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CRIMINAL LAW AND TERRORISM: PENAL AND PROSECUTORIAL REGIMES IN BRAZIL AND PORTUGAL

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ABSTRACT
This article aims to critically analyse the anti-terrorism legislation of Brazil and Portugal. To this end, a synthesis of the terrorist phenomenon through the years and its current configuration in society will be presented. Starting from the identification of diverse types of terrorist phenomena, the article will demonstrate how the Brazilian legal system addresses the issue, its historical origins, and the development of anti-terrorism legislation. The Portuguese legislation will be examined in the same manner. The article intends to demonstrate the similarities between these legislations, their alignment with international criminal law, and their importance in combating and preventing terrorist practices, with a special focus on the forms of criminal prosecution and the legal instruments used to investigate and punish such crimes in Brazil and Portugal, whilst maintaining the integrity and legitimacy of the current legal framework.

KEYWORDS: 1. Terrorism. 2. Criminal Law. 3. Portugal. Law nº 52/2003 4. Brazil. Law 13.260/2016.

INTRODUCTION

The 21st century presents us with a society interconnected in all its aspects. Communication is instantaneous, or very nearly so, at any point on the globe. The same applies to the physical movement of individuals, as transport has continuously evolved in efficiency.

Indeed, forms of social mobility and communication instruments have changed the way we think and act. Air travel between continents is a reality, and contact via the internet, by voice and image, occurs in real time.

Beyond the speed with which people move between territories and the ease of communication through the worldwide network, contemporary society is significantly marked by the mobility of capital. Thousands of dollars, euros, reais, etc., are moved daily, instantaneously, in any country connected to international markets.

Unfortunately, the development of such technologies has not brought us only positive situations. In many cases, it has ultimately sparked conflict, whether due to behaviours of domination of peoples and nations, one by another, or through the conflict of ideas, customs, or religion[1].

In this complex scenario, it has always been possible to identify behaviours that remained beyond any moral control. Sometimes identified with individual behaviours, sometimes through the action of groups organised by common motivations, the fact is that the practice of terrorist acts has emerged as one of the most delicate issues for contemporary society. This is because its direct and indirect effects ultimately affect an indeterminate number of people.

As will be demonstrated throughout this work, such practices have come to be termed acts of terror or, more modernally, as acts of terrorism, with an impact from a moral, social, and behavioural standpoint, even in places distant from the one that endured the act.

On the European continent, attacks have been constant, requiring authorities to adopt measures to curb the organisation and execution of attacks. The complexity of the subject is accentuated when we realise that this phenomenon, of already quite ancient origin in human history, changes its foundations and modes of constituting terror with the passage of time and with the evolution of society itself.

Understanding terrorism as a social phenomenon becomes mandatory when in all modern nations, Criminal Law[2] has ultimately been tasked with serving as an instrument to curb the structuring of terrorist groups and punish, as a rule quite severely, those involved in propagating terror.

The complexity of the subject is further accentuated when we realise that acts of terror are always supported by justifications related to offence or disrespect of a certain "right" of the aggressor or of people he believes he represents. This justification encompasses religious, ideological, ethnic issues, among others.

This work aims, through research and data collection, to present the development of criminal legislation in Brazil and Portugal regarding the fight against terrorist practice, as well as the particularities observed in the process of investigation and punishment of these criminal practices.

1. TERRORISM

1.1 -- HISTORICAL EVOLUTION

The terrorist practice that has taken a prominent place in the media in recent decades has very little resemblance to the practices that brought terror in the 19th and 20th centuries.

Despite the justification for the practices of acts of terror being similar, as they stem from clashes of thoughts linked to religion, ethnicity, politics, and other conflicting factors, it is certain that the 21st century presents a much more complex society in all aspects.

The term terrorism would have originated in the 18th century, during the French Revolution, in the so-called "Doctrine of Terror" or "Reign of Terror", in allusion to the acts practiced by the Jacobins, led by Maximilien Robespierre[3].

On terrorism, Professor Francisco Proença Garcia explains that "between 1936 and the present day we find more than a hundred definitions of terrorism"[4]. The author asserts that from the 1970s, terrorist practice, derived from political activity, gained significant space. And the study of terrorism still conducted today was born after the attack on 11 September 2001, in New York City.

As will be seen later, the concept of terrorism has important variants. NATO, for example, records in a document of the Popular Committee MC 472, terrorism as "uses of violence or the threat of violence to create fear, and to coerce or intimidate governments or societies into acceptance of goals that are political, religious and ideological or combinations thereof".

The manner of execution of terrorist acts also appears quite diversified at this time, with special concern about attacks unleashed individually and potential attacks carried out through the world wide web. This very effective connection allowed by the internet represents a sensitive point in defence strategies, either due to some vulnerabilities of the system or due to the variety of damages that may eventually be caused through cyberterrorism.

1.2 -- CLASSIFICATION

The attempt to classify the types of terrorism aims to facilitate the understanding of its origin and development. Classification with some methodology allows the study of the subject to be ordered. Indeed, although the origins of acts of terror may be distinct, it is certain that the result sought by the acts practiced is similar, varying, as a rule, by intensity.

The choice of a methodology adopted by a European body originates from the fact that the present study is being developed at a Portuguese university and, secondly, because this methodology has been used in previous research.

This differentiation, in addition to being established by part of the doctrine[5], also deserves prominence in the practical field, as EUROPOL itself organises its studies and reports

with this methodology. Its adoption by the official agency, and consequently in the 28 Member States, favours the study of the subject and will be adopted in this work.

1.2.1 -- JIHADISM

Jihadism refers to terrorism practiced by individuals or groups that justify their criminal actions in fundamentalist religious faith[6] such as, e.g., the self-titled Islamic State (IS). In 2016, EUROPOL recorded the arrest of 1002 people who would have a connection with the practice and/or attempt of acts classified as terrorism in one of the 28 Member States. Of this total, 718 arrests were related to this type of terrorism.

It therefore reflects the main motivation for the practice of terrorist acts in this century. In Brazil, for example, the only conviction based on the Terrorism Law, to date, had Islamic radicalism as its backdrop.

It is impossible not to recognise the importance of religious radicalism as a motivation for the practice of what we qualify as a terrorist act contemporaneously. But it is also necessary to recognise that the significance of this motivation stems from the fact that locations of great political, social, and touristic importance are struck in a more expressive manner by radical religious groups seeking greater coverage by the media.

The result of these situations is a social disarrangement, which begins to involve people who had no connection with extremist groups, capturing, or recruiting, in many cases, individuals who are willing to serve as soldiers of the fanatical cause.

1.2.2 -- RIGHT-WING

The practice of terrorist acts can also be linked to an extreme right ideology, with the aim of altering the state, political, social, and economic system. The components of these terrorist groups as a rule have a common link between themselves, linked to race, culture, and nationality, basing their actions on the existence of a superiority of the group in relation to other people. Examples of these groups would be neo-Nazi, neo-fascist, and other ultra-nationalist formations.

With the strong movement of people taking refuge in Europe, especially from conflicts in the Middle East and Africa, there has been a strengthening of nationalist discourse, with the justification of defending the jobs of nationals.

