

FREE SPEECH, ONLINE PLATFORMS AND COUNTER-TERRORISM: AN INTERNATIONAL APPROACH

LIBERDADE DE EXPRESSÃO, PLATAFORMAS ONLINE E CONTRATERRORISMO: UMA ABORDAGEM INTERNACIONAL

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Objective: This study aims to analyze how international legislation focused on combating terrorism impacts freedom of expression and the sharing of ideas in the digital environment, considering the use of surveillance technologies by governments and platforms.

Methodology: Based on the actual literature on the subject, the research critically analyzes international legislation about platform regulations and surveillance technologies. It also examines the role of digital platforms in enforcing terms of service that are stricter than local laws, particularly regarding content deemed terrorist.



Results: The results indicate that the ambiguous definition of "terrorist act" allows governments to classify criticisms as terrorism, restricting freedom of expression. Furthermore, the work shows how, by implementing stricter usage policies, digital platforms create an environment where expression is more monitored and, in many cases, censored. This exacerbates the adverse effects of constant surveillance on individual rights.

Contributions: The study contributes to the debate on the need for balanced regulation to prevent terrorism without compromising freedom of expression. It highlights the importance of protecting fundamental rights in a context of increasing surveillance, proposing guidelines to avoid state and private abuses in the use of these technologies.

Keywords: Human rights; terrorism; state surveillance; freedom of expression.

Objetivo: *Este estudo tem como objetivo analisar como a legislação internacional voltada ao combate ao terrorismo impacta a liberdade de expressão e o compartilhamento de ideias no ambiente digital, considerando o uso de tecnologias de vigilância por governos e plataformas.*

Metodologia: *Com base em pesquisa de fontes bibliográficas sobre o tema, a pesquisa analisa criticamente a legislação internacional relacionada à regulamentação de plataformas e às tecnologias de vigilância. Também examina o papel das plataformas digitais na aplicação de termos de serviço mais rígidos que as leis locais, especialmente no que diz respeito a conteúdos considerados terroristas.*

Resultados: *Os resultados indicam que a definição ambígua de "ato terrorista" permite que os governos classifiquem críticas como atos terroristas, restringindo a liberdade de expressão. Além disso, o trabalho demonstra como, ao implementar políticas de uso mais rígidas, as plataformas digitais criam um ambiente onde a expressão é severamente monitorada e, em muitos casos, censurada. Isso agrava os efeitos negativos da vigilância constante sobre os direitos individuais.*

Contribuições: *O estudo contribui para o debate sobre a necessidade de uma regulamentação equilibrada para prevenir o terrorismo sem comprometer a liberdade de expressão. Ele destaca a importância de proteger os direitos fundamentais em um contexto de crescente vigilância, propondo diretrizes para evitar abusos estatais e privados no uso dessas tecnologias.*

Palavras-chave: *Direitos humanos; terrorismo; vigilância estatal; liberdade de expressão.*

1 INTRODUCTION

Internet and Digital platforms offer the opportunity to share and receive information in inconceivable ways only years ago. By using them, people can access



public information and express their feelings and political thoughts through the Internet and social media without public or government pressure. There are historical reasons for that. As their creators conceived, the Internet should be a free place, a country with its laws, where everyone could express themselves and be free without border controls. Like the mystical energy that was supposed to circulate between free souls, the Internet was created to be the space where information creates knowledge, and knowledge creates a brand-new future (Moore, 2018). In practical terms, social media allows people to assess new information, create new ways of thought, contest injustices and governments, assemble and fight against tyranny, and for their human rights (Gerbaudo, 2012). However, this miraculous and marvelous digital world of beauty and total freedom never existed. In the real world, the Internet and social platforms are used to spread hate, discriminate against minorities, exacerbate political extremism, and foster violent acts (Fisher, 2022). It also provides platforms for those who intend to encourage and participate in terrorist violence to broadcast messages to potentially receptive audiences around the world. How should social media and the Internet be regulated so this kind of discourse does not spread to the public?

