

Censorship: most important debate of the decade in the Brazilian political scenario

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I was born in January 1985, only two months before the official end of the military regime that governed Brazil since April 1964. Of all the authoritarian acts of that time, the censorship system instituted by the Institutional Act n. 5 in December 1968 is considered one of the most damaging and impactful to the Brazilian political culture. I surely do not keep memories from this time; I am effectively a son of the New Republic, a time in which the apparent consensus between the political forces was the need to defend ordinary people's fundamental rights and guarantees, being the freedom of expression one of the most treasured.

In his book *Contra Toda Censura* (Against All Censorship, in a literal translation, no official English translation available), the diplomat Gustavo Maultasch warns us that we are living in times reversing this trend with "an increasing number of people abandoning the fundamental principle of freedom of expression in favor of a belief in tutored public debate" (Maultasch, 2022, p. 11). When I first read his short treatise on freedom of expression, I could almost feel the echoes of Ludwig von Mises in his last lecture in Argentina:

Everything that happens in the social world in our time is the result of ideas: good things and bad things. What is needed is to fight bad ideas. We must fight all that we dislike in

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public life. We must substitute better ideas for wrong ideas. (...) Ideas and only ideas can light the darkness. **These ideas must be brought to the public in such a way that they persuade people** (Mises, 2006, our emphasis).

With astonishment, I predict the debate on freedom of expression to be the most important of this decade in Brazilian politics. Unfortunately, the classical liberal position of protecting freedom against tyranny does not seem to be the most widely agreed upon right now. Concerned about this, Maultasch seeks to defend on solid grounds the complete freedom of expression, re-examining established arguments and exposing new ones. For this reason, *Contra Toda a Censura* is a necessary book for the Brazilian public debate, arriving at a critical time’.

The following sections summarize the book chapters. This paper provides to non-English speakers an overview of the exemplary contribution of a Brazilian author to the public debate. This article favors the use of the term ‘freedom of expression’ instead of ‘freedom of speech’, by reference to the official translation of the Constitution of the Federative Republic of Brazil (Brazil, 2013), the British Humans Rights Act (United Kingdom, 1998), and the United Nations Universal Declaration of Human Rights (United Nations, 1948). All citations from material written in Portuguese are free translations from the author.

Defending the Enemy

In the first chapter, *Defending the Enemy*, Maultasch starts with his definition of freedom of expression:

Freedom of expression means that every human being is free to think or not to think what they want, and to say or not say what they please; no authority, government or any other type of leadership should have the power to harass, silence or censor someone because of their ideas. To be free to express oneself means to be free from coercion; it means that a free country must take the freedom of expression of its citizens seriously and must protect them from coercion and violence that tries to silence them (Maultasch, 2022, p. 14).

Defending freedom of expression is a complex task. Maultasch reminds us that “no matter how absolute his formal authority is, the censor suffers from the stigma of authoritarianism and the illegitimacy of his function” (Maultasch, 2022, p. 13). Given its immense symbolic value, the public actors use rhetorical stretches and distortions to silence opinions by making it seem they are defending freedom of expression. It is precisely for this reason that we find dissonances, such as stating that

The fundamental right to freedom of expression, therefore, is not only directed at protecting supposedly true, admirable or conventional opinions but also those dubious, exaggerated, reprehensible, satirical, humorous, and those not shared by majorities. Democracy will not exist, and free political participation will not flourish where freedom of expression is cut off, as this constitutes an essential condition for the pluralism of ideas, which is a structuring value for the healthy functioning of the democratic system (Brasil, 2023b).

In the same judgment from the Brazilian Supreme Court (Brasil, 2023b) that decided for the complete removal of advertisements, texts, and information conveyed “from Google’s official blog in Brazil with attacks on PL 2630” (a bill in analysis in the Brazilian Parliament that regulates social media and other media venues). This is just one example of what the author diagnoses as the need to “construct a rhetorical mold that reaffirms a general appreciation for freedom of expression while offering a conceptual alibi for silencing unwanted opinions” (Maultasch, 2022, p. 14).

The Paradox of the Oppressed

In the next chapter, Maultasch analyzes the intuition and popular opinion that restraining hate speech would positively protect minorities. When a debater is part of a minority group, he would like to be able to structure the public debate with freedom of expression to promote his ideas. At the same time, he would like offensive and discriminatory views against their minority group to achieve less strength and influence. Nevertheless, these are conflicting objectives: he would need state power to reduce the scope of specific ideas that the members of his minority consider offensive, running the risk of becoming the target of this regulation.

