



PUERTO RICO FORWARD

Episode 22: How PR's Status Allows Human Rights Violations

TRANSCRIPT

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If you've listened to any of this podcast's episodes about Puerto Rico's (hereinafter PR) status issue, you know that one of the non-colonial options for the archipelago is statehood. For years, many people in PR have been of the idea that statehood is the best status option for moving out of the current colonial status. But beyond the common arguments that touch on economic or security issues, PR's statehood movement has alleged human and civil rights violations as a basis to justify their claim.¹ In today's episode, I'll focus on the issue of human rights since it lies at the center of a very interesting case that was presented before Inter-American Commission on Human Rights (hereinafter IACHR) back in 2006.

Without a doubt, statehood is a legal status that has been recognized by international law. In fact, the United Nation's General Assembly made this clear when it adopted *Resolution 1541*, in which it states as its sixth principle the following: "A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State."² That said, is the US's persistent desire to maintain PR in a colonial condition a violation of its people's human rights? Such a question was posed, in part, before the IACHR in the case of *Roselló et al v. United States*.³ But before we

¹ See <https://caribbeanbusiness.com/puerto-rico-statehood-admission-bill-introduced-in-u-s-congress/> and https://www.washingtonpost.com/national/puerto-rico-pushes-for-statehood-calling-it-a-civil-rights-issue/2018/06/27/717c5092-7a43-11e8-93cc-6d3becdd7a3_story.html?noredirect=on and <https://caribbeanbusiness.com/puerto-ricos-presidential-vote-issue-takes-center-stage/> see also <https://thehill.com/opinion/international/377851-full-us-political-participation-should-be-recognized-as-fundamental>.

² G.A. Res. 1541 (XV), U.N. GAOR, 15th Sess., Supp. No. 16 U.N. Doc. A/4684 (Sept. 20 to Dec. 20, 1960)

³ IACHR, Report No. 17/17. Admissibility. Pedro Roselló et al. United States. January 27, 2017.

discuss said case, a bit of background. A visit to the IACHR's website reveals the following description of said organization:

The IACHR is a principal and autonomous organ of the Organization of American States ("OAS") whose mission is to promote and protect human rights in the American hemisphere. It is composed of seven independent members who serve in a personal capacity. Created by the OAS in 1959, the Commission has its headquarters in Washington, D.C. Together with the Inter-American Court of Human Rights ("the Court" or "the I/A Court H.R."), installed in 1979, the Commission is one of the institutions within the inter-American system for the protection of human rights ("IAHRS"). The formal beginning of the IAHRS was [the] approval of the **American Declaration of the Rights and Duties of Man** at the Ninth International Conference of American States held in Bogotá [Colombia] in 1948. There the OAS Charter (hereinafter "the Charter") was adopted, which declares that one of the principles upon which the Organization is founded is the "fundamental rights of the individual."⁴ (*emphasis added*)

As stated above, the most important event in the in the creation of the Inter-American human rights system was the adoption of the *American Declaration of the Rights and Duties of Man* in 1948. According to the OAS' website, "[t]he American Declaration was the first international human rights instrument of a general nature."⁵ Of course, this was no small feat, but rather an event that made an attempt to provide a stable and organized structure to the otherwise ethereal concept of human rights.

As we can see, the IACHR stems from the Organization of American States (hereinafter OAS). As a result, in order to understand the IACHR's role, we need to have a clear picture of what the OAS is. A quick review of its website yields the following description:

The OAS came into being in 1948 with the signing in Bogotá, Colombia, of the Charter of the OAS, which entered into force in December 1951. [...] The Organization was established in order to achieve among its member states—as stipulated in Article 1 of the Charter—"an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence." Today, the OAS brings together all 35 independent states of the Americas and constitutes the main political, juridical, and social governmental forum in the Hemisphere.⁶

⁴ Organization of American States, *What is the IACHR?*
<http://www.oas.org/en/iachr/mandate/what.asp> (last visited Sept. 13, 2019)

⁵ *Id.*

⁶ Organization of American States, *Who We Are*
http://www.oas.org/en/about/who_we_are.asp (last visited Sept. 13, 2019)

Currently, the US is one of the thirty five Member States of the OAS and thus is accountable before the IACHR for human rights violations.

