of, or participation in, terrorist acts or the* ***providing or receiving of terrorist training****, and the* ***financing of their travel and of their activities****;*

United Nations General Assembly

Council of Europe

Council of Europe Convention on the Prevention of Terrorism (2005)

- **Brings a new perspective** to the regulation of this problem in order to **increase the effectiveness** of existing international texts.
  - It criminalizes preparatory acts as a way of filling the gaps in the regulation of this phenomenon.
  - It also refers to the process of radicalization and its prevention, highlighting the participation of civil society and non-governmental organizations as actors in the promotion of interreligious dialogue (art. 3.3 ECPT 2005).

Additional Protocol to the European Convention on the Prevention of Terrorism (2015)

It criminalizes **preparatory measures related to the figure of foreign terrorist fighters**

EU Counter-Terrorism regulation

EU Counter-Terrorism Strategy 2005

Its main commitment is to fight against this phenomenon from a multisectoral approach and is based on **four main lines of action**:

- **Prevention,** addressing the factors or root causes leading to radicalization and recruitment;
- **Protect**, both citizens and infrastructure;
- **Pursue and investigate** terrorists across borders;
- **Respond** in a joint, coordinated and supportive manner, sharing operational and law enforcement information.

European Union Strategy for Combating Radicalization and Terrorist Recruitment

- Despite the fact that the Counter-Terrorism Strategy already included tackling violent radicalization as a means of preventing terrorism, on November 24, 2005, is published **the European Union Strategy for Combating Radicalization and Terrorist Recruitment**.

- The call for global jihad or new phenomena such as passive recruitment, self-training or self-radicalization, as well as the emergence of the foreign terrorist fighters made the **fight against radicalization and its causes a priority in the political agenda**.

Framework Decision 2002/475/JAI, of June 13

- The most important instrument of the anti-terrorist criminal response.
- A "minimum agreement" allows the harmonization of subsequent policies.
- Includes a **closed list of serious crimes** that, as long as they seek to achieve one of the indicated purposes, are **considered terrorist crimes**.

Framework Decision 2008/919/JHA, of November 28

- It amends the 2002 Framework Decision in order to adapt European legislation to the obligations established by the 2005 CoE Convention;
- It criminalizes a series of acts related to terrorist activities in the preparatory phase, with the intention of stopping the dissemination of materials that can lead to terrorist crimes.
- Examples: "provoking the commission", recruitment or training.

Advances the limits of what is punishable and creates a typology of abstract danger unrelated to the effective injury of any protected legal right.

Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism

- Replaces the Framework Decision 2002/475/JHA, of June 13 as the axis on which the **EU's anti-terrorism legislation pivots.**
- It seeks to **incorporate prevention regulations** after the Lisbon Treaty and **harmonize internal legislation** in order to include the obligations imposed by international organizations.
- **It maintains the mixed formula of its predecessor with regard to the criminalization of terrorist offenses:**
    - List of common crimes that, if they serve specific purposes, are considered terrorist.
- Unlike its predecessor, **it focuses on the seriousness of the conduct or the effect it generates** beyond the ultimate purpose of the act.
- It incorporates the **offenses related to a terrorist group** already included in the DM 2002.
- Adds a separate title called **"offenses related to terrorist activities"**

Main limitations

- Amnesty International:
  - **Principle of legality:** "criminalization of ancillary offenses arising from conduct that, to a greater or lesser extent, departs from the principal offense ("terrorist offense") and is therefore more difficult to identify with certainty".
  - **Freedom of movement** and problems with the **burden of proof** in demonstrating that "funds are provided or collected for purposes other than the commission of, participation in, or significant contribution to a predicate offense".

- **Martin Scheinin**
  - The Convention "seeks to address forms of conduct, such as travel abroad, which may be undertaken for legitimate reasons".

“One of the best test benches to know the state of health that a democratic State enjoys is the analysis of the anti-terrorist legislation and its practical application. It is in this area where the political system, even the so-called democratic one, shows most clearly an authoritarian tendency that seriously damages the effectiveness of individual guarantees”

National Level

Organic Law 5/2010 of June 22, 2010, of the Penal Code: reordering of criminal typologies.

- Carry out a **profound restructuring of the criminal typologies.**
  - The chapter covers both terrorist organizations or groups and terrorist crimes.
  - This reordering reaffirms a category of "special" crimes whose exceptions extend beyond what was initially foreseen.
- It affects the regulation of the conduct of collaboration and incrimination of punishable preparatory acts:

Organic Law 5/2010 of June 22, 2010, of the Criminal Code: reordering of criminal typologies.