Following the 9/11 attacks in New York, measures aimed at combating terrorism emerged remarkably quickly at the international level. The EU Council officially recognized in 2008 the Internet as a medium used by terrorist recruiters to disseminate propaganda material. Several studies have revealed the critical role social media platforms, predominantly Twitter, played in the ISIS propaganda strategy (Williamson, 2009). On this issue, a 2015 report indicated that ISIS members, on average, posted 38 propaganda materials daily, ranging from videos to photographs or articles, on various platforms, including Facebook, Tumblr, Twitter, or Surespot. Countering this type of speech has challenged traditional law enforcement in many ways. In 2014, the EU Commission recognized that conventional law enforcement is insufficient to deal with evolving trends in radicalization and that all of society ought to be involved in countering terrorism online. Against this background, measures against online terror propaganda have become increasingly accepted, to the point where specialists in internet regulation consider measures taken against terrorist support online to be universally accepted as truth (Benedek; Kettermann, 2014). The measures to combat terrorism online include the preventive blocking of terror content, the



identification of users who create, spread, or support terrorism online, and finally, the identification of anyone who takes part in such activities.

Such measures have raised questions concerning the extent of government powers to legitimately impose restrictions on human rights in the name of countering terrorism. Scholarly debates raise new concerns regarding the compatibility of anti-terrorism measures with human rights protections (Vashakmadze, 2011). Concerning freedom of speech, of particular concern is the recent proliferation of measures aimed at proscribing online speech characterized as 'glorifying' or 'encouraging' terrorism on the basis that such speech may incite future terrorist acts. The justifications for such proscriptions are often presented regarding the 'unique challenges' posed by disseminating terrorist content via online platforms A (Kettermann, 2020). At the core of these arguments is the notion that there is something special about online terrorist-related speech such that it does not fit into existing normative frameworks. We challenge this assumption by examining questions relating to the appropriate role, if any, of digital intermediaries (entities that merely provide platforms for the expression of users) in regulating online terrorist-related content and the extent to which proponents of human rights should be concerned with the free speech implications of intermediary liability. First, we need to assess the concept of terrorism.

2 TERRORISM AND THE SEARCH FOR THE UNKNOWN CONCEPT

Terrorism is a difficult concept to grasp. Due to its contextual and political nature, everyone tends to have a different concept of terrorism. So, while Richard Nixon claimed that anti-war protests were a kind of terrorist action, Lyndon Johnson used this term to refer to Vietcong actions against US troops. None of them considered CIA bombing, kidnapping, or mutilation of civilians as a terrorist action (Gascón, 2023). This difficulty has historical and political roots. Defining terrorism means choosing a political side not just because the term is used in situations of armed conflicts but also because of its negative political connotations. In other words, one may say that "terrorism may well be the most politicized term in the political vocabulary these days. Used as a label for a certain form of political violence, it reflects, if it 'sticks', negatively on a political opponent, demonizing him and de-legitimizing his conduct" (Schmidt,



2011, p. 40). We must thus keep in mind the fact that the main difficulty of the task presented before someone who tries to define terrorism is the difficulty in choosing a political side: “One man's terrorist is another man's freedom fighter” (Eichhorst, 2006).

This message can grasp the main difficulty in defining terrorism: terrorism is not solely a juridical concept. On the contrary, it encompasses many political, ideological, and even religious questions, making the presentation of a comprehensive definition of terrorism a difficult or even impossible mission for some (Barczak, 2021). Nevertheless, specific attacks and international conflicts have led to a continual effort by nations and international organizations to define and regulate terrorism. After the 1934 assassination of King Alexander of Yugoslavia by a Macedonian separatist, the League of Nations drafted an international Convention to repress the crime of terrorism and another treaty establishing an international criminal court to prosecute it. In this treaty, terrorism was “as ‘criminal acts directed against a [foreign] State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.’ (Saul, 2006). However, this treaty has never been accepted by the international community. As a result, despite the existence of over twenty international treaties on the subject of terrorism, these treaties have never been fully implemented. To this day, there is no comprehensive definition of terrorism at the international level. This lack of consensus grants national legislatures a broad range of possibilities in determining the notion of terrorism and its associated consequences (Thürer; Schwendimann, 2006).