On October 17th 2006, the case of Rosselló et al v. United States was presented before the IACHR. The petitioner claimed that the alleged victims, one of which is two-term governor of PR Pedro Rosselló,⁷ were suffering human rights violations. The facts, as alleged by the petitioners, are the following:

The petitioners affirm that all American citizens residing in Puerto Rico are denied the right to vote and elect the President, the Vice-President and voting members of the Congress of the United States of America on the discriminatory basis that they reside in a U.S. territory and not in a state. They indicate that Puerto Rico has been a territory of the United States since 1898, and its residents have been recognized as U.S. citizens since 1917. [...] They claim that U.S. federal law applies to Puerto Rico without the consent of its residents, notwithstanding that its residents pay U.S. taxes and must also serve in the United States military whenever it is compulsory in the mainland United States. They emphasize that the inhabitants of Puerto Rico have the same duties and obligations as U.S. citizens residing in the 50 states. Nevertheless, they are not allowed to have any true political participation in the Senate or House of Representatives, and are constantly discriminated against with respect to federal programs. They allege, for example, that citizens residing in Puerto Rico are subjected to unfair treatment in the area of healthcare, notwithstanding that they are required to pay the same amount of taxes as any other U.S. citizen.

In particular, Rosselló invoked Articles II, XX, XXXII and XXXIV of the American Declaration on Human Rights and Duties of Man⁸ (hereinafter the Declaration). He also invoked Articles 1, 3, 6, 8, 9 and 23 of the Inter-American Democratic Charter⁹ (hereinafter the Charter). Let's take a look at each article in turn.

Article II of the Declaration is known as the *right to equality before the law*, and states the following: "All persons are equal before the law and have the rights and duties established

⁷ If the last name "Rosselló" rings a bell, it's because he is the father of Ricardo Rosselló-Nevores, the former Governor of PR who was ousted in July of 2019 as a result of relentless protests demanding his resignation or removal. For more information on the matter, listen to *The Boricua Awakening of 2019 and its Repercussions* http://puertoricoforward.com/the-boricua-awakening-of-2019-and-its-repercussions?tdest_id=640699

⁸ Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948

⁹ Inter-American Democratic Charter, 11 September 2001.

in this Declaration, without distinction as to race, sex, language, creed or any other factor.”¹⁰ Moving along, Article XX, known as the *right to vote and to participate in government*, declares that “Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”¹¹ On the other hand, Article XXXII, also known as the *right of association*, indicates that “Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.”¹² Finally, Article XXXIV of the Declaration describes the *right of petition* in the following way: “Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.”¹³

As we mentioned before, the victim also cited the following Articles of the Inter-American Democratic Charter in his claim: Article 1 of the Charter states that “[t]he peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. Democracy is essential for the social, political, and economic development of the peoples of the Americas.”¹⁴ On the other hand, Article 3 demands that the

Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.¹⁵

Moving along, Article 6 of the Charter expresses that “It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.”¹⁶ The victim also invoked Articles 8 and 9, which state the following:

[Art. 8] Any person or group of persons who consider that their human rights have been violated may present claims or petitions to the inter-American system

¹⁰ *Supra*, note viii at Art. 2

¹¹ *Id.* at Art. 20

¹² *Id.* at Art. 32

¹³ *Id.* at Art. 34

¹⁴ *Supra*, note ix art 1

¹⁵ *Id.* at Art. 3

¹⁶ *Id.* at Art. 6

for the promotion and protection of human rights in accordance with its established procedures. Member states reaffirm their intention to strengthen the inter-American system for the protection of human rights for the consolidation of democracy in the Hemisphere.

[Art. 9] The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation.¹⁷

Finally, the victim also based his petition on Article 23 of the Charter, which reads the following way:

Member states are responsible for organizing, conducting, and ensuring free and fair electoral processes. Member states, in the exercise of their sovereignty, may request that the Organization of American States provide advisory services or assistance for strengthening and developing their electoral institutions and processes, including sending preliminary missions for that purpose.¹⁸

Now, although Rosselló is not the only alleged victim in the petition, for the purposes of today's episode, we will focus on his particular cause of action as presented.¹⁹ The main grievance brought before the IACHR by Rosselló was a simple one: the fact that US Citizens living in PR are not able to participate in US federal elections is a violation of their human rights.

Although this is not the first time that this fact has been highlighted in a manner of criticism, this time around it is being singled out as a violation of human rights before an international forum. In particular, Mr. Rosselló insists that this state of affairs violates Articles II and XX of the American Declaration on Human Rights and Duties of Man. This, in my opinion, is no small matter. As cited before, these Articles describe the *right to equality before the law* and the *right to vote and to participate in government* respectively.