- The legislator typifies the **crime of active indoctrination** (art. 576.3 Penal Code), which in no case was imposed by international norms.
- Concerning the **punishment of preparatory acts,** the legislator introduces a new section in article 579 Penal Code that goes beyond international recommendations, which advises punishing only provocative behaviours, but not merely favouring.
- It also defines a new **crime of financing terrorism**, which covers both intentional and reckless conduct, in addition to the criminal liability of legal persons.

Organic Law 2/2015, of March 30 of the Penal Code: recruitment, apology, and indoctrination as preventive figures.

- The OL 2/2015, of March 30 try to **adapt Resolution 2178 (2014) of the Security Council to the national regulation**; but again it reflects a criminal policy as a result of an extraordinary punitive reaction.
- It fundamentally affects two aspects:
  - it **increases the purposes** for which a person or organization can be **qualified as a terrorist;**
  - the **criminal modalitie**s in the matter.
- **New advancement of the line of criminal intervention** by regulating the crimes of indoctrination and training, whether to third parties (art. 577.2 Penal Code), passively (art. 575.1 Penal Code) or autonomously, that is, under the figure of self-indoctrination or self-training (art. 575.2 Penal Code).

Organic Law 2/2015, of March 30 of the Penal Code: recruitment, apology, and indoctrination as preventive figures.

- It is worth highlighting **several discrepancies of these criminal typologies concerning the international scope:**
  - I. The legislator of 2015 regulates in this reform a **passive training not foreseen in the European framework decisions** and which is not reflected in the community regulations until two years later.
  - II. **Neither the Framework Decisions of 2002 and 2008 nor the subsequent directive of 2017 regulates indoctrination**; a figure that is already evident in the reform introduced in 2010 in its active form, which is added in 2015 in its passive version and maintained by the legislator to date.
  - **III. Neither the Framework Decisions nor the Directive includes merely ideological self-indoctrination** as a way of anticipating the punishability barrier to moments before those of the action, even to perpetrate terrorist crimes.

Organic Law 1/2019, of February 20, 2019, of the Penal Code: increase of penalties and measures.

- **It broadens the penalties** in this area without restricting any criminal typology regulated in excess of what was established by European regulations.

If the Directive does not include any novelty concerning the 2015 reform, to what extent is the 2019 reform necessary from a political-criminal perspective?

The reality in numbers

- 197 Sentences between 2001-2020
- Increase from 2016 due to OL 2/2015.

DEFENDANTS	CONVICTED	ACQUITTED
373	222 (59.5%)	151 (36.4%)

- 110 Convictions (49.7%): promotion, organization (572.1 PC) or active membership (572.2 PC)
- 24 Convictions (10.8%): recruitment and indoctrination

Results

- 60.5% of persons are convicted for contributing to the aims of the groups or organizations through recruitment, training, aiding or abetting behaviour.
- All of them are serious crimes, but the penalty varies depending on the role of the individual

- Reforms broaden the typical scope of the crime of collaboration.
- Generates problems of constitutionality, due to:
  - The broadness with which the conducts are described.
  - The equalization of penalties for crimes of different gravity.

Some findings

At domestic level

- Justification: Compliance with international obligations
- Reality:
  - Criminal policy discourse based on: emergency situation + perception of insecurity.
  - Overwhelming expansion of offences classified as terrorist crimes and repeated advancement of criminal intervention to merely preparatory acts that do not endanger any specific legal asset.
- Ineffectiveness of the penal system itself

Some findings at international level

- The **absence of a legal definition** of terrorism means that such regulatory competence falls to the States as one of their spheres of sovereignty, which favours the possibility of **using such circumstances to act following their interests.**
- Taking advantage of this vagueness, the **Spanish legislator has criminalized conducts not included in the international texts**, to apply positive general prevention as a method of guaranteeing public safety.
- Reforms in the criminal code should be based on the **principle of harmfulness or fragmentariness,** demanding responsibilities only for external and concrete conducts, leaving aside impunity for mere thought or life plan.
- In its reforms, the Spanish legislator **equates a radical with a violent radical,** ignoring the qualitative difference that exists between the two terms.
- This **distinction** is fundamental when applying a true and effective **prevention strategy**.

General Conclusions

- From the reactive answer to preventing answer.
- Fight against radicalization as a way to deal with terrorism.
- Safeguard of individual rights and freedoms Vs. Protection of public security.

So, how do apply effective measures ...

- Without advancing the limits of what is punishable?
- Without creating types of abstract danger unrelated to the effective injury of any protected legal asset?

- Reforms in the international and national regulations should be based on the principle of harmfulness or fragmentariness, demanding responsibilities only for external and concrete conducts, leaving aside impunity for mere thought or life plan.

SALAMAT PO

THANK YOU VERY MUCH