

FREEDOM OF EXPRESSION

Questioning a Fundamental Right¹

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ABSTRACT The freedoms of expression and of the press are basic pillars of the western democracies. The contemporary theoretical framework which gives support to these rights was generated in the wake of the liberal revolutions which took place in Western Europe and in North America starting from the second half of the 1600s. Our purpose in this text is to present the current scene regarding this topic, focusing whenever pertinent on the Brazilian case, and seeking to question the unconditional defense of the freedoms of expression and of the press made by the thinkers who founded these principles vis-à-vis contemporary issues of the communicational universe. Going beyond theoretical-conceptual reflections, we present and analyze the results of a content analysis showing how 53 Brazilian newspapers and 4 magazines with nationwide circulation report (or not) topics relating to freedom of expression and of the press.

KEY-WORDS Freedom of expression, Freedom of the press, Human Rights, Regulation, Content analysis.

Introduction

"I may not agree with a single word that you say,
but I shall defend until the death your right to say it."

François Marie Arouet Voltaire (1694-1778), French illuminist philosopher

Governmental and court decisions in the Brazilian context which have taken place in the third millennium (2003-2007) have intensified the defense of a right which is frequently invoked by various groups of actors, but above all, in contemporary life, by media actors: freedom of expression and, as a complement, freedom of the press.

Matters with such different scopes and such diverse origins and consequences such as the expulsion of a foreign journalist who wrote an article which displeased the President of the Republic; attitudes and

norms of different levels of the federal government with regard to the press; the attempt to create a Federal Board of Journalists; the attempt to structure a super Audiovisual Regulatory Agency; the design and implementation of a Public Policy for a TV Rating System and, therefore, of protection of the rights of children and adolescents with relation to audiovisual content; the judicial restrictions on journalistic information which discredited different citizens; murders of journalists, among others, have all been analyzed and often hurriedly condemned based on one same argument, that of restriction of the freedoms of expression and of the press.

A minimal knowledge of these events shows that the utilization of the principle of freedom of expression and of the press in order to combat them or approve them out of context is only possible due to the wide misinterpretation of the conception of these rights, which end up being transformed into a potent shield against any legitimate attempts at democratic regulation of the means of communication.

This text therefore intends to point out some issues related to freedom of expression, a concept which was widely utilized in these episodes, while little discussed in greater depth. At the same time, it will offer an empirical analysis of how 53 newspapers from all the Brazilian states and 4 magazines with nationwide circulation have utilized the ideas of freedom of expression, of the press and censorship in their coverage of topics relating to communicational activity in the three-year period 2003-2005.

When something seems very obvious to us, we often assume without any difficulty that there is no need for us to get bogged down in further explanations regarding the topic in question. Well then, when we say that Brazil is a democracy and this is desirable, we rarely take the trouble to define the term, since all of us suppose that our interlocutors understand the message perfectly. In the same way, we simply take it for granted that freedom of expression today is viewed as something so solid in the western democracies (including Brazil) that the mere mention of this right is self-explanatory.

Our argument is that unfortunately reality does not permit this simplification. Various reasons lead us to maintain that the issue involving freedom of expression is more complex than it appears to be; 1) Freedom of expression in Brazil is not as consolidated as we would like; 2) Freedom of expression does not imply the absence of regulation relating to this topic; 3) Explicit, institutionalized censorship in the form

of a government policy, while one of the models utilized to prevent freedom of expression, is not the only one, and perhaps is not the most important way of restraining this fundamental human right; 4) Freedom of expression is not guaranteed to the same extent for everybody; 5) The ideal freedom of expression is a necessary and sufficient condition for different groups in society to introduce and debate the points of political conflict inherent in a democratic environment; 6) Real freedom of expression cannot be comprehended separately in the system of human rights nor as hierarchically superior to other rights; 7) Public programming of this discussion suffers and will inexorably suffer from an inherent limitation: the mass communication media, one of the main factors responsible for the introduction of any topics in the public sphere, possess a notorious conflict of interest when the agenda includes the debate on freedom of expression and of the press and its regulation in contemporary societies.

Based on these premises, we then intend to discuss briefly the importance of freedom of expression for the western idea of democracy; we will analyze how some illustrative events which occurred during the administration of President Lula and the current situation of the Brazilian communication system can be (or are) comprehended as concrete obstacles to the solidification of the idea of freedom of expression; we will introduce some discussions connected with the regulation of the communication sector and with the guarantee of freedom of expression; we will present the main data of the study which we conducted within the scope of the Children's and Adolescents' News Agency regarding press coverage of this topic. Finally, we will draw some conclusions.

Freedom of expression: democratic high point

It is undeniable that the right to freedom of expression has been, since the first developments of democracy, on the list of basic conditions for guaranteeing a system of government which differed from autocracies and oligarchies.

One of the apogees of Athenian direct democracy, according to many of its admirers, was the possibility that the citizens had for expressing themselves in the Areopagus. The study of *doxa* (opinion) was always very dear to the Greek philosophers. It should be emphasized that it was not just a question of the right to express oneself but, equally relevant, of the need to debate contrary positions.