If the goal of protecting a minority is based on the premise that minorities would be handicapped in promoting their ideas, being the target of any regulation that would restrict the freedom of expression of members of that minority, it would make their situation even worse. The author calls this contradiction the paradox of the oppressed.

If we live in a non-prejudiced, open, and tolerant society, the symbolic violence of hate speech will not be hegemonic and, therefore, it would not make sense to undertake the state bureaucracy to pursue merely marginal speech. On the other hand, if prejudice is hegemonic, it will also be hegemonic among whistleblowers and repressors of the state bureaucracy itself, therefore not serving the desired objective. If we live in a prejudiced environment where symbolic violence is hegemonic, how can we build the state bureaucracy that will protect these minorities through regulating expression? (Maultasch, 2022, p. 27).

After presenting different historical examples of the use of state bureaucracy to oppress minorities by restricting freedom of expression, he concludes that we mostly need extensive and unrestricted application of freedom of expression. When we try to sieve some types of speeches out and not others, freedom of expression loses its strength as a general principle and starts to serve as a tool to silence political opponents.

Who Adjudges? (Who decides What Is Right?)

In his essay on liberty, John Stuart Mill points out that the tension between freedom and authority causes one of the most evident conflicts throughout history (Mill, 1869). By understanding that rulers opposed the social roles of the ruled, political thinkers began to understand freedom as a means of protection against the tyranny of political leaders. Their

power was seen as necessary to organize society but also as a dangerous tool that rulers could easily abuse:

To prevent the weaker members of the community from being preyed upon by innumerable vultures, it was necessary that there be an animal of prey stronger than the rest, commissioned to keep them down. However, as the king of the vultures would be no less bent upon preying on the flock than any of the minor harpies, it was indispensable to be in a perpetual attitude of defense against his beak and claws. Therefore, the aim of patriots was to set limits to the power which the ruler should be suffered to exercise over the community; and this limitation was what they meant by liberty (Mill, 1869, p. 8-9).

Authority is constituted in the modern liberal state to protect citizens from threats to their lives and property. As noted by Stuart Mill and later by Public Choice School theorists, once the bureaucracy that will exercise this authority is endowed with the necessary means to achieve its objectives, it will tend to become an interest group itself in society with its own ambitions and internal cultures. This interest group will use its resources to increase its power and weaken its opposition. In this spirit, Maultasch accounts for episodes in which the power constituted to regulate freedom of expression effectively abused its prerogatives and others in which regulation was incapable of (or even caused) political violence.

The Law is the Limit, the Paradox of Tolerance, and Other Somnambulisms

Any principle like freedom of expression is a “compressed, simplified, low-resolution image” that seeks to simplify complex reality through a model (Maultasch, 2022, p. 56). Abstraction is the most important intellectual tool humans have developed to thrive in the material world. However, the arbitrary simplifications involved in this process make its results incompatible with reality in several concrete cases. In the following chapters, Maultasch proposes to analyze the practical problem of establishing the limits to freedom of expression, making them compatible with other principles, without the discussion degenerating into a mere dispute of strength.

The chapter *The Limit is the Law, the Paradox of Tolerance, and Other Somnambulisms* argues that positive law cannot be a guideline for this discussion. Laws in democratic states are mirror images of circumstances. They are constantly modified to reflect new consensuses that emerge in society. Using the law as the basis for the delimitation of general principles would therefore serve as a brake on the very purpose of Democracy: “What we are discussing is precisely the nature of justice regardless of the law, so that we can judge the law itself; and when it is the law that is in check, we need to put something else in the bench of the judge” (Maultasch, 2022, p. 58).

Maultasch further ponders that

[...] the concept of prohibition has nothing to do with the precedence or posteriority of the dissuasive force against it, or with the existence or not of prior monitoring; it has to do with the presence of coercion and punishment: if there is a provision of the use of force

to punish the conduct, then there is coercion, and therefore the conduct is in practice prohibited (Maultasch, 2022, p. 62).

