

THE PARADOX OF DEMOCRATIC STRENGTHENING: CRIMINALISATION OF POLITICAL TERRORISM AS A LEGAL DISCREDITING MECHANISM

ALEXIS COUTO DE BRITO*
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ABSTRACT

This article explores the Brazilian legal system in light of recent proposals to amend the anti-terrorism law, a move amplified by the country's political instability, which culminated on 8th January 2023, when supporters of the former president invaded government buildings on the pretext of contesting election results. The essay examines whether these amendment proposals align with the principles of our constitutional democracy and their potential to foster genuine democratic reinforcement.

Keywords: terrorism, democracy, democratic rule of law, constitutional principles

INTRODUCTION

The escalating occurrence of authoritarian events worldwide seems to have prompted reflections on the capacity of current legislation to safeguard the stability of the Rule of Law and Democracy. In Brazil, this debate gained relative prominence among

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scholars and the general public after the events of 8 January 2023. On that day, supporters of the former President Bolsonaro invaded and destroyed the Planalto Palace, the Executive branch's headquarters, and the Brazilian Supreme Court.

While media outlets are quick to label the incident as a terrorist act, Brazilian anti-terror legislation would not categorise these coup acts as such, unlike other international instruments. Indeed, these acts would not even be considered an attempt to commit a terrorist act.

Considering these events and genuine concerns about the proliferation of anti-democratic movements intent on discrediting the electoral process, there is a call to amend Law 13.260/16 – the Brazilian anti-terror legislation – to punish acts of violence driven by political convictions. This amendment proposal is not unprecedented; it was first introduced during Bolsonaro's government via bill 732/2022. This bill proposed incorporating "violent actions with political or ideological aims, intending to incite social or generalised terror" as a motive to commit terrorism. It currently awaits evaluation by the Constitutionality and Justice Committee of the Federal Senate.

This essay, therefore, aims to assess whether such intentions might be valid within our legal system, and the extent to which they meet the objectives of its current advocates: preventing anti-democratic movements and bolstering democracy along with its defence mechanisms.

To accomplish this study's aim, we will examine the specifics and objectives of the existing Brazilian anti-terror legislation and the relevance of the reasons cited by the proponents of its modification. This analysis will take into account the criminal principles informing the Brazilian legal system, with the goal of determining the feasibility of the criminal typification of the acts committed on 8th January 2023.

1. ANTI-TERRORISM LAW IN BRAZIL: ITS CHARACTERISTICS AND THE LEGITIMACY OF THE CALLS FOR AMENDMENT

Unlike many international laws,¹ the Brazilian anti-terrorism law – Federal Law No. 13, 260/16 – enacted on March 16, 2016, offers a restricted definition of terrorism, along with a list of acts potentially classified as this crime. Article 2 states that:

¹ "Broadly, there are three types of definition regime. In the United States, definitions appear to have been devised to deal with particular problems, and while FISA-type definitions predominate, other definitions govern important areas of counterterror laws. In the United Kingdom and Australia, there is a general definition of terrorism, which governs virtually all contexts in which it is relevant that »terrorism« is involved. The post-9/11 Canadian and New Zealand definitions have similarly general application. However, there is one important difference. Like the UK and Australian definitions, they include a general definition of terrorism, which resembles those definitions in both structure and content. However, following the precedent set by the Terrorist Financing Convention, Canada also defines terrorist activity to include activities falling within a number of specified offences that implement Canada's obligations under terrorism conventions. New Zealand's definition is similar to Canada's, except that it defines terrorism to include offences against the conventions, rather than by reference to pre-existing or concurrently created offences designed to implement New Zealand's obligations under the conventions. There is overlap between the categories, but there will be acts that are terrorist only because they either constitute a convention offence or fall within the general definition. The inclusion of offences

“Terrorism consists of the acts outlined in this article, committed by one or more individuals, for reasons of xenophobia, discrimination or prejudice based on race, colour, ethnicity or religion, intended to provoke social or generalised terror, endangering people, property, public peace or public safety.”²

This national legislation also details the means through which terrorism can be practised, as specified in Article 2 § 1^o:

I – Use or threat to use, transport, store, possess or carry explosives, toxic gases, poisons, biological, chemical, nuclear substances or other means capable of causing harm or promoting mass destruction.

IV – Sabotage or seize, with violence, serious threat to the person or using cybernetic mechanisms, total or partial control, even temporarily, of communication or transport means, ports, airports, railway or bus stations, hospitals, nursing homes, schools, sports stadiums, public facilities or places where essential public services operate, energy generation or transmission facilities, military facilities, oil and gas exploration, refining and processing facilities and banking institutions.

V – An attempt against the life or physical integrity of a person.³

Brazil’s legislature is believed to have succumbed to international pressure, notably from the United States with its prominent ‘war against terror’ agenda. Consequently, Brazil chose to construct a symbolic instrument to declare support for this political arrangement, despite potential framing of these acts under different crime categories, such as organised criminal offence.

