# Der öffentliche Diskurs





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#### Marlene Straub (Hrsg.)

# Der öffentliche Diskurs

9/11, 20 Jahre später: eine verfassungsrechtliche Spurensuche



#### Vorwort

Die Anschläge vom 11. September 2001 waren nicht nur selbst ein mediales Ereignis, sondern haben auch die Leitplanken des medialen und des öffentlichen Diskurses nachhaltig verschoben. Diese Verschiebungen sind vielfältig und werden sowohl in der Presse- und Informations- als auch der Meinungsfreiheit sichtbar. Über die 10 Beiträge dieses Bandes hinweg zeigen wir auf, wie der Terrorismus, oder ganz allgemein die öffentliche Sicherheit, Regierungen auf der ganzen Welt verstärkt als Legitimationsgrund dient, den öffentlichen Zugang zu Informationen auf vielfältige Arten und Weisen einzuschränken. Diese Einschränkungen wiederum erschweren es, öffentliche Institutionen zur Verantwortung zu ziehen.

Doch genau das tun die Autor\*innen der Beiträge. Sie identifizieren über vier Kontinente hinweg erstaunlich ähnliche Argumentationsmuster, um im Namen der inneren Sicherheit die Presse-, Informations- und Meinungsfreiheiten einzuschränken, wobei diese Maßnahmen den Regierungen ein hohes Maß an Ermessensspielraum zuschreiben. Auffällig ist, wie wandelbar das Feindbild ist, auf das sich die Sicherheitsmaßnahmen beziehen, und wie dennoch im "Westen" etablierte diskriminierende Narrative global als Schablone dienen. In den letzten Jahren haben beispielsweise Regierungen in Indien und China vermehrt die im Westen verwendeten Bilder eines gewalttätigen Islam und

muslimischer Männer als Bedrohung und Terroristen instrumentalisiert, um nationale Minderheiten zu unterdrücken. In einer parallelen Entwicklung werden Journalist\*innen zum Schweigen gebracht, um Kritik an diesen Darstellungen und den darauffolgenden Maßnahmen zu ersticken. Vor diesem Hintergrund werden die Presse-, Informationsund Meinungsfreiheit zu Freiheiten, die aktiv geschützt werden müssen. Dieser Band mit 10 Beiträgen ist nach dem Band "9/11 und die Überwachung im öffentlichen Raum" der vierte in einer Reihe von siehen Bänden. Diese Buchreihe ist aus zwei Projekten des Verfassungsblogs hervorgegangen: Gefördert von der Bundeszentrale für Politische Bildung konnten wir im Rahmen des Projekts 9/11, 20 Jahre später: eine verfassungsrechtliche Spurensuche sieben Blog-Symposien realisieren. Unser vom Bundesministerium für Bildung und Forschung gefördertes Projekt Offener Zugang zu Öffentlichem Recht hat uns ermöglicht, aus diesen Symposium Bücher zu machen. Dabei wollen wir den digitalen Ursprung dieses Buches nicht leugnen: mit dem OR-Code auf der rechten Seite gelangen Leser\*innen direkt zum Blog-Symposium, und über die einzelnen QR- Codes, die den Beiträgen vorangestellt sind, zu den einzelnen Texten – eine Idee, die wir uns bei den Kolleg\*innen vom Theorieblog abgeguckt haben. Über diesen kleinen Umweg lassen sich die Quellen nachvollziehen, die in der Printversion an den ursprünglich verlinkten Stellen grau gehalten sind.



### Inhalt

The Impact of 9/11 on Freedom of Expression in the United States  Ash Bhagwat	11
Terrorism Law and the Erosion of Free Speech in the UK  Jacob Rowbottom	23
Terror-Struck: Freedom of Expression in France Charles Girard and Pierre Auriel	35
The Legacy of the War on Terror in the Philippines: A Total War Against Dissent and Democratic Decline  Jayson Lamchek	46
Constitutional Battles beyond China's Regulation of Online Terrorist  Ge Chen	59
"An Assault on the Constitution": Counterterrorism Laws and Freedom of Speech in India  M. Imran Parray	71
9/11 on Turkish Shores  Cem Tecimer	81
Anti-Terrorism Regulation and the Media in Uganda Florence Namasinga Selnes	92
The Moderation of Extremist Content is Prone to Error, Causing Real-World Harm	
Jillian C. York	105

# Terrorist Content Online and Threats to Freedom of Expression: From Legal Restrictions to Choreographed Content Moderation

Joan Barata 117

#### Ash Bhagwat

# The Impact of 9/11 on Freedom of Expression in the United States



 $\Gamma$  his online symposium seeks to consider what impact, globally, the terrorist attacks of September 11, 2001 had on freedom of expression and media liberty. The underlying hypothesis of the symposium seems to be that the impact has been uniformly negative, with governments invoking national security concerns to justify crackdowns on both dissident speech and media liberty. That some such impacts have occurred, even in democratic countries, cannot be doubted. Furthermore, any number of autocratic or autocratic-leaning countries such as Russia, Turkey, and increasingly India have undoubtedly used often-concocted terrorism concerns to suppress political opposition. In the United States, however, the actual impact of 9/11 and the subsequent "War on Terror" on speech and press freedoms has been complex, and in many ways much less than expected. In fact, free speech rights vis-à-vis the government remain largely robust in the United States; the real conflicts and issues today concern the role of private internet companies, notably social media, in restricting free speech.

#### Background: the First Amendment law of incitement

The First Amendment to the Constitution of the United States provides that "Congress shall make no law [...] abridging the freedom of speech, or of the press". Though by its terms the Amendment only restricts the power of Congress, the Supreme Court of the United States has interpreted the

provision to restrict the authority of all US governmental entities, at the federal as well as at the state and local levels. Though protections for freedom of speech and the press raise many difficult legal problems, one prominent issue that the Supreme Court has been struggling with for over a century, since the Court first seriously considered the meaning of the First Amendment in 1919, is the extent to which the First Amendment protects speech that promotes or "incites" violence.

For the first half century that it considered the issue, a majority of the Supreme Court gave very limited or no protection to speech inciting violence, albeit over dissents from Justices Oliver Wendell Holmes, Jr. and Louis Brandeis, two of the most highly respected Justices in American history. In 1969, however, the Court changed tack and adopted probably the most-speech protective standard in the world regarding incitement. In the case Brandenburg v. Ohio (which involved the prosecution of a leader of the Ku Klux Klan or KKK, a white-supremacist terrorist organisation), the Court said that speech could be prosecuted as incitement only if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action". And the Supreme Court subsequently clarified that prosecution under this standard is permissible only when violence is likely to, or does, occur immediately after the speech being prosecuted.

The Brandenburg decision is now 53 years old, but remains the binding standard determining when the government may punish speech that promotes violence in the United States. Truth be told, however, for the first 30 years of its existence, the standard produced little controversy. But then two things happened that reopened the debate. The first was, of course, the terrorist attack of September 11, 2001. The second was the emergence of the internet, and especially social media, as the primary modern vehicle for expression and the dissemination of propaganda, including terrorist recruitment. The 9/11 attacks reintroduced serious fears of widespread, politically motivated violence in the United States, a concern that had been dormant since the 1970s. The internet made it vastly easier for terrorist organisations, whether foreign or domestic, to secretly recruit individuals willing to engage in acts of terrorism without detection by law enforcement. As a consequence, when the American judicial system began to consider First Amendment challenges to terrorism laws and prosecutions, it was operating in a wholly new and changed environment.

#### Terrorism and the First Amendment in the courts

Since 9/11, the United States Supreme Court has only decided one First Amendment case involving terrorism laws (prosecuting the planning or commission of actual violence does not, of course, implicate the First Amendment), and

the case did not involve actual terrorists. The *Holder v. Humanitarian Law Project* case, decided in 2010, was a challenge to a federal statute forbidding the provision of material support to designated foreign terrorist organisations, or FTOs (the State Department maintains a list of designated FTOs). It was brought by a group of lawyers and human rights activists who wished to provide training to support the nonviolent activities of two designated FTOs (the Tamil Tigers and the Kurdish Workers' Party). The plaintiffs argued that applying the material support statute to their speech (since training is, of course, speech) violated the First Amendment because their proposed trainings could in no way contribute to or support the FTOs' violent actions.

The Supreme Court acknowledged that applying material support law to this kind of activity did in fact burden First Amendment rights, but ultimately a majority of the Court concluded that the government's interest in restraining *all* activities of FTOs was sufficiently powerful to justify the burden on First Amendment rights. Crucially, moreover, the Court deferred to the government's argument that as a factual matter, even nonviolent training can under some circumstances advance terrorism. What was notable about the *Humanitarian Law Project* decision was not the result (which was surely predictable), but the fact that the Court did not weaken existing First Amendment law in the case. Even its willingness to defer to the government,

which it would not normally do in a First Amendment case, had precedent in other cases arising implicating national security concerns.

Unlike the Supreme Court, lower federal courts have had many occasions to consider the application of the First Amendment to terrorist prosecutions, mainly under the same material support statute upheld in *Humanitarian Law Project*. The best that can be said about these decisions is that they have essentially always found creative, perhaps even unprincipled, ways to reject First Amendment claims in such cases without altering existing law. For example, in 2011 the federal government obtained a terrorism conviction against a young man, a native-born US citizen living in Massachusetts, named Tarek Mehanna. The essence of the government's case at trial was that Mehanna materially supported Al Qaeda by translating Al Qaeda propaganda into English and then distributing it on the internet.

The difficulty with this theory is that in *Humanitarian Law Project* the Supreme Court had specifically said that independent speech in support of FTOs was protected by the First Amendment, and that that conviction for materials support required proof of coordination with the FTO. In the Mehanna case, however, the prosecution presented no evidence that Mehanna had ever been in touch with Al Oaeda.

Ultimately, an appellate court affirmed Mehanna's conviction based on a separate trip he had made to Yemen in 2004 (also a dubious ground for factual reasons, but one that avoided the First Amendment issue).

Another area where courts have elided rather than confronted First Amendment issues concerns prosecutions for donations of money to FTOs, of which there have been many (I discuss these and other terrorism prosecutions implicating the First Amendment in a scholarly article available here). In those cases, courts tended to quickly reject First Amendment claims with flat, unsupported statements that the First Amendment does not protect the right to support terrorism, and that the donation of money is not speech. The difficulty with this argument is that in other contexts, notably challenges to campaign finance regulation, the Supreme Court and lower courts have consistently held that contribution of money is protected by the First Amendment, albeit as a form of association rather than speech. Indeed, just last year the Supreme Court reaffirmed the principle that financial contributions are a form of protected association. This is not to say that the First Amendment prohibits prosecuting individuals for donating money to FTOs – to the contrary, the reasoning of *Humanitarian* Law Project clearly suggests that the government interest in fighting terrorism is strong enough to overcome any burden on First Amendment rights. But what is noteworthy is

that the lower courts did not even seriously contend with the First Amendment issues in these cases.

In short, the manner in which the courts have handled terrorism cases implicating the First Amendment is somewhat disheartening. As they did before in the Red Scare prosecutions of Socialists following World War II, and of Communists during the Cold War McCarthy era, courts have not taken the First Amendment seriously in these cases. That is perhaps inevitable in a world in which judges, like their fellow citizens, feel threatened and afraid. But it is nonetheless an important lesson about the limits of constitutional law

#### The stability of First Amendment law and the role of social media

In other ways, however, the courts' conduct since 9/11 offers some hope. Most notably, despite calls from prominent academics to do so, the Supreme Court has *not* reconsidered or weakened the *Brandenburg* standard governing protections for incitement of violence. Thus whether or not the lower courts adhered in practice to *Brandenburg* in terrorism cases following 9/11, the standard continues to protect speech today. Furthermore, the United States continues to provide strong constitutional protections to so-called "hate speech" (that is to say, speech which denigrates groups based on characteristics such as race, religion, sex, or sexual orientation), unlike most other western democracies. Indeed, the

Supreme Court recently unanimously reaffirmed that such speech receives full First Amendment protection. However one feels about protection for hate speech (and reasonable people surely differ on this question), it is noteworthy that the Supreme Court has not opened the door for the use of hate speech laws to target speech favouring terrorism, as has happened elsewhere. The edifice of First Amendment law, in other words, has emerged unscathed from the post-9/11 era, despite failures of implementation.

Lest one celebrate this fact too much, however, it is worth considering why this has happened. It is not because either the courts, the government, or society have become tolerant of terrorist recruitment or propaganda. It is rather that suppression or criminal prosecution of such speech by the government has become unnecessary. The reason is the rise of social media. In the early years after 9/11, the internet was a chaotic place, and the only entities able to control over speech on the internet were governments. Then things changed. YouTube was founded in 2005, and was purchased by Google in 2006. Twitter was founded in 2006. And also in 2006, Facebook became available to the general public. All of these services famously enjoyed massive growth in subsequent years, and within ten years they became the dominant platforms for speech on the internet (add Google's search feature and that dominance becomes close to absolute). As a result, suddenly new potential speech police had emerged.

