

The Consequences of European Security Laws after September 11th on Muslims in Europe

José María Ortuño Aix – University of Barcelona

The legal raison versus the reasons of State

In the field of social control of democratic States of Law, and particularly in the field of security policies, there is an inevitable conflict between two principles which go in opposite directions: the legal reason (*raison juridique*) and the reasons of State (*raison d'État*). The former is subjected to precise limits and to the Constitutional rights which keep under control the —in the words of German jurist Winfried Hassemer— “dangerous tools which are at the hands of the criminal system”,¹ while the latter has a tendency to suspend the rights in exceptional circumstances, according to the principle of emergency or of necessity (*status necessitates*), since as the legal adage says: *necessitas legem non habet* (necessity has no laws).²

The conflict of both reasons (*juridique* and *d'État*) becomes more evident in the legal procedural field, since it is there where the duplicity of the systems of pursuit and control of crime are clearer: first there is the legal system, ordinary and subjected to the rules of the State of Law, intervening only when the crime has been committed; and second there is the police investigation proceedings, special, administrative, of preventive nature and ruled by considerations of emergency which is legitimized by the *raison d'État*.³

¹ As the right to remain silent and to refuse to answer questions, the right to defence, the right to defend himself against accusations, etc.. See W. Hassemer, *Crítica al derecho penal de hoy*, Buenos Aires: Ad-Hoc, 2003, p. 20

² And as it is pointed by G. Agamben: exceptional circumstances are exclusively those which are declared as such. See G. Agamben, *Homo sacer II, 1. Estado de excepción*, Valencia: Pre-textos, 2003, p. 47

³ J. Terradillos Basoco, *Terrorismo y derecho*, Madrid: Tecnos, 1988, p. 40-41

According to German jurist G. Jakobs, the legal system of a democratic State of Law must be governed by the principle *cogitationis poenam nemo patitur* (thoughts must not be punished).⁴ This principle says that the State cannot intervene in the private affairs of the citizens and, therefore, must refrain from intervening until the violation of the legal rule. But, in the other hand, the reasons of State demand the neutralization of future dangers and the prevention of particular crimes which attempt against the National security. The collision becomes obvious, as Jakobs himself admits: "if future crimes have to be punished there is no reason to leave the thoughts unpunished", something which would go against the principle of *cogitationis*. And "only an insubstantial theory", Jakobs adds, "can reconcile the existence of both possibilities".⁵

In practice, given the impossibility of reconciling both, the security policies will encroach easily upon the system of Constitutional rights. That is the reason why Jakobs, a defendant of the reasons of State as well as of the rule of Law, theorizes on the need of a different criminal law, kept apart from the law applied to citizens: the Criminal Law of the Enemy. The general purpose of this law is, according to Jakobs, not the amendment of the citizen who violates the rule, as it is the case of the ordinary criminal system, but the neutralization of the enemies before they attempt against society. The principle of the ordinary criminal law is reactive, whereas the principle of the law addressed to enemies is proactive.⁶

While the general purpose of the criminal law for enemies is the same everywhere, that is, the disposal of rights and guarantees in a

⁴ G. Jakobs, "Kriminalisierung im Vorfeld einer Rechtsgutsverletzung" in ZStW 97 (1985), pp 751-785. We quote the Spanish edition: "Criminalización en el estadio previo a la lesión de un bien jurídico" in *Estudios de Derecho Penal*, Madrid: Civitas, 1997 [1985], p. 295

⁵ *Ibid.* p. 312

⁶ C. Brants, S. Field, "Les méthodes d'enquête policières preactives et leur contrôle", *Déviante et Société*, 21, n.4, 1997, p. 403. See also D. Bigo, "La recherche proactive et la gestion du risque", *Déviante et Société*, 21, n.4, 1997