In this context, introducing a subjective limitation in the current definition of terrorism could be seen as a victory for social organisations. In early 2016, they

against the conventions within the definition is also a feature of several US definitions, including that of the INA (which is predicated on offences against some of the conventions) and the definition of a »federal crime of terrorism« (whose elements include commission of one or more specified federal offences, which include those against laws giving effect to conventions). Despite these differences, definitions typically include a number of elements. All include a »harm« element, which defines the physical or economic harm that terrorism entails (or, possibly, threatens). Most include an »intended purpose« element (which limits »terrorism« to acts done with the intention that they will produce particular results); and many include a »motivation« element (not generally found in US legislation, but an aspect of the general definitions in the other four jurisdictions)” (Douglas, R., ‘What Is Terrorism?’, *Law, Liberty, and the Pursuit of Terrorism*, 2014, pp. 46–61. *JSTOR*, <https://doi.org/10.2307/j.ctt1gk08gq.8>, accessed on 23 February 2023.

² The original: “O terrorismo consiste na prática por um ou mais indivíduos dos atos previstos neste artigo, por razões de xenofobia, discriminação ou preconceito de raça, cor, etnia e religião, quando cometidos com a finalidade de provocar terror social ou generalizado, expondo a perigo pessoa, patrimônio, a paz pública ou a incolumidade pública.”

³ The original: “I – usar ou ameaçar usar, transportar, guardar, portar ou trazer consigo explosivos, gases tóxicos, venenos, conteúdos biológicos, químicos, nucleares ou outros meios capazes de causar danos ou promover destruição em massa; IV – sabotar o funcionamento ou apoderar-se, com violência, grave ameaça à pessoa ou servindo-se de mecanismos cibernéticos, do controle total ou parcial, ainda que de modo temporário, de meio de comunicação ou de transporte, de portos, aeroportos, estações ferroviárias ou rodoviárias, hospitais, casas de saúde, escolas, estádios esportivos, instalações públicas ou locais onde funcionem serviços públicos essenciais, instalações de geração ou transmissão de energia, instalações militares, instalações de exploração, refino e processamento de petróleo e gás e instituições bancárias e sua rede de atendimento; V – atentar contra a vida ou a integridade física de pessoa.”

expressed concern that the proposed legislation might frame social movements themselves.

As previously highlighted in another study,⁴ debates in the Brazilian Congress since 5 January 2015 indicate that opponents of the project were worried about an overly broad and flexible concept of terrorism, allowing the persecution of political dissidents, particularly leftist supporters. The original project criminalised the generic conduct of “attacking democratic institutions gravely”⁵ and the exceptions contained in the rule would not prevent the initiation of a criminal proceeding or the mere classification of the act as a blatant offence.⁶

On the other hand, proponents argued that it was necessary to respond to external pressures, which have intensified post 9/11. Additionally, they maintained that destructive actions under the guise of legitimate social demands would be socially discouraged through tightening of the legislation.

The language used by supporters appears to evoke the spectre of right-wing neorealism, which has long influenced the ideas of a segment of the Brazilian population and the legislature.

At that time, Federal Law 7717/83, known as the National Security Law, was still in force. This law embodied the ideas mentioned and the political agenda of the military dictatorship that began in Brazil in 1964. The law has been heavily criticised since its inception, as its enactment was supposedly due to an alleged institutional crisis, rooted in anti-democratic and totalitarian beliefs, thereby creating the so-called ‘Revolutionary Criminal Law’ as Cláudio Heleno Fragoso termed it.⁷

Following appeals from jurists who for years had shown the absolute incompatibility of The National Security Law with the Brazilian Constitution of 1988, it was repealed on 1 September 2021, with the introduction of Law 14.197/2021. This new law incorporated crimes against the democratic rule of law under Title XII

⁴ Brito, Couto de, A., Moraes, da Silva, J., ‘Terrorismo Interno: Breves considerações sobre a legitimidade de criminalização de movimentos sociais’, *Revista Latino-Americana de Criminologia*, Brasília, 2021, Vol. 1, No. 2.

⁵ The original: “atentar gravemente contra as instituições democráticas”.

⁶ § 2 The provisions of this article do not apply to the individual or collective behaviour of individuals involved in political manifestations, social, union, religious, class, or professional category movements, driven by social or demanding purposes, aimed at challenging, criticising, protesting or supporting, with the aim of defending constitutional rights, guarantees, and freedoms, without prejudice to the criminal classification outlined in the law.

⁷ In his own words: There is a current national awareness of the urgent need to rework the security law, subjecting it to the fundamental requirements of defending the State in a freedom regime. The National Security Law emerged at a time of institutional crisis, as an expression of a supposedly revolutionary criminal law, inspired by the military, which aimed to incorporate a deeply anti-democratic and totalitarian doctrine into the law. We are now living in new times. The President of the Republic repeatedly pledged his word, and his vigorous action aligns with it, towards the redemocratisation of the Country. The National Security Law appears as an aberration, a dead and putrid body in the fresh atmosphere that the Nation breathes. Civil society, through its most representative bodies, rejects this infamous law. Authorised government representatives publicly declare that the law needs to be revised and Congress is studying its reformulation. (Fragoso, H.C., ‘Para uma interpretação democrática da Lei de Segurança Nacional’, *Jornal O Estado de S. Paulo*, São Paulo, pp. 34–34, 21 April 1984). In the same sense: http://www.fragoso.com.br/wp-content/uploads/2017/10/20171002195930-nova_lei_seguranca_nacional.pdf.

of the Federal Criminal Code. Among the newly created crimes are “the violent abolition of the democratic state of law”, ‘the coup d’Etat’, political violence, and espionage.