The dialogues present, for example, in Plato's works and in the reports of the Socratic works are illustrative of the Greek interpretation that knowledge can only be achieved based on the contraposition of opinions and complementary and/or opposing points of view. In this connection, since its birth, the right to freedom of expression has gone *pari passu* with the argument that democracy will be achieved with the guarantee that the plurality of views present in society has a corresponding plurality in the public places for debate, reflection, forming of opinions and decision-making.

It also seems quite reasonable for us to state that several systems of power that followed the Greek democratic experience, and even previous to it, were anchored on some degree of control of the right to inform and to be informed. In Ancient Egypt², there are reports that the scribes, guardians of information, were kept confined by the pharaohs, given their strategic importance. The darkness of the Middle Ages and the lights of the Renaissance were closely linked, respectively, to the reduction and the expansion of the level of information available to people in general (BURKE, 2003; STARR, 2005).

Throughout the Middle Ages, we come across the emergence of one of the most sophisticated apparatus for control of freedom of expression: the Inquisition sponsored by the Catholic Church. For no other reason, it should be emphasized, the construction of the right to freedom of expression goes hand-in-hand with the struggle for the right to tolerance and to religious freedom. The restriction of freedom of expression carried out by the Church during successive centuries was aimed, above all, at preventing the emergence and the profession of other beliefs (or no belief) and therefore greatly limited the exercising of another fundamental right: that of religious freedom.

The legacy of English and American thinkers

Even when democracy ceases to be part of the agenda of real political options, since its nature, until then exclusively direct, faced an insoluble problem of scale, freedom (or restriction) of expression continued on the list of concerns of the recently-organized National States. Here it appears as a highly individual right. In 1644 the English Member of Parliament, John Milton, in his famous speech *Areopagite*³, makes one of the most vehement defenses of the right to freedom of expression, motivated by the prior censorship which the English parliament decided to impose on book publication.

For Milton, freedom of expression should be granted before all the freedoms. An illustration of the enormous difficulties which surrounded and surround the broad defense of freedom of expression is the fact that Milton's pleading was only granted 50 years after he made his famous speech. It should be emphasized, nevertheless, that not many years later another thinker, David Hume, would emphatically recognize the English advances in this field: "There is nothing more capable of surprising a foreigner than the extreme freedom that we enjoy in this country of communicating to the public all that we want, as well as openly criticizing any measure which the King or his ministers might take" (HUME, 1963:3).

It should be noted that the defense of freedom of the press by Milton and other thinkers who followed him is not a defense of freedom for freedom's sake, as if they believed that it represented an end in itself. These authors were clearly aware of the relevance of freedom of expression for guaranteeing other basic structures of democracies. For Milton (1999:52):

[...]when complaints are freely heard, deeply consider'd and speedily reform'd, then is the utmost bound of civil liberty attain'd, that wise men looke for. [according to the original text]

The English philosopher Stuart Mill, on writing a seminal treatise on freedom, even states that freedom of expression is so fundamental that it does not even need to be discussed more profoundly. For him, "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, then he, if he had the power, would be justified in silencing mankind" (MILL, 1989).

Thus the construction of a Liberal State, although not necessarily democratic, is intimately connected with the capability for assuring civil rights (to utilize the typology of T. H. MARSHALL, 1967), among which freedom of expression has an outstanding place.

Tocqueville (1998:137), on emphasizing the importance of newspapers and therefore of freedom of the press for construction of democracy in the United States, also emphasizes:

I will not deny that, in democratic nations, newspapers often lead the citizens to jointly take foolish initiatives; but, if there were no newspapers, there almost would not be any joint action. The harm they produce is therefore much less than the harm they cure.

Tocqueville's reasoning is in agreement with what one of the founding fathers of American democracy, Thomas Jefferson, wrote on this topic:

The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them. (JEFFERSON, 1963:89)

The introduction of representative democracy

The invention of the electoral systems opened a path to solution of the problems of scale in the government of the people. Democracy gradually became the system adopted by the Liberal States. In this relationship freedom of expression again began to be seen as fundamental for guaranteeing what was no longer direct democracy, but electoral, or indirect, or delegated democracy⁴.

Freedom of expression plays several roles in guaranteeing a more vigorous indirect democracy: the first and most obvious one is to enable the voter to have access to a set of relevant information in order to make his decision with regard to who will occupy the positions of popular representation. In other words, freedom of expression is fundamental in order for all the political conflicts and corresponding proposals for resolving them to be presented to the voters. The second, with very extensive consequences, has to do with the fact that the press (connected to freedom of expression in an umbilical way), especially in the view of the American Federalists, is an integral part of the system of checks and balances inherent in the attempt to build democracy. This leads to the conclusion that there is no effective accountability on the part of the elected government without freedom of expression and without a free press. In other words, this type of freedom contributed to the bad government not being so bad after all. A third aspect which appears to us to be highly relevant is that the construction of a public sphere for discussion (as HABERMAS, 1984, warns us), which is essential for the

improvement of democracy, is only possible in an environment in which there is freedom of expression and freedom of the press.