Without a doubt, US citizens living in PR are treated very differently in comparison to US citizens living anywhere else; and I do mean, anywhere else. In order to highlight just how dramatic the situation can be, lets look at the voting rights of a US citizen living abroad and compare them to one living in PR.

¹⁷ *Id.* at Art. 8 and 9

¹⁸ *Id.* at Art. 23

¹⁹ I encourage anyone interested in this matter to watch Mr. Rosselló's testimony. <https://www.youtube.com/watch?v=uvQOsKHYveA&t=1s>

Imagine for a second two people that are identical in every way possible and both are US Citizens. We'll call them Person One (hereinafter P1) and Person Two (hereinafter P2). Lets further imagine that both of them are originally from the state of New York. One day, both of them are forced to leave New York. P1 decides to go to China while P2 decides to move to PR. However, both maintain an interest in US politics and are determined to vote in the next elections. First, lets look at what P1 would have to do in order to cast his vote.

Now, when it comes to absentee voting, the US Department of State's Bureau of Consular Affairs is the controlling government agency. The agency's own web page describes its mission the following way:

Consular Affairs (CA) is the public face of the Department of State for millions of people around the world. CA is responsible for the welfare and protection of U.S. citizens abroad, for the issuance of passports and other documentation to citizens and nationals, and for the protection of U.S. border security and the facilitation of legitimate travel to the United States.²⁰

While in China, in order for P1 to be able to cast his vote in the US federal elections, the steps would be the following (as stated by the Bureau of Consular Affairs):

Absentee voting is a simple two-step process: [step 1] Each year, submit a completed Federal Post Card Application (FPCA) to your local election officials. They will: [...] Confirm your eligibility to vote and put your name on a list to receive absentee ballots for any elections held that calendar year [and] [s]end you a blank absentee ballot electronically or by mail. [step 2] Complete and return the ballot so it arrives before your state's ballot return deadline.

To vote from abroad, you must register with local election officials in your state of voting residence AND request an absentee ballot.

Overseas voters have a number of options for returning completed ballots:

Local mail– If you have a reliable mail service to the United States, put your ballot in the mail with appropriate international postage.

U.S. Embassy Diplomatic Pouch– You or another person can drop off your ballot request (FPCA) or completed ballot at the nearest U.S. embassy or consulate for return to the United States. [...]

Fax, Email, or Internet– Some states permit electronic transmission of completed ballots.

²⁰ US Dept. of State, Bureau of Consular Affairs, *About Us* <https://travel.state.gov/content/travel/en/about-us.html> (last visited Sept. 13, 2019)

Express Courier Service– If time is short or local mail unreliable, you can use professional courier services such as FedEx, DHL, or UPS at your own expense.

²¹

As we can see, there's a hefty amount of bureaucracy that comes along with a vote from abroad. Nonetheless, if P1 complies with the applicable regulations, he would in fact be able to cast a valid vote all the way from China in the next US federal elections.

Of course, we know that P2's situation will be drastically different when compared to P1's. As we've covered in past episodes,²² US Citizens that reside in PR are not able to vote in US federal elections. Why? Well, the answer is simple: the US Constitution does not allow it. Article II Section 1 Clauses 2 and 3 of said constitution state the following, in part:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an Office of Trust or Profit under the United States shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves.²³

As we can see, the US Constitution clearly identifies as “electors” those who inhabit a *State*. However, residents of Washington D.C., which is most certainly **not** a state, do have voting rights in federal elections as a result of Section 1 of the Twenty-Third Amendment:

The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State...²⁴

²¹ US Dept. of State, Bureau of Consular Affairs, *Absentee Voting Information for U.S. Citizens Abroad*
<https://travel.state.gov/content/travel/en/international-travel/while-abroad/voting.html> (last visited Sept. 13, 2019)

²² Listen to the episode titled *The Vote for President* here:
<http://puertoricoforward.com/puerto-rico-forward-the-vote-for-president>

²³ U.S. Const. art. II § 1 cl. 2

²⁴ U.S. Const. amend. XXIII § 1

As a result, the Constitution's text, by specifically identifying the states of the Union and the District of Columbia as the only places whose residents have the right to vote, it is excluding all other US territories, including PR. In fact, this reading of the Constitution is so accurate, that the US's legal representatives, in the Rosselló case before the IACHR, used this logic in order to argue that the victim's human right were not being violated. The Commission summarizes their logic in the following way:

The State acknowledges that American citizens residing in Puerto Rico cannot vote in U.S. presidential elections since the U.S. Constitution only affords this right to citizens residing in states and in the District of Columbia. It claims, however, that this does not constitute a violation of the American Declaration since the facts alleged by the petitioners do not establish any discrimination against specific individuals or any inappropriate denial of the rights to vote or participate in government.

