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Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 133/09; Petition 989-04
Session:	Hundred Thirty-Seventh Regular Session (28 October – 13 November 2009)
Title/Style of Cause:	Physicians Union of the Federal District v. Brazil
Doc. Type:	Decision
Decided by:	President: Luz Patricia Mejia Guerrero; First Vice President: Victor Abramovich; Second Vice President: Felipe Gonzalez; Commissioners: Sir Clare K. Roberts, Florentin Melendez, Paolo Carozza. Commissioner Paulo Sergio Pinheiro, a Brazilian national, did not take part either in the deliberations or in the decision regarding this petition, in accordance with the provisions of Article 17(2)(a) of the Rules of Procedure of the IACHR.
Dated:	12 November 2009
Citation:	Physicians Union v. Brazil, Petition 989-04, Inter-Am. C.H.R., Report No. 133/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
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I. SUMMARY

1. On October 4, 2004, the Inter-American Commission on Human Rights (hereinafter the “Inter-American Commission,” or “the IACHR”) received a petition alleging the international responsibility of the Federative Republic of Brazil (“the State” or “Brazil”) for eliminating the exemption of social security taxes (*contribuição previdenciária*) for retired government employees and pensioners, which took effect on December 19, 2003, after passage of Constitutional Amendment No. 41/03. The petition alleges that the State is responsible for violating the right to property and the vested right to a full pension, without deductions, to the detriment of certain Brazilian retirees and pensioners.

2. The petition was filed by the President of the Physicians Union of the Federal District (“the petitioner”), on behalf of the members of that union who would be the alleged victims. The petitioner alleges that the State has violated the fundamental rights of the alleged victims by passing Constitutional Amendment No. 41/03, which establishes the collection of Social Security taxes from retired government employees and pensioners, who, prior to the passage of the above mentioned amendment, were exempt from that tax. Therefore, the petitioner argues that the Brazilian State has violated Articles 11, 21, 25, 29, 44 and 46 of the American Convention on Human Rights (the “American Convention”).

3. The State, for its part, filed a timely objection of failure to state facts that tend to establish a violation, pursuant to Article 47(b) of the American Convention. In this respect, the State notes

that the mere fact that the judicial decision issued by the Federal Supreme Court (Supremo Tribunal Federal), has been contrary to the petitioners' interests does not automatically mean that there has been a violation of the right to judicial protection. To the contrary, according to the State, that judgment was issued in keeping with the principles of defense and equality of arms, through a decision that was properly reasoned in detail, within a reasonable time. In addition, the State argues that Constitutional Amendment No. 41/03 was motivated by the social security deficit and the increase in life expectancy for Brazilian citizens, as well as the need to maintain the financial balance of the State and to ensure the right of all citizens to receive a pension, therefore, it was a just and reasonable measure proportional to the suitable end indicated supra.

4. In this report, the Inter-American Commission analyzes the available information and the parties' positions in light of the provisions of the American Convention and concludes that the petition does not state facts that tend to establish a violation of the rights guaranteed by the American Convention. Therefore, pursuant to Article 47.b of the American Convention, the IACHR decides that this petition is inadmissible. The Inter-American Commission also decides to publish this report and include it in its Annual Report to the General Assembly of the Organization of American States (OAS).

II. PROCESSING BEFORE THE COMMISSION

5. The complaint was received on October 4, 2004. On November 15, 2006, the Inter-American Commission notified the petitioners and the State that this petition had been joined to petitions P-1133-04 (Sindicato Nacional dos Auditores Fiscais da Receita Federal), P-115-05 (Waldomiro Augusto de Almeida et al) and P 644-05 (MOSAP et al), in accordance with Article 29.1.d of the Rules of Procedure of the Commission, due to the fact that those petitions alleged similar facts. In addition, the IACHR asked the petitioners whether they had designated a common representative before the Inter-American Commission. On the same date, the IACHR forwarded the relevant parts of the joined petitions to the State, and set a deadline of two months for the State to respond with its observations. On February 22 and 23, 2007, the State issued its response to the joined petitions.

6. On February 10, 2007, the IACHR also received communications from the petitioners with regard to the joinder of the petitions and the impossibility of designating a common representative to represent them all.

7. On September 10, 2008, the IACHR notified the petitioners and the State that it had decided to separate petitions P-644-05, P-989-04 and P-1133-04[FN2], in accordance with the provisions of Article 29(1)(c) of its Rules of Procedure, in order to facilitate the processing of the petition for the parties. Therefore, this report only covers petition P-989-04.

[FN2] Based on the wishes expressed by the petitioners, petition P-115-05 remained aggregated to petition P-1133-04.

8. The IACHR also received additional information from the petitioners in the following dates: April 30, 2007; February 26, 2008; May 23, 2008; October 28, 2008; and March 3, 2009. Those communications were duly forwarded to the State.

9. On the other hand, the State forwarded additional observations to the IACHR on the following dates: June 4, 2007; June 11, 2007; July 12, 2007; April 18, 2008; July 2, 2008; and January 6, 2009. Those communications were duly forwarded to the petitioners.