It is not without reason, therefore, that even the most succinct definitions of democracy do not fail to call attention to the pertinence of assuring freedom of expression by means of the Democratic State of Law. Economists Joseph Schumpeter (1984) and Anthony Downs (1999), as well as political scientist Robert Dahl (1956), frequently associated with a more procedural view of democracy, underline with special colors the role of freedom of expression in their definitions of democracy.

In a very incisive way, the Inter-American Court of Human Rights emphasizes its view of the importance of freedom of expression for democracy. For the Court:

Freedom of expression is a cornerstone of the very existence of a democratic society. It is indispensable for the formation of public opinion...It is, in short, the condition that the community, at the time of exercising its options, is sufficiently informed. Finally, it is possible to declare that a society which is not well-informed is not entirely free.

The opinion in the Report on Freedom of Expression (2002) of the Organization of American States goes even further and directly relates freedom of expression with protection of human rights and with the fight against corruption.

Whether as an inalienable individual right, or as an important guarantor of democracy as an institution, freedom of expression has been gradually protected and assured by international treaties, decisions by international courts and national constitutions, and therefore there should not be any doubt regarding its relevance for the consolidation of the contemporary democratic environment.

Freedom of expression guaranteed by the system of rights

The best-known legal instrument for broad protection of freedom of expression is the First Amendment to the American Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Brazilian Constitution of 1988 makes clear in its article 5, section IX:

The expression of intellectual, artistic, scientific activity and of communication is free, regardless of censorship or license.

The Universal Declaration of Human Rights of 1948 states in its article 19:

All individuals have the right to freedom of opinion and of expression, which implies the right not to be perturbed due to their opinions and the right to seek, receive and disseminate, without any consideration given to borders, information and ideas by any means of expression.

The broad support for the right to freedom of expression has in the consequent guarantee of freedom of the press one of its most relevant results. Along the same lines of the other conventions and declarations mentioned above, the American Convention of Human Rights also devotes special attention to freedom of expression in its article 13:

All people have the right to freedom of thought and of expression. This right includes freedom to seek, receive and disseminate information and ideas of all kinds, without any consideration given to borders, whether orally or in writing, or in printed or artistic form, or by any other process of their choice.

The Brazilian State is a signatory, a co-author and often stimulator of these declarations and conventions. Additionally, in two hemispheric meetings, in Santiago and in Quebec, the Brazilian government reiterated, together with the other countries of the continent that were present, its intense defense of freedom of expression. The Declaration of Santiago (1998) reads:

We coincide that a free press plays a fundamental role [in the matter of Human Rights] and we reaffirm the importance of guaranteeing Freedom of Expression, of information and of opinion. We applaud the recent designation of a Special Reporter for Freedom of Expression, within the framework of the Organization of American States.

Therefore, it appears to us that there are no doubts regarding the consolidation of a national and international legal framework widely favorable to the freedoms of expression and of the press.

Brazil, show your face

Unfortunately, freedom of expression in Brazil does not suffer just from momentary and even anecdotic attacks. In a way that is more serious and more difficult to be resolved, there are serious structural problems.

Freedom of expression never had such an important place on the agenda of societies. As we have already emphasized, it is essential not to miss the opportunity to point out the other problems which erode this fundamental right. I refer the reader, in this context, to the worldwide measurement made by the non-governmental organization Freedom House (www.freedomhouse.org)⁵.

At the top of the list (year 2004, which reflects the state of freedom in the year 2003)⁶ we find Denmark, Iceland and Sweden, with 8 points, followed by Belgium, Norway and Switzerland, with 9. Brazil is in the 80th position, together with Mexico, Mongolia and Cape Verde, having received 36 points and is considered partially free with regard to freedom of the press.

What could explain a position like this? Several matters can and deserve to be considered; we will concentrate only on those which we believe are more relevant.

Concentration of ownership

The heavy (horizontal, vertical and crossed) concentration of the ownership of the means of communication in Brazil (very well documented) implies a potential reduction of freedom of expression. Along the lines of our argument at another time (cf. GODOI, 2004), in our opinion the greater the concentration of the means of communication, the least number of groups that will have a voice by way of these means.

The problem of scale of Athenian direct democracy (it is impossible for billions of people to have a voice in the Areopagus) was, to a large extent, resolved with the advent of the means of communication: the message can reach billions of people. Nevertheless, contrary to what occurs with face-to-face communication, the content now passes through an intermediary, the media. This mediator constitutes an important filter between the producers and the receivers of information, and therefore can exercise significant control over the content(s) which will be actually transmitted to the final receiver. In a scenario of heavy concentration, the potential for this control is obviously increased. In this connection,

it is important not to confuse freedom of the press and of expression (individual and collective rights aimed at the guaranteeing of the plurality of opinions in the public sphere) with a supposed – because it is not present in the legal basis of this issue – freedom of the communication companies to do whatever they please.

Relation between politicians and media

The equally well-documented possession of the means of communication by local, regional and national politicians can take the form of an important obstacle to freedom of expression, since conflicts of interest will often take place between the editorial rooms and the holders of power.

Regulatory limbo

Our Press Law is from 1967, and therefore it was produced in and by the military regime; our Telecommunications Code is from 1962. These two legal documents are clearly out of date with relation to what our own Constitution provides and with relation to the more recent discussions with respect to the means of communication in a general way and especially to freedom of expression.