Even though the invasions and depredations carried out on 8th January 2023, could be classified as some of these newly listed crimes, the political instability amplified following President Luís Inácio Lula da Silva’s victory sparked public debate on the need to modify anti-terror legislation, to make it possible to reach political extremists. Some defended the appropriateness of the current legislation, despite the clear violation of legality principles, arguing that “discrimination, xenophobia or prejudice based on race, colour, ethnicity, and religion” essentially defines terrorism in Brazil. This argument also embraces the concept of ‘preparatory acts’ to commit acts of terrorism.⁸

Supporters of legislative change, on the other hand, argue that the current political landscape differs significantly from that of 2016. They claim that the emergence of terrorist cells over the last six years and the growth of extremist groups could significantly boost anti-democratic movements. They also contend that the current definition of terrorism is at odds with international treaties and guidelines on the matter. The latter argument underpinned another bill aiming to alter the current law – PL 83/2023 – presented by Senator Alessandro Vieira (PSDB-SE):⁹

Finally, it is worth noting that the inclusion of political motivation within the legal text is consistent with international treaties acknowledging political motivation, such as the International Convention on the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism and the International Convention for the Suppression of Acts of Nuclear Terrorism. These were internalised in Brazil by Decree No. 4.394 of 26 September 2002, Decree No. 5.640 of 26 December 2005, and Decree No. 9.967 of 8 August 2019. All these documents stipulate that each State Party is obliged to adopt the necessary measures, including the formulation of domestic legislation, to ensure that under no circumstances can terrorist acts be justified on the grounds of political, philosophical, ideological, racial, ethnic, religious biases or any other similar nature. These acts should be suppressed with penalties appropriate to their severity.¹⁰

Important to note is that unlike recent bills seeking to broaden the scope of Law 13.260/16, this bill is not a result of demands from extreme right-wing parties.

⁸ For example: <https://www.olharjuridico.com.br/noticias/exibir.asp?id=50609¬icia=lei-antiterrorismo-pode-ser-invocada-no-episodio-dos-ataques-ocorridos-em-brasilia-especialista-responde&edicao=2>.

⁹ Available at: <https://legis.senado.leg.br/sdleg-getter/documento?dm=9248770&dispositio=inline>.

¹⁰ In the original: “Por fim, destaque-se que a inclusão da motivação política vai na mesma linha de tratados internacionais preveem a motivação política, a exemplo da Convenção Internacional sobre a Supressão de Atentados Terroristas com Bombas, da Convenção Internacional para Supressão do Financiamento do Terrorismo e da Convenção Internacional para a Supressão de Atos de Terrorismo Nuclear, internalizadas no Brasil pelos Decreto nº 4.394, de 26 de setembro de 2002, Decreto nº 5.640, de 26 de dezembro de 2005 e Decreto nº 9.967, de 8 de agosto de 2019. Todas estipulam que cada Estado Parte deve adotar as medidas necessárias, incluindo a adoção de legislação interna, que assegurem que os atos terroristas não possam ser em nenhuma circunstância justificados por considerações de natureza política, filosófica, ideológica, racial, étnica, religiosa ou outra similar e sejam reprimidos com penas compatíveis com sua gravidade.”

Instead, a social democratic party, deemed more moderate, presented it with support from popular left-wing voices under the pretext of increasing punishment – or protection – against future extremist acts inspired by speeches that question the legitimacy of the current government. Regarding the applicability of the Law, various media sources have conveyed the primary explanations¹¹:

“Between 2010 and 2018, 81 investigation procedures were opened. From 2019 to 2021, another 107 inquiries were initiated under legislation established during the dictatorship era (1964–1985). Given this, the Congress decided to repeal the NSL (National Security Law), replacing it with the Law for the Defense of Democracy and the Rule of Law, which was approved in May 2021 by the House of Representatives and the Senate. Under the new law, criticising any of the three powers (executive, legislature, and judiciary) is no longer considered a crime. However, ten new offences were added to the Federal Penal Code, including coup d’état, undermining freedom of speech, political violence, abrupt abolition of the democratic state, interruption of the electoral process, and mass misleading communication, which refers to the spread of fake news that could impact the electoral process. Gustavo Sampaio, a professor at the Department of Public Law at Fluminense Federal University in Brazil, explained how the repeal of the National Security Law safeguards freedom of speech and the potential applications of the new law in countering recent attacks on democracy and elections.”

However, the law’s intention seems to echo the discourse once promoted by extreme right-wing parties but reformulated with different terminology. It perpetuates social insecurity as a basis for extending the scope of criminal figures (crimes), overlooking the constitutional guarantees of the Brazilian Federal Constitution of 1988.