In Brazil, the issue does not entail major concerns because the country still does not have a stabilised economy and a currency of world expression. In Portugal, as in much of Western Europe, this is a present reality that can stimulate the revolt of social groups that feel marginalised.

1.2.3 -- LEFT-WING AND ANARCHISM TERRORISM

The groups framed in this ideology justify their terrorist actions in the objective of changing the current State system, with a radical extreme left tendency. Sometimes it is associated with anarchist movements[7] that oppose established power and the capitalist system, for the establishment of communist or socialist structures. As a rule, these groups possess a Marxist-Leninist ideology.

Currently, this hypothesis seems less recurrent among the reasons presented for the practice of terrorism, possibly due to the weakening of ideologies linked to communism, given the almost total rise of the capitalist system, even in countries like Russia and China.

1.2.4 -- ETHNO-NATIONALISM AND SEPARATISM

This category includes groups such as the Irish Republican Army (IRA), the Basque group ETA, and the PKK Organisation, originated in Kurdistan. With nationalist, ethnic and/or religious motivation, aiming at the separation of a territory, its annexation to another, not always with a well-defined political ideology.

These movements still have strength within Middle Eastern countries and especially in Africa, resulting in armed conflicts of large proportions and in the practice of terrorist acts to promote destabilisation of governments.

On the African continent, these movements still represent a major concern. In the European sphere, these movements have lost strength and have integrated into political movements and political discussion instead of the armed option.

1.2.5 - SINGLE-ISSUE TERRORISM

This is terrorism exercised with the aim of changing a particular political or social practice, in a specific society. Issues related to abortion, environmental protection, can represent the motivation of these groups. Examples are the Earth Liberation Front (ELF) and the Animal Liberation Front (ALF).

This form of terrorism has a different motivation from the traditional hypotheses, as it is linked to demands resulting from contemporary society. Its actions would have support in the clamour of a significant part of Western society, in demanding the protection of elements that receive an important valuation at the beginning of this century, such as environmental protection.

Although there are no more in-depth studies on this reason for the practice of terrorist acts, the constant development of new technologies may give rise to a greater number of cases. The very development of science sometimes collides with religious dogmas and can represent a stimulus for the practice of acts of terror.

1.3 -- CONTEMPORARY ISSUES

In this current context, with a multicultural society, which has ample means of communication, combating terrorism is a challenge for the authorities. In some cities, walking the streets makes it evident that simple appearance, manner of dress, or behaviour does not allow one to identify a person as suspicious, highlighting the complexity of the issue.

At this point, the practice of terrorism does not have different contours from other modern phenomena, impossible to be strictly controlled by governments. The means of transport, communication, social relationship, undergo a constant and rapid mutation, making rules imposed by the Law always in need of improvements.

Irremediably, this is not a peculiarity of criminal law, as technological innovations and social dynamics are reflected in practically all branches of the legal system. However, criminal law ends up receiving an overload[8], because, as a last resort, when a solution for

a certain social obstacle is demanded from this branch of Law, this definitely stems from the impossibility of effective discipline on the part of other legal disciplines.

The concern that terrorists have access to atomic material and even biological agents that allow for mass destruction represents a real possibility. With knowledge made available on the world wide web, including videos that teach the construction of devices that can injure a significant number of people.

The inexistence of borders for the internet and access to increasingly faster means of transportation, practically prevents a definitive combat to terrorist practices, especially in geographical spaces without internal border controls, as is the case of the European Union. In the words of Marcelo Mendroni, dealing with modern terrorist organisations:

Globalisation also favoured them. The free circulation of money, people, and communications created an environment conducive to the proliferation of terrorist cells, which can travel between countless countries, snatching new members, threatening supposed adversaries, practicing crimes of all nature, and even escaping persecutions of justices, circulating and laundering money, buying weapons, and organising the most diverse actions until culminating in the known "terrorist attacks".[9]

Nevertheless, it remains evident that contemporary terrorism presents itself in an innovative way and totally different from that of the 19th and 20th centuries, victimising a much larger number of people and with characteristics of international crime.

Data published by the Global Terrorism Database show that, in 2016, 34,23 deaths of people victims of terrorist attacks were recorded, with 71% of deaths occurring in four countries: Afghanistan, Syria, Somalia, and Iraq. The European continent endured 2.5% of the deaths.

These data seem important when we find that the countries that suffer from a higher incidence of terrorist practices have significant political fragility or state fragility, without organisation of powers and well-structured security forces.

2. LEGAL FRAMEWORK

2.1 -- IN BRAZIL

First, it is important to highlight that the constituent legislator, still in the original text of the 1988 Constitution, impelled that terrorism be treated effectively (and, it seems severely, as it restricts the granting of provisional freedom in these hypotheses), when determining in its art. 5, item XLIII that "the law shall consider crimes unbailable and not subject to grace or amnesty the practice of torture, illicit trafficking of narcotics and related drugs, terrorism, and those defined as heinous crimes, for them responding the commanders, the executors and those who, being able to avoid them, abstain"[10].

However, this provision did not stimulate parliament to regulate the constitutional dictate, which came to occur only in March 2016, on the eve of the Olympic Games in Rio de Janeiro.

2.1.1 -- NATIONAL SECURITY LAW

The National Security Law guaranteed for many years the discussion about the need, or not, for a specific law that would define what would be terrorism and which acts practiced would deserve punishment, since the precept contained in the law in question is too generic, injuring the principle of legality for the constitution of criminal types.

The penalty foreseen for the referred criminal type is quite expressive, and can reach up to 30 years, in case of death. A fact that made the discussion about its constitutionality even more fierce among legal operators[11].

With almost thirty years of a dictatorial regime, the legislation originated from this period did not hold the necessary legitimacy for its application, not only for its quantification but also for the inexistence of any democratic debate, which was natural to the period of control of the institutions by the military government.

2.1.2 -- HEINOUS CRIMES LAW

Evidence of legislative confusion in Brazil is latent in Law 8.072, of 25 July 1990, which even without finding a typification for the crime of terrorism, and other related figures, established, by force of article 2 of the referred law, that terrorism will be unsusceptible to amnesty, grace, and pardon, also prohibiting the granting of bail. At this same time, the Portuguese legislator had already typified the terrorist practice in its Penal Code, more precisely in its articles 288 and 289.

The restrictions imposed by the Heinous Crimes Law, especially in what is related to the execution of the penalty, always sustained allegations of unconstitutionality. The generic determination imposing restriction on a certain species of crime may represent offence to the principle of individualisation of the penalty.

2.1.3 -- TERRORISM LAW -- LAW 13.260/2016

Pushed by the proximity of the Olympic Games in Rio de Janeiro, the Brazilian Parliament approved the first criminal legislation to punish acts of terrorism, terrorist organisations, and the promotion of these practices through the internet and other media.

The Anti-Terrorism Law was published on 17 March 2016, entering into force on the same date, regulating the provisions of item XLIII of art. 5 of the Federal Constitution, addressing terrorism, investigative means, and process. It also presented changes to Laws 7.960/1989 and Law 12.850/2013.