The rise of extremism in modern societies has made this task even more challenging. With the virulence of online speech, the examination of appropriate limits on freedom of expression in the digital age is of particular importance. There are several examples to support this view. In the aftermath of the 9/11 terror attacks, the world has witnessed numerous efforts in the search for the concept of terrorism. Based on a proposal from Indian representatives, the UN Draft of Comprehensive Terrorism Convention proposes to define terrorism as situations in which a person 'unlawfully and intentionally' causes: '[d]eath or serious bodily injury to any person'; '[s]erious damage to public or private property'; or '[d]amage to property, places, facilities, or systems... resulting or likely to result in major economic loss' (UNGA Sixth Committee, 2001, annex I, 16). The purpose of such conduct, by its nature or context, must be “to intimidate a population, or to compel a government or an international organization to



do or abstain from doing any act”. There is no further requirement for these acts to be politically motivated. The treaty would exclude its offenses from the political offense exception to extradition.

The legal and international difficulties that arise from such a concept are evident. To begin with, one must grapple with the question of who may be labeled as terrorists in cases of political distress. One might argue that it is anyone who causes unnecessary civilian suffering, but then the problem becomes defining what we mean by the term “unnecessary”. While it is easy to assert that bombing a school is a monstrous and unnecessary act, when we mention that Hitler was residing inside this same school, people begin to contemplate the concept at stake (Saul, 2006). This does not justify the bombing of the school but illustrates that the same act can be labeled as terrorism not solely based on its human consequences but rather depending on the side of the political dispute people are aligned with. Regarding regulating freedom of expression, this characteristic of the terrorist concept can cause serious problems, the most salient being the possibility of the government using this same concept for political purposes.

3 TERRORISM, FEAR AND THE SUSPENSION OF HUMAN RIGHTS

The terrorist attacks in New Zealand in early 2019 were live-streamed on Facebook and quickly spread to other platforms, serving as a stark example of the extent to which individuals and groups committing acts of violence for political purposes are increasingly utilizing online platforms to disseminate hateful content. Similar attacks have occurred worldwide in schools, universities, shopping malls, airports, concert halls, and other public venues (Fisher, 2022). These acts have contributed to the cultivation of a pervasive state of fear that characterizes the concept of terrorism, simultaneously making its definition more elusive. In this sense, the fear of terrorism not only serves as a means to define the crime itself but also the exaggeration of this fear can promote a state of affairs where all actions are justified in combating the perceived terrorist enemy. It happens like a circle: when they act against civilians, terrorists want to spread panic and fear; in doing that, terrorists become targets of state authorities, who will tend to create mechanisms to suspend the rule of



law and fundamental rights so they may efficiently combat terrorists; but then terrorists will have another reason to act against the state and against civilians who support state actions, because they may consider that the rule of law was manipulated against them (Eichhorst, 2006). This causes the dissemination of the sentiment of fear, not only due to the constant feeling of an imminent attack but also because all the guarantees of the rule of law have been suspended for the sake of combating terrorism. Nevertheless, this feeling may not correspond to reality. Take the US, for instance: while in the period following the 9/11 attacks, the probability of an American dying in the United States as a result of terrorism remained steady at one in forty million; forty percent of Americans feared that they or a family member might become a victim of terrorism in 2018 (Coché, 2018).

Since fear is not a rational feeling, it is also highly probable that those who fear something will direct this sentiment against those who are considered strangers or foreigners. Moreover, since fear brings war and resentment against strangers, those who intend to combat terrorist activities will very likely act in a discriminatory way (Williamson, 2009). Again, in this case, fear is not the best advisor: while empirical evidence demonstrates that by far the most significant contemporary threat to American national security is from domestic right-wing extremism, a majority of Americans believe that Islamic extremism poses a more substantial threat (Coché, 2018). This implies that terrorism and extremism thrive on fear, and since fear is a personal and subjective emotion, the concept of terrorism becomes increasingly challenging to comprehend as it becomes more commonplace to discuss terrorism in everyday life.