With such outdated laws, and in the case of the Press Law with several unconstitutional provisions, we are living in a regulatory limbo. This situation produces two major results: where there is no regulation, there is a feeling that anything is permitted; to avoid this potential “anything goes” situation, the Public Prosecutor’s Office and the Courts have taken upon themselves the mission of supervising, disciplining and punishing possible mistakes made by the press. However, in the absence of a legal basis discussed by the representatives of society, this action by the Public Prosecutor and the Courts ends up by being disorganized and, here and there, it sometimes oversteps reasonable limits and sometimes falls far short of them. These limits should be expressed and established in pertinent legislation.

In this kind of scenario, it is not surprising that many people declare that the freedoms of expression and of the press undergo concrete, sharp threats in Brazil. This situation, as well as the episode involving the cancellation of the New York Times journalist’s visa, should, at the very minimum, generate equal amounts of concern and indignation.

Freedom of expression, regulation, censorship and the bulletproof vest

On one occasion, an excellent professor of Social Sciences Methodology told us that ideology is a “bulletproof vest”. We suspect that the attitude of the entrepreneurs of the means of communication of bringing up the “ghost” of censorship at any sign that regulation of the sector will be placed on the agenda takes the form of the same strategy of closing the discussion without discussion. Just as ideology cuts short debate, in the view of the methodology professor mentioned above, this evocation of censorship as being the inevitable consequence of any regulation that might be desired for the sector ends up by always putting a period on the discussion even before it occurs; it is a straitjacket, a bulletproof vest.

Certainly, this argument (of censorship) deserves respect and attention for various reasons. Firstly, more impressionistic, because, still very present in the hearts and minds of a large part of the opinion formers and decision-makers (even those who have no dangerous ties to media companies) are the 20 years of existence of the authoritarian regime which did away with freedom of expression, opinion and information on the Brazilian scene, and therefore, any least chance of the return to censorship instruments is totally and rightly rejected.

In the second place, article 5, section IX of the Federal Constitution of 1988 is utilized as an indisputable argument that nothing can affect freedom of expression. Control of content, therefore, appears to be the great Achilles heel of the regulatory discussion. Always labeled “censorship”, this type of control is difficult to accept in the most diverse societies, especially due to the devious way in which the debate is conducted.

Freedom of expression, however, implies that all the conflicting or different groups in society have their right to be heard assured. As we can easily verify, there are extremely few who have this right guaranteed in a media such as the Brazilian one. What kind of freedom of expression is this? Is not this restriction of the right to be heard a more aggressive form of censorship than democratic control of content?

In the end, we can say that freedom of expression, *grosso modo*, is freedom for the communication companies. Various authors share this point of view. Fernandes (2002) recalls Fábio Konder Comparato and underlines: “nevertheless, there are means not accessible to all, such as radio and television. In these cases, only the holders of the licenses

for exploitation of broadcasting possess full freedom of expression of thought and of opinions; the other members of the community do not.”⁷

In this same direction, the philosopher Renato Janine Ribeiro (2001, 26) concludes: “It is not a question of reducing or repressing freedom, but rather a question of noting that this freedom is exercised by few people, basically due to the capital which they have available, and which constitutes a mechanism for control by these few of the general public”.

When we talk about control we are referring generically to different democratic regulatory instruments which would permit a greater plurality of voices in the means of communication and therefore greater freedom of expression. These controls range from concrete Public Policies to institutionalized groups for action relating to the communication media. A well-regulated right of reply could be an interesting way out in these cases, for example.

The journalistic companies themselves emphasize the importance of guaranteeing the plurality of voices, as seen by the Editing Manual of the newspaper *Folha de São Paulo*: “In a complex society, every event is subject to multiple, if not contrary, interpretations. *Folha* readers should be assured their right to access to all of them. All the society’s significant ideological tendencies should be represented in the newspaper” (2007:47). Nevertheless, as the table below demonstrates, the presentation of divergent opinions is not a constant in the coverage of Social Public Policies by the Brazilian press.

Table 1: Does the text mention divergent opinions?

Topic Researched	Period analyzed	%
Transgenic items	2004	36.5
Public Communication Policies	2003 to 2005	15.7
Advice	2003	11.3
Human and Social Development	08/2001 to 07/2002	11.2
Human Rights	2004	11.0
Education	2004	10.3
Drugs	08/2002 to 07/2003	8.4
Children’s Health	2002	7.0
Tobacco and Alcohol	2001	6.7
Domestic Work by Children	2002	6.6
Adolescents’ Health	2001	5.2
Social Responsibility of Business	10/2003 to 09/2004	4.5
Deficiency	2002	4.2
Social Technologies	2004	3.1

Between the ideal and the real

Moreover, freedom of expression is really, as the discourse of many heralds of non-censorship suggests, inversely proportional to control of content. That is, to the extent that all groups have access to the means of communication, the need for controlling content disappears, since all will be able to democratically contest the information which seems wrong to them. Until this occurs, this *quasi* right to “freedom of expression” which we have available to us at this time needs to be questioned, and with regard to it a question arises: why does the right to freedom of expression antecede, for example, youths’ or women’s rights? Why, on behalf of this freedom of expression, must society accept profound disrespect for human rights? Why must it accept programming which violates the ethical parameters that are already furnished by the Federal Constitution?