Unlike other legislations, it opted to define terrorism. Under the terms of this diploma, terrorism consists "in the practice by one or more individuals of the acts foreseen in this article, for reasons of xenophobia, discrimination, or prejudice of race, colour, ethnicity, and religion, when committed with the purpose of provoking social or generalised terror, exposing to danger person, patrimony, public peace or public safety" (art. 2).

Nevertheless, by requiring for the configuration of terrorism specific reasons, that is, reasons taxatively foreseen, the legislator makes it difficult to punish the author. In this case, the motivation must be demonstrated during the process, under penalty of not being allowed to apply the Brazilian anti-terrorist legislation.

As will be seen later, this requirement (determined motive) for the constitution of the legal type was not accepted by the Portuguese legislator, who directed greater attention to the acts practiced and their social repercussion, a position aligned with the legislation of other countries that are members of the European Union.

Indeed, the need to prove the reasons why the individual unleashed the terrorist acts described in the Anti-Terrorism Law will require a psychological incursion, which will obligatorily demand the production of more robust evidential backing and, sometimes, impossible.

Xenophobia characterised as aversion to foreign people or things, was not defined in the legal text, leaving it to the judge's discretion to recognise such a motive in the concrete case. From this results a typification of conduct that is not very precise, leaving the accused dependent on subjective criteria of the judge.

To punish the terrorist acts described in the paragraphs of the first paragraph, the legislator imposes a prison sentence that can vary from twelve to thirty years, also allowing, without prejudice to the crime of terrorism, the punishability of the crimes of threat and violence practiced.

In many cases, reasons for discrimination and prejudice appear juxtaposed. Prejudice can be concretised due to discrimination resulting from, e.g., colour, in many cases related to the origin of the individual. Brazilian legislation, by conditioning the practice of terrorism to reasons of prejudice of race, colour, ethnicity, and religion, diminishes the protection to the legal good[12] that it intends to protect with the criminal norm and, on the other hand, subjects the accused of crime of terrorism to overly subjective criteria on the part of the judge.

The Brazilian legislator showed special concern in disqualifying as terrorist acts political, social, professional, and religious manifestations, when they represent forms of contestation, criticism, and other legitimate manifestations, for the defence of right, guarantees, and freedoms established in the Federal Constitution. This concern is a reflection of a troubled period of social manifestations that the country had been facing since the year preceding the publication of the law.

Item IV of art. 2 seems innovative when demonstrating concern with the practice of terrorism through sabotage or control of cybernetic mechanisms, means of communication, and even the banking service network. This registers a special concern of the Brazilian legislator with the importance of the world wide web and the means of communication that have great importance in contemporary society. The norm deals with what we can call cyber terrorism, or cyberterrorism.

Also sanctioned are conducts that aim to promote or constitute a terrorist organisation, as well as the practice of preparatory acts and, with considerable rigour, any form of financing for people, groups, entities, associations, and criminal organisations, whose main or even secondary purpose is the practice of any of the crimes foreseen in the legal diploma.

The competence of the Federal Justice was established for the processing and judgment of the crimes foreseen in this diploma, as considered by the legislator as crimes practiced against the interest of the Union (art. 11).

International cooperation in combat also deserved special treatment by the Law. Establishing that regardless of international treaties or conventions, the Federal Justice may comply with requests referring to the fulfilment of assecuratory measures on goods, rights, and values originated from any crime practiced that finds typification in the Anti-Terrorism Law.

This measure is quite adjusted to contemporary reality, where the movement of resources is done quickly, requiring immediate and effective intervention to paralyse the sources of resources of individuals or groups linked to terrorism.

Indeed, the Law in reference is aligned with the regulation imposed in other countries to repress terrorist practices. Brazilian legislation seems to innovate when it opted to define terrorism, restricting it to those practices that have the purpose of provoking social or generalised terror.

This delimitation of what can be considered terrorism initially responds to a demand of criminal law by forming a criminal type with clear contours, preventing any conducts from being encompassed by the law. However, in the Brazilian case, it ends up preventing actions developed, for example, by criminal organisations that practice acts that inflict social and generalised terror, such as organisations linked to drug trafficking, which act aggressively and attack collectivities to maintain control over a certain region, from being punished by the Brazilian Anti-Terrorism Law, since this reason does not find a frame in the provisions of art. 2.

Regarding the penalty imposed in case of conviction for terrorist acts, the Brazilian legislator opted to dose the minimum and maximum of the penalty in expressive limits, fixing the penalty of reclusion, from 12 to 30 years, in addition to the sanctions related to eventual threats or violence.

2.2 -- IN PORTUGAL

In the Portuguese case, when the discussion is the legislation that deals with terrorism, there is a line of action traced by the Council of the European Union, dated 30 November 2005, which establishes action on four pillars: prevent, protect, pursue, and respond.

In the first pillar, prevent, the actions that seek to avoid the radicalisation of people and their recruitment to terrorist activity stand out. This means the implementation of policies that pass through education in schools, prisons, places of worship, in the search to provide clear information about the development of an integrated and cooperative society.

Protect, the second pillar, focuses on the strategy of protecting targets that have a higher probability of attacks, such as public transport, public buildings, parks, schools, and hospitals, in addition to strategic government installations.

In the pursue pillar is the conception that terrorists must be pursued even beyond borders, ensuring the protection of human rights. Also pursue the forms of investment and movement of capital that can finance the practice of terrorist acts.

Finally, respond is the pillar that, in the face of the occurrence of terrorist acts, represents the solidary action on the part of the State to guarantee indemnity to the victims and their families.

Indeed, one cannot forget that Portuguese legislation has a quite expressive maturation when compared to Brazilian legislation. Moreover, the study of the subject by the doctrine and the discussions in the legislative sphere occurred at a much earlier moment than what happened in the Brazilian case.

2.2.1 -- TERRORISM IN THE PENAL CODE

The doctrine points out that the first Portuguese anti-terrorist legislation is Law No. 24/1981, of 20 August, which already punished independently the crimes of criminal organisation and terrorism. In 1982 these criminal types were incorporated into the Penal Code.

At this point, the Framework Decision No. 2002/475/JHA of the Council, of 13 June, deserves highlight, which aims at a harmonisation of the penal system in the European Union, to guarantee greater protection to the citizen.

The Portuguese Penal Code disciplined in its arts. 300º and 301º, the crime of terrorist organisations and terrorism. By force of adaptation to the referred Framework Decision, these criminal types were revoked by Law No. 52/2003, of 22 August, which currently disciplines and punishes acts of terrorism.

2.2.2 -- LAW 52/2003, OF 22 AUGUST

With the previous considerations, it is noted that Portuguese legislation reflects a maturation of the legislator, being more restrained in its wording by not conceptualising what would be terrorism.

The objective of the Law is the "prediction and punishment of terrorist acts and organisations, in fulfilment of the Framework Decision No. 2002/475/JHA, of the Council, of 13 June, related to the fight against terrorism", thus avoiding, at least in part, that Portuguese legislation enters into conflict with its partners of the European Union bloc.

