

Judicial denationalisation of Dominicans of Haitian descent

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A recent Constitutional Tribunal decision in the Dominican Republic, if implemented as drafted, will leave thousands of Dominicans stateless and send a lesson to other states that mass arbitrary denationalisations are acceptable as long as they are judicially mandated.

In the Dominican Republic (DR) enjoyment of nationality and its attendant rights has become all but impossible for persons of Haitian descent – a population that numbers between 250,000 and 500,000 in a population of about ten million.¹ Recent changes in the DR's constitution, followed by a perverse interpretation by the Constitutional Court in September 2013, have heightened the threat that Dominicans of Haitian descent – although citizens under a plain reading of the constitution – will become permanently stateless, as defined by international law.

An important cause of the marginalisation of Dominicans of Haitian descent is the state's longstanding reluctance to recognise their Dominican nationality. From 1929 until January 2010 the Dominican constitution granted Dominican nationality to all children born on national territory, except for those born to diplomats and to parents who were "in transit" at the time of the child's birth. For years the DR insisted that individuals of Haitian descent born in the DR had no right to Dominican nationality because their parents were in transit, even when these families had been in the country for multiple generations.

In September 2005, the Inter-American Court of Human Rights became the first international tribunal to find unequivocally that the prohibition on racial discrimination applies to nationality. In a landmark judgment, *Yean and Bosico v. Dominican Republic*, it ruled that the DR's discriminatory application of its constitution, citizenship and birth-registration laws and regulations rendered children of Haitian descent stateless

and unable to access equal protection before the law. The Court affirmed that: "Although the determination of who is a national of a particular state continues to fall within the ambit of state sovereignty, states' discretion must be limited by international human rights that exist to protect individuals against arbitrary state actions. States are particularly limited in their discretion to grant nationality by their obligations to guarantee equal protection before the law and to prevent, avoid, and reduce statelessness."²

Notwithstanding that it is a legally binding decision, the Court's ruling had the opposite of its intended effect at the national level. Even before *Yean and Bosico*, in 2004 the government passed a migration law that expanded the definition of "in transit" to include all "non-residents", a broad category which included anyone who could not prove their lawful residency in the country. In this way the meaning of the nationality provision of the constitution was changed without changing its wording. After *Yean and Bosico*, application of this law was stepped up. Although intended to be applied prospectively, the Dominican civil registry agency (JCE) began using it retroactively to withdraw citizenship from Dominicans of Haitian descent whose nationality it had previously recognised.

On 26th January 2010, the DR adopted a heavily revised constitution which accords citizenship only to children of "residents" born on Dominican soil. Thus individuals born in the DR after January 2010 who do not have documentary proof of their parents' Dominican citizenship or legal residency

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no longer have the right to Dominican nationality, as their parents are now categorised as non-residents – regardless of how long they or their families have lived in the DR, which might extend to generations.

Equally disturbing, it is now government-issued documentary proof of legal residency that determines what rights an individual has, rather than real events. An individual's parents or grandparents may have had every right to citizenship under the earlier Dominican constitution, yet been denied that proof due to bureaucratic or logistical failings of the state, or discrimination. The new constitution thus elevates the historic actions of the state – even though they may have been wrong or flawed at the time they were committed – to be determining factors of the rights of individuals today.

After the JCE began refusing to give Dominicans of Haitian descent identity documents such as national identity cards and birth certificates without official recognition – documentary proof – of their nationality, many of them experienced an erosion of their quality of life. Due to citizenship's character as a 'gateway', it is not only the right to nationality that is at stake but also the rights to juridical personality, equality before the law, family life, education, political participation and freedom of movement. Without access to their lawful nationality, Dominicans of Haitian descent will continue to be consigned by their own government to a status of permanent illegality in their own country.

Recent developments

The latest blow was a ruling of the Constitutional Tribunal (CT) on 23rd September 2013 which ruled that Juliana Deguis Pierre, who was born in the Dominican Republic in 1984, had been wrongly registered as Dominican at her birth. The CT decided that her parents, who allegedly could not prove that their migration status in the DR was "regular", were therefore "foreigners in transit"

for the purposes of Dominican domestic legislation. Therefore, Juliana was not entitled to the citizenship she was granted at birth and must be denationalised. Going further, the CT also ordered the JCE to thoroughly examine all birth registries since 1929 and remove from them all persons who were supposedly wrongly registered and recognised as Dominican citizens.