“legally ordered way” of those considered “enemies”, turning the law into something close to a “weapon of combat”; its dispositions varies largely in every country.⁷ Nevertheless, we could describe the main features of that law for the enemies, some of them mentioned by Jakobs himself: 1) It is not based on facts but on future risks which must be prevented; 2) It is based on the neutralization of individuals according to sociological profiles (it is a “law on authors”, not “on facts”, not on crimes but on behaviours);⁸ 3) the punishment is prior to the commission of crimes (such as putting at the same level the preparatory acts and their commission, or administering preventive custodial sanctions in worse conditions than prison itself); 4) general use for indefinite periods of time of preventive custodial sanctions; 5) restriction of rights and guarantees in the legal proceedings (such as the presumption of innocence, the legal principle of equal arms for prosecutors and defendants, the admission of evidences, or the use of the secrecy); 6) the sentences out of proportion (related not to facts but to the nature of the threat);⁹ and 7) the toughening of the penitentiary regulations (such as isolation measures or the allocation of convicts in prisons far of home, because, as we said, it is a law for the neutralization, not for the amendment).¹⁰

The criminal Law for the enemy within

⁷ G. Jakobs, “Derecho penal del enemigo” in G. Jakobs-M. Cancio Meliá, *Derecho penal del enemigo*, Buenos Aires, Hammurabi, 2005 p. 46

⁸ José L. González Cussac, *El derecho penal frente al terrorismo. Cuestiones y perspectivas*, Castellón de la Plana: Universitat Jaume I, 2005 p. 31; M. Cancio Meliá, “¿Derecho penal del enemigo?” in G. Jakobs-M. Cancio, *ibid.* p. 104-105

⁹ This fact was put clearly enough by the former British Home Secretary David Blunkett when he declared to the BBC: “I just make this point very strongly, that whatever we do should not only be proportionate, but should actually relate to the nature of the threat”, *BBC-Radio 4*, 16/11/2006

¹⁰ Compare with the rights and guarantees that govern the penal system of a democratic State of law as enumerated by Winfried Hassemer in *Crítica al derecho penal de hoy*, Buenos Aires, Ad-Hoc, 2003 [1995], p. 20

Our reports show that after September 11, nearly all the countries passed laws which share some of the features above mentioned.¹¹ We will mention only three cases as representatives of the general trend. In United Kingdom, the *Anti-terrorism, Crime and Security Bill*, was passed in November 2001 and updated after the attacks of July 7 with the *Prevention of Terrorism Act*. These laws proscribed several groups, criminalized the condoning of terrorism, allowed the detention of suspects for up to ninety days without bringing charges (later reduced by the House of Commons to 28 days), proposed the possibility of stripping citizenship from naturalised Britons accused of terrorism, and introduced three new offences: Acts Preparatory, Indirect Incitement, and Terrorist training in the use of hazardous substances.¹²

In Germany, two anti-terrorist laws were passed after September 11, the first one a few days after the terrorist attacks, and the second, the *Law Combating Terrorism*, in January 2002. These laws introduced amendments to twenty laws and edicts which increased investigative powers for the police, increased the vetting of the people occupying security-sensitive jobs, introduced the possibility of banning religious groups considered a threat to society, introduced biometric data into documents for foreigners, tightened the asylum granting procedures to prevent the entrance in the country or make easier the expulsion of foreigners considered dangerous for democracy and security.¹³

¹¹ In addition to our reports by country, it can be of interest the good synthesis of the anti-terrorist legislations in ten countries in the Foreign & Commonwealth report, "Counter-Terrorism Legislation and Practice", October 2005. The full text is available at the web.