With regard to the alleged discriminatory restriction of voting rights, the State submits that the right to equal treatment before the law means that the law may not treat similarly situated persons differently. The State maintains that American citizens residing in Puerto Rico are not in the same situation as citizens residing in states and the District of Columbia, but rather in the same situation as citizens residing in other U.S. territories such as Guam and the U.S. Virgin Islands. It asserts that citizens residing in Puerto Rico are treated in a way that is equal to the treatment accorded to citizens residing in other U.S. territories.

The State indicates that the difference in voting rights between these two groups is not based on race, sex, language, creed or any other invidious distinction barred by Article II of the American Declaration, but rather is based on the very nature of statehood under the U.S. Constitution. Citizens residing in Puerto Rico cannot participate in U.S. presidential elections. [...] The U.S. submits that residents of Puerto Rico enjoy the freedom to move within the United States with no restrictions and they automatically gain the right to vote in U.S. presidential elections if they take up residence in any of the states or the District of Columbia.

²⁵

The arguments presented by the US are not only flawed, but insulting as well. Their first point is perhaps the most unsound. In essence, they argue that since they are not discriminating against one particular person, there is no human rights violation under the American Declaration. It's almost as if to say that, in order there to be a violation, the victim must be selected by name. Of course, this cannot be sufficient to argue against the petitioner's claim. If we were to accept this as true, a country's government would only need

²⁵ *Supra*, note iii at 2-3

to construct a particular set of circumstances that would have an effect on a select group or person in order to perform a human rights violation without possibility of reprimand.

The State's second argument is also very cringe-worthy. Here it argues that since it treats US Citizens residing in PR the same as it would those residing in other US territories, such as Guam and the USVI, there can be no discriminatory restriction of voting rights. Here, the State seems to be attempting to argue that, since it discriminates against all US territory residents the same, there is no discrimination at all. This is a pitiful argument, if I've ever heard one. Since when is an act of blatant discrimination allowed as long as its done to millions of people? This argument seems reminiscent of a not-so-long-ago era in which racial segregation was allowed. Are we to believe that uniform discrimination is not discrimination at all? I ask you dear listener, is it fair to pay one woman less than a man for the same work as long as we pay **ALL** women less. The answer, without a shadow of a doubt is a resounding **NO**. However, the state believes it to be perfectly acceptable to violate a US resident of PR's right to participation in government as long as it does the same to all the residents of the US territories. Not only is this argument shameful, but it's insulting as well.

Lastly, the state's last point is perhaps the most grotesque and insensitive of them all. Here the state argues that since Puerto Ricans enjoy the "freedom" to move within the US with no restrictions, we would automatically gain the right to vote in US presidential elections if we move to a state. To be honest I was quite surprised that the State's representation would even think about presenting this argument since it is strikingly similar to the reasoning posed by those who opposed marriage equality. As we can recall, before the case of *Obergefell v. Hodges*, the legal validity of same sex marriages was in the hands of each state's local government. This meant that some states allowed it while others did not. Of course, for those couples that lived in a state that did not allow said marriage, this meant that they would have to mobilize to a state that did in order for their union to be legal. Although this situation was blatantly unjust an unequal, those who oppose marriage equality and lived in a state that did not allow it would argue that same sex couples could just move if they wanted to get married.

Without a doubt, if someone would try to argue this point, that person would not only be deemed as discriminatory, but would be correctly labeled as a bigot. And yet here we have the United States, before a forum, using this exact argument to defend the indefensible.

Well then, what does this all mean for P2? Simply put, he has no remedy. By moving to PR, P2 has effectively been disenfranchised. If you were in the shoes of P2, you would no longer matter in the voting equation. Your voice would be completely silenced in regards to US federal elections. In order to recover said rights, P2 would have to do one of three things: move back to New York, or any other state for that matter, move to Washington D.C., or move to a foreign country, like China. Yes my friends, once again, PR's colonial status has allowed Congress' insanity to reign supreme. You can vote for president from CHINA, but not from PR. So far, the IACHR has not reached a decision regarding the Rosselló case cited before.

In any event, we'll be keeping a close eye on this case since it surely will have repercussions that reach far beyond the parties in the case.