Despite the bill’s core reflecting a legitimate social concern – the rising number of groups inciting the destabilisation of democratic institutions and spreading hate speech – it exemplifies how fear can be exploited to expand criminal law coverage to the greatest number of situations. In this regard, the state’s criminal law continues to be idealised as a final resort (*ultima ratio*) to counter all social adversities and risks, even the most minor. It is seen as a magical solution to increasingly complex social practices that, in reality, require diverse solutions beyond the punitive state intervention. Quadrado’s observation on this topic is notable¹²:

¹¹ Sampaio, G., ‘Por que o Congresso revogou a Lei de Segurança Nacional?’, *O Globo*, 2021, available at: <https://oglobo.globo.com/podcast/por-que-congresso-revogou-lei-de-seguranca-nacional-1-25151832>, accessed on 23 February 2023.

¹² In the original: “O discurso do ódio, atualmente amplificado pelas redes sociais digitais, ganha projeção a partir da ação de haters speech (Rosenfeld, 2001, p. 02). Os haters speech são sujeitos que propagam mensagens preconceituosas, geralmente contra as minorias sociais tendo como base o racismo, as diferenças religiosas, étnicas ou de nacionalidade. Rosenfeld (2001, p. 03) realiza importante distinção do ponto de vista conceitual circunscrevendo o fenômeno em hate speech in form e hate speech in substance. Para o autor, como hate speech in form podemos classificar aquelas manifestações odiosas, ao passo que o hate speech in substance se refere à modalidade velada do discurso do ódio. Para Santos e Silva (2016, p. 05), o discurso do ódio é a “prática social que reutiliza da linguagem e da comunicação para promover violência aos grupos, classes e categorias, ou ainda, a sujeitos que pertencem a estas coletividades, sendo algo que pode estar relacionado ao desrespeito à diferença e à identidade.” In: Quadrado Carvalho, J.,

“Hate speech, currently amplified by digital social networks, gains its significance through hate speakers (Rosenfeld, 2001, p. 2). Hate speakers are subjects who spread prejudiced messages, usually against social minorities, on the basis of race, religion, ethnicity or national origin. Rosenfeld (2001, p. 3) makes an important distinction from a conceptual point of view, distinguishing hate speech ‘in form’ and hate speech ‘in substance’. According to the author, hate speech in form consists in hateful manifestations, while hate speech in substance refers to the veiled mode of hate speech. According to Santos e Silva (2016, p. 5), hate speech is a social practice that reuses language and communication to promote violence against groups, classes, and categories, or even individuals who belong to these communities, which could be related to disrespect towards difference and identity”.

In Brazil, more than twenty bills are currently pending in Congress, each intending to modify the existing anti-terrorism legislation. These bills aim either to adhere to international body regulations or to enhance domestic security.

Current data reveals that 67% of projects proposing changes to the Anti-Terrorism Law were introduced during Bolsonaro’s administration between 2019 and 2021, which is a concerning increase. PSL, the party that elected the former president, proposed the most bills aiming to revise the current legal text, with a total of eleven, compared to four by PR (another political party), and three by PSDB, who ranked third.

It can be observed that the bill presented in 2023, like those introduced before the current presidential election, is rooted in the belief that punitive measures are more effective than investing in social programs to combat crime. This mindset harkens back to the national security movement and right-wing neorealism with its ‘law & order’ slogan. This slogan, extensively propagated as an output of US criminal policy from the 1980s, also anticipates contemporary punitive rage, aimed at more rigorous application of Criminal Law with stiffer penalties.¹³

Ferreira da Silva, E., ‘Ódio e intolerância nas redes sociais digitais’, *Revista Katálysis*, 2020, Vol. 23, No. 3, pp. 419–428.

¹³ “Due to the significant concern with the increase in crime and in response to society’s wishes, the movement called Law and Order emerged in the United States in the 1970s. This ideological movement proposes Maximum Criminal Law, that is, it suggests an application of Criminal Law to as many cases as possible, leading to more severe penalties. Such a proposal would make the population believe that Criminal Law could be the solution to end crime, or if not, reduce it. (...) From this perspective and inspired by society’s aspirations, the Law and Order movement proposes a reformation of Criminal Law, and this ideology has spread to several countries to institute not only more severe penalties, but also a stronger criminal and more rigid executions. For the defenders of Law and Order, the adage “human rights for human rights” is perfectly aligned with the policy of “Zero Tolerance, in the sense that human rights must prioritise honest people to live free from crime”. In the original: “Em razão de tamanha preocupação com o aumento da criminalidade e em busca de respostas aos anseios da sociedade, surgiu nos Estados Unidos, na década de 1970, o movimento chamado Law and Order, ou “Lei e Ordem”. O aludido movimento ideológico propõe o Direito Penal Máximo, ou seja, sugere um alargamento da incidência do Direito Penal, fazendo com que penas mais severas sejam aplicadas, na mesma perspectiva de que as penas já existentes sejam agravadas. Tal proposta faria com que a população acreditasse que o Direito Penal é a solução para acabar com a criminalidade, ou senão, reduzi-la. (...) Nessa perspectiva e inspirados pelas pretensões da sociedade, o movimento Law and Order propõe uma reformulação no Direito Penal, sendo que tal ideologia se expandiu para vários países a fim de instituir não somente penas mais gravosas, como também uma execução penal mais fortalecida e rígida. Para os defensores do Law and Order, o brocardo “direitos humanos para humanos

