

The logo for ARTICLE 19, featuring the text 'ARTICLE 19' in white, bold, sans-serif font, centered within a red, stylized shape that resembles a paper airplane or a folded banner. The shape is composed of two overlapping triangles pointing towards the center.

# ARTICLE 19

## ARTICLE 19, PROTESTE, Imaflora, and FITERT Joint Submission to the Universal Periodic Review of the Federative Republic of Brazil

*For consideration on the 27<sup>th</sup> Session of the  
UPR Working Group of the Human Rights Council April/May 2017*

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### Introduction

1. ARTICLE 19, Associação Brasileira de Defesa do Consumidor (PROTESTE), Instituto de Manejo e Certificação Ambiental (Imaflora), and National Federation of Radialists (FITERT) welcome the opportunity to contribute to the third cycle of the UPR of Brazil. This submission focuses on Brazil's compliance with its international freedom of expression obligations and is primarily based on information collected by ARTICLE 19 Brazil's office.
2. In particular, this submission addresses:
  - restrictive **media legislation**;
  - misuse of **defamation and *desacato* laws**;
  - violations of **digital rights**;
  - **violence against journalists**, radialists, media workers and human rights defenders;
  - violations of human rights during **protests**;
  - violations of freedom of information concerning **large-scale development projects**
3. In all these areas, challenges remain since the last UPR and no real progress has been observed in relation to relevant recommendations.

### Restrictive media legislation

4. The legislation on the operation of media - the 1962 Telecommunications Code (Law 4117/62) is technically and technologically outdated. The Code has been slowly replaced by different regulations, forming a patchwork of confusing provisions that generate legal uncertainty and open the way to inconsistent interpretations. This has a serious impact on the freedom of the media in the country. In particular:
5. **Community radios**: The lack of clarity in the media regulation has resulted in the adoption of judicial decisions making use of criminal provisions against community radios operating without licenses. This happens despite the fact that these issues could be addressed through administrative or civil procedures. Criminal sanctions in these cases are disproportionate sanctions that violate international freedom of expression standards.
6. Many community radios operate without a license is due to the lengthy, burdensome, and punitive way in which the licensing procedure for community broadcasters operates.

Improvements to amend this process have been slow and have not sufficiently remedied the problems.

7. Regarding the adoption of the National Plan for Community Broadcasting Concessions by the Ministry for Communications in 2015, better coordination of the allocation of frequencies to community radios is needed to facilitate freedom of expression.
8. **Public service media** is still in a nascent stage, is not protected against political interventions and lacks financial autonomy. The Brazilian Communications Company (EBC) is linked to the Communications Secretariat of the Presidency and its sole shareholder being the Union, has suffered a number of challenges to its independence and financial viability. Under the applicable law, the EBC should be financed 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 the EBC has not had access to its resources. Since the EBC is legally barred from broadcasting advertisements and selling air time for publicity, its sustainability is greatly endangered. Recent changes in government have led to interference in the operation of EBC that is seen by many as political intervention; such as the abolition of EBC's Consultative Board and the dismissal of its Director.
9. **Private media:** There is a high degree of media concentration in the private media sector. Local experts point out there are 11 family business groups that control the press and broadcasting in Brazil, threatening media pluralism and diversity. Article 220 of the 1988 Constitution states that media cannot be directly or indirectly subject to monopoly or oligopoly. The Decree-Law 236 of 1967, which regulates the Telecommunications Code, also sets up some limits in ownership. These laws, however, are not duly enforced by relevant agencies.
10. Some private broadcasters are also accused of disseminating content that could be considered as hate speech or speech of strong discriminatory nature. However, given the absence in Brazilian legislation of an independent broadcasting regulator or similar bodies, audience protection schemes are not in place and rules adopted for the protection of children and adolescents have been questioned in their constitutionality. In practice, norms set up to ensure pluralism and respect for human rights are either not enforced or completely disregarded.
11. Political control of the private media is a further issue of concern. Although the Brazilian Constitution prohibits Congress representatives being granted public concessions (a specific type of public contract), 40 Congress members currently hold a TV or radio license (32 members of the lower house and eight members of the Senate). This may lead to biased decisions concerning the allocation of frequencies, since Congress holds responsibility of approving new licenses and license renewals.

