

# **Dominicans of Haitian Descent and the Compromised Right to Nationality**

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## **Introduction**

The right to nationality is one of the most critical of human rights. Although in theory few rights – such as to hold national public office, to vote in national elections or to exit and enter a country freely – are conditioned upon nationality, in practice access to nationality is a prerequisite to enjoyment of many of the benefits that people derive from membership in a political community – from education to social services to the right to counsel. In the Dominican Republic, enjoyment of the right to nationality has become all but impossible for persons of Haitian descent. Following decades of *ad hoc* discrimination in access to the identity documents that recognized them as lawful citizens, Dominicans of Haitian descent have since 2004 faced an avalanche of hostile legislative changes and administrative policies that have restricted their ability to enjoy the nationality that is guaranteed to them under the Dominican constitution. Singled out because of their national origin and their skin color, thousands of Dominicans of Haitian descent have been left effectively stateless and permanently excluded from the political, economic social and cultural life of their country of birth and residence. A January 2010 change to the Dominican Republic’s constitutional nationality provision threatens to make permanent their status of illegality.

In pursuing these racially discriminatory policies, the Dominican Republic is running afoul of its human rights obligations, particularly its responsibilities to ensure equal protection before the law and to prevent, avoid, and reduce statelessness,<sup>1</sup> as numerous human rights monitoring bodies have affirmed.<sup>2</sup> The time has come for the Dominican Republic to reverse course. At stake is not just the human rights of Dominicans of Haitian descent to nationality, but also their fundamental rights to juridical personality, equality before the law, family life, education, political participation, and freedom of movement. If the Dominican government is unwilling to take these steps on its own, the international community must assist the country in ending its racially discriminatory nationality policies.

This report first reviews the Dominican Republic’s history of racial discrimination against Dominicans of Haitian descent in access to nationality, focusing particular attention on those policies and practices that have emerged in the past decade. It then demonstrates how the January

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<sup>1</sup> *Dilcia Yean and Violeta Bosico v. Dominican Republic*, Judgment of September 8, 2005, Inter-Am Ct. H.R. (Ser. C), No. 130 (2005), para. 140.

<sup>2</sup> For the most recent findings of international human rights monitoring bodies, please see: UN Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, Doudou Diène, and the independent expert on minority issues, Gay McDougall: Mission to the Dominican Republic*, UN Doc. A/HRC/7/19/Add.5, A/HRC/7/23/Add.3, March 18, 2008; Committee on the Rights of the Child, *Concluding Observations: Dominican Republic*, UN Doc. CRC/C/DOM/CO/2, February 11, 2008, para. 126, wherein the Special Rapporteur and Independent Expert issued a joint recommendation that the Dominican Republic “appropriately implement the law in a manner that protects the right to non-discrimination enjoyed by every person within Dominican territory and the imperative to avoid statelessness”; UN Committee on the Rights of the Child, *Concluding Observations: Dominican Republic*, UN Doc. CRC/C/DOM/CO/2, 11 February 2008, para. 40, where the Committee “encourage[d] the State party to adopt a procedure to require nationality which is applied to all children born in the Dominican Republic in a non-discriminatory manner and to make sure that no child becomes stateless,” UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Dominican Republic*, UN Doc. CERD/C/DOM/CO/12, May 16, 2008, wherein the Committee ; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Dominican Republic*, UN Doc A/HRC/13/3, January 4, 2010, para. 53, where Working Group members recommended that that the Dominican Republic “[a]dopt measures to ensure that Dominicans of Haitian descent are not denied citizenship or access to civil and birth registration procedures and are not arbitrarily subject to retroactive cancelation of birth and identity comments and that it “[a]pply consistent and non-discriminatory citizenship policies and practices.”

2010 constitutional changes purport to legalize the government's discriminatory policies of the past six years, and review the impact of these changes on Dominicans of Haitian descent. The report concludes with a set of recommendations for the government of the Dominican Republic and a call for international action to encourage the Dominican Republic to change its discriminatory policies and comply with its human rights obligations.

## **The Right to Nationality in the Dominican Republic**

In the Dominican Republic, the right to nationality is regulated by law and manifested in the issuance of state identity documents.