In this sense, censorship would not depend on whether the restriction on expression is made via prior control or the threat of subsequent punishment. This observation is hugely relevant in the current judicial practice in Brazil, given the interpretation of the Brazilian Supreme Court:

The constitutional text does not contain permissive to restrict freedom of expression in its negative sense, that is, to preemptively limit the content of public debate due to a conjecture about the effect that certain contents may have on the public. That is, PRIOR CENSORSHIP IS PROHIBITED. The Federal Constitution, however, enshrines freedom of expression, in its positive aspect, the PROHIBITION OF ANONYMITY and SUBSEQUENT CIVIL, ADMINISTRATIVE, AND CRIMINAL LIABILITY for the content disseminated, in addition to the provision of the right of reply (Brasil, 2023a, 2023b).

This interpretation serves as legal support to apply prison sentences in criminal proceedings against a parliamentarian (Brasil, 2021) due to the publication and dissemination of videos in digital media:

1. The Federal Constitution does not allow the dissemination of ideas contrary to the constitutional order and the Democratic State (CF, art. 5, XLIV; 34, III and IV), nor does it allow demonstrations on social networks aimed at breaking the rule of law, with the extinction of the fundamental constitutional clauses - Separation of Powers (CF, art. 60, paragraph 4) [...]
3. The parliamentarian perpetrated the conduct in a virtual environment through the publication and dissemination of videos on digital media ("YouTube") throughout the day [...] (Brasil, 2021).

By incorporating the possibility of subsequent accountability to the principle of freedom of expression, we open space for interpreting legal norms to the detriment of unwanted speeches. For instance, the constitutional devices mentioned above guard no relationship, in principle, with freedom of expression:

Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, liberty, equality, security, and property, on the following terms: (CA No. 45, 2004)

[...]

XLIV – the action of armed groups, either civil or military, against the constitutional order and the democratic state is a non-bailable crime, with no limitation;

Article 34. The Union shall not intervene in the states or the Federal District, except: (CA No. 14, 1996; CA No. 29, 2000)

[...]

III – to put an end to serious jeopardy to public order;

IV – to guarantee the free exercise of any of the powers of the units of the Federation [...] (Brasil, 2013).

Using other examples, Maultash questions whether it might be better to have prior censorship in place, as it is better to know in advance whether a given expression of thought would be subject to judicial accountability or not: with this information in hand, citizens would be able to decide whether or not to publish their opinion.

“Fire!” and the First Amendment

The Negative Trend theory is the foundation of the current Brazilian generation of defenders of sanctions against fake news, attacks on institutions, hate speech, and others. In this doctrine, speech should be banned if it contains elements that could eventually result in future violence, even if the connection between cause and effect is indirect or challenging to explain. The chapter “Fire!” and the First Amendment narrates how this position, consensual by the United States Supreme Court, was slowly transformed.

The change began in 1919 with the dissenting opinion of Judge Oliver Wendell Holmes Jr. in *Abrams v. United States* (United States, 1919). In that case, a group of Russian immigrants had been arrested and convicted of producing and distributing leaflets questioning President Woodrow Wilson’s deployment of troops to Russia.

Every year, if not every day, we must wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our (constitutional) system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country (United States, 1919).

In his vote, Holmes introduces in a concrete decision the notion of Imminent Harm as an alternative to the theory of negative tendency to serve as a limit to freedom of expression. In this new view, intervention in the freedom of expression is only justified when there is no time to fight a discourse with another discourse. We would otherwise be destroying the possibility of the free trade of ideas seen by Holmes as the best mechanism for testing the truth. The first consensus in The Supreme Court of The United States (SCOTUS) around this concept appeared only in 1931. However, it was still being improved and detailed until at least 1969.

Different from the SCOTUS, the Brazilian Supreme Court admits individual decisions from its judges, making it more difficult to understand what would be the consensus established in the Court at a given moment (or even if such a consensus even exists). Justice Alexandre de Moraes gave the most recent (and vehement) decisions concerning the freedom of expression, who has reiterated:

Freedom of expression is not freedom of aggression!

Freedom of expression is not freedom to destroy Democracy, Institutions, and the dignity and honor of others!

Freedom of expression is not freedom to propagate hateful and prejudiced speeches! (Brasil, 2023a, 2023b).

In Brazil, we must catch up for at least a century in the debate about freedom of expression in our higher courts.