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

12. The use of *desacato*, criminal defamation, calumny, and slander continues to be a matter of concern. In our experience, in the majority of these cases, the plaintiff is a public official or authority. For example, in early 2016, 2 adolescents from small towns in Sao Paulo and Ceara regions were taken into custody for criticising police behaviour in social media posts, despite the fact that none of them mentioned a particular police officer, but simply expressed criticism against the institution. Defamation and related offences should be decriminalised and replaced with civil remedies.

13. At the same time, various aspects of civil defamation laws violate the right to freedom of expression, in particular (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 criticism of corruption and other irregularities involving public officials. These laws are also often used to silence independent reporting by journalists/bloggers, for example in the case of Jose Maria Portilho, Leonardo Sakamoto, Paulo Henrique Amorim and others.
14. Trademark and copyright laws have also increasingly been used to silence criticism. For example, in Recife, for an artist was sued for publishing a cartoon criticising a local re-urbanisation project and featuring logos of the four companies involved in the project.

## Digital rights

15. In 2014, Brazil adopted *Marco Civil da Internet (Marco Civil)* a progressive legislation aimed at the protection of rights on the Internet. This was a positive development and included the participation of civil society. However, the implementation of the law has been inadequate. The lack of knowledge on digital issues contributes to serious limitations to its enforcement by courts.
16. In 2015 and 2016, courts authorised blocking of mobile telephone application, Whatsapp four times throughout Brazil, because Whatsapp refused to provide access the users' conversations for criminal investigation purposes. No consideration was given to the proportionality of sanctions and the rights of a significant number of Whatsapp users in Brazil that had their primary means of communication interrupted for several hours.
17. There have been several proposals to revise the *Marco Civil* allegedly to improve security of online interactions. These include overbroad blocking orders of certain content considered illegal, prohibiting online anonymity, and expanding permissible grounds for accessing personal data in case of investigations. These proposals aim to legitimise some practices that the law enforcement has been using already, in particular during events such as the Football World Cup and the Olympic Games when Brazilian security and intelligence forces actively monitored social media, particularly targetting social movements, and used different software to map communications in cyberspace.
18. Further, some public institutions, such as the Federal Police, have reportedly negotiated with companies, such as the Italian Hacking Team and the Israeli Elbit Systems, to acquire their products for use in Brazil. Both companies face serious accusations from international organisations and human rights defenders.
19. The protection of privacy through the adoption of a law on personal data has been a demand of civil society in Brazil for a number of years. The lack of dedicated legislation continues to be a concern, particularly with the expansion of Internet users and the unrestricted collection of data online. Currently, many Bills are pending revision by Congress. It is urgent that Brazil adopt a law that accords to international human rights standards regarding data protection and privacy.
20. Access to the internet remains a concern in Brazil, as reportedly only 51% of Brazilian homes have access to the internet, while 31% of the connected homes do not have a broadband connection. Further, 67% have to pay more than BRL\$50 (approximately USD\$15) for their internet connection that is usually slow and inefficient. Public policy to address the issue of access has been inadequate (the low cost internet service plans originally designed are very limited and difficult to acquire). This resulted in an announcement of Facebook in 2015 to implement its Internet.org project in Brazil to

provide certain content free of charge to poor communities; however, this would seriously violate net neutrality rules of the Marco Civil and also reduces the free flow of information. The plan seems to have been abandoned for the time being.

21. There are concerns regarding the role of private internet companies in “censoring” online content. Private censorship has become a frequent issue, especially for communicators and human rights defenders who use social media for the exercise of their activism.
22. The Teatro Oficina, a traditional theatre group of São Paulo, is known for its experimental and daring style. On August 7th, its Facebook page was blocked by the platform administrator because of a picture that contained a woman showing her naked breast. Along with the blocking notice, Facebook sent a message that allowed the page owners to appeal the decision, recommending that they should delete any other material that could be infringing the terms of use of the platform before appealing. Teatro Oficina removed content. However, their page was not restored. The page has since been removed completely with no chance of recovery, forcing the group to create a new page. The group used to have 33,000 followers on their old page and now has only 7,000 followers.
23. In April, 2015, the Brazilian Ministry of Culture posted a turn of the century image of an indigenous Brazilian couple, members of the Botocudos people, as a marketing action to launch of the Portal Brasileira Fotográfica website which gives access to historical images from the nineteenth and twentieth centuries, including the censored image. The Ministry argued that if the indigenous people can't be shown as they are, the platform is denying them the right of being who they are, and that it violates several constitutional rights, including indigenous cultural rights. The Ministry is currently suing Facebook.