Portuguese legislation foresees the following crimes linked to terrorism: a) crime of terrorist organisations; b) terrorism; c) international terrorism; and d) financing of terrorism. With specific provision regarding the criminal responsibility of legal persons and assimilated, which does not find similar in Brazilian legislation on the same subject[13].

On the innovations brought by the anti-terror legislation, it is important to understand the concept of legal good, since from this finding the protective actions and measures can be taken by the competent authorities.

In this context, the amplitude of interests protected by the anti-terrorism legislation remains quite evident. Even more interesting is the fact that the legal goods to be protected, peace, order, security, are seen and analysed in a way that extrapolates the interests of a single European state. Portuguese legislation is put with the objective of guaranteeing security for all countries that compose the European Union, also focusing on a joint action, coordinated among the countries of the bloc.

Portuguese legislation opted not to define terrorism, but rather to define criminal practices that represent a terrorist act and due to their gravity must be sanctioned in the form of specific legislation.

The legislator's concern in penalising conduct that has the world wide web as an instrument of action is highlighted. Whether to organise or to recruit people interested in joining a terrorist organisation or only be willing to contribute to the terrorist practice.

Another situation that has been identified and is severely punished by the legal system is the training of people with the purpose of practicing terrorist acts or even fighting alongside terrorist groups.

Indeed, Portuguese legislation seeks to punish even the attempt to leave the place of residence or nationality of the individual, with the objective of integrating terrorist groups. The punishment of this attempt seems to be a quite arduous task for the authorities, especially because it is necessary to identify that the individual will make this displacement with the specific purpose of joining or participating in a terrorist group.

Paragraph 13º also presents an important provision, by foreseeing the possibility of the penalty being substantially attenuated, or even the non-imposition of punishment, when the agent voluntarily retreats from the terrorist objectives that he may have projected, preventing the result or even collaborating for the investigation of the facts.

Regarding the penal sanction, Portuguese legislation to combat terrorism foresees as the most severe penalty the hypothesis in which the individual leads or directs a group, organised or terrorist association, which will be punished with a penalty of up to 20 years.

Even merely preparatory acts can be punished with a penalty of up to 8 years. Nevertheless, one cannot deny the importance of punishing acts of this nature, especially in the case of terrorist practices, because the minimal intervention of the individual can result in the death of a high number of people, being reasonable the imposition of penalty in these hypotheses.

A terrorist organisation can be composed of just two people who acting, provenly, in an adjusted manner, seek to harm the integrity and national independence, hinder the functioning of state institutions, obliging public authorities to practice or refrain from practicing ordinary acts, intimidating people or the population in general, through any of the conducts listed in art. 2 of Law 52/2003.

2.3 -- CONVERGENCES AND DIVERGENCES BETWEEN BRAZILIAN AND PORTUGUESE LEGISLATION

Despite similar objectives, the legislation of the two countries starts from different premises. Brazilian legislation opted to define terrorism and, from this concept, typify main conducts, of co-authorship or participation, in the crime of terrorism, and after secondary conducts, or accessory crimes as the doctrine prefers to refer. The Brazilian legislator also opted, expressly, to identify the origin of the acts that can be characterised as crime, with the criminal practice necessarily stemming from reasons of xenophobia, discrimination, or prejudice of race, colour, ethnicity, and religion.

In Portuguese legislation, there was no definition of terrorism, being specified in the text the conducts that must be restrained for representing acts of terrorism. The Portuguese legislative technique in this point seems to be more adequate to the reality of international law, because as will be explained below, there is no consensus on a definition of what would be terrorism.

Another point that deserves positive highlight in the Lusitanian legislation is the imposition of criminal responsibility to the legal person and other assimilated organisations, for the practice of terrorist acts described in the law. Nevertheless, the impossibility of an identical situation in Brazilian law seems to be the result of a limitation imposed by the law itself, which nowadays, in Brazil, has regulated only the possibility of criminal responsibility for legal persons in the hypotheses of environmental crimes.

The study of the legislative texts also allows us to conclude that the protected legal good is the protection of international peace, since they seek to protect nationals and foreigners, as well as international organisations.

One of the factors that have enabled the development of terrorist organisations is the fact that these are frequently financed, directly or indirectly, through money laundering activities carried out in different countries, sometimes encompassing the practice of other crimes (illicit drug trafficking, people, etc.).

The punishment of money laundering with the purpose of financing activities that aim at the practice of terrorist acts also deserved special prominence both in Brazil and in Portugal. This severe regulation of capital markets seems to be the strong point of anti-terrorism legislation in both countries.

Regarding the quantification of the penalty, we have an overwhelming in the amount of years of incarceration. A fact that generates many criticisms due to the ineffectiveness of the penalty as an instrument of resocialisation and in the case, in particular, of terrorism, as an instrument of general prevention, that is, to stimulate that individuals do not adhere to the practice of new crimes of this nature.

3. CRIMINAL PROSECUTION FOR THE INVESTIGATION OF TERRORIST PRACTICES

3.1 – INTRODUCTION

Besides the state concern in outlining the criminal legislation that inhibits the practice of terrorist acts, which, both in Brazil and in Portugal -- and other European States --, deserve sanctions that impose decades of incarceration, there is still the need for cases to be instructed and judged quickly and effectively.

As well as the prevention and investigation of cases that investigate acts of terrorism, the instruction of these facts, carried out in its judicial phase, also has its complexity. As we will see, in addition to assecuratory measures to guarantee the utility of the process, with judicial constriction of goods and even precautionary segregation. There are those who defend that the judgment of terrorist acts should be of competence of courts specialised for this task.

In Brazil, no special body was created for this purpose, which would require constitutional provision. What the legislation opted to determine was that the jurisdictional body

competent for the judgment of crime of terrorism will be the common Federal Justice, which has its competence established in the Federal Constitution of 1988, with emphasis on cases in which the interests of the Union are verified.

In Portugal, as in Brazil, there is no specific procedure to be followed when the judicial procedure for the application of the penal sanctions foreseen in the governing law. There are, it is true, some provisions that dispense special treatment in the investigation phase. In Portugal, as imposed by Law 49/2008, of 27 August, in its art. 7, No. 2, line l, it determines that the investigation of the crimes of terrorist organisations, terrorism, international terrorism, and financing of terrorism, are of reserved competence of the Judicial Police, not being able to be delegated to other criminal police bodies.

It is certain that there is a special concern with the investigation of terrorist practices and the financing of these actions. This seems to stem from the pressing need to prevent terrorist acts from being consummated, victimising, as a rule, a significant number of people.

With all correctness, Portuguese legislation dedicates special treatment to the financing of terrorism. Indeed, in the same way that some characteristics of our modern society facilitate the action of terrorist agents with the ease of communication and displacement, it should also be recognised that without the employment of resources, the maintenance of the means of communication and the displacements cannot be carried out.

There is an important relationship between the amount of resources employed and the number of victims of terrorist acts. The emergence of the so-called lone wolves may stem from the restrictions imposed on the financing of terrorist groups. If on the one hand identifying and punishing individuals who act in isolation seems more difficult, it should also be recognised that, as a rule, the number of victims is more restricted in actions of this nature.