And best of all (from the point of view of anti-terrorism policy), because these platforms are not governmental actors, they are not subject to the strictures of the First Amendment.

And in fact over the years, because of some combination of public pressure and their own preferences, these platforms adopted policies designed to suppress terrorist propaganda and recruitment. Thus, while speech praising or promoting terrorism or terrorist groups is fully protected by the First Amendment (unless it also calls for immediate violence), it is prohibited by Facebook's Community Standards, Twitter's rules, and YouTube's Community Guidelines. So long as these platforms enforce their own policies, then, the government need not become involved, and the First Amendment becomes irrelevant. Admittedly, the platforms have been less than fully effective in their enforcement efforts – but they have struggled in more in countries such as Myanmar and Sri Lanka than in the United States or Europe. In the West, the platforms have been fairly – though of course not perfectly – effective in restricting terrorist propaganda and recruitment.

What is ironic here is that it is the concentration of control over social media and the Internet in a handful of Silicon Valley firms – a development that has been widely decried by politicians of all stripes, around the world – that permits this centralised control and suppression of terrorist propa-

ganda. Meaning that if, as some policymakers are advocating, anti-competition laws are used to break up the major platforms, then the need for government control of speech, and with it the free speech issues surrounding terrorism that courts struggled with in the early years after 9/11, will reemerge. We might call this the law of unintended consequences.

#### Jacob Rowbottom

# Terrorism Law and the Erosion of Free Speech in the UK



The response to the 9/11 attacks, along with the attacks in Madrid in 2004 and London in 2005, resulted in the curtailment of a range of liberties. In the years that followed, various statutes were enacted to strengthen powers to investigate and counter the terrorist threat. The antiterrorism laws had an impact on expression rights via controls on the content of publications, and through powers of search and surveillance. The horrifying nature and unpredictability of the attacks meant that in the UK, the extensions of state power had considerable public support in the years following 9/11.

The laws were designed to facilitate early interventions to combat terrorist activity. While useful to authorities dealing with an unpredictable threat, there are several factors that provide a potent recipe to erode expression rights. First, the laws are cast in broad terms and set a relatively low threshold for the restriction of speech. As a result, the laws have the potential to criminalise and restrict those who pose no terrorist threat. Secondly, the laws place considerable discretion in the hands of enforcement agencies when deciding who to target. Thirdly, as the threat of terrorism evolves, there is a continuing pressure to incrementally expand the law. Finally, while civil liberties groups have warned of the dangers of such laws, the political climate has enabled governments to press ahead with limited political cost.

#### 9/11 and the consolidation of anti-terror laws

Before considering the impact on free speech, the response to 9/11 in the UK has to be placed in the broader context. The UK already had a long history of anti-terrorism laws, with various measures enacted primarily to tackle the threats relating to Northern Ireland. However, as the political situation surrounding Northern Ireland changed in the late 1990s, the government undertook a comprehensive overhaul of the legislation and reframed anti-terrorism laws. Under the Terrorism Act 2000, terrorism was defined in general terms referring to certain activities furthering political, religious and ideological causes. That definition provided the basis for a number of government powers, such as the power to proscribe organisations "concerned with terrorism". That part of the legal framework was already in place in the UK prior to 9/11.

The response to 9/11 also has to be assessed alongside the development of the digital media. The transformation of communications in the last two decades has allowed for terrorist propaganda to circulate and reach new audiences. People already attracted to extremist ideologies have the chance to meet like-minded people online, exchange ideas and reinforce one another's viewpoints. This in itself has changed the sources of terrorist threats, posing a greater risk of decentralised activities from actors that are not part of an organisation. At the same time, digital media

have provided opportunities for the authorities to engage in covert surveillance of communications and to gather evidence from the digital data trail.

While several factors explain the development of antiterror laws, the 9/11 attacks were a wake-up call that underlined the severity and sources of the threat. The prevention of terrorism became a priority for government, with police and intelligence services gaining more resources and powers. An obvious goal was to enable law enforcement to intervene at the earliest stages. However, early intervention involves a degree of speculation about those likely or at risk of pursuing terrorist activities. The goal of prevention also meant that the government sought to prohibit the ideas that lead people to support terrorist causes, in the hope that it would stop people even contemplating the commission of terrorist acts.

#### Speech crimes and early intervention

In pursuit of these goals, Parliament enacted controls on speech that apply a lower threshold than for crimes of incitement. For example, the publication of content that encourages or induces terrorism became a criminal offence in 2006. The offence was enacted in response to a Council of Europe requirement to criminalise the public provocation of terrorist offences. The UK version of the offence, however, goes beyond the European requirements and extends

to statements that glorify the commission or preparation of a terrorist act (in such a way as to suggest the act should be emulated). That offence was built on an already broad definition of terrorism, and can be committed where the publisher is reckless and even if the statement is unlikely to influence anyone. These laws could thereby criminalise speech that is remote from any likely acts of terrorism. Legal scholar Andrew Cornford has noted that the offence can curtail "the freedoms to discuss controversial topics openly, and to share moral, political and religious opinions".

A separate terrorism offence prohibits the *possession* of information "of a kind likely to be useful to a person committing or preparing an act of terrorism". The law treats such information as a type of weapon, so to possess it is deemed to be a wrong. The courts have interpreted this law to apply only to information designed to provide practical assistance to a terrorist, such as bomb making instructions. Despite this limitation, the offence is still notable for the range of information potentially covered and the fact it does not require any intention to use the information for terrorist purposes.

The offence offers a number of advantages for a preventive strategy, as prosecuting the possession of information allows for intervention long before any terrorist acts are planned or committed. Proving the possession of information will also be easier than showing evidence of a terror-

ist plot. However, the mere possession of such information may not be a reliable marker to identify a future terrorist. A person might look at a bomb making video out of curiosity, with no prospect of acting on the information.

The two offences show how the post-9/11 settlement places considerable trust in the authorities to decide who should face a criminal sanction. For example, there may be much information in circulation that would provide practical assistance to a terrorist, and not every possessor can be prosecuted. The offence is therefore more likely to be enforced against those people that come under the suspicion of the authorities, for whatever reason, and be subject to an investigation that detects the possession of the information. As such, the possession offence may in practice function as a proxy for a different activity or wrongdoing that brought the person under suspicion in the first place.

#### Search and surveillance

In addition to controls on publications, anti-terrorism laws also include broad powers to investigate potential terrorist activities. For example, search powers will be a necessary part of a preventive strategy. However, the courts have noted that the bar for exercising search powers under the Terrorism Act 2000 has been set "at quite a low level". By casting a wide net, such powers can be used in relation to

journalists and other publishers. The spouse of a journalist who had played a central role in publishing the Edward Snowden disclosures was stopped at a border using powers under the Terrorism Act. The case raised complex legal issues and the court found that additional safeguards are necessary to protect journalists. However, the case illustrated the potential for investigative powers designed to combat terrorism (broadly defined) to overlap with goals of national security and government secrecy (and potentially be used to avoid political embarrassment).

A further example arises with powers of surveillance. In 2016, the UK enacted the Investigatory Powers Act, which allows law enforcement agencies to intercept communications and communications data. While the powers are defended as a way to gather intelligence and prevent acts of terrorism, there are knock on effects for privacy and expression rights. For example, there are concerns about the adequacy of the safeguards to protect the identity of journalists' sources being discovered. There are also the broader concerns about the general chilling effects on expression that result from surveillance. While civil liberties groups have expressed strong criticism of the Act, the system has not yet prompted a broader public backlash. That may be the result of both public willingness to accept measures that are said to combat terrorism, and the lack of visibility of such controls

#### The continuing terrorist threat and expansion of controls

The threat of terrorism has not gone away, and there continue to be amendments to expand the controls on expression and association rights. Some of the amendments respond to changes in the ways that terrorist content is disseminated. In 2019, it became a criminal offence not only to possess information useful to a terrorist, but to view or access it. The amendment aims to deal with those who watch bomb making instructions via, for example, a streamed video without downloading or storing the content. However, the effect of the amendment is to widen the net and to pose a further risk of criminalising those who see such content in a moment of curiosity.

Other amendments have sought to expand the scope of the law. In 2019, the law was amended to criminalise the expression of an opinion or belief that is supportive of a proscribed organisation. That offence is committed where the speaker is reckless as to whether the statement will encourage people to support the organisation. The law therefore criminalises acts that are still remote from and do not encourage any actual terrorist acts. A person explaining why an organisation should not be proscribed in the first place could potentially fall foul of the provision.

Terrorist acts are unpredictable and after an attack it is common to consider what signals were missed that could have identified a threat. For example, those committing terrorist attacks are very likely to have read and possess terrorist propaganda. As a result, there have been calls for the government to consider making it an offence to *possess* certain types of terrorist propaganda. The line of argument is that such a possession offence would enable interventions at the earliest stages. However, while most terrorists are likely to have read such propaganda, not every reader will become a terrorist. While the call is not currently being pursued by the government, it shows how the desire for pre-emptive action can generate continuing demands for more powers and laws.

#### Where next?

The expansion of controls is likely to continue as the terrorist threat evolves. Twenty years ago, commentators noted the problem of identifying terrorist threats from largely decentralised networks of actors. That problem has been exacerbated with online radicalisation, seeing the rise of "lone wolf" actors, which will be harder still to predict. Moreover, the range of terrorist causes appears to have proliferated. In recent years, certain far right-wing extremist groups have been proscribed by the Secretary of State. MI5's website states that it has responsibility for handling threats from "Right Wing Terrorism" and "Left, Anarchist, and Single-Issue Terrorism". The Independent Reviewer on Terrorism

Legislation has commented that in response to the evolving threats "the UK is moving towards of the edges of what our law allows". In this environment, terrorist activity becomes harder to distinguish from extremism in general. As a result, we see debates about whether actors, such as incel groups, should be treated as terrorists. The nature of the controls are also evolving, as social media companies will soon be under legal obligations in the UK to stop the circulation of content prohibited under the publication and possession offences mentioned earlier.

The shift following 9/11 has been ongoing and has evolved. The desire to prevent and pre-empt terrorists has led to an expansive set of powers and criminal controls. In midst of such threats, it is easy to lose sight of the free speech issues. In an individual case, the types of speech subject to a criminal prosecution will often be deemed to be of low value, and easily traded off with the interest in public safety. As the existing laws get expanded through tweaks and amendments, the changes are incremental and thereby less likely to generate a public backlash. However, the free speech issues are significant and the pressure for expansion poses the risk of an ongoing erosion of the right to expression.

#### Charles Girard and Pierre Auriel

## Terror-Struck

Freedom of Expression in France



9/11 made a deep impression on French public opinion, altering perceptions of the threat of terrorism and the vulnerability of democracy. It was primarily, though, the jihadist attacks within the country in the 2010s that put freedom of expression to the test in France. Whether they were indiscriminate attacks on anonymous crowds – the simultaneous attacks in Paris and Saint-Denis on 13 November 2015; the lorry attack in Nice on 14 July 2016 – or murders targeting people because of their religion – pupils at Jewish schools in Toulouse in March 2012; customers in a Jewish supermarket in Paris on 9 January 2015; a priest in Saint-Étienne-du-Rouvray in July 2016 – or of their function – soldiers and police officers on several occasions –, these events led to the enactment of anti-terrorism legislation that has redefined the balance between security and civil liberties, including freedom of expression.

Some attacks actually involved freedom of expression very directly: the massacre on 7 January 2015 at the editorial offices of the magazine *Charlie Hebdo* (which had published cartoons of the prophet Muhammad), or the beheading of teacher Samuel Paty in the middle of the street on 16 October 2020 (who had shown some of those cartoons to his pupils), were both presented by the perpetrators as reprisals to punish blasphemers. Coming as part of a long string of targeted killings worldwide that began with the *fatwa* against Salman Rushdie in 1989, these murders

prompted new forms of self-censorship and revived controversies about the limits of freedom of expression in religious matters. The great emotional reaction stirred by these crimes was also exploited for political gain, with the defence of freedom of expression being hijacked by politicians in a paradoxical attempt to silence their opponents.

First-hand experience of jihadist terrorism has therefore summoned up a treble danger for freedom of expression: restrictions are advocated for the purposes of bolstering public safety, of avoiding causing offence to religious beliefs, and even of defending freedom of expression itself.

## Glorifying terrorism and radicalisation

Terrorist attacks have made the prevention of radicalisation a public policy requirement. The authorities have endeavoured to prevent jihadist indoctrination so as to avert the commission of attacks. An undertaking of this kind specifically involves the monitoring of terrorism-related speech, not only because of its immediate danger but also because of its influence on hearts and minds.

