

## THE FEDERATIVE REPUBLIC OF BRAZIL

### ARTICLE 19's Submission to the UN Universal Periodic Review of the Federative Republic of Brazil

*Thirteenth Session of the Working Group of the Human Rights Council, May-June 2012*

#### **Executive summary**

1. ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19) is an international organisation, with observer status with ECOSOC, that works globally to promote and protect freedom of expression and information. The regional office was established in Brazil in 2007 and works on various issues related to freedom of expression and information, including the improvement of legal frameworks on broadcasting and other media-related issues, and campaigning for the adoption of an Access to Public Information Law.
2. With this submission, ARTICLE 19 seeks to make a constructive contribution to the preparation process of the UPR for Brazil. Given our expertise, this submission focuses on Brazil's compliance with its international human rights obligations in respect of freedom of expression. In particular, it addresses **restrictive legislation** on the operation of the media and freedom of expression in general, threats to **freedom of expression on Internet**, misuse of **defamation and *desacato* laws** to suppress freedom of speech, instances of **violence against journalists**, and freedom of information violations concerning the **right to truth** and **large-scale development projects**.

#### **Inappropriate legal framework for broadcasting - threats to media pluralism and diversity**

3. The main piece of legislation on the operation of media outlets in Brazil is the 1962 Telecommunications Code (Law 4117/62). The Code is technically and technologically outdated. Although it has been repeatedly modified and two thirds of its original articles have already been replaced by subsequent laws, it has never been entirely revoked. For more than ten years, the large number of sparse laws regulating specific issues in the area has created a situation of confusion and legal uncertainty, with contrasting interpretations that allow for abuses against freedom of expression. This situation contravenes international and regional standards in the area.
4. One of the key international standards on freedom of expression is that of pluralism and diversity of the media. ARTICLE 19 submits that Brazil has failed to satisfy this standard by i) the failure of regulatory policies to support the development of independent broadcasters, in particular of non-commercial and community broadcasters; and ii) a high degree of concentration of media ownership.

The commercial sector has historically dominated the broadcasting scenario in Brazil. In addition to horizontal concentration, the Brazilian media context has also shown strong vertical concentration. Lack of transparency in the concession of rights for commercially exploring broadcasting services has been one of the main obstacles to securing diversity. For example, although Brazilian law prohibits congress representatives of being granted broadcasting licenses, 68 of them currently hold a TV or radio license. This is worrisome and may lead to illegal decisions concerning the allocation of frequencies, since the Congress holds the responsibility of approving new licenses and licenses' renewals. Conflicts of interest have not stopped Congress representatives from voting on their own behalf in such licensing processes.

5. ARTICLE 19 believes that this situation could be greatly improved with an expansion of community broadcasters. However, despite recent improvements, such as the adoption of the

National Plan for Community Broadcasting Concessions by the Ministry for Communications, the licensing procedure for community broadcasters, especially radios, is lengthy, ineffective and punitive. Thousands of community broadcasters are still waiting to be attributed a license, some of them for more than 5 years. Many end up operating without such authorisation, resulting in legal actions against them. ARTICLE 19's research at Brazilian federal regional courts identified at least 326 lawsuits against community radios, 154 of them criminal (based in Art. 70 of the Telecommunications Code that criminalizes unlicensed broadcasting operations). Many consider that this article was revoked by the Community Radios Law (Law 9612/98), but most judges fail to recognise this. ARTICLE 19's research also indicates a pattern of discriminatory behaviour by monitoring authorities since commercial radio stations on average do not suffer any type of sanctions for non-compliance with broadcasting regulations. The reality for community radio stations is much different with many accounts of violent behaviour, confiscation of equipment and closing down of stations by ANATEL and the Federal Police.

6. Public service broadcasting is still in its initial stages in Brazil. The Brazilian Communications Company (EBC) was created in April 2008 as a public company to manage and expand the public broadcasting sector in Brazil. It currently manages 1 TV channel, 8 radio channels, 1 radio news agency and 1 internet news agency. EBC has been suffering a number of challenges concerning its independence and financial viability. It is linked to the Communications Secretariat of the Presidency and the Union is its sole shareholder. The law that created EBC established a public fund that should be formed from the collection of a fee imposed on a number of different telecommunication activities (Contribuição de Fomento à Comunicação Pública). This fund, however, has been constitutionally challenged by telecommunication companies and EBC has not had access to its resources. Since EBC is legally barred from broadcasting advertisements and selling air time for publicity, its sustainability is greatly endangered.

### **Threats to freedom of expression on the Internet**

7. The use of the Internet in Brazil has been growing significantly and continuously (Brazil is the 9<sup>th</sup> country with the largest number of IP addresses in the world) and the Internet has assumed an important role as a key tool for the exercise of freedom of expression and information. At the same time, ARTICLE 19 is concerned about attempts to adopt legislation restricting freedom of speech on the Internet. For example, a Bill on Cybercrimes (Draft Bill 84/99, or "Azeredo" Bill) has been under discussion at the Brazilian Congress for 12 years. The text proposes a number of provisions that may limit freedom of expression online, most of them resulting from the use of vague and open terminology in the definition of crimes. The Bill also sets up the obligation of internet service providers to inform authorities about any possible crimes that may have been committed through the internet services provided under their responsibility. The imposition of this type of liability on intermediaries has been condemned under international freedom of expression standards and may have a chilling effect on the free flow of information online.