The attempt to symbolically apply Criminal Law is evident from a straightforward reading of the bill's rationale, as presented by Senator Alessandro Vieira. Although the aforementioned conducts perpetrated on 8th January could be categorised under different types of offences, the author of the bill built his argument on a purely semantic issue to expand the current Article 2 of the anti-terrorism law:

The attack on 'Praça dos Três Poderes' on 8 January and recent attacks on power transmission towers prompted the media and population to label the individuals responsible as terrorists. However, although the term 'terrorism' holds a political meaning in addition to a legal one, with different interpretations globally, the conducted acts do not constitute terrorism under Brazilian criminal law. (...) The perpetrated acts comply with law requirements one and three, but the second was not present, as they were not performed due to xenophobia, discrimination or prejudice based on race, colour, ethnicity and religion; they cannot be considered terrorist acts. This conclusion arises from the principle of strict legality among Criminal Law principles, which prohibits the use of analogy. From the reasons listed by the anti-terrorism law, political motivation cannot be deduced, even with extensive interpretation. Hence, there is a need to amend the law to include these other circumstances.

While achieving these objectives directly conflicts with the Brazilian Federal Constitution, it simultaneously distorts the original purpose, nurturing authoritarianism instead of constraining it. As for the constitutional violations, it is important to acknowledge that the subsidiary protection of legal interests or even the containment of the State's punitive power is displaced as the core purpose of criminal law by the need to satisfy the interests of international organisations. Under these conditions, the law itself loses its legitimacy as a mechanism for resolving major social conflicts and instead becomes a tool to be wielded according to the whims of the country's foreign policy.

In the absence of concrete evidence and reasons genuinely justifying legislative changes – especially those seeking to broaden punishment scope, the State's mandated legitimacy will be undermined, and the guarantees and social safeguards defended since Beccaria's era may be compromised, especially regarding events that, as noted previously, may already have legal classification. For this reason, agreeing with Muñoz Conde,¹⁴ among others, is imperative:

"The Rule of Law's inherent fundamental rights and guarantees, especially those of a material criminal nature (principles of legality, minimum intervention and culpability) and criminal procedure (right to presumption of innocence, judicial protection, not to testify against oneself, etc.), are non-negotiable premises of the Rule of Law's essence. If its repeal is allowed, even in extreme and serious specific cases, dismantling the Rule of Law must also be admitted. Under these circumstances, the legal system becomes a purely technocratic or functional system, devoid of any reference to a system of values, or worse, referring to any system, even if unjust, as long as its proponents have the power

direitos" coaduna-se exatamente com a política da "Tolerância Zero, no sentido de que os direitos humanos devem primar às pessoas honestas e livres de criminalidade" (Duarte Tavares, M.H., Curi Cherem, V.F., 'Os influxos do Movimento Law and Order e The Broken Windows Theory no Brasil', *Revista Liberdades*, São Paulo, Vol. 19, pp. 35–44, May 2015).

¹⁴ Muñoz Conde, F., 'De Nuevo sobre el »Derecho Penal del Enemigo«, *Revista Penal*, 2005, No. 16, pp. 133–134.

or strength to enforce it. Law understood in this manner becomes pure State Law, in which the law is subject to the interests that the State or forces controlling or monopolising its power determine at any given moment.”¹⁵

The objective seems to be the creation of versatile wording, capable of being applied to those expressing their political stance against the established power, potentially allowing the law to label them as ‘terrorists’. The pivotal question is: what criteria permit case-by-case differentiation to avoid a clear violation of the Constitutional Principle of Legality? In essence, how do we distinguish between an overstep of the right to free speech and a blatant terrorist act, as defined by law? When does the transportation of ‘means capable of causing damage’ for ‘political reasons’ evolve into a terrorist act that can be classified under Article 2, § 1, I of Law 13.260/16? Dissenha and Guaragni provide a potent perspective on this issue¹⁶:

“How do we address those unwilling to accept the pluralism so vital for democracy, like religious or political fundamentalists resorting to extreme terrorist acts? When these limits are not enough, it is necessary to surpass them by establishing new ones. Here is where the exception penalty appears as a natural demand of strict tolerance. The conventional punitive system serves well to protect society against risks arising from the democratic system itself, but falls short when providing adequate solutions for external threats. As the tolerant and inclusive ideals of democracy cannot prevent external agents from infiltrating the system, finding solutions to counteract them becomes vital, especially since they cannot be assimilated due to their intolerance. Amid the need for freedom of speech and the demand for system security to ensure tolerance, there exists a »structural tension, but not a dialectical one, as it is incapable of producing a synthesis« (Pavarini, 2007, p. 8). This tension inevitably results in the demand for an exceptional Criminal Law, designed specifically to address these enemies.”