Obviously these two arguments (that of non-censorship and that of freedom of expression) are pertinent. What is not pertinent is the use made of them. The unrestricted defense of freedom of expression, as we have emphasized, if this could be taken to its ultimate consequences, would be a necessary and sufficient condition for eliminating the problems arising from the mediation imposed by the mass communication media since their advent. There is here a “market failure”; therefore we need regulation.

It is clear that any person on the street can expound his ideas, in Brazil, without being jailed for this. The opposing groups of the society can even present exhaustively their ideas on their sites on the Internet. Nevertheless, freedom of expression is associated with the extent of the discourse of those who enjoy it. Having freedom of expression at 8 p.m. on the national television network is very different from having freedom of expression standing on a bench in a public square.

Accordingly, evoking classical thoughts on freedom of expression, as Keane (1991) strongly emphasizes, implies contextualizing the thinking of freedom of expression, or of the First Amendment to the American Constitution, in the communicational system which is in effect at the beginning of this century. Otherwise, we would be talking of a right applicable to a non-existent social reality.

Freedom of expression and other rights

We have already seen that there is a “market failure” in the constitutional guarantee of freedom of expression. With the introduction of the mass communication media, the utilization of this right begins to occur in an unequal way.

Stated starkly, some people have more freedom of expression than others, or some are more equal than the others. Resolving this issue is the main task of any regulation.

There are several ways out on the legislators’ horizon for equating this complex problem: 1) Guaranteeing the plurality of voices in the communication media (starting with the guarantee of a plural ownership of these media); 2) Instituting appropriate legislation providing for the right to reply; 3) Regulating the right to antenna; 4) Establishing rules of transparency for media activity; 5) Developing democratic policies for regulation of content, such as in the case of the TV Rating Systems; 6) Encouraging the introduction of the figure of ombudsman, of media watchers, press boards and other forms of guaranteeing media accountability; 7) Outlining how the right to freedom of expression relates to other rights (for example, in the name of freedom of expression, can a television channel identify itself and behave in an anti-Semitic manner?); 8) Encouraging the higher courts to define the limits of freedom of expression, as has occurred in various countries; 9) Guaranteeing this equilibrium of voices with an empowering of the public communication media.

We would like to stress the seventh point, which is especially interesting given the international experience, and repeat a general warning: freedom of expression and of the press should be analyzed and regulated keeping in mind the entire group of human rights and not individually, as has already been emphasized. Some countries’ regulatory agencies have already been emphatic in considering that the protection of other rights should be put on the scale (in addition to freedom of expression) when the means of communication are in the eye of the hurricane in the discussions.

In this connection, the wording found in the New Code of Conduct for Broadcasters prepared by the independent regulatory authority of South Africa (ICASA), quoted by Gallagher (pp. 26 and 24) seems to us to be noteworthy:

The outcome of disputes turning on the guarantee of freedom of expression will depend upon the value the courts are prepared to place on that freedom and the extent to which they will be inclined to subordinate other rights and interests to free expression. Rights of free expression will have to be weighed up against many other rights, including the right to equality, dignity, privacy, political campaigning, fair trial, economic activity, workplace democracy, property and most significantly the rights of children and women. (ICASA, New Code of Conduct for Broadcasters, paragraph. 7, emphasis added; see www.icasa.org.za)

In this minefield it is, however, important to work towards frameworks that encourage reflection on the potential conflicts between human rights, freedoms and responsibilities, and which acknowledge that 'rights' have a different legal basis from 'freedoms'" (see MCIVER, 2000).

As jurist and current Justice of the Federal Supreme Court, Eros Grau points out that the Constitution cannot be analyzed in strips, as if we were choosing the excerpts which best fit in with our particular interests, and therefore we cannot talk about the absolute right of freedom of expression, as if the latter overshadowed all the other guarantees present in the constitutional text.

In this connection, it is worth mentioning that in successive debates, including that found in the Habeas Corpus Judgment 82424/RS, referring to the practice of racism committed by a book publisher in the State of Rio Grande do Sul, the Federal Supreme Court maintained the nonexistence of absolute rights, particularly with respect to the right to freedom of expression. Justice Celso de Melo taught us, in his vote cast with relation to this case:

Publications such as those involved in this case – which go beyond the limits of scientific inquiry and historical research, deteriorating to the primary level of insults, of offenses, and above all of encouragement of intolerance and public hate of the Jews, do not deserve the dignity of the constitutional protection which assures freedom of expression and of thought, which cannot include, in its scope of tutelage, expressions clothed in criminal illicitness.