### **Civil and criminal defamation and *desacato***

8. ARTICLE 19 continues to be profoundly concerned by the use of *desacato* laws, a class of legislation that criminalizes expression which offends, insults, or threatens a public functionary in the performance of his or her official duties. *Desacato* provisions are present in a number of provisions in Brazil, including in Article 331 of the Criminal Code. *Desacato* provisions protect officials from public scrutiny and criticism and run counter to democratic values of transparency and accountability and can be easily abused by authorities. For example, most recently, in September 2011, Felipe Werneck, a reporter covering a robbery in a hostel in Leblon, Rio de Janeiro, was taken into custody for *desacato* because he refused to leave the Police Station where he was trying to collect information about the robbery.

9. In addition to *desacato* laws, the Brazilian legislation set up criminal sanctions for “crimes against the honor”, which include calumny, defamation and slander. Calumny is the act of attributing a crime to someone, while knowing or having reasons to believe this is not true. Defamation is the act of attributing to someone a fact that is offensive to his/her reputation. Slander is the act of offending someone’s dignity or morals. According ARTICLE 19’s research, in the majority of cases taken to courts in relation to these crimes the plaintiff is a public official or authority.
10. ARTICLE 19 is also particularly concerned with the high number of civil defamation cases that are currently under way in the country and with the nature of these cases. Some particularly concerning features of defamation include (i) the lack of a ceiling and clear methodology for setting up indemnification amounts; (ii) the use of injunctions and provisional decisions amounting to prior censorship; and (iii) the fact that most cases refer to denouncements concerning corruption and other irregularities involving public officials.
11. ARTICLE 19 interviewed some journalists that are facing more than a dozen lawsuits. Journalist Juca Kfour, for example, told ARTICLE 19 that he “lost count” of the lawsuits. At least 50 of them were filed by the head of the Brazilian Football Confederation, Mr. Ricardo Teixeira, recently accused of corruption in relation to the preparation works for the 2014 World Cup to take place in Brazil (involving millions in public funds). A Parliamentary Investigative Commission has been set up to investigate the case. Mr. Teixeira has also been accused by British journalist Andrew Jennings, from the BBC, concerning a major FIFA scandal relating to the payment of bribes. Mr. Jennings is also facing a defamation lawsuit put forward by Mr. Teixeira.

### **Violence against journalists**

12. Violence against journalists is also a concern for ARTICLE 19. According to available information, at least 6 journalists were murdered in Brazil between 2007 and 2010 and at least 58 cases of physical aggression were reported in the same period. However, in 2011, ARTICLE 19 has already recorded 6 cases of killings of journalists, all of them while carrying out their professional duties: Luciano Leitão Pedrosa, killed on 9 April, in the city of Vitoria de Santo Antão, State of Pernambuco; Valério Nascimento, killed in May 3, in Rio Claro, State of Rio de Janeiro; Edinaldo Filgueira, killed on 15 June, in Serra do Mel, State of Rio Grande do Norte; Auro Ida, killed on 22 July in Cuiabá, State of Mato Grosso; Valderlei Canuto Leandro, killed on 1 September in Tabatinga, State of Amazonas; and Gelson Domingo, killed on 13 November in Rio de Janeiro, State of Rio de Janeiro. All cases are pending investigation. In addition, reports show that 13 (out of 27) cases of killings of journalists reported since 1992, remain unsolved. Impunity is a major factor that indirectly promotes the occurrence of new cases of violence against journalists, since perpetrators feel safe and immune to any type of liability.
13. According to interviews carried out by ARTICLE 19, in the majority, cases of violence against journalists relate to the publication or broadcasting of investigative pieces on corruption or other irregular behavior by public authorities. Organized crime syndicates, corrupt politicians and police officers were indicated as the main perpetrators.
14. Journalists and freedom of expression groups interviewed by ARTICLE 19 also confirmed that journalists and media workers working for small media outlets in the North and Northeast administrative regions of the country are particularly vulnerable to direct acts of violence and threats. Those working for regional and national media outlets, most of which are based in state capitals, while not immune to threats or attacks, are somehow less at risk of physical aggression.