## **Protests**

24. There has been increase in protests around the country, in particular as response to large scale events (the Football World Cup and the Olympic Games) and related corruption and unaccountable decision-making. The state's response to these has been repression and violence: thousands of arbitrary arrests; preventive detention and prior restraint, including restrictions of journalists. Police have used excessive force against demonstrators, including highly indiscriminate use of less lethal weapons. Police accountability has been lacking as a large number of police officers either remove their identification or have refused to identify themselves when asked during protests.
25. Simultaneously, several Bills have been proposed in Congress to criminalise demonstrations, including increasing the penalty for crimes related to property damage and assaults which occur during demonstrations, the criminalisation of the use of masks in protests, and the blocking of public roads.
26. Further, there have been attempts to increase the penalties under the Anti-Terrorism Law and apply these to protests. Despite some changes, the Anti-Terrorism law still presents substantial risk to the right to protest and to social movements' freedom of assembly.

## **Violence against journalists, radialists, and other media workers**

27. Violence against journalists, radialists, and others who exercise their right to freedom of expression have increased. For example, in 2015, the number of violations increased by 67% in comparison to 2014. Our monitoring shows that 121 communicators were murdered, faced attempted murder, received death threats, or were kidnapped, between

2012 and 2015; in particular homicides doubled in 2015 (with 6 communicators murdered). In 2016, we have already received reports of 28 death threats, 10 attempted murders and 8 murders of journalists.

28. In the midst of this crisis, the federal government reduced substantially the operation of the Protection Programme for Human Rights Defenders. The formerly autonomous Human Rights Secretariat that was in charge of it, is now under the control of the Ministry of Justice. This programme, despite its deficiencies, was the sole initiative by the government to provide preventive and protection measures to activists at risk. Since the federal programme has been halted, only very limited preventive or protective measures are provided in an *ad hoc* manner.
29. Impunity is a major factor that indirectly promotes violence against journalists, radialists and other media workers. Police investigations of violence against communicators is inadequate and there is a lack political will to bring perpetrators and instigators to justice.
30. ARTICLE 19 has documented that up to January 2016, there has been no significant progress in 62% of the cases investigated in 2015. This is particularly concerning since often, those responsible for violence are often alleged to be public officials. In 2015, public officials were suspected of being the perpetrators in 49% of cases. Local authorities' implicated involvement in the crimes demonstrates the poor ability of the institutions to carry out complete investigations.
31. The lack of an effective response to the violations contributes to an escalation of violence with violations in many situations becoming even more serious over time. In 2015, the data shows the same trend as previously, with 80% of the victimised communicators being those who had already suffered violations in the past. In an analysis of murder cases alone, the data is shocking with 100% of the victims having been previously victim of a violation.
32. The Judiciary has also an important role, as evidenced by the case of Brazilian photographer Alexandro da Silveira (known as Alex Silva) who lost the sight of an eye after being shot with a rubber bullet by military police while covering a demonstration in São Paulo in 2000. The original decision to award him compensation was revoked when the Court of Justice of the State of São Paulo found that the injury was not proved to be due to police action and that Silveira should be responsible for any damage incurred for choosing to continue to cover the demonstration as a journalist during a police crackdown.
33. Recently, on August 6 2016, a new court decision denied redress to photojournalist Sérgio Silva for serious injuries inflicted by an unlawfully discharged rubber bullet while he covered a 2013 protest in Sao Paulo. Placing responsibility on a journalist for reporting a dangerous situation, rather than on the authorities for violating the law, signals impunity to military police in Brazil, who routinely use excessive and unlawful force against protesters, without regard to the rights of journalists or protesters.
34. According to ARTICLE 19's monitoring, in the majority, cases of violence against journalists, radialists and other media workers, relates to the publication of investigative pieces on corruption or other irregular behaviour by public authorities. Additionally, most activists killed worked on land-related causes. ARTICLE 19 has reported human rights violations from murder and physical attacks to arbitrary detention and surveillance, often linked to business interests of extractive industries and the State. Mining and construction projects implemented at the cost of local communities and the environment. Absence of transparency and a lack concern for the environment are major issues.