Justice Gilmar Mendes went even further. Although he recognizes the vital importance of the right to freedom of expression and, above all, freedom of the press, he partakes of the argument developed by Kevin Boyle, a scholar in this matter, reproduced in the vote presented at the time of the judgment mentioned above. For Boyle, when the right to

freedom of expression and the right to non-discrimination enter into conflict, the latter should prevail over the former:

The reply lies in the fact that we are facing a conflict between two rights in a democratic society – freedom of expression and the right to non-discrimination. Freedom of expression, including freedom of the press, is fundamental for a democracy. If democracy is defined as control of the government by the people, then, if the people cannot express their point of view freely, this control is not possible. It would not be a democratic society. But, likewise, the central element of democracy is the value of political equality. ‘Every one counts as one and no more than one’, as Jeremy Bentham said. Political equality is, consequently, also necessary, if a society intends to be democratic. A society whose objective is democracy should both protect the right to freedom of expression as well as the right to non-discrimination. In order to achieve political equality it is necessary to prohibit discrimination or exclusion of any type, which denies to some people the exercising of rights, including the right to political participation.

Content analysis: Freedom of Expression and Censorship

There should not be any doubts regarding the pertinence of the concepts of “freedom of expression” and of “censorship” for the wider debate of the interconnections between media and democracy, as we have emphasized up to now.

For this very reason, an enormously relevant issue arises: the debate regarding the guarantee and the regulation of the rights to freedom of expression and of the press is of major importance for contemporary democracies; at the same time, it is noted that one of the main agenda-makers of any public reflections is the very same media. However, are the media able to knit together a broad and profound coverage – including the different angles from which the discussion can be evaluated – with these rights being of special interest to the communication business and therefore constituting a topic which directly affects the editorial policy of the news media? (Cf. SCHUDSON, 2003:31).

This question was at the heart of the research which we coordinated, within the scope of the ANDI and with the support of the Ford Foundation, regarding how 53 Brazilian newspapers⁸ and 4 magazines with nationwide circulation (CARTA CAPITAL, ÉPOCA, ISTO É, VEJA) covered topics under the wide umbrella of the so-called Public Communication Policies. We analyzed 1184 editorials, articles, columns, interviews and news items throughout the three-year period 2003-2005, by means of the methodological tool of

content analysis. We present below specific data for the cross section of freedom of expression/press and censorship.

The presence of these two concepts in the texts concerning issues pertinent to communication, published during the three-year period analyzed, was not be negligible: 14.9% of them mentioned the expression censorship and 10.7% mentioned freedom of expression or of the press (in 33.5% of the texts which mentioned censorship or in 46.46% of those which dealt with freedom of expression, the concepts appeared concomitantly). Even in other research works coordinated by the ANDI, this fact is repeated: in research on how the media covered Human Rights, in partnership with the Special Secretariat for Human Rights and the UNESCO, it was revealed that the human right most covered by the media, in the year 2004, was the right to freedom of expression and of the press.

The greater presence of the key word “censorship” – which, as has been emphasized, is always evoked for the purpose of preventing debate regarding regulatory changes for the sector – in the texts already begins to indicate the profile of this coverage: as a rule, it served more to defend and explain the interests of the communication companies themselves rather than to effectively delve into a public debate regarding these issues, especially from the perspective of the rights.

Other data corroborate this perception. Within the several rights connected with the broader idea of communication, the right to freedom of expression and to freedom of the press – much utilized in an interchangeable way, although they are not the same thing – is mentioned 6.35 more times than the right to information and 127 times more than the right to have a voice.

Table 2: Which of the following rights or freedoms is mainly mentioned by the text

Rights	%
Right to have a voice	.1
Right to communication	.2
Right to expression	.2
Right to information	1.7
Authors' rights	1.1
Freedom of expression	10.7
Freedom of information	.5
Not mentioned	85.6
Total	100.0

Interested presence

Returning to the initial argument, we again underline that debating censorship and freedom of expression is certainly an attitude of undeniable journalistic value and of unquestionable relevance for comprehension of the role and of the context in which the mass communication media are situated in contemporary democracies. However, that was not exactly what occurred in the coverage of topics linked to communication in the period analyzed.

Focusing on the coverage which made use of the idea of freedom of expression or of the press, we found that 60% of these texts had the main concern of emphasizing that these freedoms would be threatened by specific governmental action. Despite the importance of coverage with this profile, it is relevant to emphasize that only 1 (one) text established relations between the protection of the right to freedom of expression vis-à-vis the protection of other fundamental rights; only 2 (two) texts offered a historical debate regarding the issue and no more than 3 (three) presented the concept of freedom of expression and of the press.

In coverage with these characteristics, the possibility of putting on the agenda a qualified debate regarding the issue is greatly reduced, which unduly minimized the importance of the topic that ends up with a functionalist and biased use.

Table 3: Mention of freedom of expression occurs mainly in the following context

Type of mention	%
As threatened by a specific governmental action	59.1
As threatened by a specific action of other actors	4.7
As the consequence (strengthening) of a specific action of other actors	4.7
As threatened by a specific action of the media	3.9
As the consequence (strengthening) of a specific action of the media	3.1
As the consequence (strengthening) of a specific governmental action	2.4
There is a conceptual discussion regarding the topic	2.4
There is a historical discussion	1.6
Vis-à-vis other fundamental rights	.8
It was not possible to identify	17.3
Total	100.0

* 10.7 % of the texts deal with the idea of freedom, of expression or of the press

A similar situation occurs with the texts which mention the expression “censorship”. In 42.1% of the texts analyzed, censorship appears as a characteristic or consequence of a specific governmental action. Important issues such as the concept of censorship (3 texts) and the potential misinterpretation which the evocation of the term brings to some regulatory discussions (also 3 texts) were practically absent from the debate. However, the reference to the history of censorship (in 8% of the texts which made use of the expression) was not negligible.