### **Access to information and the right to truth**

15. ARTICLE 19 remains seriously concerned about the continuous secrecy over the files concerning serious human rights violations that occurred during the Brazilian military dictatorship. More than 20 years after the end of the authoritarian regime, the families and friends of those killed and those forcibly disappeared still wait to learn the truth about what happened to their loved ones. Although Brazil has already been condemned for this situation by the Inter-American Court of Human Rights in *Gomes Lund and others v. Brazil* (the “Araguaia Guerrilla” case), it failed to adopt measures to fully implement the decision.
16. ARTICLE 19 also regrets that the 1979 Amnesty Law remains in force, creating obstacles to the exercise of the right to information and the right to the truth for the victims of the dictatorship and their relatives. This law provided a certificate of whereabouts unknown or presumed death of the political disappeared, exempting the military-civilian regime of their responsibilities and preventing the elucidation of the circumstances of the deaths. ARTICLE 19 notes that the amnesty laws that provide for the establishment of statutes of limitations or exclude responsibility for certain crimes have been already declared incompatible with the American Convention on Human Rights by the Inter-American Court.
17. ARTICLE 19 welcomes the creation of the Truth Commission in November 2011. The Commission shall investigate human rights violations that occurred between 1946 and 1985, including the disappearance of activists, murders and torture. We note that although it will have investigative powers, perpetrators will not be prosecuted due to the Amnesty Law that is still in force. The Commission could have a significant role in redressing the lack of information regarding this period, however it is delegated with a very difficult task considering that it will operate only for 2 years, will be composed of 7 members and cover such an extensive period of Brazilian history.

#### **Access to public information and large development projects**

18. ARTICLE 19 fully welcomes the passing of the Access to Public Information Law in November 2011. The law is progressive in many of its provisions and a significant step forward in the realisation of the right to information in Brazil. We regret, however, that the law failed to establish an independent body tasked with responsibility of enforcing the law and promoting the right to information in the country. This law should also be instrumental in making the access to information a reality in the country, including large development projects.
19. Brazil’s economic growth in the past years has led to a speedy increase in the number of large scale development projects underway in the country. Large dams connected to power plants, highways, bridges, beautification and urban renovation projects are frequently seen around the territory. Despite seeking to create infrastructure and bring progress, these projects have a significant social and environmental impact and they have disproportionately severe effects on traditional, rural and indigenous communities.
20. ARTICLE 19’s monitoring shows that many development projects have resulted in serious violations of freedom of expression and information rights. In the case of indigenous communities, proper consultations - as determined by ILO Convention 169 – are rarely if ever organized before the beginning of the project. It is common for affected communities to be denied complete and significant information about the projects, including in relation to displacement and severe deterioration of environmental conditions. Public hearings are called with insufficient prior notice and documents and reports are provided in format and language that may be inaccessible to many of those that will be affected. There is no space for true participation by civil society in the environmental licensing procedures. In some cases, ARTICLE 19 received reports of community leaders threatened for speaking out against this situation and opposing the implementation of projects.

21. Some cases of concern for ARTICLE 19 include the construction of the Belo Monte power plant in Rio Xingu, the Jirau and Santo Antonio power plants in Rio Madeira, the Rodoanel in Sao Paulo, a number of smaller scale cases of urban renovation in different state capitals and in relation to the works already underway in preparation for the 2014 World Cup and the 2016 Olympic Games.
22. The findings of ARTICLE 19 are corroborated by other reports. For example, a 2011 report by regional organization Plataforma DHESCA affirms that the “in the cases studied, the rights most violated repeatedly were: 1. Right to information and participation; 2. Right to freedom of assembly, association and expression.”.

### **Recommendations**

23. In response to these concerns, ARTICLE 19 calls on the UN Human Rights Council to make the following recommendations to the Government of Brazil:
  - The Government should take immediate action to address the legal uncertainty surrounding the regulation of broadcasting and should prioritise setting up an appropriate legal framework for broadcasting. This reform should be based on international freedom of expression standards, especially those on plurality, diversity, access to information, public participation and social monitoring. Public, private and community systems should be mutually complementary and should all ensure the free flow of ideas and opinions coming from different groups and regions, representing the richness of diversity within Brazilian society.
  - The operation of radios without broadcasting licences should be decriminalized and should be replaced by administrative offenses.
  - The Bill on Cybercrimes should not be adopted and any future law on cybercrimes should conform to international freedom of expression standards.
  - All criminal defamation and *desacato* provisions should be repealed and replaced by appropriate civil defamation laws. At the same time, the Government should ensure that proper training is provided to the judiciary on defamation and other freedom of expression related issues and that clear guidelines regarding civil defamation lawsuits are introduced, especially in regard to the use of injunctions and the setting of indemnification amounts.
  - All cases of killings and other forms of violence against media professionals should be effectively, promptly and independently investigated and those responsible should be held accountable. Additionally, witness protection programs for journalists, and whistleblowers reporting on violence, corruption, or other forms abuse of power should be strengthened.
  - The 1979 Amnesty Law should be repealed.
  - The Government should commit to full and timely implementation of the Access to Public Information Law, ensuring that the bodies in charge of enforcing it act in an autonomous and unbiased manner. It should also actively engage in promotional measures aimed at training public officials to implement the law and informing the public about the law, its use and mechanisms.
  - The Government should provide the Truth Commission with sufficient resources in order to complete its tasks successfully. Consideration should be given to significantly extending the number of its members and the duration of its operation.
  - The Government should ensure the occurrence of proper consultations in all large-scale development projects affecting indigenous peoples. It should guarantee that the rights to freedom of expression and information of all impacted by such projects are respected and fulfilled, especially through the proper provision of information during all phases of the project, organisation of public hearings with adequate prior notice and with respect to local languages and allowing for the effective participation of these groups during the environmental licensing procedures.