¹² See the British report by Chris Allen in Jocelyne Cesari (ed.), *Securitization and Religious Divides in Europe. Muslims in Western Europe After 9/11: Why the term Islamophobia is more a predicament than an explanation*, 2006, p. 65-66

¹³ See the German report by Yasemin Karakaşoğlu, Sigrid Luchtenberg, Frank Peter, and Riem Spielhaus, *ibid.* p. 148-149

In Italy, a law *On Urgent Measures Against International Terrorism* was passed in December 2001, and was updated in July 2005 after the London attacks. These package of measures, known as “package Pisanu” (after the name of the minister of Interior) introduced 19 articles in the Italian Penal Code which widened the definition of terrorism to include promoting, constituting, or financing organisations with violent purposes, the assistance to any individual who participates in such organisations, and the training of individuals to carry out violent acts. These laws allow also the detective method of interrogation, without a defending counsel, makes easier the expulsion of foreigners considered dangerous to national security, increases the control measures on internet and mobile phones communications, and expanded police detention powers of suspected people.¹⁴

While, these legislations were careful not to single out of Muslims, the timing of such laws, as well as the debates around them, as Alexandre Caeiro says for France,¹⁵ have made such links obvious. This kind of laws and policies, in the other hand, require a certain degree of cooperation from the courts of law, not questioning evidences (sometimes obtained by unlawful means), accepting willingly police reports and imposing secrecy to the investigation and judicial proceedings, making difficult the work of the defence attorneys and, in practice, voiding of sense the right to an effective defence.¹⁶

¹⁴ See Italian report by Mirna Liguori in J. Cesari (2006), *ibid.* p. 304-308

¹⁵ See French report by Alexandre Caeiro, p. 203 in *ibid.*

¹⁶ C. Brants, S. Field, “Les méthodes d’enquête policières proactives et leur contrôle” in *Deviance et Société*, 1997, vol. 21, No. 4, p. 407-408. In this respect, Human Rights Watch stated that in Spain, after M-11 : « The right of terrorist suspects to an effective defense, already undermined by the limitation on access to counsel during the incommunicado period, is further impaired by the use of secret legal proceedings... Under *secreto de sumario*, defense attorney do not have access to critical information regarding the charges against their clients or the evidence against them, including the full grounds for remand to pre-trial detention » HRW, *Setting an Example? Counter-Terrorism Measures in Spain*, January 2005, vol. 17

The legality/legitimacy of such a law which empowers the law of police in detriment of the Constitutional rights has been contested by a number of legal scholars and sociologists of law, arguing that in a democratic State of law nobody can enter into the legal proceedings with an status (enemy) lower than that of citizen (of *persona*), only because of suspicions, not because of facts.¹⁷

The Muslims as the main target of the Security Laws

The attacks of S-11 are not, nevertheless, a kind of "year zero" for the anti-terrorist policies and for the investigative methods based on suspicion and on the lack of democratic guarantees.¹⁸ In any case, these tragic events, as also the ones of Madrid and London in 2004 and 2005 respectively, reactivated and strengthened an already existing trend of stigmatization of a large social group, as it is the case of France after the terrorist attacks of September 1986 and of the middle of the 1990s, in Paris. From that time onwards, the Muslims are looked as a kind of "enemy within".¹⁹

p.2. The Spanish Supreme Court reversed recently a sentence of conviction by the Audiencia Nacional (the highest court for criminal matters) against a Spanish citizen, of Muslim religion, in these terms: "In summary, the condemnatory sentence does not go, by far, beyond the cannon of 'certainty beyond any reasonable doubt' which is required for any conviction, there is a total lack of evidences, there is a violation of the right to the presumption of innocence of the appellant, with the conclusion that the appeal must be accepted and the appellant acquitted... being freed immediately". Spanish Supreme Court, sentence 828/2006 of July 20, 2006

¹⁷ C. Brants, S. Field, *Ibid.*; G. Portilla Contreras, "La legislación de lucha contra las no-personas: represión legal del 'enemigo' tras el atentado de 11 de septiembre de 2001" in *Mientras Tanto*, 2002, n. 83; L. Gracia Martín, "Consideraciones críticas sobre el actualmente denominado 'Derecho Penal del Enemigo'", *Revista Electrónica de Ciencia Penal y Criminología*, 2005, 07-02, among others.

