



Submission to the United Nations Human Rights Council: The State of Freedom of Expression and Information in Brazil

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Latin America Programme
20 November 2007

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INTRODUCTION

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information. ARTICLE 19 believes that freedom of expression and of information is not a luxury but a basic human right: it is central to achieving individual freedoms and developing democracy. ARTICLE 19 established an office in Sao Paulo in 2006, as part of its progressive regionalisation process, to follow up on the situation of freedom of expression and information in the country and carry out advocacy, capacity building and litigation activities on this topic.

Through this Submission, ARTICLE 19, as an organization with observer status at the UN, seeks to make a constructive contribution to the process of preparation of the Universal Periodical Review (UPR), for consideration during the next UPR session to take place from 7-18 April 2008.

This Submission outlines six areas of concern as regards Brazil's compliance with its international obligations on freedom of expression and information as follows:

1. Lack of an appropriate legal framework

The legal framework for the protection of freedom of expression, including freedom of information, is incomplete at best, seriously problematic at worse. While the right to freedom of expression and access to information, is protected by article 5 of the Brazilian Constitution, the Brazilian legislative bodies have failed to translate these rights into sufficiently robust laws to safeguard them properly.

The main pieces of legislation on the operation of media outlets in Brazil are the 1967 Press Law and the 1962 Telecommunications Code. They were both adopted during the military dictatorship and contain a number of repressive provisions typical of authoritarian regimes. Although most of such provisions have not been applied for many years, it is unacceptable that a 20-year-old democracy have been unable to revoke such authoritarian rules. Furthermore, the Telecommunications Code is technically and technologically outdated.

Both pieces of legislation have been repeatedly modified by an expressive number of subsequent laws, but were never entirely revoked, although in the case of the Telecommunications Code, 2/3 of its original articles have already been revoked. The large number of sparse laws regulating specific issues in the area has created a situation of legal uncertainty, with contrasting interpretations and dubious provisions that allow for abuses against freedom of expression.

Recommendations to the Brazilian government:

These outdated laws contravene international and regional standards regarding freedom of expression. There are many proposal and draft bills for reviewing such legislations, none of which have been brought to a successful end. As with many other issues, the legislative processes have reached a stalemate which is greatly prejudicial to the effective protection of freedom of expression.

- We urge the Government and members of Parliament to take immediate action to fill the legal vacuum and prioritise setting up an appropriate legal framework for freedom of expression in Brazil, a legal framework that is in keeping with Brazil's international status.
- Any legislation adopted in the area should observe international standards by applying only legitimate restrictions to freedom of expression and clearly stating all such limitations in a way that human rights concerns are seriously taken into consideration, especially those on plurality, diversity, access to information, public participation and social monitoring.

2. Threats to media pluralism and diversity

A crucial international standard with regard to freedom of expression is that of pluralism and diversity of the media. This has been recognized by international and regional bodies and courts, which have also elaborated on the several components of pluralism and diversity, such as the existence of three broadcasting systems (public, private and community), source pluralism or the existence of fully independent regulatory bodies.

Unfortunately, the current situation in Brazil is far from satisfying international standards in this area. The lack of pluralism is mainly due to two factors that shape the Brazilian media landscape:

- the failure of regulatory policies to support the development of independent broadcasters, in particular of non-commercial and community broadcasters; and
- a high degree of concentration of media ownership;

On October 11th, 2007, the federal government has created, through an act of the executive (Medida Provisória), the Brazilian Public TV Broadcasting Network – TV Brasil - which is announced to start broadcasting in December. However, there is still no overall public service broadcasting system. Civil society groups want to make sure this TV channel will be the starting point for the creation of a true public broadcasting system in the country. Public service broadcasting, as per international standards, must be protected from political or commercial interference. Independence and diversity must be respected. Content “should serve the public interest and, in particular, be balanced and impartial”¹.