Table 4: As regards the use of the term “censorship”, it occurs mainly in the following context

Type of mention	%
As a characteristic of a specific governmental action	27.3
As the consequence of a specific governmental action	14.8
There is a historical discussion	8.0
Against censorship	6.3
As a characteristic of a specific action of other actors	4.5
As a characteristic of a specific action of the media	4.0
As being avoided by a specific governmental action	3.4
As being avoided by a specific action of the media	2.8
As being responsible (the utilization of the term) for the misinterpretation of a specific debate	1.7
Within the observation of the rejection of censorship by specific groups (or by the population)	1.7
There is a conceptual discussion regarding the topic censorship	1.7
As the consequence of a specific action of other actors	1.1
As being avoided by a specific action of other actors	1.1
In favor of censorship	1.1
As the consequence of a specific action of the media	.6
Within the observation of the support of censorship by specific groups (or by the population)	.6
It was not possible to identify	19.3
Total	100.0

Editorial parameters

The journalistic material which made use of the ideas of freedom of expression and censorship presents very similar general characteristics. For example, it is concentrated on a very specific focus: around 70% of the texts that mention these concepts are concerned with issues of content,

rarely associating other relevant topics (such as regulation or media and democracy or concentration of ownership, for example).

Inclusion in the agenda also presents a similar characteristic: the initiative of the press itself. The texts that bring these expressions to the center of our attention at the moment were, in general, the result of spaces opened by the management of the media researched. In the case of censorship, in 31.3% of the texts analyzed, the topic ended up being included on the agenda due to an initiative of the press itself, a figure which jumps to 36.2% in the case of freedom of expression. In second place, when the expression under analysis is censorship, are governmental actions and, for freedom of expression, events of the area.

The high percentage of texts linked to an editorial decision to open important space in the newspapers for reflection on the topic is reflected in the breakdown of the texts which make use of the words “censorship” and “freedom of expression” by types of journalistic material. Compared with other topics of this very research and other research works headed by the ANDI, these two matters are the ones that were mostly disseminated by types of material featuring opinion (articles, columns, editorials and interviews): 40% of the cases.

Table 5: Type of journalistic text

Type	Key Words %	
	Censorship	Freedom of Expression
News stories	63.1	58.3
Signed articles	13.1	16.5
Signed columns or column notes	11.4	7.1
Editorials	5.1	10.2
Interviews	7.4	7.9
Total	100.0	100.0

* 14.9% of the texts mentioned censorship and 10.7% freedom of expression or of the press

There was also a tendency to associate the use of the key words “censorship” and “freedom of expression” with some specific cases that took place during the period analyzed. Thus, “censorship” was linked to the cases of the bill creating the Federal Board of Journalists – CFJ (13.6%), reflections regarding the TV Rating System (8.5%) and the expulsion of

journalist Larry Rohter (6.3%). “Freedom of expression” appeared in the discussions about the CFJ (28.3%), the National Movie and Audio Visual Agency (ANCINAV) (8.7%) and the expulsion of the New York Times journalist (7.9%).

The texts presented external sources for corroborating their reasoning: 50% of the texts which made use of the expression “censorship” and 59% of those which utilized freedom of expression mentioned specific legislation. 11.4% of those dealing with censorship and 9.4% of those involving freedom of expression had as their main source a specialist or technician.

Also with regard to the sources, it should be emphasized that in the case of the texts with the expression “censorship”, 10.8% of the primary sources were from the private sector, a figure which jumps to 23.6% when we focus on the material with the idea of freedom of expression. With respect to the polemics surrounding these two concepts, around 20% of the texts had diverging opinions – a high percentage, if we take into consideration the general average in the research, while less than expected for a discussion with these outlines.

Conclusions

We believe that the main conclusions still need to be established, since we continue to rely on a very timid debate with relation to all the dilemmas and questioning involved in the larger issue of freedom of expression.

We have tried to advocate four major ideas in this article: 1) The recent episodes are a useful source for initiating and going more deeply into this so necessary debate; 2) The attempts against freedom of expression are attempts against democracy and need to be observed carefully; 3) Debating freedom of expression implies entering into a full discussion of a regulation for the system of social communication, which urgently needs to assume an outstanding position on the agenda of Brazilian society; 4) It is necessary to seek means for equating an incompatibility inherent in the debate on freedom of expression and of the press: the main articulator of public discussion at the present time – the very media – has direct and often not republican interests in these issues, which leads us to doubt the possibility of its presenting coverage with the required distancing between company interests and press activities.

The emphasis given by the media to the episodes which occurred during the three-year period analyzed constitutes a symptomatic

illustration of our basic problem: treating the question of freedom of expression and of the press based on isolated cases and therefore without linking it to the basic issues of the regulation of communications in Brazil. Here lies the Gordian knot of the question, whether for public policies, for debate in the academic world and in the organized civil society, or for journalistic coverage of the topic.