From 1929 until January 26, 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 their children's birth.<sup>3</sup> Long-standing authoritative legal interpretations limited the temporal scope of the "in transit" exception to a period of less than ten days, meaning that children born in the Dominican Republic to migrants and other temporary and permanent residents whose stay in the country exceeded ten days had a constitutional right to Dominican nationality.<sup>4</sup> It was not until a new migration law was passed in 2004 that the "in transit" exception was further defined and qualified, as discussed further, below. A revised national constitution introduced on January 26, 2010 excluded an additional group from the *jus soli*<sup>5</sup> guarantee of nationality: the children of illegal residents.

While the Dominican constitution defines who has the right to Dominican nationality, official recognition and proof of such nationality are granted by the state civil registry agency, today regulated by the Central Electoral Board (the *Junta Central Electoral*, or "JCE").<sup>6</sup> The JCE issues birth certificates and national identity cards (*cédulas de identidad y electoral*).

In order to be officially recognized as a national of the Dominican Republic, a child must first obtain a birth certificate from the civil registry agency. Parents must provide proof of their

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<sup>3</sup> The exact language of Article 11 of the 1999 Constitution of the Dominican Republic was "Dominicans are: All persons born in the territory of the Republic with the exception of the legitimate children of foreigners resident in the country in diplomatic representation or in transit."

<sup>4</sup> According to the Immigration Act No. 95 of April 14, 1939 and the Immigration Regulation No. 279 of May 12, 1939, which were until August 2004 the applicable migration regulations, foreigners "in transit" were those who entered the Dominican Republic with the principle objectives of traveling to another destination, those engaging in business or leisure activities, and diplomats. According to statements made by the Dominican Republic before the passage of the 2004 migration law, "A period of 10 days will be considered ordinarily sufficient to pass through the Republic" See: UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Dominican Republic 27/04/2000*, UN Doc. CCPR/C/DOM/99/3, para 18 and *Follow-up State Reporting: Action by State Party: Dominican Republic*, UN Doc. CCPR/CO/71/DOM/Add.1(2002), para. 57.

<sup>5</sup> *Jus soli*, also known as birthright citizenship, is a right by which nationality or citizenship can be granted to any individual born in the territory of the related state.

<sup>6</sup> Since 1992, the Central Electoral Board (*Junta Central Electoral*, or "JCE") has been the state agency responsible for administering the Dominican Republic's civil registry system. It is charge of the 161 civil registry offices located throughout the country, and is responsible for the issuance of birth certificates, *cédulas*, and passports. It is also in charge of running all public office elections. The JCE currently comprised nine members and their substitutes, (appointed every four years by the Senate) and it is subdivided into three branches: (1) the Plenary (2) the Administrative Chamber; and (3) the Judicial Chamber. Further information on the agency can be found at <http://www.jce.gov.do>.

own identity and proof of their child's birth.<sup>7</sup> Once these documentary requirements have been met, the civil registry then issues the child an official birth certificate, which for the first time identifies the child as a Dominican national. Birth certificates serve as the primary form of identification for all Dominican citizens under the age of 18.

Upon reaching 18 years of age, all Dominican nationals must apply for a *cédula de identidad y electoral*. In order to obtain a *cédula*, applicants must first present a certified copy of their birth certificate issued by the JCE specifically for the purposes of applying for a *cédula*.<sup>8</sup> Possession of a valid *cédula* is mandatory under law; to be caught without one is to risk fines, imprisonment, and even deportation.<sup>9</sup> For adult Dominicans, *cédulas* are a necessary prerequisite to enjoying a wide variety of civil, political, social and economic rights. *Cédulas* are required to vote and to run for political office, to register for university education, to pay into the Dominican social security system, to open a bank account and acquire or transfer property, to apply for a passport, to make a sworn statement before the judicial system, to get married or divorced, and to register the birth of one's children. In short, without a *cédula* it is impossible, as the Inter-American Court of Human Rights has concluded, to "acquire and exercise [the] rights and obligations inherent in membership in a political community."<sup>10</sup>

## **Accessing Dominican Nationality: An Uneven History for Dominicans of Haitian Descent**

Until 2004, Dominicans of Haitian descent – the descendants of Haitian migrants who worked and settled in the Dominican Republic throughout the 20<sup>th</sup> century – enjoyed a constitutional right to Dominican nationality. Born on Dominican territory to parents who resided in the country for periods far in excess of 10 days, they were legally exempt from the "in transit" provision of the constitution's nationality provision. Historically, however, this vulnerable population has always faced some difficulties in obtaining formal recognition of their Dominican nationality.

