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NEWSLETTER – 2009 IN REVIEW

This newsletter was prepared by **Luís Roberto Barroso & Associates – Escritório de Advocacia**, under the scientific supervision of **Nelson Nascimento Diz**, Professor of Constitutional Law at Universidade Cândido Mendes.

The purpose of this newsletter is to present a review of Superior Courts' case law and Brazilian legislation on public law matters. Both the Bulletin and this newsletter are also available on www.lrbarroso.com.br.

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Case Law

▪ **Dictatorship-era press law struck down**

By majority vote, Brazil's Supreme Court struck down a press censorship law (Act no. 5.250/1967) that was one of the last vestiges of the 1964-1985 military regime. The court ruled that the law was unconstitutional and violated freedom of expression and information, which was incompatible with the democratic rule established by the 1988 Constitution. The votes of (i) Justices Ellen Gracie and Joaquim Barbosa, who understood to be constitutional the types of offences and restrictions on subversive, biased and war-related propaganda, were overruled in part; (ii) the vote of Justice Gilmar Mendes, who only maintained the provisions on the right of reply, was also overruled in part; and (iii) the vote of Justice Marco Aurélio, who deemed the claim groundless, was fully overruled (ADPF no. 130).

▪ **Degree requirement for journalists overturned**

This is another case in which journalism is connected with the broad exercise of freedom of expression, information and professional exercise. Brazil's Supreme Court overturned article 4, item V, of Executive Order no. 972/69 requiring a journalism degree of all practicing members of the profession. Considering the close relation between journalism and freedom of information, the Supreme Court argues that the Constitution only provides for the definition of professional qualifications which are established to ensure and strengthen the exercise of said freedom by journalists. According to Brazil's Supreme Court, any sort of control to the profession would represent prior censorship, which is unlawful. As a consequence of that, the establishment of any organization or independent body to regulate journalism would be invalid. It is worth to mention that the Supreme Court referred to a decision of the Inter-American Court of Human Rights, which recognizes the ever growing influence of international instances on internal order, namely of organizations which comprise the human rights protection system (RE no. 511961).

- **City council's constitution amendment partly suspended**

Brazil's Supreme Court, by majority vote, awarded a preliminary decision voiced by reporting Justice Cármen Lúcia, to suspend the effect of article 3, item I, of Constitution Amendment no. 58/09. This clause established that the recomposition of City Councils, imposed by article 1 of said Amendment, would be effective as from 2008 elections – i.e., retrospectively. The Court ruled plausible the allegation of affront to due electoral process, to legal security and to the legitimacy of local legislative branches. The Court's opinion is that a retrospective amendment to the composition of city councils might impact the proportional representation system and political parties, which would erode trust in the electoral process. Only the vote of Justice Eros Grau was overruled (ADI no. 4307).

- **Ban on retread tire imports**

The President of the Republic filed a claim regarding a series of court decisions that, declaring invalid the regulations on this matter, authorized the import of used tires. This issue opposes, on one hand, a person's rights to live in a balanced environment which shows due respect for health, and, on the other, a more sustainable economical growth, in view of jobs generated by the retread of used tires, and free enterprise and free market principles. Referring to the treatment given to this topic at the MERCOSUR and the WTO, the Court deemed partly grounded the claim to rule valid the pertinent regulations, and to rule unconstitutional any understanding – although legally accepted – that, by removing their application, would allow the import of retread tires. Only the final and unappealable decisions were maintained, whose content was enforced and the subject-matter entirely covered. The vote of Justice Marco Aurélio, who dismissed the claim, and thus ruled it groundless, was overruled (ADPF no. 101).

- **Postal service monopoly**

By majority vote, Brazil's Supreme Court declared that Act no. 6.538/78 was included in the 1988 Constitution. In practical terms, the decision upholds the monopoly of state-run company ECT to provide commercial and personal mail services, postcard and parcel services, even though restructured as a public utility. All other types of services are not exclusive to ECT and can be carried out by private companies. The votes of (i) reporting Justice Marco Aurélio, who ruled the claim grounded; (ii) Justices Gilmar Mendes, Ricardo Lewandowski and Celso de Mello, who excluded the exclusivity on the provision of slips, newspaper, books, journals or other types of document or services, were overruled. By unanimous vote, the Court decided to construe the law pursuant to the Constitution to restrict the criminalization of breach of monopoly under the argument that the broad nature of this type of offence was incompatible with legality requirements (ADPF no. 46).

Legislation

- **Act no. 12.063/2009**

Act no. 12.063/2009 establishes process guidance on the direct appeal of unconstitutionality due to omission, created by the 1988 Constitution to overcome legal gaps. This appeal, however, had little role, in view of the guidance by Brazil's Supreme Court that it would only be used to inform the defaulting branch to remedy the gap. This act innovates in the sense that it sets forth particularly that the Supreme Court may grant injunctions grounded on that – which had hitherto been considered impracticable by the Court. On this regard, we pose an interesting question: the preliminary decision, such as set forth in law, acquires broader scope and provides further possibilities when compared to the final decision, which, on such regard, the law does not provide any especial innovation. For the sake of coherence of the system, it seems that the Court will have to whether to: (i) keep their traditional guidance and rule the new law constitutional; (ii) review their current understanding of the final decision of the direct appeal of unconstitutionality due to omission, considering the possibility to voice an integrative decision and overcome the apathy of the constituted branches; or (iii) rule the law valid, and extent the effects of the injunction beyond the decision of the matter. Among them, the second decision seems the most adequate, and aligns with the concrete features recently assigned to the injunction by the Court – another initiative enabled by the Constitution to allow attaining rights which rely on legal regulation.

- **Act no. 12.016/2009**

Act no. 12.016/2009 provides for the new legal treatment of personal amparo injunction and innovates in the sense that establishes the guidelines for collective amparo process. The possibility to start this injunction electronically is worth mention.

- **Act no. 12.187/2009**

Act no. 12.187/2009 establishes the National Policy on Climate Change (PNMC, in Portuguese), in addition to set forth its principles, purposes, guidelines and instruments. In general lines, by means of a nation-wide voluntary commitment, the target is to reduce greenhouse gas emissions from 36.1% to 38.9% by year 2020.

- **Ordinance no. 7.037/2009**

Ordinance no. 7.037/2009 approves the National Human Rights Program (PNDH-3, in Portuguese), which shall be implemented based on the following guidelines: (i) democratic interaction between Government and civil society; (ii) development alongside the enforcement of human rights; (iii) general assurance of rights to mitigate inequality; (iv) enforcement of public security, access to justice and fight against violence; (v) promote human rights literacy and culture, and (vi) acknowledge the right to memory and truth. Although its purpose is to strengthen democratic process and human rights, the Program became target of controversies, among which related to the potential ascertainment of crimes committed during the Brazilian dictatorship era (1964 - 1985).