¹⁸ L. Bonelly, "'Hidden in plain sight'. Intelligence, exception and suspicion after September 11, 2001", in D. Bigo and A. Tsoukala, *Illiberal practices of liberal regimes: the (in)security games*, Paris: L'Harmattan/Cultures et Conflits, 2006

¹⁹ J. Cesari, *When Islam and Democracy Meet*, New York: Palgrave MacMillan, 2004, p. 35, 38 *et passim*. See also the IHF's report *Intolerance and Discrimination against Muslims in the EU. Developments since September 11*. International Helsinki Federation for Human Rights, March 2005, p. 7. For the long history of the derogatory image of Muslims in Spain, and particularly of Maghrebis, see E. Martín Corrales, *La imagen del magrebí en España. Una perspectiva histórica, siglos XVI-XVII*, Barcelona: Edicions Bellaterra, 2002

After the terrorist attacks in New York, the world has become, in the words of the Argentinean jurist E.R. Zaffaroni, a place “which demands the accuracy of movements of a domestic cat among pieces of broken glasses, in order to provide security to the others and, particularly, to the State”.²⁰ But, in this situation, Muslims are the social group who bear the worst part. In Huntington’s theory on the clash of civilizations,²¹ they appear inevitably as the enemy within ready to ally with the enemies outside. Indeed, in the European media, as J. Cesari states “there is a tendency to mix foreign and domestic Islam together, thus extending the entire trope of politically radical Islam to immigrant Muslim populations”.²² In this sense, some scholars, as the Italian political scientist Giovanni Sartori, stressed the natural difficulty of Muslims to accept Western values and to integrate into the host society,²³ while others have openly established alleged connections between the terrorist attacks in Spain with the recent Muslim immigration and the consequent opening of mosques where some, according to that view, have been radicalised.²⁴ The elaboration of sociological profiles to help the work of the intelligence services and police activities,²⁵ can contribute also, as a collateral effect, to the stigmatization of a large proportion of Muslims.²⁶ The

²⁰ E.R. Zaffaroni, *El Enemigo en el Derecho Penal*, Bogotá: Grupo Editorial Ibáñez 2006, p. 31

²¹ S. P. Huntington, *The clash of civilizations and the remaking of the World order*, 1996. We use the Spanish edition of 1996, Barcelona: Paidós, p. 259 *et passim*.

²² J. Cesari, “Introduction” in J. Cesari (ed.), *Securitization and Religious Divides in Europe. Muslims in Western Europe After 9/11: Why the term Islamophobia is more a predicament than an explanation*, 2006

²³ Giovanni Sartori, *Pluralismo, multiculturalismo e estranei. Saggio sulla società multietnica*, Rizzoli/Biblioteca Univ. 2000

²⁴ F. Reinares, “Al Qaeda, neosalafistas magrebíes y 11-M: sobre el nuevo terrorismo islamista en España”, in F. Reinares, A. Elorza, *El nuevo terrorismo islamista*, Madrid: Temas de Hoy, 2004 p. 30, 37

²⁵ D. Bigo, “La recherche proactive et la gestion du risque”, *Déviance et Société*, 1997, vol. 21, No. 4, p. 426

²⁶ In this sense, F. Reinares, analysing the profiles of Muslim detainees (in pre-trial detention) wrote in *El País* that the sociological profile of the jihadists is the following: Maghrebi (mainly Moroccans) origin, males between 26-40 years old,

media, in this sense, have cooperated in the establishment of the nexus between terrorism, immigration (Muslim) and asylum.²⁷

It is remarkable, in this sense, the efforts for the distinction between a "good" and a "bad" Islam, as it is the case of France and Italy. As Alexander Caeiro states in his report, in France the French Council of the Muslim Religion (CFCM) is expected to contribute to the formalization of 'good' Islam in France, disseminating a liberal doxa and marginalizing radical elements.²⁸ As he adds, this distinction of a "bad" and a "good" Islam underlines the assumption that Islam is problematic in nature. In the same way, the Italian minister of Interior Pisano signed a decree establishing the creation of a Islamic Council in order to encourage an Italian Islam, that is a "good" Islam, since as he declared when introducing the Islamic Council: "the fight against Islamic fundamentalism should be pursued in two ways: treating terrorists as enemies and moderate Muslims as friends".²⁹