From the 1950s through the 1990s, the Dominican state formally recognized as citizens a significant number of Dominicans of Haitian descent. Many Haitian migrant parents used their Haitian nationality documents in support of the birth registration of their Dominican Republic-born children. The civil registry also habitually accepted as proof of parental identity documents known as *fichas*, workplace identity cards issued by Dominican companies that hired Haitian

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<sup>7</sup> Hospitals and other medical facilities provide documents known as *constancias de nacimiento*. In the case of home births, parents can also provide sworn statements by witnesses to the birth.

<sup>8</sup> This particular copy of birth certificate is known as a "birth certificate for purposes of *cédula* only" (*certificado de declaración de nacimiento con fin de cédula*). The JCE will only issue it a few months prior to the bearer's *cédula* application.

<sup>9</sup> Article 1 of Law No. 6125 of 1962 on Personal Identification *Cédula* (Ley No. 6125 de 1962 sobre *Cédula de Identificación Personal*), as amended by Law No. 17 of 1963 on Personal Identification *Cédula* (Ley No. 17 de 1963 sobre *Cédula de Identificación Personal*), made mandatory the possession, use and carrying of a *cédulas*, while article 32 of that same law mandates a punishment of imprisonment, which can range from 5 to 30 days, for all those who fail to comply with the obligation to carry and provide that document. These requirements have remained unchanged throughout the subsequent changes to the *cédula* legislation in 1964, 1971, 1977, 1985, 1992 and 2001.

<sup>10</sup> *Dilcia Yean and Violeta Bosico v. Dominican Republic*, Judgment of September 8, 2005, Inter-Am Ct. H.R. (Ser. C), No. 130 (2005), para. 137.

laborers.<sup>11</sup> As mandated under the Dominican constitution, these children were recognized as Dominican citizens and were subsequently issued Dominican birth certificates, *cédulas*, and passports. They used these documents to establish their lives in the Dominican Republic and access the rights guaranteed to its nationals. These first generations of Dominican citizens of Haitian descent went on to register the births of their own children, who were also officially recognized as Dominican nationals, as were their grandchildren.

Alongside those whose Dominican nationality was formally acknowledged by the Dominican state, however, there developed a multi-generational class of permanently undocumented Dominicans of Haitian descent. With no basis in then-existing legislation, some civil registry offices determined that the undocumented Haitian parents of children born in the Dominican Republic were technically “in transit” and that therefore their children did not have a right to Dominican nationality. Children whose parents were deemed as being “in transit” by local civil registry offices were denied birth certificates and official recognition as Dominican nationals.

The ability of Dominicans of Haitian descent to obtain birth certificates was also stymied by the inconsistent documentary requirements imposed by different civil registry offices. Whereas previously civil registry offices had generally accepted documents like *fichas* as sufficient proof of parental identity, in the 1980s and 1990s certain offices began requiring more official proof of identity, such as valid Haitian passports or Dominican foreign residency cards. Migrants who lacked such documents were often turned away from their local civil registry offices. By 2000, even parents who could provide valid passports, foreign residency cards, and even valid *cédulas de identidad y electoral* were being turned away by some local civil registry offices on the basis that they were “Haitians” and that all Haitians were “in transit.” Some offices made clear that they would not register anyone who “looked like a Haitian,” by which they meant anyone who had darker skin color, spoke with an accent, or wore certain types of clothes. This policy was not consistently applied. Many civil registries chose to observe the law while others exercised wide discretion – and abused it - in determining to whom they would grant Dominican nationality.<sup>12</sup>

Over time, thousands of children born to parents who had been living in the Dominican Republic for many years were denied Dominican nationality and Dominican identity documents. By 1999, the situation of permanent illegality to which many Dominicans of Haitian descent had been consigned was acute enough to prompt close attention by the Inter-American Commission on Human Rights. In its country report on the Dominican Republic issued that year, the Commission noted that the situation of illegality of Haitian parents was often passed down to children even when they were born in the country:

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<sup>11</sup> *Fichas* were supposed to list the company’s name, the laborer’s name, the approved length of the employment contract, and the region where the laborer was authorized to work. More often, however, *fichas* only listed the company’s name, the laborer’s name, and the agricultural reason. Rarely was information provided about the approved length of the labor contract, as this allowed the companies to retain a relatively stable workforce even in the absence of formal labor accords between Haiti and the Dominican Republic.