A recent demonstration of this approach is the law of 24 August 2021, *strengthening the respect of the French Republic's principles*, which tightens state control over pronouncements made in places of worship. Stiffer penalties have been introduced for religious ministers in the event they should

provoke discrimination, hatred or violence. A religious minister found guilty of making utterances glorifying jihadist terrorism may concomitantly be prohibited from attending a place of worship in the future. The prefect may close places of worship where such utterances are repeatedly proffered.

Endeavours to prevent radicalisation have led legislators to contemplate imposing substantial limitations on freedom of expression. On three occasions, the Constitutional Council has rejected provisions that would make it an offence to consult on a habitual basis websites glorifying terrorism. It formed the view that merely accessing jihadist content did not have a sufficiently direct connection with terrorist violence to warrant it being made an offence.

Alongside the *ex post* monitoring of utterances glorifying jihadist terrorism, places conducive to their circulation are now subject to active surveillance by state agencies. In addition to websites and mosques, prisons have come in for particular attention because of the presence of persons found guilty of offences related to jihadist terrorism, as well as individuals deemed liable to become radicalised through their influence. In addition to deradicalisation programmes, the prison authorities have introduced solitary confinement for anyone who is radicalised so as to avert any proselytism. These policies have come in for harsh criticism from the French Inspector of Prisons, because they allow the author-

ities to systematically monitor inmates' communications with third parties. Their freedom of expression, which is already restrained, is thereby denied so as to prevent the recruitment of new terrorists.

### Blasphemy and religious sensitivities

The primary aim of targeted killings of news reporters, writers or artists accused of blasphemy is to silence their like by establishing a climate of fear through repeated acts of murder. The initial publication of the twelve drawings depicting Muhammad by the Iyllands-Posten in 2005 was already intended at the time, according to the Danish paper, as a response to self-censorship concerning Islam, further to the killing of Theo Van Gogh the year before. That publication initiated a sequence that led to the Charlie Hebdo massacre and Samuel Paty's murder. The dissuasive effect of those attacks, while confirmed by testimony about cancelled exhibitions or topics avoided in the classroom, is hard to gauge. However, it is easy to identify the explicit calls for self-censorship they prompted. Some commentators suggested not publishing caricatures, since, although they form part of the national tradition of satirical drawings in the press and are legal in French law, in other contexts they are not readily understood and appear outrageously blasphemous.

However, outright calls for a redefinition of the legal limits on freedom of expression were rare. They came for the most part from representatives of the Roman Catholic Church. Pope Francis reacted to the attack against *Charlie Hebdo* by affirming that freedom of expression should be practised "without giving offence". However, the offence of blasphemy was abolished in France by articles 10 and 11 of the *Declaration of the Rights of Man and of the Citizen* and by the 1881 Press Freedom Act. Under the Fifth Republic, the courts have consistently reiterated that freedom of expression cannot be limited other than by the 1881 Press Freedom Act, which does not recognise any right not to be offended.

However, religious groups have sought to reinstate the offence of blasphemy in a new guise, no longer as an outrage against the divinity but as an infringement of religious feelings. This argument had already been made by Catholic associations seeking a ban on Jacques Rivette's screen adaptation of Diderot's *The Nun* in 1966. It was taken up again by Muslim and Christian groups to denounce the publication of the *Satanic Verses* and the screening of Martin Scorsese's *The Last Temptation of Christ* in 1989.

Now for the first time this line of argument has been taken up not just by religious figures but by intellectuals engaged in the fight against discrimination and especially discrimination against Muslims. It has been suggested that the protection French law affords to speech that is offensive to believers is incompatible with article 1 of the French Constitution which states that the Republic "respects all beliefs". Yet, this claim is based on a clear failure to distinguish between the neutrality of the *state* with regard to all beliefs (religious or otherwise) and the right of *individuals* to freedom of expression. French law does not place private individuals or entities under any obligation to show themselves to be "respectful" of religious beliefs (or any other beliefs) when expressing themselves. Any statutory duty of the kind, the implications of which are unclear, would leave little scope for open discussion of religious issues, or of moral and political ones for that matter.

The appropriation by new actors of the argument invoking a speaker's alleged obligation to respect religious beliefs is intended, among other things, to counter the discourse that seeks to stigmatise French Muslims by instrumentalizing the defence of freedom of expression against terrorism. However, this reaction is tantamount to suggesting that freedom should be limited so as to counter the pronouncements of those who instrumentalize it. The outcome is a pernicious failure to separate the question of freedom of expression from the question of the fight against racism and discrimination. One particularly disturbing consequence of this is the erasing of that all-important difference between offensive speech that importunes beliefs and hate speech that attacks people.

## Censorship in the name of freedom of expression

A further aim of jihadist attacks is to deepen divisions within the societies that they strike - tensions between Muslims and non-Muslims but also between supporters of contrasting understandings of terrorism or Islam. In France, the attacks have turned the defence of freedom of expression against terrorists into a watchword to rally around, but also into a tempting rhetorical weapon for those out to silence their opponents. This dynamic became apparent within hours of the Charlie Hebdo massacre. In the name of the defence of freedom of expression, enjoinders to be silent immediately sprang up, waving the threat of an accusation of complicity with the terrorists. They were aimed both at critics of the satirical magazine, suspected of conniving tacitly with the terrorists, and at cartoonists, accused of playing into the terrorists' hands by misusing this freedom. These would-be defences of freedom of expression failed to realize that it can be endangered not just by murderers and state censorship but also by intimidation and social pressure.

The temptation to invoke freedom of expression to silence opponents has spread to the governmental sphere in recent years. After the murder of Samuel Paty, France's Education Minister joined in a media campaign against "Islamoleftists" who supposedly populated universities, student unions and left-wing political parties, asserting that they "promote an ideology which then, from time to time, leads

to the very worst". This rhetoric, designed to compromise diverse actors on the political left by associating them with jihadist terrorism, makes a dual call on the defence of freedom of expression: by dismissing the opponents so designated as being on the side of the armed enemies of this freedom and by suggesting those same opponents impose an informal censorship in some parts of society. For that matter, as controversies come and go, Islamo-leftism has found itself associated with cancel culture and then wokism, to form a putative threat that seems all the more menacing because it is indeterminate.

Rhetoric of this kind encourages self-censorship, out of fear of being publicly branded the ally of murderers and the enemy of freedom of expression. It may also lead on to legal forms of censorship. In this respect, academic freedom has been in the crosshairs, after France's Ministers of Education and Higher Education, backed by conservative intellectuals, depicted the universities as being blighted by dangerous and liberticidal ideologies. An amendment was passed by the Senate in October 2020 – before being entirely rewritten – so as to "maintain the freedom to teach", further to the murder of Samuel Paty. What it proposed, however, was to limit academic freedoms, stating that they "are exercised in keeping with the Republic's values". It being uncertain what the content of such values might be, since they supposedly go beyond the laws already in force, an obligation of the kind

would have lent itself to all sorts of disquieting political interpretations. The defence of freedom with regard to the terrorist threat is thus invoked to justify disturbing attempts to extend political control over universities.

The threat created by jihadist terrorism for freedom of expression is a particularly serious one in that it operates on several levels. It provides an incentive to sacrifice freedom of expression for the fight against terrorism, it impels people to avoid forms of expression that the killers condemn, and it provides political actors with an effective pretext for silencing or censuring certain voices. Genuinely defending this freedom means not giving ground on any of these fronts.

#### Jayson Lamchek

# The Legacy of the War on Terror in the Philippines

A Total War Against Dissent and Democratic Decline



"Without facts, you can't have the truth; without the truth, you can't have trust. Without any of these, democracy as we know it is dead."

- Maria Ressa, 2021 Nobel peace prize laureate.

wenty years after 9/11, the definitive problems of democracy globally relate to disinformation and illiberal intolerance. The Philippines, an illustration of posttruth politics that has engulfed the world, is wracked by tensions between families and neighbours on account of support or resistance to an aggressive campaign against illegal drugs. Government-abetted abhorrence towards drug addicts spill over to violent treatment of quarantine rules violators (called pasaway) as well as to attacks on journalists reporting on disfavoured issues and events. How has the War on Terror contributed to this scenario? Can respect for human rights be preserved by taming counterterrorism and can law reform be used to extricate the country from this malady? I argue that the War on Terror considerably contributed to a turn towards authoritarianism in the Philippines, and that law reform offers a very limited kind of remedy.

### Philippines: the War on Terror as a war on dissent

#### Constructing the threat of terrorism

When US President George W. Bush declared a global War on Terror in 2001, the Philippines was among the first to join the "Coalition of the Willing". The cash strapped and unpopular government of Philippine President Gloria Arroyo clearly saw opportunity in the renewed alliance with the United States. But there was a slight problem. Terrorism in the Philippines was an obscure phenomenon previously associated by some to enigmatic groups with links to the dirty tricks department of military intelligence. If the Philippines was to join an open-ended global War on Terror, a threat of terrorism had to be identified that was more formidable and enduring.

In the beginning, proponents of the War on Terror found a convenient target in the Abu Sayyaf group that operated in the unruly southwestern part of Mindanao. The Abu Sayyaf is easily the most notorious of the criminal gangs that engaged in high-profile kidnappings for ransom of foreigners as well as beheadings and bombings that cemented their fearsome reputation.

In succeeding developments, counterterrorism also expanded to target the better-organized Moro Islamic Liberation Front (MILF) and the Communist Party of the Philippines-New People's Army (CPP-NPA). These organizations engaged in armed conflict with the government; previously regarded as insurgents, their new treatment as terrorists threatened to bring armed conflict with them to a decisive end, albeit through heightened military engagement with US participation. Luckily for the MILF, this was not

to be. Despite being linked to the Abu Sayyaf and Islamist organizations abroad, the MILF eventually evaded being officially tagged a terrorist by the US and Philippine governments. By 2014, the MILF and the Philippine government signed a comprehensive peace settlement; by 2018, President Duterte began implementing the agreement with the establishment of an expanded autonomous region for Muslim Mindanao called Bangsamoro.

But the communists weren't as fortunate. Their terrorist tagging by the US set off a chain reaction that led to the stalling of peace negotiations and the continuation of conflict.

# Political dissent, military operations, and anti-terrorism law

The targeting of the CPP-NPA as terrorists also had profound implications for Philippine civil society and its ability to voice dissenting views. Filipino Maoist communists had for decades, in the struggle against the Marcos dictatorship and successive post-EDSA governments, shaped and influenced Philippine social movements. They contributed political demands for socio-economic reforms and created counter-cultural practices that deeply challenged neoliberalism and conservative hegemony. In the renewed all-out war against the CPP-NPA, aboveground left-wing activists among unions, peasant organizations, the political party

Bayan Muna, and the like became fair game. Treated as fronts of the CPP-NPA and therefore also terrorists, the Philippine military subjected them to an aggressive grassroots campaign of vilification that resulted in hundreds of extrajudicial killings. Transnational human rights campaigning was to bring the rate of leftist killings down to a slow hum. But the devastating impact of these killings which continue to be felt in remote rural communities today mean the voices that used to decry land grabbing, environmental destruction, and human rights abuses against the downtrodden have largely been eliminated in those places. Impunity for the killings of activists gave the appearance of an unchanging and unchallengeable local reality.

What role did law play in all this? Philippine counterterrorism was largely an extrajudicial activity. Nevertheless, an anti-terrorism law was enacted in the Phil-ippines in 2007, six years after 9/11. The legislation is an ambiguous artefact of the times, and its significance is contested. On the one hand, the Philippine anti-terrorism law was the product of international pressure for the country to register the new global abhorrence towards terrorist acts in the criminal law. It was also testament to an increasingly confident thrust towards human rights-compliant counterterrorism (a view that counterterrorism can be governed by law and be made respectful of human rights). Thus, the anti-terrorism law was dubbed Human Security Act to emphasise

that what was being protected was not only state security narrowly conceived but the broader *human* security that included the freedom of individuals to enjoy rights.

On the other hand, the law was also vigorously opposed by a large part of Philippine civil society, i.e. those targeted by counterterrorist operations as we have mentioned. They were naturally not interested in embracing the War on Terror, and its institutionalization in the legal system. Instead, they engaged in campaigning against US military operations and the critique of terrorism discourse.

In practice, the anti-terrorism legislation was not utilized to transform counterterrorism from a predominantly extraordinary military activity into a normal everyday law and order activity where judges and lawyers in civilian courts might be expected to participate. Thus, for example, hardly anyone was prosecuted for terrorist acts defined under the anti-terrorism law, though military operations continued under the banner of counterterrorism. What the anti-terrorism law accomplished was not to tame or reign in counterterrorism as in the model of human rightscompliant counterterrorism, but simply to convey the international norms against terrorism into the Philippine setting. While extrajudicial killings were clearly illegal acts violative of human rights, the state could draw on international norms against terrorism to invoke a backdrop of an extraordinary fight against terrorists that gave its actions a

veneer of legitimacy. That is to say, it reproduced the discourse of the War on Terror in the Philippines, that critics had warned would poison public discourse, heighten enmity and imperil dialogue and peaceful solutions to structural and social problems.