Evidently, the wording proposed in Bill 83/2023 does not offer satisfactory responses to these societal concerns and could not do so, considering its intentional – and, in our understanding, illegitimate – level of abstraction. The permission granted in § 2, as in the original anti-terror law bill, does not resolve the issue either, a fact already demonstrated by legislative representatives during Congressional debates pre-2016¹⁷:

¹⁵ In the original: “Los derechos y garantías fundamentales propias del Estado de Derecho, sobre todo las de carácter penal material (principios de legalidad, intervención mínima y culpabilidad) y procesal penal (derecho a la presunción de inocencia, a la tutela judicial, a no declarar contra sí mismo, etc.), son presupuestos irrenunciables de la propia esencia del Estado de Derecho. Si se admite su derogación, aunque sea en casos puntuales extremos y muy graves, se tiene que admitir también el desmantelamiento del Estado de Derecho, cuyo Ordenamiento jurídico se convierte en un ordenamiento puramente tecnocrático o funcional, sin ninguna referencia a un sistema de valores, o, lo que es peor, referido a cualquier sistema, aunque sea injusto, siempre que sus valores tengan el poder o la fuerza suficiente para imponerlo. El Derecho así entendido se convierte en un puro Derecho de Estado, en el que el derecho se somete a los intereses que en cada momento determine el Estado o la fuerzas que controlen o monopolicen su poder.”

¹⁶ Dissenha, R.C., Guaragni, G.V., ‘Os Limites da Democracia: A Tolerância Restrita e a Criminalização do Terrorismo’, *Revista Direitos Culturais*, Santo Ângelo, 2019, Vol. 14, No. 34, pp. 165–186.

¹⁷ de Brito Couto, A., Moraes da Silva, J., ‘Terrorismo Interno: Breves considerações sobre a legitimidade de criminalização de movimentos sociais’, *Revista Latino-Americana de Criminologia*, Brasília, 2021, Vol. 1, No. 2, p. 5.

Under paragraph 2 of Article 2, activities of social, union as well as religious and classist movements shall not be considered terrorist acts. However, it cannot prevent someone's persecution, since one could be prosecuted and later, potentially not convicted by the justice system. This is what is happening with these citizens who have been incarcerated for 3 months.

It is discernible, therefore, that an additional objective with the proposed law alteration is ostensibly "to keep society under control," beginning with a flawed concept of social safety and political homogeneity. As a result, the judiciary is granted discretion to categorise which groups fall under the 'terrorist' label and which under the 'protester' label, exemplifying a criminal law model predicated on the author's characteristics. Hence, Fernández Abad makes a valid point¹⁸:

"Briefly, in its effort to rule the future through a theoretical framework operating amid ignorance and uncertainty, the »discourse on radicalisation« contributes to constructing a present-day reality marked by the existence of a category of people who, due to their professed ideology, vulnerable situation, or frequent company, are considered potentially dangerous, justifying the implementation of measures and tools primarily aimed at their control and potential neutralisation. This not only provides the foundation for highly harmful and discriminatory policies – which, in itself, is already a concerning issue, especially from a human rights respect perspective – but also becomes real in its effects. This epistemological framework creates conditions suitable for the feelings of injustice and disaffection, identified as some of the main factors fuelling these rapidly spreading processes. In these terms, rather than serving as the basis for effective crime-fighting policies, it appears reasonable to consider that the productive effects derived from the »discourse on radicalisation« contribute to perpetuating the issue itself."

Regardless, it is clear that the outcome of this strategy deviates significantly from the initial intention behind the bill's design. This ultimately fuels democratic destabilisation, rather than strengthening democratic institutions as initially intended. The extreme vagueness and broad latitude of the legal text, besides generating legal uncertainty, could potentially flip the law's application, not as a tool to contain

¹⁸ In the original: "En definitiva, en su intento de gobernar el futuro a través de un cuerpo teórico que opera en un marco caracterizado por el desconocimiento y la incertidumbre, el »discurso sobre la radicalización« contribuye a crear una realidad en el presente que está marcada por la existencia de toda una categoría de personas que, ya sea por la ideología que profesan, la situación de vulnerabilidad en la que se encuentran o las compañías que frecuentan, son consideradas como potencialmente peligrosas, lo que justifica la puesta en marcha de medidas e instrumentos que, en esencia, están orientados a su control y eventual neutralización. Esto, por su parte, no solo sirve de base para la formulación de políticas que resultan altamente lesivas y discriminatorias – lo que, en sí misma, ya es una cuestión preocupante desde una perspectiva que enfatice el respeto a los derechos humanos – sino que, volviéndose real en sus efectos, este marco epistemológico genera las condiciones adecuadas para que se extiendan rápidamente los sentimientos de injusticia y desafección que, desde el mismo, han sido señalados como una de las causas principales que nutren estos procesos. En estos términos, más que servir de base para la articulación de políticas eficientes en la lucha contra este fenómeno, parece razonable pensar que los efectos productivos que se derivan del »discurso sobre la radicalización« contribuyen a perpetuar la existencia de esta problemática." In: Abad, C.F., 'El »discurso sobre la radicalización« como base para gobernar un futuro incierto. Una aproximación crítica a su naturaleza performativa y los efectos que se derivan de su existencia', *Indret*, 2022, No. 1, p. 359.