NOTES

- 1 A preliminary version of this work was discussed with the members of the Communications Policies and Research Nucleus, at the V Meeting of INTERCOM Research Nuclei, the Brazilian Society of Communication Sciences and with colleagues from the Children's Rights News Agency - ANDI. I am grateful to all these entities and to all my interlocutors for their valuable comments, criticisms and suggestions, emphasizing that I am entirely responsible for the remaining errors. Additionally, I emphasize and am grateful for the support of the Ford Foundation, the W.K. Kellogg Foundation, the Brazilian Ministry of Justice, Save the Children Sweden and the Avina Foundation, whose funds contributed, at different times, to the ANDI and to the research and strategies that I have coordinated in the organization have been essential for the development of this reflection.
- 2 Milton (1999: 69 and subs.) offers many examples of institutional violations of freedom of expression and of the press in the Roman Empire and in the actions of the Catholic Church. He criticizes with acid irony the latter: "To fill up the measure of encroachment, their last invention was to ordain that no Book, pamphlet or paper should be Printed (as if St. Peter had bequeth'd them the keys of the Presse also out of Paradise) unless it were approv'd and licenc'd under the hands of 2 or 3 glutton Freirs" (MILTON, op. cit, 72, according to the original pamphlet).
- 3 The writer of the preface to the Brazilian edition of the Miltonian speech, diplomat Felipe Fortuna, emphasizes: "The main objective of *Areopagite*, as defined by its author, is the defense of total freedom of the press, for the purpose of enabling the maximum advance of knowledge and of truth. Since its publication, the pamphlet has been praised as the most radical text on the futility of censorship, the passionate defense of the circulation of all ideas and the need for religious tolerance".

- 4 Even if we take into consideration other models of democracy, such as the participative or deliberative type, we will see that freedom of expression, at least theoretically, plays a major role. Regarding other models, cf. ELSTER (1986).
- 5 Freedom House has been following, for several decades, how things stand with freedom in different nations of the globe. Based on several criteria, therefore, the institution offers annually a ranking of the most free and least free countries on the planet. Parallel to the general ranking of the countries' level of freedom, the ONG also publishes annually a ranking of freedom of the press. This ranking is based on information obtained by the institution with regard to 3 sets of criteria: legal (laws and regulations which guarantee or obstruct freedom of expression); political (political means of controlling freedom of expression, such as censorship) and economic (such as the sector's ownership system). Based on the collection of information, marks are attributed to the criteria, and at the end, countries can have an overall total of points ranging from 0 to 100, with 0 being an indicator of total freedom of the press and 100 indicating total restriction. The institution works with 3 major categories of countries: countries with averages that range from 0 to 30 points are considered free; between 31 and 60 points we have partially free countries; and countries with from 61 to 100 points are not free.
- 6 There are more recent data; nevertheless, we have opted for data which reflect the year 2003, to avoid establishing a relation between the events of the period analyzed and the results of the Freedom House ranking, since we are emphasizing that the problems are structural and not linked only to specific attitudes of this or that administration.
- 7 In this connection cf. tb. Hankin (1963:13).
- 8 The following daily newspapers in the States indicated were analyzed: A Crítica (Amazonas), A Gazeta (Acre), A Gazeta (Espírito Santo), A Gazeta (Mato Grosso), A Notícia (Santa Catarina), A Tarde (Bahia), Brasil Norte (Roraima), Correio Braziliense (Federal District), Correio da Bahia (Bahia), Correio da Paraíba (Paraíba), Correio de Sergipe (Sergipe), Correio do Estado (Mato Grosso do Sul), Correio do Povo (Rio Grande do Sul), Diário Catarinense (Santa Catarina), Diário da Amazônia (Rondônia), Diário da Manhã (Goiás), Diário da Tarde (Minas Gerais), Diário de Cuiabá (Mato Grosso), Diário de Natal (Rio Grande do Norte), Diário de Pernambuco (Pernambuco), Diário do Amapá (Amapá), Diário do Amazonas (Amazonas), Diário do Nordeste (Ceará), Diário do Pará (Pará), Estado de Minas (Minas Gerais), Folha de Boa Vista (Roraima), Folha de Londrina (Paraná), Folha de S. Paulo (São Paulo), Gazeta de Alagoas (Alagoas), Gazeta do Povo

(Paraná), Gazeta Mercantil (São Paulo), Hoje em Dia (Minas Gerais), Jornal da Tarde (São Paulo), Jornal de Brasília (Federal District), Jornal do Brasil (Rio de Janeiro), Jornal do Commercio (Pernambuco), Jornal do Tocantins (Tocantins), Meio Norte (Piauí), O Dia (Piauí), O Dia (Rio de Janeiro), O Estadão do Norte (Rondônia), O Estado de S. Paulo (São Paulo), O Estado do Maranhão (Maranhão), O Globo (Rio de Janeiro), O Liberal (Pará), O Norte (Paraíba), O Popular (Goiás), O Povo (Ceará), O Rio Branco (Acre), Tribuna de Alagoas (Alagoas), Tribuna do Norte (Rio Grande do Norte), Valor Econômico (São Paulo), Zero Hora (Rio Grande do Sul).

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