# From the war on terror to the war on drugs

#### War on dissent continued

After the Philippines elected Rodrigo Duterte as president in 2016, human rights were challenged not only by the War on Terror but also by the War on Drugs which has overtaken it in terms of lethality. Duterte has risen to prominence as a politician who espoused an aggressive campaign against street-level drug peddlers and addicts, winning the highest office on election promises of killing tens of thousands of undesirables from the nation's cities and towns. While targeting addicts not activists, the War on Drugs was also a war on dissent. It is also about controlling the space for alternatives to the socio-economic system he presided, as well as to his highly personal authoritarian rule. By scapegoating drug addicts for the ills of society, the War on Drugs deflected attention away from the real work of reforming failing economic policies and dismantling oppressive social structures. It also energised a substantial segment of the people, weaponizing them with disinformation, and unleashing angry virtual mobs against his critics.

In a new low point for human rights, Duterte made an enemy out of human rights advocates, and rejected the notion that human rights were a measure of the validity of government conduct. Previous governments, of course, also disrespected human rights in practice (most obviously, in the counterinsurgency context), but rarely if at all did they openly challenge the rhetoric of human rights; they simply denied they committed systematic violations but professed adherence to the rhetoric of human rights. Duterte abandoned even this pretence, and led in a new public discourse celebrating the dehumanisation of criminals and enemies.

Just as the War on Terror allowed, indeed required, the construction of terrorists, the War on Drugs enabled Duterte to construct the threat posed by illegal drugs. Indeed, he chose his targets almost at will. A central instrument of Duterte's power was the matrices and drug watch lists with which he implicated hundreds of individuals in illegal activities without evidence and due process of law. Through these lists, Duterte pronounced on fates of everyone, judges, police and military officials, political rivals and local officials included. The War on Terror and the War on Drugs were not simply aggressive campaigns against ill-defined enemies. In an important sense, they provided a common template for exercising power and governing the people; the formula being simulate empowerment by rallying the people against undesirable, eliminable *others* (including the poor against

themselves). By legitimizing executives' exercise of violence against people whom they determined were fit for extermination or neutralization, and indeed mobilizing people's support for these actions, the War on Terror and the War on Drugs have reshaped ideas and practices of democracy towards forms alien to constitutionalism and human rights.

#### New anti-terrorism law: continuities

It is perhaps telling that a new anti-terrorism law was adopted in the Philippines in 2020 at the height of the COVID pandemic in the Philippines. Seeing dangers in challengers and critics to his (mis)handling of the health crisis, Duterte securitized the pandemic. Even the spontaneous sharing of food and pantry items – the so-called "community pantry", a nationwide phenomenon – was not spared from suspicion. Duterte engaged in a renewal of the discourse of terrorism by opportunistic enemies, casting the protesting hungry masses as manipulated by the left.

The new anti-terrorism law signifies a number of continuities. First, the continuity of the transnational pressure to keep international counterterrorism norms reflected in domestic laws. This pressure was perhaps best described as ritualistic. The siege of Marawi city in northern Mindanao by ISIS-affiliated groups in 2017 was easily framed by international counterterrorism technical assistance teams and leg-

islators alike as the eruption of globally networked terrorism in Southeast Asia, warranting the updating of Philippine anti-terrorism law to the latest UN Security Councilinstigated standards. The almost technocratic concern for keeping Philippine anti-terrorism law up to date ignored the politics of terrorism in the Philippines. It ignored the likely political consequences of further expanding the powers of police and executive officials in countering terrorism in the context of a government and society ditching liberal values and transforming into authoritarianism.

Second, we also observe the continuity of resistance to anti-terrorism legislation on human rights grounds, as shown by Philippine civil society mobilization against the new law. In the international plane, mainstream human rights advocates have more or less embraced the discourse of a perpetual fight against terrorism (almost as if terrorism was a natural catastrophic phenomenon like climate change), asserting only a greater role for legal frameworks and the observance of human rights in its execution. In contrast to the ritualism of international proponents of counterterrorism, the resistance to the new anti-terrorism law in the Philippines was deeply political, involving the awareness of the political significance of the law for Duterte's hold on power at the time of COVID. It gestured towards an understanding of human rights, not in the legalist-reformist mode of perfecting the mechanisms of counterterrorism,

but as providing a thoroughgoing critique of the discourse of terrorism as authorizing a mode of power and rule.

#### Conclusion

There is a thread connecting the old US-led War on Terror to the new war on drugs, human rights and facts in the Philippines. Intolerance to dissent and a legacy of the killings of activists in the immediate post-9/11 period underpin and animate the workings of Duterte's War on Drugs, understood as a template of power. Through ritualism and profound disregard for the politics of terrorism, anti-terrorism law is implicated in the country's march towards authoritarianism. As long as the reform of counterterrorism is captured by an imagination of a perpetual War on Terror, it is unlikely to contribute towards a way out of the country's malady.

#### Ge Chen

# Constitutional Battles beyond China's Regulation of Online Terrorist



The Chinese government's suppression of Internet speech is almost legendary. It has waxed with critiques and curses. It has met with opposition at home and abroad. It has generated attention, research, investigation, and literature across the world. Yet, it has managed to forge. along with the Chinese Communist Party's (CCP) military force, an impregnable cornerstone of what Oxford professor Stein Ringen dubbed the Party-state's "perfect dictatorship". In essence, authoritarian states are all worried about uncontrolled internet speech and the menace it may pose to the monopolistic rule of this form of government and its leadership. As early as 2009, the Shanghai Cooperation Organisation presaged the advent of an "information war" in an agreement that aligns authoritarian states. In 2015, China enacted the National Security Act (NSA), art. 25 of which prescribes "cyber sovereignty". This term conceptualises the presumptuous assertion of state sovereignty in a virtual environment and the weaponisation of the internet. Presumably, such an overall information war is also targeted at terrorist speech. Indeed, art. 19 of the Counterterrorism Act lays down the principle of combatting terrorist speech in accordance with relevant online speech regulations. Therefore, in order to understand China's approach to terrorist speech, it is indispensable to go beyond and understand the entire picture of China's developing agenda of taming internet speech.

### A regulatory framework of vaque speech consequentialism

At a landmark plenary session in 2014, the CCP pledged to turn its resolution of redefining and retooling the Partystate structure into national laws. Thus, the ensuing seven vears witnessed the proliferation of China's laws and regulations on internet speech in an unprecedented manner, particularly the 2018 constitutional amendment which upgrades the CCP's disciplinary organs into a constitutional power and allows it to oversee the speech of all public servants. The current legal framework of internet speech regulation is found primarily under a skein of legal sources including China's Constitution, laws issued by the National People's Congress (China's central legislature), regulations enacted by the State Council and its constituent ministries and departments (China's central government), as well as the judicial interpretations of the Supreme People's Court (SPC/China's highest judicial authority). Basically, this patchwork of online speech regulation coalesces around China's constitutional mandates of speech protection on the one hand and its restrictions on the other. In a Marxist-Leninist one-party state, however, the focus is always on the regulatory side. There are three types of constitutional caveats against "misuse of internet speech" in China, each dotted with various forms of speech-repressive rules geared toward speech consequentialism.

The first caveat, and one of utmost importance, places national interests with "national security" at the very top. All recent laws including the NSA, the Cybersecurity Act (2016), the Anti-Espionage Act (2017), and the Counterterrorism Act (2018) refer to this fundamental, vet ambiguously defined concept. In most cases, "national security" covers such online speech that criticises the government, its officials and its policies, which could all amount to incitement or subversion. Alternatively, speech that supposedly "divulges national secrets" may also be considered a potential threat endangering the regime. Besides, the Counterterrorism Act defines "terrorism" in terms of "the aim to realise political, ideological and other purposes". Vague as these accusations may be, the punishments are always clear: online speakers could be fined, warned, administratively detained. or penalised.

The second caveat concerns societal interests. Any online speech with the potential of arousing social chaos, confusion, and, ultimately, collective action would be deemed socially and politically harmful. This is also a case defined by the Counterterrorism Act. Such speakers run the risk of a criminal offence under the title of "seeking a quarrel to make trouble". Strategically, censors and prosecutors would also place most online speech related to incitement and sedition under this open-ended category, so as to avoid wider attention and criticism for their prosecution of po-

litical dissidents. "Socially harmful speech" may include mass protests and insulting national flags. But it may also cover pornography and online rumours. The latter represents one of China's recent legal developments in controlling the "irresponsible spread of online speech". In practice, however, government authorities often muffle whistleblowers by virtue of this speech-restrictive rule, notably, in case of a pandemic that could be ascribed to government ineptitude. The final caveat addresses individual interests. This type of online speech regulation aims to restrict speech in the name of protecting one's right to equal status, reputation, privacy, and copyright. Above all, the Counterterrorism Act emphasises the threats of online hate and extremist speech. The regulation may result in prosecution of speech that often triggers the government's radical reaction to ethnical tension, religious intransigence, regional confrontation, or gender discrimination. But such regulations could also be targeted at defamation and libel. Where speech is not connected directly to government concerns, enforcement can be linked to one's material losses such as economic loss due to an infringement. A notable form of defamation is created under China's 2018 Act on the Protection of Heroes and Martyrs, which bans any alleged insult or defamation of those persons the state defines as heroes or martyrs. Under this law, even an online parody of such a person was subject to prosecution.

#### Extraterritoriality: How long can an authoritarian long-arm be?

Armed with such a speech-repressive regime, China's authoritarian state aims to expand its global influence through long-arm regulation of internet speech including terrorist speech. At its 19th Congress, the CCP claimed to "move toward the centre of the global stage". This was a clarion call that reverberates in all fields of the internet ranging from political speech to commercial and academic speech. While contemporary online speech governance dwells on a co-existential triangle consisting of states, speech platforms, and end users, China's authoritarian model of speech regulation turns both media platforms and users into passive recipients of its orders. Art. 43 of the Cybersecurity Act establishes the notice and takedown measures for Internet Service Providers (ISPs) in a comprehensive manner, which predates Germany's Network Enforcement Act (Netzwerkdurchsetzungsgesetz/NetzDG). In fact, this is merely an extension of its entrenched online censorship regime. Indeed, art. 49 of this Act subjects this system of speech surveillance to government supervision, and art. 50 empowers government authorities to block overseas information transfer where they perceive any danger. These principles are enshrined in art. 19 of the Counterterrorism Act and generate global chilling effects.

More recently, China's Cyberspace Administration has published new draft regulations to ban the use and abet-

ted use of VPNs to visit overseas websites, while making a feigned gesture of "soliciting public comments" on the authoritarian regime's adamant step forward of heightening the penalty for seeking and receiving overseas information. For individual users whose fingers on the keyboard tremble under a variety of draconian censorship rules, this draft is merely a final punch of a rivet in sealing the coffin. However, this measure may be just supplementary to a series of rules against multinational internet and high-tech companies that used to run lucrative business in China. The CCP is well aware of the tremendous ripple effects on digital trade and e-commerce of the other side of the Pacific Ocean: when it decides to regulate internet speech and punish large domestic social media, shareholders on Wall Street will feel the pain in their accounts, the National Basketball Association will swallow the pill of self-censorship for fear of losing market shares in China, and Microsoft will have to close its localised version of LinkedIn.

Compared with the US, Europe appears to be even more vulnerable to China's online speech regulations. Rather than in business, the most salient examples of chilling effects come from academic, educational and cultural sectors. In 2017, the world's biggest academic book publisher Springer was found to have blocked access to politically sensitive titles in China, after Cambridge University Press received orders from Chinese authorities to censor similar ti-

tles there. Indeed, there are several important voices questioning whether China bought its way into UK universities, considering the huge educational services and research partnerships that exist between the two countries. More recently, a Confucius Institute at two German universities turned down a book talk concerning China's paramount leader, causing the debate on whether Germany's academic freedom is decided in Beijing. In France, two universities in Lyon had to end their partnership with the Confucius Institute earlier, when officials from Beijing required the French side to revise its curriculum in favour of the Chinese government's ideology.

# The rise of Chinese constitutionalism: Is it a moment of constitutional rot for western democracies?

As analysed above, a comprehensive framework of regulating online speech, including terrorist speech, is embedded in China's constitutional framework since its famous 2018 amendment, which removed the term limit of the state chairman and consecrated the "Xi Jinping Thought" as the country's new ideological guideline. Thus, the Constitution upholsters the infrastructure of the Party-state in an age of a universally digitalised world. With that, the Chinese state accomplishes its stunning turn toward legalising a politically repressive regime.