35. Latin America is, by far, the most dangerous region of the world for environmental human rights defenders, many of whom are indigenous leaders or come from indigenous communities. The persistent human rights violations targeting indigenous peoples are caused by resource exploitation, and increasing numbers of large-scale and mega-development projects in Latin American countries.
36. Of the recorded killings of environmental human rights defenders in 35 countries by Global Witness, the death toll in Brazil accounts for just under half of the recorded killings (448 out of 908). According to CPT (Comissão Pastoral da Terra), an organisation which works on land conflicts, the rural scenario in Brazil is critical. In 2015, there were 50 deaths, 144 people threatened and 59 attempted murders in cases of land conflict. The states of Rondônia, Pará and Maranhão concentrate 90% of those cases. From 2010 to 2015, there were 219 deaths and 300 attempted murders in the country related to land conflicts. Less than 6% of those cases were investigated. Brazilian NGO CIMI reported 97 murders of indigenous individuals in 2013 and 70 in 2014. The Brazilian Human Rights Defenders Committee has already reported more than 45 deaths related to land conflict in Brazil in 2016 so far.

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

37. In 2011 an Access to Public Information Law was passed and entered into force in May 2012. The law is progressive in many of its provisions and represents a significant step forward in the realisation of the right to information in Brazil. Currently, the Federal Executive electronic systems receives an average of 9,711 information requests each month, and has received so far more than 500,000 requests since the Law entered into force. Other instances and levels of government that monitor the number of requests in general point out to a constant increment in the use of the Access to Information Law. Despite progress seen especially at the Federal Executive, implementation continues to be a challenge, in particular at the local level or in relation to sensitive areas, such as environmental issues and public security.
38. Brazil continues to invest heavily in a number of development projects. In urban areas these projects refer, for example, to urban renovation and beautification, and infrastructure related to international sports events, such as the Confederations and the Football World Cups and the Olympic Games. In rural areas, many of such projects relate to the construction of roads, ports and dams for the production of electricity. Typically, throughout the country, large development projects are approved in indigenous lands irrespective of prior and informed consent, or carried out without proper consultation with affected communities, despite their significant social and environmental impact. In general, the severe effects of such projects are disproportionately imposed on poor and marginalised communities.
39. 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.

## Recommendations

40. In response to these concerns, ARTICLE 19, PROTESTE, Imaflora, and FITERT call on member states to make the following recommendations:
- i. The Brazilian 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 the media. This reform should be based on international freedom of expression standards, particularly those on independence, 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.
  - ii. The operation of radios without broadcasting licences should be decriminalised.
  - iii. All criminal defamation and *desacato* provisions should be repealed and replaced by appropriate civil defamation laws. The Brazilian 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, particularly in regard to the use of injunctions and the setting of indemnification amounts.
  - iv. The State should adopt a specific protocol for the use of force during demonstrations based in international human rights standards and with the participation of civil society, in order to contain the unnecessary and disproportionate police violence observed as a rule during public demonstrations.
  - v. An adequate legal framework should be adopted in order to protect personal data and privacy, online and offline.
  - vi. Clear rules should be set up and published by the State concerning the use of surveillance, that are in accordance with international human rights standards of necessity and proportionality.
  - vii. 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.
  - viii. Adequate and effective protection programs for journalists and whistleblowers reporting on violence, corruption, or other forms abuse of power should be strengthened.
  - ix. The Brazilian 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 can do so in an autonomous and unbiased manner. Existing access to information authorities should be empowered. The Brazilian government 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.
  - x. Production and dissemination of information of particular interest to specific and vulnerable groups should be a priority, for example, information on violence against women or racial disaggregated data.
  - xi. The Brazilian government should ensure proper consultations on all large-scale development projects. When affecting indigenous peoples, these projects should go through processes in order to reach prior and informed consent. The State 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.