But, in parallel to the efforts to encourage the development of a European Islam, these attempts are followed by laws as the French Law that prohibit "conspicuous" religious symbols. Despite their stated purpose of promoting the republican values and of fighting the gender discrimination, in practice they have contributed to fueling hostility against Muslim women wearing headscarves and to feed stereotypes. Rather, this law seems to have the purpose of "identifying" Muslims girls and thereafter excluding them from schools and other public places in order to put them under pressure. That could be illustrated with the case of Cennet Doganay, a 15-year-old girl whose attempts to replace her headscarf by a bandana or a

lacking labour skills and religious. "¿Quiénes son los 'yihadistas' en España?", *El País*, 11/3/2006

²⁷ A. Tsoukala, "Defining the terrorist threat in the post-September 11th era", in D. Bigo, A. Tsoukala, *ibid.* p 75 and forwards. See also the reports by country in J. Cesari (ed.), 2006

²⁸ French report p. 198

²⁹ Italian report p. 303-304

beret, were not deemed satisfactory to the school authorities. Finally she decided to shave off her hair because, she explained, her bald head was the only way to comply with French and Islamic law.³⁰

In this tense social atmosphere, Muslims have to be particularly mindful of what they do, since, as it is put by J. Cesari, “indeed, it has become increasingly difficult to practice *zakat* —the Islamic duty of charitable giving— without being subject to scrutiny”.³¹ In fact, according to our informants in Spain,³² many of the detentions of suspects have been carried out after the transference of small quantities of money to people under suspicion. Most of them have been released subsequently without charges, as in United Kingdom³³ and in Spain,³⁴ but their release attracted much less the attention of the media than their detention. The consequence of these police raids is that a part of society feels that it is legitimate to suspect on Muslims.

Conclusion

After the terrorist attacks of September 11, March 11 and July 7, there has been an abundant legislative production in Western countries which are addressed to fight future threats. These laws are based on the purpose of neutralizing suspects, considered as enemies, to prevent them from the commission of crimes. As these laws are designed to manage future dangers and not only to combat criminal facts committed in the past (they deal with the future as much as with the past), they need abundant data on sociological profiles of potential terrorists and on suspicious behaviours. As a

³⁰ “Muslim Girl Shaves Head over Ban”, *BBC*, October 1, 2004. Quoted from IHF report, “Intolerance and Discrimination against Muslims in EU. Developments since September 11”, March 2005, p. 71

³¹ J. Cesari, *Ibid.* p. 39

³² Relatives of Spanish detainees.

³³ See the report by the International Helsinki Federation for Human Rights (IHF), 2005, *ibid.* pages 17 and 143

³⁴ See Report on Spain in J. Cesari (ed.) 2006, p. 277

consequence of that, these laws contribute to the criminalization of whole social collectives, and of Muslims in particular, reinforcing prejudices and stereotypes already existing in society against them. These laws contribute to the image of domestic Muslims as representatives of radical foreign Muslims, and therefore, potential enemies infiltrated in Western societies. That this image was existing before can be illustrated by the hostilities against Muslims and their places of cult in many European countries after the attacks of New York, Madrid and London, or after the murder of the Dutch filmmaker Theo van Gogh. At that time what was working was a kind of allocation of responsibility, in a corporate sense, on domestic Muslims, taking them as allies or at least, as sympathizers, of the terrorists. But the security laws, and some other legislations that implicitly target Muslims, as it is the case of the French law on religious symbols, have reinforced the existing social prejudices and stereotypes. The contribution of the media in this task is also remarkable, since they have privileged the image of a radical Islam and of its alleged incompatibility with Western values, and have hidden the moderated voices of the large majority of Muslims and of the Islamic scholars on this subject.