This means that fear intensifies as the subject of this emotion is subjected to widespread and constant surveillance. Consequently, terrorism does not solely thrive on extreme ideologies advocated by groups and individuals. Its vitality and potency are also fueled by the panic instigated by states, which utilize the propagation of fear not only to combat terrorism but also to augment their power. This shows why there is a compelling government reason to regulate incitement to commit terrorist acts narrowly. However, this policy must be checked against government overreach to abuse civil liberties.

Significant speech-related concerns include whether terrorist communications fit traditionally and historically low-value categories (Stone, 2009). However, as in other



areas of law, a full range of considerations come into play when we consider human rights regulation, requiring a nuanced assessment of constitutional values and their application to specific cases. Sanctions against terrorist instigation must be drafted narrowly enough to protect the public while not interfering with the ability to make controversial statements. As important as this matter is for the preservation of public order, great care must be taken to preserve one's ability to dissent from accepted norms and institutions and to engage in contrarian politics while checking indeed threatening calls to commit terrorism. It is not permissible, for instance, to consider a role political movement as a terrorist without indicating specific actions of violence that the militants have caused. Notably, one must also consider that it is not possible to deduce from a specific terrorist act that all human rights may be suspended, akin to a state of exception as outlined and regulated by the International Covenant on Civil and Political Rights (Article 15), or the European Convention on Human Rights (Article 5). Such an action would signify an unauthorized and disproportionate expansion of state powers, as one single terrorist activity cannot be deemed a genuine threat against the existence of an entire democracy (Jestaedt, 2018). Likewise, the combat of terrorist activities may not bypass basic human rights notions, like respect for life, the prohibition of torture, and the due process of law (Thürer; Schwendimann, 2006). For this reason, criticism against the expansion of powers created by anti-terror legislation became commonplace in Western literature.

In the UK, several minority rights have been restricted in the course of British anti-terrorism measures, leading to stigmatization of religious or ethnic groups, practices of torture, and raising concerns regarding human rights to be protected from discrimination (Samour, 2020). Additionally, since 2013, the UK government has faced criticism for its involvement in extensive Internet surveillance, such as scanning massive amounts of data through wiretapping transatlantic fiber-optic cables, resulting in a violation of privacy rights and the right to liberty. This has led to the censorship of speakers and the banning of websites and organizations for non-violent extremism, posing challenges to freedom of expression. Germany faces similar issues. For example, the German Air Security Law of 2004 granted the defense minister the authority to order the shooting down of civilian airplanes to prevent a scenario similar to 9/11, violating the right to life and human dignity. Another example is the German data retention law, which goes against an EU directive and allows for the retention of



telecommunication metadata for six months. Therefore, the German Supreme Court found it unconstitutional. At last, Brazil's experience shows how the government tends to abuse its power when the relation of human rights and the combat of terrorism is at stake. Since the 2016 Olympics, the Brazilian federal police and the Intelligence Agency have monitored more than 600 people without knowing the targets.

The issue of freedom of speech is acute, as evidenced by the history of this human right. Indeed, given that speech can be curtailed simply by the threat of punishment, it is commonly asserted that freedom of speech can be subject to a kind of 'chilling effect': "This is so because the individual speaker usually gains very little personally from signing a petition, marching in a demonstration, handing out leaflets, or posting on a blog. Except in the most unusual circumstances, whether an individual speaks or not is unlikely to impact the world appreciably. Thus, if the individual knows he might go to jail for speaking out, he will often forego his right to speak" (Stone, 2009, p. 277). That is what is happening in the area of internet regulation.