In a sense, these outright impacts of China's online speech regulations are corollaries of the rise of "Chinese constitutionalism", a self-conflicting term created in an authoritarian state that didn't draw much attention when it emerged toward the end of China's post-Deng reform era. However, it has become more outstanding with the rise of China's self-asserted global political influence. In the eyes of several Chinese constitutional lawyers, Chinese constitutionalism is based on, connected with, and much akin to the political philosophy developed by the German jurist Carl Schmitt, a member of the Nazi Party. That political theory was *inter alia* criticised for endorsing totalitarian power by highlighting the enemy of the regime and instrumentalising law to realise political goals.

The aforementioned CCP legal agenda dating back to 2014 fits into this theoretical framework. In fact, "rule by law" (instrumentalising law for political goals) in lieu of the rule of law was the political wisdom of ancient Chinese rulers. As early as in the second century B.C., a Chinese political theorist remarked that "righteousness and kindness are the cutting edge of a prince, while power and laws are merely his knife and axe" (夫仁義恩厚,人主之芒刃也;權勢法制,人主之斤斧也). This approach of combining law and morality to rule a country is echoed astoundingly by the dichotomy of "law of justice and law of love" (loi de justice et loi d'amour) which served, ultimately, to restrict the press free-

dom in France in the 19th century. This dualistic view of law and politics was adopted by China's former State Chairman Jiang, but Chairman Xi's view of law is more inward-looking and adjacent to what I'd call "I am the law" (*le droit, c'est moi*). This version of rule-by-law tactics is still way far from what Fredrick the Great, an enlightened despot of Prussia in the 18th century, embraced as a first step toward the rule of law (*Rechtsstaatlichkeit*).

As Balkin argues, every liberal democracy may face a period of "constitutional rot" at different stages of political stagnancy. Surely China's thriving authoritarian system of speech regulation envisages, at least for itself, a rapidly falling western civilisation that it aims to conquer by its information war and disinformation campaigns. It is against this backdrop that China's belligerent "wolf warrior diplomacy" is propagating its belief on a large scale. Chinese diplomats are carrying out this show in an increasingly fierce manner on various social media platforms in liberal democracies, though ordinary Chinese in the mainland are forbidden to visit any overseas websites.

Western countries are standing up to this online information war in alliance. Australia says no. France says no. Germany says no. The UK says no. Not to say the Sino-US relationship is plummeting to the hell on a steady track – partly owing to this online information war. Perhaps there are no visible physical conflicts. Perhaps authoritarian and liberal

rules of regulating terrorist speech are highly identical on a technical level. But there is a hardly reconcilable, fundamental clash of two types of constitutional values that treat free speech, which aims to ensure one's core access to political participation, in different ways: one regime's survival relies on a flourishing scenario of internet speech, while the other's survival relies on a moribund one. Everyone who wants to keep this right alive should remember what Plato taught us: "One of the penalties for refusing to participate in politics is that you end up being governed by your inferiors." So did the CCP remember the words well before 1949. Hardly will one do after 1984 arrives.

# M. Imran Parray

# "An Assault on the Constitution"

Counterterrorism Laws and Freedom of Speech in India



n a cold and snowy January night, an army contingent cordoned off a house in a sleepy village in Kashmir, the northernmost Himalayan territory embroiled in decades of conflict. The house belonged to Sajad Gul, a local journalist. After some questioning by the men in uniform outside his home, he was taken away in a jeep, only to be handed over to the police. Gul, who works with Srinagar-based online news magazine, *The Kashmir Walla*, was charged under the Public Safety Act – a preventive detention law that activists observe has been widely misused in Jammu and Kashmir – for spreading disinformation through his "fake tweets" concerning an "anti-terror" operation. In the opinion of police, the journalist's activities were prejudicial to the sovereignty of the country and his social media account disseminated information against the "national interests".

The reporter's family, colleagues, and journalist federations have contested the charges and are calling for his release. "My son writes the truth", Gul's mother Gulshana Bano told a journalist. According to Fahad Shah, editor of *The Kashmir Walla*, "Sajad always reported what was happening – what the people told him. Every story goes through a process of factchecking and editing. But journalism has been criminalised in Kashmir. Now, you can be booked under Public Safety Act for your reporting. Draconian, highly condemnable." Gul is not the only journalist from the region – or for that matter across India – to

be arrested for his work. A growing number of journalists and activists have been charged under various legal provisions. Asif Sultan, a Srinagar-based journalist, has been in prison since August 2018, when he was arrested under charges of being "in contact" with indigenous rebel group Hizbul Mujahideen and for "glorifying" militants in his news reports. Sultan was arrested under the Unlawful Activities (Prevention) Act, a notorious counterterrorism law applicable throughout India. His employer, family and local journalist unions have all denied the charges and challenged Sultan's detention. But Sultan remains behind the bars despite global calls for his release. However, during his imprisonment, the Washington D.C.-based National Press Club awarded Sultan with the John Aubuchon Press Freedom Award 2019 for his reporting to "disclose the truth in trying circumstances". According to NPC members, the spectacular case of Sultan "reflects worsening conditions for the press and citizenry in Kashmir" and that it was "completely unacceptable for India to violate the basic human rights of reporters and to deny the people of Kashmir access to unfiltered information through an unfettered press".

What is worth examining here is not the denial and violation of human rights alone but the use of counterterrorism laws across India on journalists, activists and members of civil society. Many petitions have been filed in Indian courts of law with activists arguing that anti-terror laws are used

as tools to muzzle dissent. In December 2021, the Government of India revealed in the Parliament that between 2018 and 2020, 57 percent of those arrested under the Unlawful Activities (Prevention) Act were below 30 years of age.

A spectacular case of another journalist facing terror charges is that of Siddique Kappan who was arrested by police in the north Indian state of Uttar Pradesh when he was on his way to Hathras, a small village, where a young Dalit girl was reportedly gangraped and murdered. Kappan's continued detention has been termed by many as an "assault on India's constitution".

### British colonialism, 9/11, and the spectre of terror

Global and regional terrorism is a major backdrop of this increasing assault on the constitution. A consequence of the 9/11 attacks in the United States and the December 13 attack on the Indian Parliament was India's strengthening of its counter-terrorism apparatus. New anti-terror laws such as the Prevention of Terrorism Act (POTA) and the Unlawful Activities (Prevention) Act (UAPA) were added to the existing arsenal of legal provisions. Critical legal scholarship traces the genesis of these laws in British colonialism. Colonial authorities made widespread misuse of laws like the East India Company Act of 1784, the Defence of India Acts of 1915 and 1939, the Government of India Act of 1919, the Rowlatt Act of 1919, and the Bengal Criminal Law Amendment Act of

1925, often trying leaders of Indian nationalist struggle to "safeguard national security".

The post-colonial Indian state extended this colonial hangover by enacting laws like the Terrorist and Disruptive Activities (Prevention) Act of 1987 (TADA), the exercise of which resulted in what C. Raj Kumar observes "widespread torture, arbitrary detention, and harassment of mostly innocent citizens". Counterterrorism laws have been enacted at both federal and state levels in India. While the Armed Forces (Special Powers) Act, TADA, POTA, and UAPA were passed by the Indian Parliament, from time to time, state governments have enacted their own laws. Among them are the J&K Public Safety Act, Maharashtra Control of Organized Crime Act, Karnataka Control of Organised Crime Act, and Chhattisgarh Vishesh Jan Suraksha Adhiniyam.

The Indian state has for long recognised that such legal provisions are vital for the security of the state but antiterrorism laws on the whole have been found to be draconian, the misuse of which have severely impacted human rights and civil liberties. Because of prevalence of militant struggles, Kashmir and parts of the northeast have been othered by the Indian state as potential threats to the country's sovereignty. The left-leaning Maoist and Naxalite movements in central India, rebellion in the Punjab, and the so-called "Islamic terrorism with international linkages" are also projected as major security fault lines. As a result, the

widespread misuse of counterterrorism laws has resulted in large-scale human rights violations. Indeed, according to the Indian government's own assessments, the draconian AFSPA has resulted in the highest number of rights violations in Jammu and Kashmir followed by Assam, a northeastern state.

### "State of exception"

I argue that this complex interlocking of securitization and freedom of expression in India poses a serious challenge to democratic ideals of free speech. What is witnessed today is an increased targeting of journalists and activists across India. In particular, conflict-ridden regions have presented a more serious situation where journalists are subjected to assassinations, life threats, imprisonment, and accusations to conspire with the enemies of the state. This stifling cycle exposes the vulnerabilities of India's peripheries such as Kashmir and the northeast, the territoriality of which is embroiled in disputes with neighbouring countries such as Pakistan and China. The growing practice of muzzling the press and forums of public debate with draconian laws has thus created a culture of fear among the civil society, which directly affects the quality of democracy and free speech.

Elsewhere, I have shown how local journalists on India's fringes often resort to self-censorship in response to

widespread misuse of counter-terrorism laws against journalists and activists. In the wake of the 9/11 attacks, as is the case in India, it has become increasingly clear that democratic states hide behind the veneer of security and countering terrorism arguments while imposing severe restrictions on free speech.

Journalist Shujaat Bukhari, who was assassinated by unknown gunmen outside his office in Srinagar on 14 June 2018, observed that counterterrorism laws have been systematically used by the Indian state to repress the press in Kashmir. During the 1990s, local newspapers and journalists were charged under the Terrorist and Disruptive Act for "supporting" the local movement. The Press Council of India, however, noted in its 1991 report, *Crisis and Credibility*, that such charges and accusations were "totally counterproductive and wrong".

The continued use/misuse of counterterrorism laws perpetuates what Giorgio Agamben calls "a state of exception". In this state of exception, citizens are not only stripped off their civil liberties via suspension of their rights but they are also eliminated because of their differences with the political power. The degree of freedom with which legal institutions transcend the law itself in perpetuation of the state of exception is quite staggering. The Unlawful Activities (Prevention) Act and Public Safety Act, for instance, allow for the government to imprison activists, political leaders, and jour-

nalists without trial for years. Why Kashmir as a peripheral region in particular assumes a complex position with regard to the use of counterterrorism laws is the incidence of numbers alone. Since 2019, more than 2300 people have been booked under UAPA in Jammu and Kashmir, out of which 46 percent are still in jail. Many in Kashmir believe that use of UAPA against journalists, activists, and internet users is a collective punishment and a way to "control souls".

### New paradigm of security

Agamben argues that "an unprecedented generalisation of the paradigm of security as the normal technique of government" has supplanted the notion of the state of exception. In this context, the use of counterterrorism laws by the Indian state has reached a stage where the invocation of laws on journalists, activists, and citizens appears to be a normal technique in the governance of the population's conduct. In view of the frequency and number of such cases, it seems the state of exception has the tendency to endure in the future. The endurance of the security paradigm in India can hardly be challenged by "international actors", when the security paradigm as a discourse folds international actors and nation states into a single mould of complex transactions of power.

### Cem Tecimer

### 9/11 on Turkish Shores



Neither 9/11 nor its aftershocks resulted in a dramatic shift in the Turkish public sphere. However, the coup attempt of 2016 provoked government measures to rapidly shrink the public sphere. In this post, I explore why it was not 9/11 but the coup attempt of 2016 that turned out to be Turkey's "9/11 moment".

### Why 9/11 did not hit Turkish shores

The 9/11 attacks exposed the precariousness of the public sphere. As the United States and many parts of the Western world struggled to come to terms with how such an attack so close to "home" could have happened, Turkey experienced an aftershock in 2003. That year, Al Qaeda terrorists attacked strategic financial, diplomatic, and religious centres in Istanbul. Bombs exploded near a global bank, a consular building, and several synagogues, which collectively led to the death of around 60 people and left more than 750 injured.

Yet, these terrorist attacks did not result in an immediate "post-9/11 mentality" in the Turkish state apparatus. No immediate or restrictive measures were taken to amend the Turkish Anti-Terrorism Law, for example. Neither did the government initiate or double down on its efforts to shrink the public sphere by increasing its surveillance activities. Turkish intelligence no doubt investigated the attacks, as did the Turkish police forces and judiciary, but the political

elites and the country hardly experienced a "rally around the flag" moment as was arguably the case in the United States under the Bush presidency. Nor did Turkish legal scholars argue in favour of state-sanctioned torture, unlike some of their American colleagues. In short and on balance, Turkey did not adopt a "post-9/11 mentality".

How come? Why did Turkey, perhaps surprisingly, not pursue mass surveillance, more intrusive means of monitoring public and private life, as well as tighter anti-terrorism measures during the early 2000s? That Turkey did not give a knee jerk reaction in the face of terrorism, in and of itself, points to a potential flaw in our collective post-9/11 narrative, which is our erroneous tendency to lump the post-9/11 experiences of a multitude of countries in a single basket. That is a mistake. 9/11 itself, as well as its aftershocks, were perceived differently by each and every country, and perhaps *especially* differently in Turkey for a variety of reasons.

For one, despite resulting in tragic losses, the Istanbul bombings were not comparable in scale to what happened in the United States; hence, my use of the word "aftershock" to describe the Istanbul bombings of 2003. Second, the fact that 9/11 happened on American soil especially shocked the American psyche and, of course, the American military complex, which had not witnessed a foreign attack of such scale since the Pearl Harbor bombings. That was hardly the sentiment in Turkey when the 2003 bombings happened.