As for the current state of commercial media in Brazil, local civil society is greatly concerned with ownership concentration, which it considers to be one of the main threats to diversity. Six private media corporations hold the Brazilian TV market, a market that negotiates more than USD 3 billion in publicity. As ARTICLE 19 has pointed out in its Submission to the Inter-American Commission on Human Rights, International Standards on the Regulation of Broadcasting, 18 July 2007, “The absence of source pluralism, reflected in the growing phenomenon of concentration of media ownership, can impact on content, as well as independence and quality, in important ways.”²

Recommendations to the Brazilian government:

- The government should set up a participatory and pluralistic process to define the model to be adopted for the upcoming public TV channel

¹ Model Law on Public Broadcasting Service, ARTICLE19, 20 June 2005, Introduction

² Submission to the Inter-American Commission on Human Rights: International Standards on the Regulation of Broadcasting, ARTICLE19, 18 July 2007, p. 6

- These discussions and the creation of the first public TV channel should be the seed for the creation of a public broadcasting system which provides public interest content and is operated according to the principles of diversity and independence
- Solutions to the issue of concentration of media ownership should be addressed by the government, including by: the adoption and effective application of clear and fair rules on concentration of ownership which preserve and protect the public interest in broadcasting; and the use of diversity as a criterion for new broadcasting licenses, as well as, in very serious cases, to the renewal of licenses.
- 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 observed within Brazilian society

3. Community Broadcasting Under Duress

Democracy demands that the state create an environment in which different types of broadcasters – including public service, commercial and community broadcasters - can flourish. Unfortunately, this is not the case in Brazil where thousands of community broadcasters are still waiting to be attributed a license, as part of a lengthy, ineffective and punitive process.

It takes on average 3,5 years before a filed application for licensing is actually approved, when it is approved. Some community radios associations have been waiting for almost 10 years for a habilitation process to be set up in their municipalities. Unlicensed radios are shut down by federal authorities and their equipment is confiscated. According to the federal police figures, 1,800 community radios have been closed since the beginning of the year. Many face criminal procedures due to their irregular situation.

ARTICLE 19 recognises the right of the state to regulate access to the airwaves and frequencies. However, the process established to obtain community broadcasting licenses in Brazil is clearly not in keeping with international best practices on the issue.

The government appears to be washing its hands of the crisis situation it has in many ways created through setting up a cumbersome process. The large number of applications – far too large for the existing number of frequencies attributed to community broadcasting – needs proper review and handling at federal and governmental level and through discussions with municipalities, community broadcasters and associations.

Recommendations to the Brazilian government:

At the heart of the Community Broadcasting quagmire is the lengthy process put in place, the insufficient number of frequencies attributed to community broadcasters, and the far from perfect decision-making process about the allocation of frequencies. In view of this, ARTICLE 19 recommends:

- Speed up the habilitation process, including by increasing the number of people working on the issue
- Extend the habilitation process to municipalities currently not included
- Strengthen the dialogue with community radios and with their associations, including by participating regularly to meetings set up to review the system in place and address problems
- Apply international and regional law and standards and evolving state practice (as reflected, inter alia, in national laws and judgments of national courts) regarding frequencies allocation.

4. Civil and criminal defamation

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 in Brazil include the following:

- Very high number of cases: Lawyers and journalists estimate that there is currently one civil law suit per journalist working for the 5 major communication groups in the country.
- High level of indemnifications: In 2003, the average indemnification was around 10,000 USD. In 2007, the figure had jumped to around 40,000 USD. (In comparison, the average monthly salary of a Brazilian journalist is 750 USD). While large media outlets may be able to defend themselves, this is not the case for smaller ones and for individual journalists.

- Corruption and Public officials: A number of civil defamation cases brought to ARTICLE 19's attention related to investigation into corruption, issues of clear public interest and involved public officials and judges - those very same people who should demonstrate a far higher tolerance for media scrutiny.
- Injunction and provisional decisions amounting to prior censorship: A significant number of provisional decisions taken by lower level judges amounts to censorship, including prior censorship in situations where the information has not yet been published.
- Original decisions revoked by Supreme Court: While journalists and media associations recognize that lack of proper training may result in bad reporting, they point out that the majority of civil defamation cases amount to abuse of power. This position seems to be confirmed by the rate of revocation at higher level. According to lawyers monitoring defamation cases closely, the Supreme Court revokes 80% of the decisions taken by the low level courts.