Incitement to Violence, Threats, and Other Acceptable Limits

In this chapter, Maultasch discusses other hypotheses that could serve as reasonable limits for freedom of expression. I highlight the discussion about the attempt to equate speech with physical action, and criticism with violence. Those are the basis of the postmodern notion that certain discourses constitute, *per se*, violence against others (popularly, “words hurt”) and, therefore, should be prohibited. Maultasch argues that violence requires a direct link between cause and effect: one can do nothing to avoid the pain they feel after being physically hit. On the other hand, the psychological distress of an offensive speech has a vital subjective component, depending on who uttered the speech and their relationship with us, our expectations regarding that person, and our emotional state. Equating an offense with actual violence, which does not require any subjective perception, can be, at most, an analogy to try to instrumentalize psychological suffering as an instrument of political struggle.

Why I Like Flat-Earthers

Next, Maultasch lends himself to analyzing the phenomenon of using science as a tool for censorship. If we learned anything from thinkers in contemporary science, it was that the proper scientific attitude involves a blend of the researcher’s confidence that motivates him to undertake an investigation that can last beyond his career, with an attitude of humility, acknowledging that all scientific knowledge is provisional.

Stephen Hawking states that “any model of the physical world is always provisional. It is only a hypothesis, you can never prove it right through experiments” (Hawking, 1998, p. 169). A new observation of the physical world that fits a theory reinforces our confidence in its correctness. Still, it cannot guarantee that a new one will not contradict the theory in the future. On the contrary, anyone can refute a scientific theory by finding a single instance in the material world that disagrees with its predictions. Given its nature, scientific knowledge is vulnerable; it is always in danger: we are always one step away from proving ourselves wrong all along.

That is why caution and humility are needed when using scientific knowledge as an argument in the political arena. Maultasch alerts to the performative use of science: using a scientific label to more easily legitimize and disseminate what is arbitrarily decided by a more educated elite (supposedly science-friendly) eager to impose its worldview on the rest of society.

He concludes the chapter by noting that politicizing all aspects of life has also invaded the sphere of professional science. On the one hand, it is impossible to isolate scientists from the noise caused by politics since it influences public and private funding systems that end up biasing research away from topics considered to be undesirable or politically dangerous.

The solution, however, will not pass through the scientists' emergence of such political enlightenment either. It is not up to science to determine which ideas can or cannot be technically discussed at the risk of destroying the credibility of the scientific enterprise.

Democracy and the Free Speech Gambit

Maultasch then discusses the relationship between Democracy as a way of organizing power structures and freedom of expression. He argues that the popular belief is that Democracy would be "a system for making collective decisions that is justified because it promotes deliberations towards a better country" (Maultasch, 2022, p. 137). In this idealist view, the quality of deliberations becomes the central aspect of Democracy, giving rise to a sense of crisis when the laws and public policies displease or are judged unsatisfactory by the political and intellectual elites. This would be the foundation underlying the attempts to restrict freedom of expression to protect Democracy. After all, the aims of Democracy are not being achieved (according to a certain enlightened elite).

Conversely, Maultasch argues that "Democracy is not the goal; the goal is freedom. To restrict freedom to preserve Democracy is to put the instrument before the target; it is like killing the uncooperative patient so we can apply the treatment more easily" (Maultasch, 2022, p. 124). Democracy is a tool to guarantee freedom and the rule of law based on an adversarial system, hindering the centralization of power and promoting the peaceful transition of rulers.

This observation reminded me of W. Churchill's quote:

On the night of May 10, 1941, with one of the last bombs of the last serious raid, our House of Commons was destroyed by the violence of the enemy, and we have now to consider whether we should build it up again, and how, and when. **We shape our buildings, and afterward, our buildings shape us.** Having dwelt and served for more than 40 years in the late Chamber and having derived fiery great pleasure and advantage therefrom, I, naturally, would like to see it restored in all essentials to its old form, convenience, and dignity (United Kingdom Parliament, 1943, our emphasis).

That was how he addressed the issue of rebuilding the House of Commons after its destruction by the German Blitz. Churchill was opposed to the semi-circular layout favored by the legislative houses abroad. He understood that the rectangular chamber was responsible for the success of the two-party system that is the essence of British parliamentary Democracy: it forces the members of the Parliament to choose a side to sit on. Both Churchill and Maultasch understand Democracy as a tool that guarantees citizens' freedom through the amplification of disagreement and not its suppression.