III. POSITION OF THE PARTIES

A. The petitioner

10. The petitioner alleges that the State violated the Brazilian Constitution, as well as human rights treaties and conventions, by promulgating Constitutional Amendment No. 41/03, by virtue of the collection of the social security contribution from retired public employees and pensioners, who prior to that amendment were exempt from the payment of that tax. The petitioner argues that the collection of that tax constitutes an “actual” violation of a person’s right to property and of the vested right of all Brazilian retirees and pensioners to draw a pension without having any deductions taken.

11. The petitioner argues that the collection of social security taxes from retirees and pensioners does not conform to the true definition of solidarity because there is no reason for it, and it does not provide any additional benefit to retirees and pensioners. In that regard, the petitioner points out that the foregoing violates the social principles of compensation, of non-reduction of pensions, and of the vested right.

12. With regard to Constitutional Amendment No. 41/03, the petitioner points out that a constitutional challenge was filed (hereinafter “ADI 3105-2003”) with the Federal Supreme Court on December 31, 2003,[FN3] in order to have the high court examine whether the amendment violated the Brazilian Constitution. According to the petitioner, on February 18, 2005, the Supreme Federal Court ruled against the alleged victims and reaffirmed the constitutionality of Constitutional Amendment No. 41/03. Therefore, the petitioner argues, the domestic remedies had been exhausted.

[FN3] ADI 315-2003 was filed by the National Association of Members of the Public Ministry (Associação Nacional dos Membros do Ministério Público – CONAMP (petitioners in P-115-05).

13. Consequently, the petitioner contends that the State violated Articles 11, 21, 25, 29, 44 and 46 of the American Convention. Based on the foregoing, the petitioners argue that the requirements for admissibility established in Articles 46 and 47 of the American Convention have been met and request that the Inter-American Commission declare the foregoing petition admissible.

B. The State

14. The State alleges that the petitioners, not satisfied with the decision adopted by the Federal Supreme Court in case ADI 3105-2003, have submitted this petition to the IACHR in effect seeking a review of the judgment handed down domestically. In addition, the State notes that the mere fact that the judicial decision referred to supra was contrary to the interests of the petitioners does not automatically mean that there has been a violation of the right to judicial protection. To the contrary, according to the State, that judgment was handed down in keeping with the principles of defense and equality of arms, through a decision that was properly explained in detail, within a reasonable time.

15. The State observes that the Inter-American Commission cannot review judgments handed down by the domestic courts when they act within their jurisdiction in keeping with pre-established laws. According to the State, the petitioners ask the IACHR to examine mere allegations of errors of fact and of law. In addition, the State argues that it has acted in keeping with what has been established by the highest judicial authority in the country.

16. The State alleges that the exemption from payment of a tax or a fee that the majority of the population pays does not constitute an individual right in the meaning of the American Convention. In addition, the State notes that the allegation as to the existence of an acquired right cannot stand (acquired right to exemption from paying the social security tax) considering that the regime in force prior to Constitutional Amendment No. 41/03 was based on factual circumstances that no longer exist in Brazil. In that regard, the State argues that it was precisely the social security deficit and the increased life expectancy of Brazilian citizens, as well as the need to maintain financial balance in the State, that led to the promulgation of that amendment to the Constitution of Brazil.

17. The State notes that the social security contribution is a tax based on the solidarity of all in order to finance the right of all citizens to receive a pension. In effect, the social security tax – before the subject of an exemption – for retired public employees, according to the State, does not tend to establish a violation of fundamental rights, due to the fact that it is in the nature of a social tax, based on solidarity and on the right of all citizens to receive a pension after their retirement.

18. Along the same lines, the State observes that the Universal Declaration of Human Rights establishes: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others....” (Article 29.2). Accordingly, the State observes that in the decisions adopted with respect to social rights and the right to property, the public interest prevails in relation to the individual interest.

19. In addition, the State emphasizes that retirees and pensioners who receive a pension whose amount is less than R\$ 1,440,00 (one thousand four hundred forty reais) continue to be exempt from that tax; therefore, the constitutional amendment in question has taken into account the most vulnerable retirees and pensioners.

20. Based on all the foregoing, the State argues that the facts described by the petitioners do not tend to establish violations of rights guaranteed in the American Convention. Therefore, the State asks the IACHR to find this petition inadmissible, pursuant to Article 47(b) of the American Convention. In this regard, the State notes that the tax from retired public employees and pensioners is necessary to protect and ensure the right of all citizens to social security.

IV. ANALYSIS OF ADMISSIBILITY

21. Employing the practice of adopting per curiam decisions, according to the decision of the IACHR in Report XX/09 with regard to P 644-05, dated November 12, 2009, the Commission concludes that it is competent to examine the present petition and that the facts presented do not tend to characterize possible violations of the American Convention. Therefore, the IACHR declares the petition inadmissible because it has not met the requirement established in Article 47(b) of the American Convention, given that the alleged facts do not tend to characterize a violation of the same instrument and hence, it is not necessary to proceed with the analysis of the merits of the case. Based on the factual and legal arguments mentioned above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition inadmissible;
2. To notify the parties of this decision;
3. To publish this decision and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 12th day of the month of November 2009. (Signed): Luz Patricia Mejía Guerrero, President; Victor E. Abramovich, First Vice-president; Felipe González, Second Vice-president; Sir Clare K. Roberts, Florentín Meléndez, and Paolo Carozza, members of the Commission.