3.2 -- PROCEDURAL INSTRUMENTS FOR THE INVESTIGATION OF TERRORIST PRACTICES

The means used for the investigation of terrorist practices and the penalties imposed can be pointed out as the great differential in relation to other criminal practices. This can be observed, in some countries, by the use of interceptions of messages and in the constitution of courts of exception, where respect for basic procedural rules for the respect of due legal process are not always respected[14].

The Brazilian legislator makes it evident that the action of the State in the hypotheses of crimes foreseen in the special legislation on terrorism deserve differentiated processing in what refers to the instruments of investigation and assecuratory of the process.

In cases covered by the Brazilian anti-terrorism legislation, the judge may, including ex officio, determine constrictive measures related to the patrimony of people involved, sufficing for this indications of the crimes foreseen in law. The particularity here is in the fact that the patrimony that can be affected by the precautionary measures encompasses what is in the name of an interposed person, that is, not the investigated or accused.

The same legislation also allowed the early alienation of the goods that come to be object of precautionary measure, seeking to prevent these goods from losing value with the

passage of time, since the lapse between the investigation and the final judgment of the condemnatory sentence can be long. The values collected may be used to repair eventual damages caused by the criminal practice, including indemnity to the victims and the payment of fines foreseen in the sentence.

For the release of the goods that suffer judicial constriction in the face of the precautionary measures, the legislation requires that the accused present himself personally, prohibited the judicial representation by a third party in this case, who must also prove by the means required by law, that the goods have no relation to the criminal practice, without prejudice that the constriction be maintained in part of the goods that should bear eventual indemnities and procedural costs.

Another important instrument to protect the production of evidence, and inhibit criminal reiteration, with provision in both national legislations, is preventive detention. This measure is extraordinary, considering that the freedom to come and go should represent the rule, outside the hypotheses of flagrant arrest, it requires, by rule, the issuance of an arrest warrant by the judge.

Indeed, both in Brazil and in Portugal, although authorised by the Constitution, the use of such a measure of deprivation of liberty is restricted to legal hypotheses, specified in ordinary legislation. In this particular, preventive detention is applicable in the same hypotheses as other crimes, the same occurring in Brazilian legislation, that is, the arrest of an investigated person for the practice of crime of terrorism is an exceptional measure and must fulfil the same legal requirements to be granted by the judge.

Still on the production of evidence, the Portuguese procedural system foresees searches that are authorised by the competent judicial authority, who must accompany the diligence, except in case of impediment. In the same hypothesis, in the case of investigation of crimes of terrorism, violent criminality, or criminal organisation, the criminal police body may proceed with searches without the authorisation or judicial order. It is relevant to highlight that this procedure does not find similarity with Brazilian legislation.

Finally, of relevant importance for criminal investigation in the case of terrorist organisations are the benefits foreseen in the legislations for participants who collaborate for the solution of the crime or to prevent it from occurring. Portuguese legislation brought this legal provision in the text of the anti-terrorism legislation itself, the possibility that the penalty be attenuated or even not applied.

The same was not done by the Brazilian legislator, without prejudice to the fact that the awarded collaboration, as it is called, is used to prevent criminal practice, or serves as an instrument for instructing the criminal action, in cases where the action of a criminal organisation is configured.

3.3 -- ON THE POSSIBLE NEED FOR A DIFFERENTIATED PROSECUTION FOR THE HYPOTHESES OF TERRORISM

The evolution of terrorist practices in this period of history clearly demonstrates that, in particular, the prevention and investigation of the facts require an improvement of the techniques and the criminal process.

Indeed, the debate on special criminal prosecution for the crimes of terrorism, or terrorist practices, depending on the legislation of each State, sometimes has a negative repercussion. This stems from the fact that by nature the action of the State to punish the individual represents offence or mitigation of some individual right. For, if we allow preventive detention to occur for a longer time in certain cases, heinous crimes, for example, in Brazil, or if we develop more powerful instruments to monitor communications via the world wide web, what we are effectively doing, is allowing the vulnerability of the right to freedom, to privacy, or at least, weakening these constitutional guarantees.

The reasons for such practices are relevant, it is true. Who could defend privacy to the detriment of people's lives, which are put at risk in case of a terrorist attack? This leads us to the conclusion that the prevention of such criminal acts will certainly impose the limitation of fundamental rights[15]. The question then seems to be in ascertaining what the limit for these state actions is.

It is common to create alert mechanisms for society and for the authorities when the possibility of the practice of terrorist acts is identified. As a consequence, there will be, in many cases, greater restriction on the freedom of movement within the territory and between the territories of different States.

In the current context, in the face of the barbarism that is verified in terrorist attacks, one can note an acceptance of these restrictions in relation to freedom, privacy, and other individual prerogatives.

Nevertheless, in the criminal process, the construction of limitations in the production of the defence of the accused would find insurmountable barriers in the principles that guide the instruction and judgments of the process. Although one can imagine the development of new investigation techniques and new instruments for the production of evidence, these cannot mean a differentiated treatment, with any forms of subtraction to guarantees linked to the contradictory and ample defence remaining prohibited[16].

In specific work on the production of evidence through torture in cases of terrorism, and its use, Professor Kai Ambos, professor at the University of Göttingen, narrates a case in which the individual who inflicted suffering on the author of a kidnapping ended up not being punished in a German court, considering that in an integral evaluation of the conducts imputed to the public agent, the imposition of penalty was not necessary. In the narrated case, the agents involved in the investigation understood that inflicting pain on the investigated would be the only way to discover the whereabouts of the victim.

The dilemma that presents itself for the investigation of terrorist practices, sometimes more violent than the heinous practice of a kidnapping, is the limit for state action. What measures and instruments are admitted for the production of evidence and consequent punishment of those involved? At first, it is simple to state that the evidence obtained, as in the example, under torture is illicit and totally inadmissible by the legal system. However, in the face of a real situation, where the involvement of a terrorist leader may remain unpunished for criminal practices, the answer about the evaluation of the evidence may not be so simple.

The conclusion that this species of evidence cannot be used, since this evidence is not reliable and would injure the integrity of the criminal process, as the cited professor asserts, seems without doubt the most correct.

Indeed, it is observed that terrorist practice involves numerous mechanisms for obtaining resources and, consequently, the practice of money laundering to allow the circulation of values between groups or cells organised in other countries.

Regarding precautionary measures that are imposed on financial resources and assets of investigated persons, their effectiveness it seems is incontestable. These measures, supported by a strict action of the bodies responsible for supervising the financial system, in some cases lead to the extinction of some criminal organisations, or repress their action, limiting the practice of terrorist acts to certain places.

However, it cannot be affirmed that the practice of crimes foreseen in the specific legislation for the combat of this species of crime requires, for its effectiveness, a specific judicial procedure as well. That is, the determinations existing in Portuguese legislation, which attributes undelegable competence to the Judicial Police to investigate the practices of terrorist acts and correlated crimes, as well as the Brazilian one that attributes to the Federal Police the competence to investigate crimes of the same nature -- this because the competence will be of Federal Justice by express provision in the law --, at this moment, respond to the needs of these countries to repress terrorist practice.