The high number of civil defamation cases and their cost significantly limit the free flow of information and ideas. Indeed, many journalists interviewed have admitted that self-censorship has become the "biggest disease" in Brazil news room, as a way of preventing the costly legal processes.

Recommendations to the Brazilian government:

- The Government should train lower level judges on defamation and issue clear guidelines regarding civil defamation
- Non pecuniary remedies should be prioritized. Fines should be awarded only where non pecuniary remedies are insufficient to address the harm caused by defamatory statements. The level of compensation should be subject to a fixed ceiling which should only be applied to the most serious cases.

5. Violence against journalists

Interviews with media workers pointed out that violence against journalists is still very present in Brazil, but its exact extent and characterization may be under-explored. Violence may include killings, physical aggression, and threats. In addition, the real possibility of judicial attacks may amount to mental, psychological and economic violence.

Journalists and civil society representatives met by ARTICLE 19 stressed that journalists and media workers working for small media outlets in the northern areas 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 or physical aggressions, although lawsuits always remain a possibility. In general, interviews also indicated that direct threats are more common against the press and radio broadcasters, rather than television. .

Different methodologies used to monitor cases of violations to freedom of press by different local actors make it difficult to fully assess the extent of the acts of violence, their number and type. People and associations seeking to monitor the situation pointed out that the small number of professionals involved, and the fact that many cases of violence occur in very distant regions, may result in under-estimating the full extent of the problem and abuses.

In general, cases of violence against journalists relate to the publication or broadcasting of the results of investigations on corruption or other irregular behavior by public authorities. The organized crime, corrupt politicians and police officers were indicated as the main perpetrators.

A journalist interviewed by ARTICLE 19 affirmed that the number of threats and actual cases of violence against journalists in the country may not be much larger because their work is restricted "from within" by editors and media owners. Controversial articles and programs are barred from publication or broadcasting by a type of "self-censorship". This self-censorship is caused both by fear and conflicting interests.

Recommendations to the Brazilian government:

- All cases of violence against media professionals should be duly investigated and those responsible held accountable
- Witness protection programs for journalists, and whistleblowers reporting on violence, corruption, or other forms abuse of power should be strengthened

6. Access to information yet to be fully implemented

Access to information is guaranteed under the 1988 Constitution, but its implementation is limited due to the lack of regulations detailing procedures and applicable deadlines.

Despite efforts by some members of the parliament, a federal law on access to information has yet to be passed, while other laws are in existence that seriously undermines the constitutionally-recognised right of the Brazilian people to access information.

A draft bill on access to information was presented to Camara dos Deputados in 2003. Although it could be improved, such draft bill observes the main principles on access to information and is in general in accordance with international standards in the area. The draft bill has been with the plenary of the Camara since 2004. But it has yet to be reviewed and voted on. This is another example of legislative stalemate, which is eating at the heart of the consolidation of the Brazilian democracy.

Initiatives by the government, such as the e-gov program and the Portal da Transparencia, demonstrate initial steps to address the right of access, and are welcomed. But their impact is limited especially by the heavy reliance on technology and the internet, which are not accessible to a large number of Brazilians.

We also recognize and welcome the development of the budget control system SIAFI, which can greatly facilitate budget monitoring, allowing for greater legislative scrutiny on the execution of public policies and on corruption. However, the system can only be accessed through passwords that have been made available to MPs only, and some high level civil servants.

In general, initiatives in the area of freedom of information by public institutions are still very few and flawed by problems such as: provision of information that is not updated or contextualized; creation of different public databases that do not “talk to each other”; provision of raw data with no analysis or explanations; and excessive use of technical language, making it virtually useless to the general population.

Recommendations to the Brazilian government:

- The government, Parliament and civil society groups should work jointly to speed up the legislative process to approve an access to information law in the near future. Such legislation should observe international standards on access to information legislation:
- Many of these principles can and should be applied to existing legal provisions on access to information in non-specific laws and to freedom of information legislation at the state and local levels
- The culture of secrecy within public bodies should start to be tackled immediately through freedom of information training to public officials and the adoption of internal codes on access and openness, including by simplifying internal proceedings
- The federal-level government and state level authorities should disseminate existing legal provisions on access to information and promote its use.