4 TERRORISM AND CONTROL OF SOCIAL MEDIA

Terrorism is not new, but its proliferation on the Internet is. Since one of the most accepted characteristics of terrorism is the intention to spread fear among the public and influence governments on public issues, the way the terrorists communicate their ideologies to the public is one fundamental quest of their activities (Tiefenbrun, 2003; Eichhorst, 2006). On this topic, the EU Commissioner for Migration, Home Affairs, and Citizenship opined that '[m]any recent attacks in the EU have shown how terrorists misuse the internet to spread their messages' (Commission, 2019). This reflects the tendency of European officials at both the national and supranational levels to characterize online terrorist-related expression as an increasingly egregious threat to regional safety and security. Consequently, this has led to the imposition of the duty on online platforms to search for and remove content related to terrorism online. Nevertheless, there was no empirical evidence demonstrating a causal link between online terrorist-related speech and the Commission of subsequent terrorist acts (Coché, 2018).



While there is no shortage of assurances that increasing restrictions on freedom of speech is necessary to combat the harm resulting from online terrorist-related content, no support for the conclusion that such harm exists was ever proffered. Instead, the resulting damage is assumed. This is not to suggest that such support does not exist but that there should be an onus on the government to present relevant and compelling evidence, rather than general conclusions, to support sweeping reforms to existing regulatory frameworks that implicate fundamental human rights.

While the EU's influence on how counter-terrorism policy is conducted at the state level is limited by the principles of sovereignty and subsidiarity, in recent years, it has shown an increased concern regarding using intermediary platforms for disseminating terrorist-related content. To address the supposed harm resulting from online terrorist-related content, the EU and other European supranational bodies have adopted a framework of ostensibly cooperative initiatives under which many intermediaries make efforts to detect and remove terrorist-related expression. The internet industry and other stakeholders aim to reduce online terrorist-related content through this initiative. Underlying this framework is the principle that intermediaries have societal obligations to protect users by preventing third parties' misuse of their platforms (Klonick, 2017; Schutz, 2019). Notwithstanding the divergence at the national level regarding what type of terrorist content the law may proscribe consistent with the right to freedom of expression, there exists a broad consensus among EU Member States for the enactment of legislative and regulatory measures at the supranational and national levels for the swift detection and removal of online terrorist-related content (Coché, 2018).

This conclusion derives from the assumption that there is something unique about terrorist expression that warrants the creation of compulsory frameworks. In this vein, on 21 April 2021, the EU created a Regulation on preventing the dissemination of terrorist content online, establishing a new framework to prevent the 'misuse' of digital intermediaries in disseminating terrorist content online (2021/784 -EU TCO Regulation). This norm targets other forms of harmful online activity, including hate speech and child sexual abuse, by way of voluntary regulatory frameworks and singles out terrorist-related content for compulsory regulation. The Regulation rationale is based on generalized references on measures to tackle illegal online content effectively, which is that the online dissemination of terrorist-related content represents



a particularly egregious threat to regional safety and security that warrants aggressive measures not required to adequately address other forms of harmful online expression. In justifying the shift to a compulsory framework for the regulation of intermediaries, the EU points to the purported limitations of voluntary efforts, including that not all intermediaries have chosen to participate, and argues that the overall progress is insufficient to address the existing threat adequately (Coché, 2018).

The measures contained in the Regulation place unprecedented obligations on intermediaries, including, among other things, the removal of terrorist content within one hour of receiving a removal order from a Member State, a duty of care obligation to ensure that platforms are not used for the dissemination of terrorist content and, depending on the circumstances, a commitment to take proactive measures to protect their platforms better. Additionally, obligations are placed on Member States to institute financial penalties for failure to comply with removal orders. The definition of “terrorist content,” which applies to removal orders, referrals, and proactive measures, encompasses information “inciting or advocating, including by glorifying, the commission of terrorist offenses, thereby causing a danger that such acts be committed”. This definition reflects the European trend of adopting increasingly broad, vague definitions of terrorism glorification-related offenses. While it remains to be seen whether the Regulation becomes law and, if so, in what form, the initial draft exacerbated existing concerns regarding the dangers to freedom of expression resulting from aggressive efforts to regulate online content through intermediaries. Two critical questions arise from this regulation.