extremists, but as a mechanism to intimidate protesters, particularly in the hands of potential authoritarian governments. It is crucial to remember that a crime should not be conceived for the present moment only, but should also consider power alternation and the dynamism of contemporary societies.¹⁹

What is being advocated here is not the practice of unrestricted freedom, implying that the destruction that took place on 8th January was in compliance with constitutional guarantees and thus justified in itself. Instead, it has been highlighted that these incidents, at least theoretically, could fall under other criminal categories, rendering any legislative intervention in this situation redundant. Furthermore, we believe the Brazilian legislator was successful in adding a subjective limitation to the concept of terrorism, making it more suitable to meet the Brazilian legal system's realities and needs.

Contrary to the bill author's intention, international guidelines, particularly Directive (EU) 2017/541 of the European Parliament and of the Council,²⁰ do not advocate for the outright criminalisation of potentially severe actions committed due to political beliefs. In reality, these regulations not only respect individual dignity and fundamental rights but also provide clear delineations for classifying actions as terrorism, such as threatening a government.²¹

2. The purposes referred to in paragraph 1 are the following: (a) to seriously intimidate a population; (b) unduly compel a public authority or an international body to perform or abstain from an act; (c) seriously destabilise or destroy a country or an international organisation's fundamental political, constitutional, economic or social structures.

2. CRIMES AGAINST THE DEMOCRATIC RULE OF LAW IN THE LIGHT OF INDIVIDUAL FREEDOMS

Having discussed the necessity for a legal change, we will now analyse the 8th January events according to the criminal figures incorporated into the Brazilian Penal Code via Law 14,197 of 2021.

¹⁹ Mir Puig offers a sensible critique: "Some people think that the future Penal Code that Parliament has to approve must be justified as a more effective Code that puts an end once and for all with all insecurity in our midst. The new Code that young people need in a still fragile Spanish Democracy should not find so much its specific difference with the current Code of Dictatorship in a greater effectiveness, as in a more refined subjection to the limits that democratic demands impose on mere repressive effectiveness. The increase in public safety must be sought through another path, through an appropriate social policy. This path is, like every democratic path, more challenging, but it is also the only one that leads to long-term solutions." (Mir Puig, S., *El Derecho Penal en El Estado Social y Democrático del Derecho*, Barcelona, 1994, p. 128.).

²⁰ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0541>.

²¹ "2. Los fines a que se refiere el apartado 1 son los siguientes: (a) intimidar gravemente a una población; (b) obligar indebidamente a los poderes públicos o a una organización internacional a realizar un acto o a abstenerse de hacerlo; (c) desestabilizar gravemente o destruir las estructuras políticas, constitucionales, económicas o sociales fundamentales de un país o de una organización internacional."

Of the nine articles created by the law, at least two could potentially apply to the events. First, Article 359-L, which covers the crime of abrupt abolition of the democratic rule of law:

Article 359-L. Attempting, through violence or serious threat, to abolish the democratic rule of law, hindering or limiting the exercise of constitutional powers:

Penalty – imprisonment, from 4 (four) to 8 (eight) years, besides the penalty corresponding to the violence.

Secondly, Article 359-M, which covers for the crime of coup d'état:

Article 359-M. Attempting overthrow, via violence or serious threat, the legitimately constituted government:

Penalty – imprisonment, from 4 (four) to 12 (twelve) years, in addition to the penalty corresponding to the violence.

Following the 8th January incident, the Ministry of Justice and Public Security established an email address for reporting terrorist acts. In total, 102,407 messages were received, indicating the involvement of over 50,000 individuals and 14,600 organisations.

Despite this, the legal provisions seem to lack a technical precision that, although not entirely undermining their use, obstructs their compatibility with the interpretative guidelines of contemporary criminal doctrine. The main example of this theoretical gap is the description of a conduct in its attempted form, when the creation of a consummated danger crime was essentially intended, whereby a tangible risk to the legitimately constituted government and the exercise of constitutional powers would materialize as a result of the consummated action.

Despite these obstacles and the interpretative effort required by the legal wording for judges to identify the legal interest to be protected in specific cases, the main reflection imposed by these Articles lies in the possibility – or lack thereof – of applying the permission contained in Article 359-T to the events that occurred on 8th January 2023:

Article 359-T. Criticising constitutional powers, press activity or the claim of constitutional rights and guarantees through marches, meetings, strikes, gatherings, or any other form of political demonstration with social aims does not constitute a crime, as laid out in this section.

Notably, the issue, apart from necessitating a case-by-case analysis of the acting agents' intentions – which could have been a distortion of public institutions or even the takeover by the candidate they were backing – might be resolved by identifying the overstepping of constitutional freedoms, among them, freedom of speech.