Thirdly, and perhaps most importantly, Turkey is a Muslimmajority country, which arguably afforded Turkey a distinct advantage over other Western countries struggling with effective and proportionate responses to terrorism perpetrated in the name of religion in the early 2000s: thanks to its Muslim-majority population, as well as its political elites reflecting that demography, Turkey avoided the dangerous pitfall of associating one religion or a particular interpretation thereof with terrorism, thereby also avoiding discriminatory practices on religious grounds in its enforcement of anti-terrorism measures. Fourthly, Turkey was deeply engaged in the now-stalled European Union membership process in the early 2000s, which required relaxing draconian anti-terrorism laws. All of these factors collectively ensured that Turkey did not adopt the "post-9/11 mentality".

### Why the coup attempt was Turkey's 9/11 moment

The picture has become less rosy in the years since then, though. Turkey's knee jerk reaction followed in response to the coup attempt of 15 July 2016, as well as to public disturbances that have happened ever since. Indiscriminate purges within the judiciary and the bureaucracy in response to the coup attempt are a case in point: they went beyond even the government's stated purpose of ridding the civil service of Gulen-affiliated members, which the Turkish government and judiciary have designated as a terrorist orga-

nization responsible for the coup attempt. These purges quickly evolved into a purge of dissidents. In a tacit acknowledgment of its disproportionate reaction, the government set up a quasi-judicial commission tasked with reviewing applications from purged members of the civil service who believe they were unlawfully dismissed from their positions.

Since the coup attempt, there have been numerous government attempts to shrink the public sphere. Two instances stand out. The first involved a Turkish Constitutional Court decision invalidating a provision in the Law on Assemblies and Demonstrations prohibiting the freedom of assembly in inter-city highways. The majority of the Court ruled that the prohibition violated the constitutionally protected right to peaceful assembly, reasoning that in a free and democratic society, as a general rule, people should be allowed to choose the venue in which they prefer to exercise their rights. The ruling prompted harsh criticism from the government, such that the Minister of Interior, known for his polemical tone, chastised the Turkish Chief Justice for the ruling, attacking him for what the Minister considered to be a decision out of touch with reality. "Given that we're a free country [...] you don't need police protection", the Minister mockingly commented, addressing the Chief Justice. "Let's see if you can bike to work! [...] I'm ready to drive myself alone [to work]. How about you?" That the ruling prompted such attacks from the government may have to do

with the "Iustice March" led by the main opposition leader and member of Parliament, Kemal Kilicdaroglu. In 2017, in protest of the post-coup attempt measures taken by the government, he walked from the nation's capital Ankara all the way to Istanbul – spanning around 280 miles in roughly three weeks, all the while using numerous inter-city highways. Mr. Kilicdaroglu's march, which some thought was inspired by Gandhi's Salt March, was an inflection point in Turkish politics in many ways, but first and foremost, it was Exhibit A in demonstrating how the innovative use and the politicization of the public space and sphere – in this case inter-city highways - has the potential to disrupt competitive authoritarian regimes: many dissidents, regardless of party affiliation or politics, clustered around the main opposition leader during his march, marking the first moment of the multi-party coalition against the current government. Add to that the Gezi Park protests of 2013, which loom large in the minds of the ruling party members, who describe the protests as "riots" instigated by Western forces.

The second instance concerns the recent ban on recording video or audio of on-duty law enforcement personnel. The ban was introduced in early 2021 through a "circular" issued by the central police force, that is, through a simple administrative order rather than a law enacted by parliament. This particular prohibition demonstrated an extreme attempt to regulate the public sphere: clumsily based on the justifica-

tion that video and audio recordings of law enforcement personnel by citizens (especially via smartphones) interfered with the performance of their policing duties. The prohibition purportedly aimed to ensure the orderly performance of law enforcement. The Council of State, Turkey's highest administrative court, blocked the measure, pending a final review, ruling that the circular appears to be an infringement on the freedom of the press and that all such infringements, in order to be justified, need to be made via law as opposed to administrative measures.

What does this picture tell us about the public sphere in Turkey? Several things:

- Turkey did not experience an immediate shrinking of its public sphere in the immediate aftermath of 9/11, primarily because 9/11 or more precisely the 2003 bombings in Istanbul that I have referred to as Turkey's 9/11 "aftershock" was perceived differently in Turkey than in other parts of the world, including the US.
- The Turkish government's reaction to the use of public space by protesters deteriorated in terms of its disproportionality, in the aftermath of the coup attempt of 15 July 2016. In this sense, the failed coup attempt was, Turkey's 9/11 moment, so to speak.

- The government has relied on existing laws (e.g. the now-invalidated provision in the law prohibiting inter-city highway demonstrations) and also enacted its own measures (e.g. the administrative measure prohibiting citizens from recording on-duty law enforcement personnel, which the courts have now blocked, pending their full review) to shrink the public sphere.
- Despite this grim picture, as the two examples discussed above demonstrate, courts are cautiously willing to intervene and stop government incursions. Arguably, they are increasingly more willing to do so, which may very well have to do with the fact that the government's future election prospects are growing increasingly dim, as more and more polls indicate waning public support.
- A decrease in electoral support, in turn, makes it costlier for governing elites to use "rally 'round the flag" tactics in the face of serious national security threats to whittle away at the public sphere.

### Why the coup attempt - and not 9/11 - was Turkey's 9/11

So why was the coup attempt Turkey's 9/11 moment? Or for that matter, why was 9/11 some of the Western world's 9/11 moment?

The answer is complex. The *scale* of the coup attempt and the 9/11 attacks as well as their momentousness, that is, the fact that they happened in a relatively short period of *time*, might be part of the answer: perhaps when perpetrated quickly and impactfully, the gravity of the crime is better processed and understood by us. Additionally, our perceptions of what constitutes a threat versus a grave threat ultimately depends on our understanding of what crime rises to the level of threatening national security. The *identity* of the perpetrator matters. That the perpetrators of 9/11 identified as Muslim and perpetrated an attack on a predominantly non-Muslim nation surely had some significance. That the Turkish government believes that the coup attempt of 2016 was perpetrated by Gulen affiliates – once the government's stern ally, now its sworn enemy - surely mattered.

So, scale, timing, identity, and possibly many other factors, all matter. The definition of what constitutes a national security threat is therefore quite malleable and will be decided by authorities based on a combination of some or all of those factors. It's a matter of interpretation.

### Florence Namasinga Selnes

# Anti-Terrorism Regulation and the Media in Uganda



or the past 10 years, Uganda has been characterized by insecurity and general instability, including in form of citizen demonstrations against President Yoweri Museveni's government. Terrorist attacks (whether real or fabricated) not only lead to the loss of lives and property, but they instil fear among the population and exacerbate insecurity in this East African country. The government has swiftly invoked legislation to fight (suspected) terrorism, following the 2001 attacks in the US, the 2010 twin bombings in Kampala, and more recently, the attacks of October and November 2021.

I argue in this article that the government of Uganda (mis)uses the anti-terrorism law to target its opponents and to stifle debate on important issues that affect the country. The use of anti-terrorism regulation to suppress dissenting views reflects growing intolerance of criticism of President Yoweri Museveni's regime. Anti-terror law is invoked whenever it suits the authorities to limit individual freedoms of expression as well as freedom of the media.

### Regulating terrorism in Uganda

Uganda has since the early 2000s been a close ally of the US in the war against terrorism on the African continent. As such, Uganda passed an Anti-terrorism Act in 2002, with media reports in 2001 stating that the US urged for expeditious passing of this law. The law criminalizes perpetration,

planning, and participation in any terrorist activities. In so doing, anyone who engages in or carries out any act of terrorism faces death upon conviction. The law has since been amended thrice – in 2015, 2016 and 2017, bringing into being the Anti-terrorism (Amendment) Act 2017.

The Anti-terrorism Act brought into force and gave discretionary powers to the Directorate of Counterterrorism; the Counterterrorism Police Unit as well as the Joint Anti-Terrorism Taskforce to enforce the law and fight terrorism. The 2021 bomb attacks in Uganda strengthen the arguments for strong regulation and other counterterrorism measures taken by President Museveni's government. In October and November 2021 alone, four bomb attacks were reportedly carried out in Kampala. One such attack took place a few meters away from Kampala's central police station, while the second one occurred near the Parliament, reflecting the boldness of the attackers, and at the same time raising questions regarding their real identity.

As noted earlier, Uganda has experienced general instability in form of political demonstrations and a series of shootings of prominent people, including that of the assistant inspector general of police, Andrew Felix Kaweesi, in 2017. The Minister of Works and Transport, Katumba Wamala, survived an assassination attempt in June 2021 in an attack that left his daughter and driver dead. While the government usually blames this instability on terrorists, the situation

can be attributed to the growing unpopularity of President Museveni's regime. He has been president since 1986. His government immediately blamed the October and November 2021 bombings on the ADF – a rebel group that is based in the eastern Democratic Republic of Congo. Museveni's government has since the 1990s been at war with the ADF, a rebel group purportedly linked to the Islamic State, accusing it of carrying out several bomb attacks in the country.

The attacks strengthened the justification for implementing certain security measures in and outside Uganda. By the end of 2021, Uganda People's Defence Forces, the national military force, had entered the neighbouring DR Congo, in a joint military operation that is intended to dislodge the rebels and put an end to their terrorist activities that potentially threaten safety in Uganda.

Back home, the government reacted fast within its antiterrorism apparatus, by arresting and/or killing those suspected to be connected to ADF and the bombings on the spot. The law gives officials and security agencies discretionary powers to enforce it and hunt down alleged terrorists. Moreover, the law gives the Minister of Internal Affairs powers to appoint a security officer to investigate terrorism cases using means such as communication surveillance (section 18[1]). It is up to the so-called security officers to interpret the law. This is problematic; first, because the law does not provide for judicial or independent oversight over inves-

tigations and second, because it is broad and hence subject to abuse.

The 2021 bombings have evoked a discourse on terrorism within and outside, questioning the authenticity of the government's narrative that ADF is a terrorist group. As early as 2001, when the Anti-terrorism law was tabled as a bill in Parliament, there were concerns that the regulation would be used to target opponents of Museveni's government and suppress his critics under the guise of averting terrorism. The government's high-handedness in dealing with suspects, characterized by arbitrary arrests, torture, and extrajudicial killings raises evebrows and at the same time validates such sentiments. While I agree that terrorism ought to be fought, the Anti-terrorism Act is, as Unwanted Witness notes, repressive and contravenes international standards of freedom of expression. Aside from blatant violations of human rights, the law is a scarecrow that prevents those with genuine concerns from expressing themselves on matters relating to terrorism. Joseph Kasule, a Ugandan researcher, rightly highlights the dilemma facing Ugandans, when he observes that the government makes it almost treasonable to question the official narrative that the ADF rebels are behind some of these attacks. This point of view, unfortunately, paints an accurate picture of what is happening in different parts of the continent. Generally, criticizing leaders, questioning human rights violations, and reporting

critically on state violence are regarded as abetting or participating in terrorism.

### The anti-terrorism law, journalism, and freedom of the media

Journalism and news media are not spared. As early as 2001, media houses in Uganda regarded the anti-terrorism law as intended to stifle the political opposition, rather than curbing terrorism. For example, the 2002 Anti-Terrorism Act has a direct bearing on news media, as it criminalizes the publication and dissemination of information that may have any links to terrorism (section 11). The law also provides for interception of any form of communication such as letters, emails and telephone calls, electronic surveillance, monitoring of meetings as well as searching premises of any persons or organizations. These provisions influence media houses since they directly relate to the journalistic work of gathering, investigating, and publishing news. The military has on several occasions raided and ransacked premises of media houses and confiscated documents and computers in search of evidence that would implicate individual journalists and their employers.

The detention of Doreen Biira for abetting terrorism in November 2016 is a good example of how the government uses the law to suppress journalists. Biira was arrested for filming and sharing videos of military brutality in western Uganda, in clashes that left over 70 people dead. The journalist was charged with abetting terrorism, a criminal offence punishable with seven years' imprisonment upon conviction. This case awakened criticism of the anti-terrorism law and prompted human rights activists and journalists' organizations to pressurize the government into dropping the terrorism charges against Biira. Equating the journalists' work of relaying the actions of the army to terrorism ought to be condemned because it threatens the real essence of journalism. It promotes impunity and gives perpetrators of violence (against the citizenry) liberty to determine what should or should not be reported.