The first is related to how this new regulation would affect the protections afforded to intermediaries under the EU's Directive on Electronic Commerce ('the E-Commerce Directive'). The main objective of the E-Commerce Directive is to remove barriers to cross-border online services and provide legal certainty in cross-border transactions by limiting the civil liability for intermediaries concerning illegal content provided by third parties. To facilitate this objective, an intermediary is shielded from liability for hosting illegal content or acting as a 'mere conduit' in transmitting such content, provided that it does not have actual knowledge of the illegality or, upon obtaining such knowledge, acts expeditiously to remove access to it. Additionally, Member States may not impose general obligations on intermediaries to monitor their platforms for illegal content or to investigate circumstances indicating unlawful activity.



While the Regulation suggests that decisions by Member States to impose proportionate and specific proactive measures should not, in principle, lead to the imposition of a general obligation to monitor, it expressly permits Member States to derogate from the E-Commerce Directive by imposing proactive measures on intermediaries given the 'particularly grave risks associated with the dissemination of terrorist content.' Thus, not only is the EU maintaining that a shift to a compulsory framework is necessary to protect against the unique threat posed by terrorist-related expression on the Internet, but it is also claiming that this threat is so grave as to justify states derogating from the protections afforded to intermediaries under the E-Commerce Directive.

The second problem is related to the effects of this Regulation. Since platform operators need more time to analyze all aspects of presumed terror content, due to the regulation, these actors will face two options. The first would be to assume that all notices about terror content are guaranteed to present enough evidence to justify removing the content. The first problem here is the difficulty of the concept of terrorism: considering the historical difficulty of the international community in grasping this concept, it is difficult to envisage the possibility of social platforms doing this in a twenty-four-hour period. On this matter, the EU's new Directive about counter-terrorism measures will not help the intermediaries with the indication that terrorist acts shall be directed to intimidate a population seriously, unduly compelling a government or an international organization to perform or abstain from performing any act, and seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization. All these aims are abstract and, therefore, they must be analyzed in the political and cultural context. Since this evaluation needs time to be realized, it is difficult to realize how this Directive can help internet intermediaries combat terrorism online.

Furthermore, it must be considered that when it comes to dealing with the criminalization of terrorist attacks, social media tends to increase the public feelings of insecurity, leading to the amplification of hate and social outrage directed against minorities. Accepting the possibility of blocking not just terrorist propaganda but any mention of terrorism in social media will possibly lead not just to the stigmatization of these social groups but to their silencing since they will not have space to defend themselves. Here, the focus on the pursuit of terrorism prevention and the efficiency of



public security mechanisms is the cause of discrimination and stigmatization of religious and social minorities who are not treated by the regulation. Paradoxically, this kind of treatment is the very cause of the type of dissatisfaction and hate that causes terrorism (Samour, 2020).

In this sense, there would be a presumption of validity for exercising the right to freedom of speech. Even though platforms have an internal incentive to act this way, as they earn money with more content online, the reality is that platforms must exist in the first place. Without accepting the consequences of the law of the land, they will not be able to exist and operate (Klonick, 2018). Assuming that as a fact, the consequence will be understanding the obligation's implications to determine the content's validity within 24 hours. To comply with this obligation, the platform will then have to assume that every potential instance of terrorism online is to be treated as a case of illegal content, resulting in the overlocking of messages and ideas that are, in fact, not related to any violent act or terrorism online.

5 FINAL REMARKS

This essay tackles some key questions and problems surrounding the international regulation of online terrorism content. In this realm, the primary obstacle lies in the absence of an internationally accepted definition of terrorism. Without such a definition, even attempting to regulate its online dissemination becomes a near-impossible task since online platforms absent a precise orientation on this meter. Furthermore, national regulations, while well-intentioned, would be inherently limited. Terrorist groups could easily exploit the gaps and inconsistencies between national laws, rendering such regulations fragmented and ineffective. This highlights the need for an international approach to this issue, without which one cannot expect to tackle the questions and difficulties raised by online terms. However, simply adopting a specific definition of terrorism is not a solution. Governments can weaponize the very ambiguity, or "indeterminacy," of this concept to prosecute and silence minorities and political opposition. Moreover, this can create a chilling effect that might stifle online communication altogether. Ultimately, we have no simple solution for this problem, but we know the solutions presented could be better conceived.



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