Under the current Brazilian constitutional regime, formed as a social-democracy, we no longer refer to national or State security, but rather to security itself, which can only be understood as legal security. Subversion, nowadays, is interpreted as the subversion of democracy, in demagoguery or tyranny, as Montesquieu's purest expression of corruption of the political system. Political representatives must be

directly and freely elected, even if they pose a threat to the nation due to their lack of political expertise and commitment to citizenship. Society and the State are not static, and therefore the constitutional text contains many political programmes to be activated for future generations. Therefore, it seems that nothing in the current political scenario justifies the application of an outdated legal diploma that centres on propagating an ideology that no longer seeks to protect the State as a distinct entity, akin to the Leviathan, but rather should aim to recognise that the State only exists due to a legal relationship formed between each and every citizen.²²

Thus, those considered ‘misfit’ can no longer be excluded but must be incorporated into the populace. Relevant here is a challenge posed by Torres del Moral: “The classic question of whether one must grant freedom to the enemies of freedom, democracy must provide an affirmative response, only to immediately clarify it: freedom for all, but not to jeopardise the very democracy that acknowledges their freedom and guarantees their rights.”²³

The proposed legal amendment – especially Article 359-L – introduces a fresh political context into pre-existing offences such as damage, injury or homicide, which must always be scrutinised meticulously. The events of 8th January 2023 were unique, strongly influenced by the circumstances and the hostile political atmosphere that had been cultivated.

In such instances, the criminalisation of the event would be justified, but the concern is that the created crime type will remain applicable even after the aforementioned incidents, and the ambiguity of the phrase “preventing or restricting the exercise of constitutional powers” could enable a broad interpretation to any form of violence that could impact one of the political powers.

It is akin to suggesting that there might be a chance of giving ‘national security’ law and mindset might be given a makeover, ostensibly making it appear more democratic, but ultimately maintaining the same objectives of persecution as in the past. At this point, it is worth mentioning the cautious observations of Lola Anyar de Castro on the concept of security. According to the author, the term ‘security’ is a problematic in the field of Critical Criminology for several reasons: (a) it recalls connotations of ‘national security’ in Latin America, where this phrase often related to the ‘law and order’ movement, used as a tool to suppress social protests; (b) authoritarianism has frequently been justified in the name of pursuing security; (c) ‘common sense theories’ often associate insecurity with delinquency in the lower-classes.

Moreover, the author contended that security – which can only be understood as a citizen’s safety – is a right necessary for people to enjoy their other rights.²⁴ Given all these factors, it seems that the supposed security might once again be aiming to curtail freedom.

²² de Brito Couto, A., ‘Movimentos sociais e a segurança nacional’, *Boletim Ibccrim*, 2014, Vol. 22, pp. 3–5.

²³ Torres Del Moral, A., ‘Terrorismo y Principio Democrático’, *Revista de Derecho político*, 2010, No. 78, p. 156.

²⁴ de Castro Anyar, L., *Criminología de los Derechos Humanos. Criminología axiológica como política criminal*, Buenos Aires, 2010, pp. 150–151.

CONCLUSION

The paradox of defending against extreme acts of violence while preserving fundamental guarantees presents itself as one of the greatest dilemmas of modern criminal policy.

Over the past seven years or so, Brazilian society has witnessed the emergence of political groups aiming at destabilising the State, either by questioning the legitimacy of the electoral process or by orchestrating the disruption of democratic institutions. This complex phenomenon culminated on 8th January 2023, when supporters of the losing presidential candidate invaded government buildings, refusing to accept the election results.

The demand for punitive strengthening through legislative changes emerged as an immediate response to this episode, particularly to allow for the classification of similar incidents as terrorism, something previously impossible given the narrow semantic confines of our current anti-terror legislation.

Even though such demands may originate from an alleged fortification of the democratic rule of law, which exhibits greater punitive stringency against its antagonists, the examination of the repercussions implied by these demands suggests that the outcome somewhat conflicts with principles established by the Brazilian Federal Constitution of 1988. Furthermore, it indicates that the ends sought by these amendments seem to echo those pursued by representatives during the authoritarian period (1964–1985), when they proposed bills to amend the anti-terror law.

In a context where it is still possible to legally classify these acts under existing criminal figures in our legislation, expanding the normative range strongly suggests the use of a symbolic Criminal Law, which ultimately contributes to the erosion of democracy as it fosters legal uncertainty and the potential intimidation of legitimate social protest.

Countries with a recent history of democracy, like Brazil, must perpetually guard against authoritarianism, not only the kind propagated by its citizens, but also the type sanctioned, even if inadvertently, by the State itself.

Therefore, the fortification of the democratic rule of law and its institutions does not depend on a punitive movement that broadens the scope of laws or legislative innovation. Instead, it relies on constant vigilance in safeguarding fundamental rights and guarantees. The solution, under these circumstances, rests in the equilibrium between punishing those who overstep the boundaries of exercising their individual freedoms and preserving freedoms through lawful restraint of the State's punitive power.

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