A terrorism charge is every journalist's worst fear, and it forces many to refrain from some journalistic activities. I interviewed several Uganda-based journalists in 2020 for a publication on counterterrorism laws and freedom of expression and I found that government agents use counterterrorism regulation as a weapon against critical reporting. For example, during the coverage of demonstrations, security agents can target "non-conforming" journalists and threaten to charge them with terrorism, something that potentially drives journalists into censorship. Journalists indicated that they sometimes refrain from interviewing sources out of fear of the repercussions that result from having contact with suspected terrorists. A newspaper journalist narrated an incident in which an anonymous caller wanted him

to interview a then suspected leader of the terrorist organization ADF. Under normal circumstances, this would have been a great opportunity any journalist would have taken up. Who would turn down an opportunity to interview such a source? But the journalist in question was skeptical about the tip and eventually missed the interview after consulting with his superiors. The journalist will never know whether he missed an exclusive moment to interview and write a story about one of the most wanted men in Uganda at the time. It is only certain that the journalist saved himself and his employer problems that would most likely arise from being in contact with and subsequently sourcing information from a suspected terrorist. What is peculiar about this story is that the journalist mostly feared that the anonymous caller could be a state agent on a mission to set up the journalist. Provisions in the anti-terrorism law relating to the interception of communication and surveillance directly affect journalists' interaction with sources, as well as journalists' ability to freely contact sources who authorities might label as terrorists (section 19[4, 5]). Since the law provides for unfettered powers for unlawful surveillance and investigation of citizens, the law is invoked to monitor all forms of journalistic communica-tion, potentially including communication with sources. Aside from contravening journalistic ideals, the law deters both journalists and sources from free expression.

### Media reporting of terrorism-related occurrences

I return to terrorist incidents in Uganda and the subsequent government responses to illustrate how terrorism regulation has a bearing on media reporting of terrorism cases. One of the problems with the incentives to not report on terrorism, outlined above, is that reporting on terrorism ends up unbalanced and skewed towards the government stance. A peek into local media reports on the 2021 bombings and the aftermath show coverage that generally lacks depth and analysis. Most of the reporting does not, for instance, question the quick and haphazard identification of alleged suspects, even in cases where the alleged suicide bombers perished in the explosions. In so doing, the media can be said to have promoted government narratives on terrorism by relaying reports from officials, in what I regard as shallow journalism. I, for example, expected the media to thoroughly critique the decision to deploy in DR Congo under the pretext of fighting terrorists because of the history of Uganda's involvement in the affairs of her neighbour in the west. In the past, independent news media provided critical coverage of Uganda's 1998 military invasion of DR Congo. Meanwhile, independent media houses such as the *Daily Monitor*, which endeared itself to readers through investigating and extensively covering government action (or inaction) on issues such as corruption and national security, mostly reported on briefings from government sources.

Now, the increased intolerance to critical journalism presents a dilemma for privately-owned media, for whom business is more important than investing in a story that has the potential to "kill" an outlet. The media ought to be forgiven for treading carefully in its reporting because of the terrorism tag attached to military action. For individual journalists, facing terrorism-related charges is chilling, as can be illustrated by the experience of a radio journalist who was arrested in 2011 over terrorism-related treason charges. While the case was dropped in 2018, the journalist decried the resources he spent on the case in addition to the psychological torture that he endured for seven years. Criminal charges of this nature drain journalists physically, financially, and mentally and slow down their career progress. Some reporters chose to leave journalism for less risky careers, while others resort to covering beats that pose no risks.

### Conclusion

Freedom of the media just like freedom of expression are provided for in the 1995 Constitution of Uganda, but spaces for exercising these rights are growing narrower by the day. Legal and physical harassment from the authorities threaten privately funded media institutions and deter journalists from covering and interrogating certain issues. There are, for example, contradicting reports on who was

behind the September and October 2021 bomb explosions. While the government of Uganda immediately identified suspected terrorists as associated with the ADF, the Islamic State issued a statement in which they claimed responsibility for the bombing and named the three suicide bombers involved in the attacks. *The Observer*, a local publication, dared to run an article that pits the government statement against that of the IS and asked, "who is the telling the truth about the Kampala twin bombings?"

Many Ugandans do not agree with the government about some of these terrorist incidents. Those who try to challenge the government narrative face imprisonment and trial. For example, journalist Timothy Kalyegira was sent to the country's maximum security prison in 2011, over reports that he doubted whether it was the al-Shabaab that bombed and killed over 70 football fans in the 11 July 2010 twin bombings. Whereas several Ugandans voiced their concerns through social media about government reports on the identities of the 2021 suicide bombers, few express themselves on the subject in offline spaces where they can be identified.

Discourse on terrorism is suppressed on two levels. One, the law on terrorism limits gathering and reporting of news related to terrorism. Two, reporting, commentary on terrorism cases is suppressed as one risks arrest and prosecution under different other criminal laws. Endemic court cases, threats of closure, raids of media houses' premises affect

journalism. This does not only impact the profession but the entire country's journey towards good governance, since the wings of the Fourth Estate are clipped to the extent that it is cautious about holding those who hold the instruments of power to account. This affects not only journalists and journalistic institutions but the entire Ugandan citizenry whose freedoms of information and expression on issues relating to terrorism are limited.

Terrorism should without a doubt be dealt with but the means with which it is addressed ought to be subject to criticism by independent institutions, such as the media. This is especially important for contexts where democracy is still developing.

### Jillian C. York

## The Moderation of Extremist Content is Prone to Error, Causing Real-World Harm



In the mid-1990s, a questionable and now-debunked study from an undergraduate student about the prevalence of pornographic imagery online sparked a TIME Magazine cover story, leading to a Congressional inquiry and eventually to the creation of the Communications Decency Act (CDA). The Act included a provision that imposed sanctions on anyone who "uses an interactive computer service to send to a specific person or persons under 18 years of age or [...] uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs".

Then-president Bill Clinton signed the Act into law in 1996, prompting opposition from civil rights groups. The American Civil Liberties Union (ACLU) filed a lawsuit, arguing that the censorship provisions of the CDA were unconstitutional because they would criminalize protected expression, as well as because the terms "indecency" and "patently offensive" were unconstitutionally vague. In a landmark 1997 ruling, the Supreme Court ruled that the CDA created an "unacceptably heavy burden on protected speech" that threatened to "torch a large segment of the Internet community". In the decision, Justice John Paul Stevens wrote that "the interest in encouraging freedom of expression in a

democratic society outweighs any theoretical but unproven benefit of censorship". <sup>1</sup>

The CDA was overturned and pornography eventually proliferated across the internet, but the debacle nevertheless had a lasting impact, creating a bright dividing line between sexually explicit websites and the rest of the web. By the time "Web 2.0" came around, most major sites had in place anti-obscenity policies, even in the absence of most other restrictions on speech.

As such, while pornography remains prevalent across the web, there has been a broad chilling effect on sexual expression, as well as the expression of non-sexual nudity and sexual health information. Government and company policies intended to keep lascivious content away from the eyes of minors (such as Facebook's complex community standard around nudity and sex) ultimately end up casting a wide net, preventing a range of expression and information-sharing.

### Old tactics, new purpose

Today, we are witnessing a similar phenomenon when it comes to extremist and terrorist content online: Policies intended to limit the ability of terrorist groups to organize, recruit, and incite – as well as for individuals to praise such groups – have been expanded in recent years and often result in the erasure of not only extremist expression, but human rights documentation, counterspeech, and art.

While some restrictions are legally required, many corporate anti-extremism policies were created in response to pressure from NGOs, governments, and the public and have little or no basis in law. For instance, while groups such as the Iranian Revolutionary Guard Corps (IRGC) are sanctioned by the United States and therefore cannot be hosted by US platforms, there is no law preventing individuals from discussing the merits of their role in Iranian society.

Despite that, companies like Facebook and Google have taken a particularly hard-line approach in recent years against such groups, relying on similar tools and tactics that have long been used to moderate sexually explicit content.

In the years following the repeal of the CDA, it was not only sexually explicit adult material that proliferated across the web, but also child sexual abuse imagery (CSAM). The need to swiftly remove such content (while causing as little harm to human content moderators as possible) required the creation of tools that could identify CSAM and automate its removal. The existence of a law enforcement database of CSAM made this relatively easy, as images that showed up online could be matched to those in an existing database. Thus, PhotoDNA – a technology that identifies CSAM and matches it to material in a database based on unique fingerprints, or hashes – was born. When images are detected, they are reported to the National Center for Missing and Exploited Children (NCMEC) as required by law.

The creator of PhotoDNA, Dr. Hany Farid – a professor at the University of California, Berkeley – suggested its use for detecting terrorist imagery, initially to little interest. But as the use of social media by groups such as the Islamic State increased in both sophistication and scale, companies began to adopt the technology, relying on a database run by the Global Internet Forum to Counter Terrorism (GIFCT). Though GIFCT member companies are not required to use the database, most do, at least in part.

# The trouble with defining "terrorism"

The race by companies to eradicate extremism is arguably more complex than the one to fight child sexual abuse imagery, however, and for a number of reasons. First, there is no globally agreed-upon definition of "terrorism", and throughout modern history, states have used the term to classify and deny rights to their opponents. A quick glance at the United States, European, and United Nations lists of terrorism organizations shows substantive differences in approach.

Second, most major social media platforms are subject to US law in some way or another, whether or not they are head-quartered in the United States. They must comply with certain US sanctions but are also under pressure to default to US classifications – classifications which are often political

in nature. Without an internationally agreed-upon definition of terrorism, companies – and by extension, the public – are forced to trust the GIFCT and its member companies' definition.

This has proven troublesome. All areas of content moderation include some errors, whether the moderation is undertaken by humans, artificial intelligence, or some combination of the two, and companies are not typically forthcoming about their error rates. When it comes to online extremism specifically, there is reason to believe that over-moderation is quite common, owing to the aforementioned complexities and the rigidity and typically binary nature of how content policies are enforced.

There are numerous illustrative examples that demonstrate the complexities of moderating extremist imagery. In 2017, for instance, an Emirati journalist posted a photo which featured a picture of Hezbollah leader Hassan Nasrallah with a rainbow Pride flag overlaid across it, intended as a satirical statement. Although satire is a permitted exception to the company's rules against terrorist content, the image was removed because it contained the photo of a designated terrorist. <sup>3</sup>

Documents leaked to the *Guardian* around the same time period demonstrated that Facebook moderators are trained to remove imagery that contains support, praise, or representation of terrorist groups, and to ignore those that are

presented in a neutral or critical fashion. But human moderators must make split-second decisions, and must therefore memorize the faces of numerous designated individuals. The propensity for error is apparent.

# Automation is error-prone

Automation seems even more prone to error than humans in this area. Training data libraries can create normative attributes for certain types of image classifications; for instance, a body with large breasts is assumed to belong to a woman.<sup>4</sup> The image of Nasrallah, then, presented without comment, would not be read as satirical if the machine learning algorithm was not trained to pick up on the overlaid rainbow flag.

Training a machine learning algorithm for the purpose of removing terrorist imagery requires the creation of a dataset that includes a significant amount of content in one category, which is then fed to the algorithm for training. For example, in order to accurately identify extremist content, a company like YouTube would create a set of data that it defines as extremist – such as a large number of ISIS videos – then feed that data to its algorithm. Any mistakes made by the algorithm can be difficult to understand – unless specifically designed to be interpretable, machine learning algorithms cannot be understood by humans.

Moderating text using machine-learning algorithms can be even more complex than moderating imagery. The Open Technology Institute describes the challenge thus: "In the case of content such as extremist content and hate speech. there are a range of nuanced variations in speech related to different groups and regions, and the context of this content can be critical in understanding whether or not it should be removed. As a result, developing comprehensive datasets for these categories of content is challenging, and developing and operationalizing a tool that can be reliably applied across different groups, regions, and sub-types of speech is also extremely difficult. In addition, the definition of what types of speech fall under these categories is much less clear." The Institute concludes that "these tools are limited in that they are unable to comprehend the nuances and contextual variations present in human speech".

It is not clear how much of the GIFCT database consists of human-identified versus machine-identified content, namely because the database has not been shared with any members of civil society focused on human rights (despite demands), and the GIFCT has offered minimal information about how the database functions. Unlike the databases used for identifying CSAM, the GIFCT database has no external oversight.

Thus, any error contained within the database is multiplied across the social web. And such errors abound: In addition to satirical content such as that in the previous example, documentation of human rights violations and violent conflict is regularly removed as well. According to Syrian Archive, a group that documents and archives such content, at least 206,077 videos documenting rights violations were made unavailable on YouTube between 2011 and May 2019.

It is no surprise that companies have undertaken such drastic measures against extremist content. Politicians, law enforcement, and other officials regularly engage in hyperbole that encourages strong action whilst ignoring the potential pitfalls. An oft-repeated quote from Commander Dean Haydon, of the Met's Counter Terrorism Command states that "Every tweet has the potential to radicalize vulnerable people", while terms like "eradicate" and "eliminate" have been used by efforts such as the Christchurch Call, an effort put forward by the governments of New Zealand and France following the attacks on a Christchurch mosque by a white supremacist in 2019.