Indeed, there is concern with the institutionalisation of a Criminal Law of special orientation, with penalties and process of differentiated criminal investigation for the crimes of terrorism that can be used, or have its special rules attracted for the punishment and processing of other crimes, because as Manuel Cancio Meliá asserts, terrorism does not represent the only form of horror in the world[17].

4. INTERNATIONAL CRIMINAL LAW AS A RESPONSE TO TERRORISM

4.1 -- EUROPEAN UNION AND THE FIGHT AGAINST TERRORISM -- ALIGNMENTS AND DISPARITIES

Terrorism represents a threat to the entire international community, with special emphasis in Europe, the Middle East, and Africa. In this conjuncture, the Security Council of the United Nations, recognising the gravity of this context, registered in Resolution 2178 (2014), orienting cooperation and organisation of preventive and repressive actions.

In Portugal, the concern with terrorism can be observed from the analysis of the Internal Security Report of 2017, which points to the possibility of attacks, since, among other reasons, the country has been an important destination within the European Union and also of the Americas.

In the European sphere, already in 1977, the European Convention for the Suppression of Terrorism, of the Council of Europe, was signed, with the objective of establishing effective measures to combat and punish the agents involved in the practice of terrorist acts. In Portugal, this convention came into force on 15 March 1982.

In 1937, the first Convention for the Prevention and Suppression of Terrorism was elaborated, defining acts of terrorism "as criminal facts directed against a State, whose

purpose or nature is to provoke terror in certain personalities, groups of people, or in the public", with this convention being ratified only by India.

Indeed, without embargo of some criticisms, following the Portuguese parliamentary activity, one can note that there is a constant activity in the sense of perfecting the legislation especially in what refers to the control of capitals. This can be observed both in what concerns criminal legislation, as well as the rules of behaviour of the institutions that act in the capital market, with quite detailed discipline of actions to monitor, register, and curb transactions that may be linked to the financing of terrorism in its most varied segments.

Moreover, as Gomes Canotilho and Vital Moreira explain, there is a primacy of European Union law over internal law, explicitly (although indirectly) recognised by the Constitution in the precept under analysis which means, above all, that internal law does not serve as an obstacle to the validity and application of that in the internal order[18].

This coordination of the European Union States has been permanent and resulted in the expansion of anti-terrorist legislation, with emphasis on the fight against money laundering and cooperation for the execution of decisions in criminal matters. This scenario undoubtedly represents a significant evolution in the fight against terrorist groups, since without access to resources, the entire existing structure for the coordination and execution of terrorist practices is extinguished.

4.2 -- SOUTH AMERICA AND THE STUDY OF TERRORISM

Despite the fact that in Brazil the legislator has only effectively demonstrated greater concern with terrorist practice in 2016, when the country hosted the World Cup and the Olympics, the practice of terrorist acts does not represent a non-existent phenomenon in South America.

The best example of this occurs in Colombia, where the group called "Revolutionary Armed Forces of Colombia" (FARC), is responsible for a series of terrorist practices. In 2017, the group reached an agreement to finalise its actions in Colombian territory[19].

From the standpoint of international law, the approval, on 3 June 2002, of the Inter-American Convention against Terrorism, which substantially ratified premises contained in the United Nations Charter, deserves highlight. This convention makes important reference to the Lima Declaration, of April 1996, to prevent, combat, and eliminate terrorism, signed during the 1st Inter-American Specialised Conference on Terrorism.

On this opportunity, Brazil proposed that terrorism be defined as "any illicit act whose purpose is to generate terror, intimidate the population, or oblige Government or International Organisation to do or not do something". However, this proposal was not accepted by the other members of the organisation[20].

Therefore, there is no uniform treatment on terrorism in South America, as occurs within the European Union. Even within Mercosur which significantly expanded Brazil's contact with its neighbours, there is no defined line of action when the subject is combating terrorism.

In Brazil, the armed combat with organisations linked to drug trafficking has lasted decades and, apparently, does not seem to evolve in the sense of a brief solution. The armed conflicts and the constant action of criminals against the structure of the State, preventing the functioning of means of public transport, functioning of schools and other services, is constant in many Brazilian cities. Due to diverse factors, the situation of the city of Rio de Janeiro deserves greater attention on the part of the international media.

Even with a clear reflex in services expressly protected by the Brazilian Anti-Terrorism Law, the practices of terror usually utilised by criminal organisations linked to drug trafficking in Rio de Janeiro, cannot be encompassed as terrorist acts under the terms of Law 13.260. As already referred, terrorist practice in Brazilian territory presupposes that the attacking acts are practiced due to xenophobia, discrimination, or prejudice of race, colour, ethnicity, and religion, which promptly excludes the action of drug traffickers to destabilise the state forces, since the objective is to maintain the commerce of illicit substances in a determined point of the national territory. That is, Brazilian legislation ignores the level of repercussion that certain actions can cause in the social bosom and, also, the protected legal good, tying itself, without exceptions, to the reasons for which the acts were practiced.

Thus, acts that are practiced with the purpose of promoting terror, in a generalised manner, putting the lives of an indeterminate number of people at risk, with aggression to patrimony and public peace, cannot be framed as terrorism, because they do not stem from reasons of xenophobia, discrimination, or racial prejudice.

4.3 -- POINTS OF CONVERGENCE

In this context, it remains evident that the practice of terrorism receives quite diversified treatment. Indeed, even with the intervention of the UN, there is a misalignment in the typification of the crime of terrorism, which naturally diminishes the effectiveness of the actions of prevention and combat to this practice.

Even within the European Union, with free traffic of people, each country component of the bloc has autonomy to typify the crime of terrorism, as well as to constitute its own public security policy. This weakens the security system against this species of crime, being possible to identify cases in which preparatory acts, for example, are punished in some countries and, in others, not.

At this moment, an agreement that systematises and diminishes the divergences that exist in the legislations of the member countries, and also of the own diplomas issued by the entity in all these years of discussion, continues in negotiation at the United Nations.

Indeed, among the main points of divergences are the question of national sovereignty, the definition of State terrorism -- which would make possible the punishment of armed forces and, therefore, national States for the practice of terrorist acts -- and the question of a freedom fighter representing a terrorist.

Similarly, Flávia Piovesan notes that even in the face of what can be called a consensus on the importance of combating terrorism, as this constitutes a special form of threat to the peace and security of all countries, and naturally an attack on human rights, there is no alignment on how terrorism should be defined[21]. The author also highlights that "in

confronting terrorism, it is essential to reiterate the idea that combat will only be effective with the respect and promotion of human rights"[22].

Indeed, even with an option of confronting terrorism by criminal law, there seems to be a consensus that with investment in public security bodies, with equipment and intelligence work, is that terrorist practices will find some effective resistance, considering all the peculiarities of this phenomenon.