The CT decision is unprecedented. Firstly, in the numbers affected: some argue that as many as 200,000 persons will be made stateless. Their prior recognition as Dominicans makes them ineligible for Haitian nationality except by naturalisation, which in turn requires residence in Haiti.

Secondly, the CT decision is in flagrant disregard of the legally binding *Yean and Bosico* decision, and violates the Dominican constitution, which provides that its provisions should not be applied retroactively and which also holds that where two legal authorities contradict each other, the principle most protective of individual rights should be upheld. Beyond the Inter-American Court and the Dominican constitution, there are three basic human rights principles that frame the regulation of citizenship: the prohibition against racial discrimination; the prohibition against statelessness; and the prohibition on arbitrary deprivation of citizenship. The ruling violates all three principles.

Reactions to the ruling

The decision sent shockwaves throughout the country, the region and the wider human rights community. What can it mean when the body charged with interpreting the constitution takes a decision at odds with the constitution's plain language meaning? Where does the rule of law stand?

Arguably, the Dominican executive should not implement the ruling out of respect for the constitution itself; however, many Dominicans, while recognising the ruling's flaws, believe that it must be respected

simply because it was issued by the nation's highest court.

Statements of concern were issued by UNHCR, UNICEF, the US and the European Union. The Caribbean Community (CARICOM) has been outspoken in its condemnation of the ruling; it suspended consideration of DR's application to join CARICOM and demanded that the situation be discussed, twice, in the Organization of American States Permanent Council. The Dominican diaspora in the US seems generally critical of the ruling – perhaps because it is easy to imagine the devastation that would be wrought in their lives if the US ever applied a similar principle.

Now all eyes turn to President Medina of the Dominican Republic, head of the branch of government that must implement the CT decision. Immediately after the ruling he apologised to those affected, saying he would ensure that no one would be denationalised; then he retracted the apology, stating that the rule of law must be respected, although he was concerned by the humanitarian effects of the ruling; then he called for an analysis and assessment of the numbers of those affected, before finally announcing that the government would proceed with full implementation of the ruling.

Within three months of the CT ruling, the Inter-American Commission of Human Rights visited the DR. During the mission, President Medina announced that a special naturalisation bill would be submitted to Congress to restore the nationality of those affected by the ruling whose citizenship had already been recognised by the JCE. However, this 'special naturalisation bill' has been repeatedly delayed.

Following its mission, the Commission specified that implementing measures of the CT ruling should:

- guarantee the right to nationality of those individuals who already had this right

under the domestic legal system in effect from 1929 to 2010

- not require people such as those who were technically denationalised by the ruling to register as foreigners as a prerequisite for their rights to be recognised
- ensure that guarantees of the right to nationality of those affected by the CT ruling are general and automatic, and must not be discretionary or implemented in a discriminatory fashion
- ensure that mechanisms to restore or guarantee citizenship must be financially accessible
- involve civil society and representatives of the populations affected by the court decision.³

If these principles are reflected in the 'Regularization Plan for Foreigners in an Irregular Migratory Status in the Dominican Republic', part of the worst injustice inherent in the CT ruling may yet be averted.

Now is the time for the international community to find a way to articulate that 'rule of law' does not refer to anything and everything handed down by a court but has substantive as well as procedural content, and to raise the political cost to the DR of implementing the CT decision as it stands.

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1. See Wooding B 'Contesting discrimination and statelessness in the Dominican Republic', *Forced Migration Review* issue 32 'Statelessness' www.fmreview.org/en/FMRpdfs/FMR32/23-25.pdf

2. *Dilcia Yean and Violeta Bosico v. Dominican Republic*, Int. Am. Ct. H.R. Case No. 12.189 (Sept. 8, 2005).

3. 'Preliminary Observations from the IACHR's Visit to the Dominican Republic', Inter American Commission on Human Rights, Santo Domingo, December 6, 2013 www.oas.org/en/iachr/media_center/PReleases/2013/097A.asp