The development of the Christchurch Call, a multistakeholder effort that includes governments, companies, and civil society and which works closely with the GIFCT, raises another key issue; that decisions about who is or not a terrorist, and who gets to make such a decision. The Christchurch Call was created in response to a white supremacist act of terror, and yet the focus of GIFCT – and ostensibly of the database it oversees – has been on Islamist groups such as ISIS and Al Qaeda. This demonstrates a clear disconnect in goals but also illuminates a core problem with the effort to "eradicate" terrorism: The world is not in agreement about what constitutes terrorism and, as previously mentioned, various (or perhaps most) governments have manipulated this term to suit their political goals. As such, the lack of oversight and minimal expert and civil society involvement is exceptionally troubling.

# References

- 1. Jillian C. York, Silicon Values: The Future of Free Speech Under Surveillance Capitalism, Verso 2021, p. 147.
- 2. Alex Schmid, Terrorism: The Definitional Problem, 36 Case Western Reserve Journal of International Law (2), 2004.
- 3. York, Silicon Values, p. 387.
- 4. York, Silicon Values, p. 388

### Ioan Barata

# Terrorist Content Online and Threats to Freedom of Expression

From Legal Restrictions to Choreographed Content Moderation



# I. Freedom of expression and threats to national security

A rticle 19 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to freedom of expression as a universal right and strictly limits the powers of states to impose restrictions and conditions to its exercise. However, paragraph 3 of the indicated article refers to preserving "national security or of public order" as one of the purposes that may justify the establishment of the mentioned limitations, provided that the principles of legality and necessity are respected.

Many states have used these general stipulations contained in international law to introduce in their countert-errorism legislation specific provisions criminalizing the dissemination of ideas or opinions that might incite, endorse, or stimulate the commission of terrorist acts. This is very sensitive territory. Drawing the line between extreme, controversial, or offensive yet politically motivated speech (thus particularly protected under human rights standards) and expressions that may trigger an unacceptable harm or danger might be particularly complicated in different contexts. Moreover, the impact of a wrong assessment in this field, in terms of free and open dissemination and discussion of ideas of all kinds, can be particularly negative.

Radical and extremist speech is generally protected under freedom of expression clauses, and it can only be restricted under exceptional, necessary, and proportionate circumstances. As the UN rapporteurs on freedom of expression have underscored, the concepts of "violent extremism" and "extremism" should not be used as the basis for restricting freedom of expression unless they are defined clearly and are "demonstrably necessary and proportionate to protect, in particular, the rights of others, national security or public order". The UN Special Rapporteur on the promotion and protection of fundamental human rights and freedoms in the fight against terrorism has also emphasized the need to restrict the criminalization of expressions to cases in which there is a "message to the public with the intention of inciting the commission of a terrorist crime, provided that such conduct, whether it advocates a terrorist crime or otherwise. leads to a risk of one or more crimes of such a nature being committed".

The fact that certain forms of radical or extremist speech are legal does not mean that they may not be potentially harmful or encourage processes of radicalisation that can lead, under certain circumstances and in connection to ulterior events, to violent actions. However, it is also important to underscore that we still know remarkably little about when extremist speech (either legal or illegal) leads to violence and how to prevent that from happening. This last aspect will be further elaborated in the next sections.

# II. Terrorist content online and the role of online platforms

From a human rights perspective, users of online platforms are generally protected by the freedom of expression when posting content online. However, such content is also subject to a series of private moderation rules, community standards or terms of service (ToS), defined by platforms themselves. These ToS define obligations, limits, and conditions beyond applicable legal provisions, and they are generally enforced across all users, independently from their location and the jurisdiction they are subjected to. This is particularly relevant regarding terrorist content online, as in parallel with national counterterrorist legislation and international standards, platforms have formulated their own and specific policies in this sensitive area.

These platform-internal efforts are the result of both internal and external pressure and factors. After the terrorist attacks in 2019 against two mosques in Christchurch, New Zealand, the Prime Minister of this country together with the French President conveyed other political leaders and representatives from the tech industry to adopt the "Christchurch Call to eliminate terrorist and violent extremist online content". The Call is based on a commitment by governments and tech companies to eliminate terrorist and violent extremist content online and outlines "collective, voluntary commitments from Governments and online service providers intended to address the issue of terrorist and

violent extremist content online and to prevent the abuse of the internet as occurred in and after the Christchurch attacks". It is important to underscore the "voluntary" nature of companies' pledge regarding the moderation of terrorist and violent extremist content (TVEC). Therefore, the Call is not mainly about enforcing and interpreting the existing legislation (which is a task that belongs to State authorities) but creating proper internal mechanisms aiming at effectively avoiding the exploitation of social media platforms for purposes including recruitment, dissemination of propaganda, communication, and mobilisation.

This and similar measures also mean that platforms are committed to adopt measures vis- $\dot{a}$ -vis legal-but-harmful content. As the debate on the Online Harms proposal in the UK has shown, this is a particularly sensitive and controversial category. In this context, transparency and accountability need to be seen as a fundamental pre-condition to guarantee that freedom of expression and reporting of matters of public interest (including for example human rights violations) are not curtailed. As a matter of fact, big platforms already have a long record of mistaken or harmful moderation decisions in this area in different parts of the world.  $^1$ 

A recent OECD publication on transparency reporting on TVEC online shows that the degree of transparency and clarity in the top 50 content sharing services' TVEC-related policies and procedures has improved over the recent years, al-

though the nature of the information provided varies from one company to another. There still is a lack of uniformity in how TVEC and related concepts are defined, what is reported, as well as the measurements and metrics used. As noted by the report as well, TVEC-related laws and regulations in force or under consideration are not necessarily consistent (including basic definitions), which also affects the way private actors come across these matters.

An important factor to be added to this equation is connected to the "voluntary" role that States can play in this area, according to the Call. As recently explained by Daphne Keller, around the world, law enforcement bodies known as Internet Referral Units (or IRUs) are asking online platforms to delete posts, videos, photos, and comments posted by their users. Such requests are not based on the existence of a clear illegality or the need to enforce TVEC legal provisions, but the allegation of the violation of platforms' internal content rules. Platforms are therefore complying by citing their own discretionary ToS as the basis for their actions. Legal intermediary liability provisions (for example in the European Union) establish that in order to retain immunity, platforms must not have actual knowledge of illegal activity or information, and therefore having received a referral might trigger liability, if the piece of content in question is proven to be also illegal. Another fundamental element in this context is that users are not being informed of

governments' involvement and such restrictions are exclusively perceived as part of the contractual private dynamics between users and companies. This also means that courts will have little or no role in reviewing the mentioned request and the adopted measures.

Last but not least, the need to coordinate efforts around the moderation of this type of content led to the creation of a body still not properly known and discussed: the Global Internet Forum to Counter Terrorism (GIFCT). GIFCT's aim is to prevent terrorist and violent extremists from exploiting digital platforms by working together and sharing technological and operational elements of each member's individual efforts. GIFCT is currently governed by an Operating Board made up of members from the founding companies (Facebook, Microsoft, Twitter, and YouTube) and is advised by an Independent Advisory Committee made up of representatives from civil society, government, and intergovernmental organisations. The organisation has made some improvements in terms of governance since its creation, to increase the presence of experts and civil society. It now also counts an academic research arm and the partnership of Tech Against Terrorism. GIFCT's most important pillar is the Hash-Sharing Database, which enables sharing of "hashes" (or "digital fingerprints") of known terrorist images and videos between GIFCT member companies based on a specific taxonomy. It is important to note, however,

that the original scope of the hash-sharing database was limited to content related to organisations on the United Nations Security Council's Consolidated Sanctions List. Following the terrorist attacks in Christchurch, in which the perpetrator livestreamed his attack, GIFCT expanded the taxonomy in order to enable hash-sharing of content from such attacks where violent propaganda is produced.

Thus, despite the mentioned changes and its increase of transparency, GIFCT is still subject to criticism, particularly for freedom of expression concerns.

Firstly, despite the collaborative and mainly private nature of the GIFCT, it is important to bear in mind that this initiative was created as the result of pressure coming from relevant Western countries' governments, in a context where companies were being accused of "not doing enough" and clear "threats" of regulation were made.

Secondly, a platform like GIFCT clearly triggers serious doubts of possible extralegal censorship. As it has already been mentioned, individual platforms do not lose their individual capacity to take their own decisions regarding this type of content. However, the existence of a database of this kind facilitates and automatises very sensitive and context-dependent decisions. This tool may be particularly attractive for small platforms with lower content moderation resources. In any case, it is clear that this powerful system has the capacity to swiftly curtail speech in the complete

absence of minimal private or public procedural and appeal safeguards. An additional outcome is the fact that opaque and unaccountable criteria become the basis for a coordinated and unified private regulation of speech, thus creating a clear version of what Evelyn Douek has termed content cartels, or monopolies over the shaping of public discourse based on arrangements between the different platforms engaging in content moderation. In such a context, the privatisation of speech regulation becomes systematic and widespread, exponentially increasing accountability deficits and harms caused by (unavoidable) mistakes.

Thirdly, the slightly mitigated presence of Governments in the governing structure of the GIFCT still triggers unanswered questions regarding the actual power and influence of these actors.

# III. The Regulation on addressing the dissemination of terrorist content online

Apart from the already mentioned and unharmonised national legislation, the Regulation on addressing the dissemination of terrorist content online of 29 April 2021 constitutes a step forward within the EU. I have analysed several aspects of this Regulation in more detail elsewhere. In the present context, only issues related to the main topic of this article will be briefly presented.

The regulation empowers national authorities to issue removal orders requiring hosting service providers to remove terrorist content or to disable access to terrorist content in all Member States. Here we are not talking about content that violates the ToS, but information that contravenes national counterterrorism legislation. Such orders must be executed by providers in any event within one hour of receipt, thus forcing them to act in an extremely rapid manner.

Even though ex post appeal mechanisms are obviously contemplated, this procedure is *de facto* depriving platforms and users of any chance to avoid the immediate implementation of the order. Art. 5 contains a group of proactive measures that definitely change the role of intermediaries in this area, particularly their content monitoring responsibilities, as they are obliged to take specific measures to protect their services against the dissemination to the public of terrorist content, especially in cases where they have already been exposed to this kind of content. State bodies will also have the power to review and request the adaptation of such measures to the objectives of the Regulation. Although the Regulation does not allow the imposition of the obligation of using automated tools, the specific nature of the obligations and responsibilities included in the Regulation may de facto determine the proactive use of this type of moderation techniques. With this legislation, Europe seems to move towards a progressive delegation of true law

enforcement powers to private companies, depriving internet users (and hosting service providers themselves) of the legal and procedural safeguards applicable to this kind of decision until now. Moreover, intermediary platforms may be progressively put in a position where cautiously overbroad decisions may be taken, as the only way to avoid the high and somewhat vaguely defined responsibilities penalties that may be imposed on them.

### IV. Final reflections

In an interesting position paper, Tech Against Terrorism has explained that terrorists use an eco-system of predominantly small platforms to communicate and disseminate propaganda, rely primarily on simple web-based tools such as pasting, archiving, and file-mirroring sites, as well as increasingly use own-operated websites, alternative decentralised and encrypted plat-forms, and infrastructure providers to host, aggregate and disseminate propaganda. Therefore, although often presented as the frontline of counterterrorism measures, big online platforms seem to play a relatively reduced role in the dissemination of TVEC.

What can be said is that social media platforms like Facebook have in the past made terrorist acts and imagery particularly visible and noticeable, perhaps to an extent wider than what our societies could tolerate. The intensive and choreographed intervention on how TVEC is regulated and moderated, both at the public and private levels, had the effect of sending this content to darker and less controllable corners of the online world.

In any case, any approach that does not properly consider and tackle the deep roots of radicalisation and terrorist behaviour offline is doomed to fail. A critical and comprehensive understanding of the current and limited tools to tackle the dissemination of TVEC online will not only improve the necessary protection of the human right to freedom of expression. It will also be key in order to properly define the measures and policies that are necessary to effectively protect all of us against the dangers of terrorist groups and activities.

## References

1. See Jillian C. York, Karen Gullo, Offline/Online Project Highlights How the Oppression Marginalised Communities Face in the Real World Follows Them Online, Electronic Frontier Foundation, 6 March 2018; Billy Perrigo, These Tech Companies Managed to Eradicate ISIS Content. But They're Also Erasing Crucial Evidence of War Crimes, *Time*, 11 April 2020; and When Content Moderation Hurts, *Mozilla*, 4 May 2020.

Die Anschläge vom 11. September waren nicht nur selbst ein Medienereignis, sondern haben auch die Leitplanken des öffentlichen und medialen Diskurses verschoben. Diese Verschiebungen sind vielfältig und haben ihre Spuren in der Presse-, Informations- und Meinungsfreiheit hinterlassen. Aber lässt sich diese Geschichte wirklich nur als Abwärtsspirale erzählen?