Repression through criminal law certainly does not represent the solution for the entire context that still generated motivation for people and groups to seek to impose terror in the social sphere with the justification of defending their political, religious, or any other nature beliefs.

However, criminal law has much to contribute, either from the point of view of serving as an instrument of repression, but also, and probably, above all, as an instrument to organise and limit state actions, preventing excesses against individual rights and guarantees from being practiced by institutions responsible for providing security to society. That is, criminal law does not represent only an instrument of repression through the application of severe penalties, especially in cases of terrorism and crimes connected to terrorist practice but represents in a singular way an instrument legitimising state action, disciplining means of investigations, adequate to the peculiarities of terrorist practices, and of the trial process that must be developed within standards of respect for due legal process.

However, even considering the peculiarities of terrorist practices, the fact is that it is not possible to construct a special criminal process for these cases. That is, to differentiate the form of investigation and instruction of the processes that investigate crime of terrorism. One cannot imagine a criminal process for the crimes of terrorism and another process for the other crimes. The difference would most probably be in the diminishing of procedural guarantees, in the use of evidence obtained through torture or other techniques of questionable legitimacy.

Nor can it be forgotten that the accused need to have guaranteed access to professionals duly qualified for processes of this nature, with full access to the evidence produced and the means by which this evidence was produced.

Otherwise, there will be no talk of parity of weapons between the defence and accusation, and the contradictory and ample defence will absolutely not be guaranteed. At this point, Brazil has institutions that can satisfactorily develop the defence of accused for crimes of terrorism. Within the scope of common Federal Justice, the Public Defender's Office of the Union has jurists and satisfactory technical support so that ample defence is guaranteed in favour of the accused, including with regard to the need for eventual appeals to the superior courts.

In Portugal, the legal protection service allows for the designation of lawyers, once the individual proves the requirements demanded in the regulation.

This concern stems from the fact that for processes that investigate more serious crimes, with a larger number of victims, greater social commotion, one can glimpse the breaking of procedural stages for a quicker resolution of the facts. Such behaviour delegitimises

the power of the State and weakens the entire procedural system, since it may remain demonstrated the utilisation of one species of process for certain cases and another process for cases, for example, of terrorism, where the ends can justify the means employed to identify the people involved and punish them.

CONCLUSION

One cannot fail to recognise that criminal law represents, at this point in history, an important instrument for the inhibition of terrorist practices that have materialised in many countries, especially in Europe. Although criminal law does not represent a definitive solution for current society to have its freedom protected from any and all threat derived from terrorist acts suppressed, its role is still of highlighted importance.

Indeed, in the face of the complexity of current society, electing one instrument as the sole solution for a certain negative social phenomenon, cannot represent the best path. It becomes necessary to add to the power of conviction that imposes the robust sanctions foreseen in the current legislations, other instruments that have as objective the identification of social fragilities, which have allowed the enticement of minds, almost always young, for a fight of political, religious, and ethnic ideas, through the radicalism of thought and use of violence as a natural path to reach their objectives.

Despite it not being possible to affirm in an incontestable way that terrorism is born with greater vigour in countries that are on the margin of the social and economic development of developed countries, it is certain that the study of the subject seems to indicate that the lack of control of armed conflicts in the Middle East and in Africa has a relation with the crimes of terrorism registered in Europe.

The recognition, on the part of the most developed States, that an intervention is necessary to extirpate the poverty and insecurity that plague the countries most aligned with the terrorist technique, such as the countries of North Africa, is an essential measure. To guide, educate, guarantee minimum conditions for dignified survival must be a priority. That is, guaranteeing dignified living conditions must be the first measure to be taken, leaving to criminal law an intervention in classical terms, that is, as a last resort.

Indeed, to combat the terrorist phenomenon, it is first necessary to know it, understand its origins and forms, to from there conceive instruments of repression and combat, which must necessarily include criminal law.

Internal criminal legislation, guided by rules of international criminal law, has demonstrated significant efficiency in combating money laundering, using control measures by the central banks of each State, and in the use of mechanisms that allow the blocking and seizure of values related to the financing of terrorism. These actions even have an important reflex in combating other species of crime, e.g., illicit drug trafficking, and even corruption in public organisms.

In this context, international criminal law has a fundamental role in the sense of organising the global combat to terrorism and guiding the construction of an internal criminal law affiliated to the needs of a globalised society. Instruments that facilitate cooperation between States have found provision in internal criminal legislation recurrently and duly aligned with the recommendations of the Security Council, as in the case of Brazil and Portugal.

Similarly, it is possible to conclude that terrorist practice cannot be removed from criminal tutelage. Even admitting that the rigidity of criminal norms, with robust sanctions, as they are in Brazil and Portugal, does not represent a solution to the problem, one cannot forget, however, that criminal law can contribute greatly to the repression of terrorism and other crimes associated with terrorist practice.

The improvement of international concepts for terrorism, their unification within the United Nations with ratification by all member countries, will guarantee the uniformisation among internal anti-terror legislations and will lead to an efficiency in the prevention and repression of terrorist practices.

Although the legal system of countries like Portugal and Brazil have their accentuated differences in some areas, the same does not occur in such an expressive way regarding criminal law. Portuguese doctrine presents itself as an important reference in works of Brazilian penalists.

Regarding the methods for investigation of crimes and the procedural rite for the judgment of crimes of terrorism, the control by the Judiciary Power is permanent and the rules that guarantee due legal process are observed regardless of the gravity of the crime.

Even recognising the heinousness of crimes of terrorism, the use of all means of evidence permitted by the internal legislations of each country should be guaranteed and allowed, and also others admitted in international treaties and conventions. Being prohibited, in an absolute form, the utilisation of evidence originated in acts of torture or derived from it, in any hypothesis.

The establishment of legal premises, internal and external, must mark out the entire procedure of criminal prosecution, of the production of evidence, to only then allow the legitimate imposition of the severe penalties foreseen in the legislation, which must be carried out exclusively by courts competent for the judgment of crimes of terrorism, without the possibility of the creation of courts of exception.

The accused of terrorist acts must also have guaranteed access to specialised technical-legal assistance so that basic principles such as ample defence and contradictory are absolutely observed.

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[1] "A religião tem como missão fundamental promover a paz e a harmonia entre os povos. Porém, quando os líderes religiosos se preocupam mais em incorporar a influência política e, assim, deter o poder, a missão da Igreja se perdeu. O Resultado foi a abertura para a prática da intolerância religiosa através das cruzadas e da Inquisição. A mudança somente foi possível com o desenvolvimento dos direitos humanos." GONÇALVES, Antonio Baptista --- Intolerância religiosa e terrorismo. In FERNANDES, Antonio Scarance; ZILLI, Marcos. (Coord.) ---Terrorismo e justiça penal: reflexões sobre a eficiência e o garantismo. Belo Horizonte: Fórum, 2014. p. 35.

[2] "O fim do direito penal é "a defesa da sociedade, pela proteção de bens jurídicos fundamentais, como a vida humana, a integridade corporal do homem, a honra, o patrimônio, a segurança da família, a paz pública etc."" DOTTI, René Ariel. -- Curso

de direito penal: parte geral. 4ª ed. São Paulo: Editora Revista dos Tribunais, 2012. p. 72.