These disagreements include the debate of Democracy itself, in a phenomenon that Maultasch calls the Free Speech Gambit:

Yes, you can say whatever you want; you even have the right to manifest your hatred, because so I renew the general social commitment to this regime that is so free that the debate about its future is permanently open, even to the worst between us; and this social

commitment reaffirms the legitimacy that we need to ensure that their extremist ideas will have less supporters than the ideas in favor of freedom and Democracy. The gambit prevents a series of arbitrary actions that could jeopardize the legitimacy of Democracy (Maultasch, 2022, p. 133).

In chess, a gambit is a move in which a player sacrifices a piece in favor of a strategic advantage further down the game. It is, therefore, a false loss. Maultasch argues that the same is true of granting freedom for extremist (and even anti-democratic) speech. It is an apparent loss but with immense gains for the general perception of the legitimacy of the entire institutional system and its consequent preservation.

Media: Technologies of Freedom, Fuss of the Vanguard

Finally, Maultasch brings up the role of new communication media in a chapter that deserves a book of its own. He begins by recalling the delightful scene from *The Wonderful Wizard of Oz* in which the characters stand before the great Wizard to collect what he had promised them. At some point, the dog Toto gets scared and knocks over a screen. He then reveals that the great Wizard was no more than a mediocre subject who pretended to be an extraordinary being.

Not even the great Wizard could maintain his reign by brute force alone. The power structures demand some level of agreement, a general belief that authority ought to be held: power follows from legitimacy. Some control of how the exceptionality of the powerful is projected in society is the foundation for rulers to maintain the general perception of their ability and trustworthiness. This process takes place both through explanations and justifications that foster in people a sense of the dignity of power and through control over what one should avoid in communicating.

The fable illustrates the need to control information to maintain power and authority structures. Once the secret of the great Wizard was revealed, the people discovered that he had nothing special to offer then; he was just a little guy who controlled the whole country from an elaborate illusion. Once his mask fell off, he needed to withdraw, and Oz got governed by Princess Ozma, the rightful heir to the throne.

Every complex social structure need myths and narratives and is a product of language. As power is based on communication, it is sensitive to changes in the topology of communication media. For this reason, the vanguard feels endangered by any change in the information ecosystem, understanding that something is wrong with society and that they need to act quickly and forcefully not to let institutions fall into chaos.

For the elites, the real problem is the probability that new media will disrupt the information ecosystem, allowing the rise of new ideas that challenge their status based on traditional institutions. At a minimum, these institutions depend on controlling what information can be hidden from the public. Every new communication media reshapes the information

ecosystem; it changes how information is produced and transmitted. Thus, they become the target of numerous attempts at suppression and control.

Unfortunately, in this process, institutions indispensable for the progress of knowledge, which were once neutral, like science and the markets, risk losing their legitimacy in the face of their use as a tool in the political struggle.

The wriggle, the emotionalism, the moral pontification, and the fundamental contradiction demonstrated by journalists and science popularizers are precisely the factors that have been destroying the credibility of science, print, and other institutions. The problem will persist as long as they think their purpose is to promote narratives to obtain from the ignorant people the behavior they deem correct in their civilizing mission (even if they do not behave themselves in this way); as long as they think that their legitimacy should derive from their institutional position, not from their actions; and while they judge that they can issue legitimate narratives from opaque institutions full of contradictions which thus reveal themselves to be merely hypocritical and devious (Maultasch, 2022, p. 155).

The Captivity of Kindness

Maultasch concludes that the resurgence of the censorship driving force in Brazil is the inability of our urban elites to realize that it is not up to the state to regulate all aspects of its citizens' life. In a country where schooling is a privilege, the symbolic power endowed by formal education degrees makes almost inevitable a narcissistic attitude in which "the vanguardists act as moral pontifices as if they were the heirs of some enlightened despot; they think of themselves as civilizing agents of the barbaric mass" (Maultasch, 2022, p. 166).

Nevertheless, they need to be corrected. In the words of Thomas Sowell (2011, p. 451): "Much of what is called 'social problems' consists of the fact that intellectuals have theories that do not fit the real world. From this, they conclude that it is the real world which is wrong and needs changing".

In trying to defend a constrained Democracy, the enlightened vanguard is indeed promoting "an eschatology, a mirage for the Brazilian history and our civilization, with a utopian vision of a tropical riviera, with a certain goal in mind" (Maultasch, 2022, p. 167). Legitimate Democracy is predicated on trust in the people and not on a pseudo-rational project. Only self-distrusting societies, deceived by false theories, promote the limitation of free expression.

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