[3] Cf. MENDRONI, Marcelo Batlouni -- Crime organizado: aspectos gerais e mecanismo legais. 6ª edição. São Paulo: Atlas, 2016, p. 83.

[4] Enciclopédia das Relações Internacionais, 1ª edição. Publicações Dom Quixote: Alfragide, 2014. p. 509.

[5] Cf. ditas formas de terrorismo seguem uma estrutura variada: "terrorismo de Estado, terrorismo Político-Revolucionário e Terrorismo Ideológico-Religioso; cfr GUIMARÃES, Marcelo Ovidio Lopes -- Tratamento penal do terrorismo. São Paulo: Quartier Latin, 2007, p. 27 e ss.

[6] ⁶ Teresa de Almeida e Silva explica que "Etimologicamente, jihad significa esforço feito no sentido de encontrar o caminho de Deus. Todavia, para os ativistas radicais do islão, jihad traduz a "Guerra Justa", normalmente traduzida como "Guerra Santa". In Enciclopédia das relações internacionais. 1ª ed. Alfagride: Dom Quixote, 2014. p. 278.

[7] É possível apontar algumas características dos movimentos radical-fundamentalista: "Seja como for, abrindo mão de uma exploração historiográfica do tema, importa reter algumas características ancilares do fundamentalismo religioso: i) a recusa à mediação hermenêutica na leitura dos textos fundantes; ii) sua natureza reativa à modernidade; iii) o caráter identitário e, nalguns casos, a tendência totalizante dos movimentos concretos, a abarcar toda a vida social; iv) o cariz monista de um discurso salvífico com pretensão monopolista de verdade. In Liberdade religiosa na Constituição: fundamentalismo, pluralismo, crenças, culto. Porto Alegre: Livraria do Advogado Editora, 2007. p. 52-53.

[8] "Também, o Direito Penal pode ser visto como uma ordem de paz pública e de tutela das relações sociais, cuja missão é proteger a convivência humana, assegurando, por meio da coação estatal, a inquebrantabilidade da ordem jurídica." PRADO, Luiz Regis. -- Tratado de direito penal: parte geral. Vol. I. 2º Ed. São Paulo: Editora Revista dos Tribunais, 2017. p. 110-111.

[9] MENDRONI, Marcelo Batlouni -- Crime organizado: aspectos gerais e mecanismo legais. 6ª edição. São Paulo: Atlas, 2016, p. 85.

[10] Nesse ponto uma particularidade do ordenamento brasileiro, pois se constata um dever de prestação normativa em matéria penal, constituindo um mandado constitucional de incriminação. Nesse sentido: FELDENS, Luciano. Comentário ao art. 5º, inciso XLII. In CANOTILHO, J.J. Gomes; MENDES, Gilmar F.; SARLAT, Ingo W.; STRECK, Lenio L. (Coords.) -- Comentários à Constituição do Brasil. São Paulo: Saraiva/Almedina, 2013, p. 394.

[11] Cf. GUIMARÃES, Marcelo Ovidio Lopes -- Tratamento penal do terrorismo. São Paulo: Quartier Latin, 2007, p. 102 e ss.

[12] Cf. Luciano Feldens: "A proibição de proteção deficiente relaciona-se diretamente, pois, à função dos direitos fundamentais como imperativos de tutela (na realidade, lhe é complementar), notadamente no ponto em que demandam, para seu integral desenvolvimento, uma atuação ativa do Estado em sua proteção."

[13] Cf. Juarez Cirino explica que "existem duas posições antagônicas na área internacional sobre a responsabilidade penal da pessoa jurídica: a) os Estado regidos pela common law, como Inglaterra e Estados Unidos, por exemplo, admitem a responsabilidade penal da pessoa jurídica: os precedentes legais que fundamentam seus sistemas de justiça criminal não criam obstáculos metodológicos ou científicos relevantes; b) os Estados regidos por sistemas legais codificados, como os da Europa continental e da América Latina, rejeitam a responsabilidade penal da pessoa jurídica:

os sistemas de conceitos fundados na unidade orgânica de instituições e normas jurídicas escritas, criam obstáculos metodológicos e científicos insuperáveis." Cf. SANTOS, Juarez Cirino dos. Direito penal -- parte geral. 5ª ed. Florianópolis: Conceito Editorial, 2012. p. 661.

[14] Cf. AMBOS, Kai. - Terrorismo e o devido processo legal. O direito possui um devido processo para os supostos terroristas detidos na baía de Guantánamo, In Ensaios de direito penal e processual penal; tradução Alexey Choi Caruncho. 1ª edição, São Paulo: Marcial Pons, 2016, p. 135 e ss.

[15] "O Direito (positivo) não significa sempre segurança jurídica e fonte limitadora do poder despótico, como denota o caso da Venezuela, assim como outros Estados onde o sistema político ditatorial (autoritário ou totalitário) e restritivo de direitos, liberdades e garantias fundamentais pessoais se enraíza na normativa jurídica da hegemonia política." VALENTE, Manuel Monteiro Guedes. - Direito penal do inimigo e o terrorismo. 2ª edição. São Paulo: Almedina, 2016. p. 91-92.

[16] Nereu José Giacomolli assevera que "da garantia da defesa ampla e plena emanam uma série de outros direitos e garantias, tais como o direito de ser informado da acusação, o direito à prova, o direito de ser ouvido, o direito de não colaborar com a acusação, o nemo tenetur, o direito ao silêncio e à igualdade de armas, por exemplo. Bettiol já afirmava ser a defesa um direito subjetivo público do imputado e que toda a estrutura do processo, em um ordenamento politicamente aberto, reconhece e salvaguarda esse direito". In O devido processo penal: abordagem conforme a Constituição Federal e o Pacto de São José da Costa Rica. 3ª ed. São Paulo: Atlas, 2016. p. 144.

[17] Cf. CANCIO MELIÁ, Manuel. Los delitos de terrorismo: estrutura típica e injusto. Madrid: Editorial Reus, 2010. p. 76.

[18] CANOTILHO, J. J. Gomes; MOREIRA, Vital. Constituição da República Portuguesa anotada. 4. ed. Coimbra: Coimbra Ed., 2014, p.256.

[19] Cf. APONTE, Alejandro. Derecho penal y terrorismo: dilemas de la legislación penal antiterrorista en Colombia. In FERNANDES, Antonio Scarance; ZILLI, Marcos (Coord.). Terrorismo e justiça penal: reflexões sobre a eficiência e o garantismo. Belo Horizonte: Fórum, 2014.

[20] Cf. MEDEIROS, Antônio Paulo Cachapuz de. In O direito internacional e o direito brasileiro em face do terrorismo. Revista de Ciências Criminais. São Paulo: Editora Revista dos Tribunais, 2011, p. 1223.

[21] PIOVESAN, Flávia. Direitos humanos e o direito constitucional internacional. 14. ed., rev. e atual. São Paulo: Saraiva, 2013, p. 421.

[22] Idem, p. 422.