<sup>12</sup> UNDP Human Development Office. *Política Social: capacidades y derechos* (Santo Domingo: UNDP, 2010), p. 122. Starting in the 1990s, efforts were made to amend Law 95 of 1939 and Regulation No. 279 on the basis that the law was outdated. First, government officials argued that Law 95 of 1939 was a legal instrument on immigration which was meant to address only labor migration flows of Haitian migrants, not broader migration into and settlement of foreigners in the country. They further argued that immigration into the Dominican Republic had undergone substantial changes, both from the point of view of the reorientation of immigration flows to non-traditional economic sectors, including the construction, non-sugar agriculture, and tourism industries.

The children do not have documents because their parents have none. It is practically impossible to obtain them, either because the officers of the hospitals or civil registries refuse to issue a birth certificate or because relevant authorities refuse to enter them in the civil registry... The Dominican authorities impose on Haitian parents the burden of showing documents that are not expressly required by Law No. 659 on Acts of Civil Status. For example, the offices of the Civil Registry, in general, require that Haitian parents present an identity document in order to register their children, even though the law does not set forth any such requirement....The human rights groups that work on these cases indicate that requiring documents such as "a national identity card or a voter registration card from the parents" not only makes it impossible for Haitian parents to register their children, but is illegal, given that the law establishes no such requirement.<sup>13</sup>

Having been denied Dominican birth certificates and proof of Dominican citizenship, and lacking any effective link to the country of their predecessors, these Dominicans of Haitian descent were condemned to a life at the margins of Dominican society. They were denied access to education, employment, political participation, and legal redress.<sup>14</sup> The effects were multi-generational, as Dominican Republic-born parents of Haitian descent who lacked identity documents were unable to register the births of their own children. Another generation was rendered effectively stateless.

In 2005, the Inter-American Court of Human Rights issued a landmark judgment against the Dominican Republic affirming that these policies discriminated against Dominicans of Haitian descent and left them vulnerable to statelessness.<sup>15</sup> The case, *Dilcia Yean and Violeta Bosico v. Dominican Republic*, was brought by two young girls of Haitian descent who were denied Dominican birth certificates even though their mothers were born in the Dominican Republic and possessed valid *cédulas*. In its judgment, the Inter-American Court found that the Dominican Republic was misapplying the "in transit" constitutional exception to deprive children of Haitian descent of their right to Dominican nationality, making them vulnerable to statelessness. The court took pains to admonish the State not to make arbitrary rules that ignore the enduring links that long term migrants people develop with the country, noting that "to consider that a person is in transit, irrespective of the classification used, the State must respect a reasonable temporal limit and understand that a foreigner who develops connections in a State cannot be equated to a person in transit."<sup>16</sup> The Court made clear that the migratory status of parents could not be transmitted to children born on national territory, and must never constitute justification for depriving a person of the right to nationality.<sup>17</sup> The Court recognized that although states enjoy wide discretion in determining who has the right to be a national, these regulations cannot be discriminatory nor have discriminatory effects on particular groups of people.<sup>18</sup>

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<sup>13</sup> Inter-American Commission on Human Rights, *Report of the Situation of Human Rights in the Dominican Republic*, Inter-Am. C.H.R. OEA/Ser.L/V/II.104 Doc. 49 rev. 1, October 1999, paras. 350-355.

<sup>14</sup> See Human Rights Watch, *"Illegal People": Haitians and Dominico-Haitians in the Dominican Republic* (Human Rights Watch: New York, 2002).

<sup>15</sup> *Dilcia Yean and Violeta Bosico v. Dominican Republic*, Judgment of September 8, 2005, Inter-Am Ct. H.R. (Ser. C), No. 130 (2005).

<sup>16</sup> *Ibid*, para. 157.

<sup>17</sup> *Ibid*, para. 156.

<sup>18</sup> *Ibid*, para. 141.

As part of its judgment, the Inter-American Court ordered the Dominican Republic to reform its birth registration system to eliminate its discriminatory elements, and to create an effective procedure to issue birth certificates to all children born on Dominican territory, regardless of their parents' migratory status. Rather than comply with the Court's order, however, the government of the Dominican Republic defied it, instituting a series of legislative, judicial, and administrative measures that have prevented Dominicans of Haitian descent from enjoying their lawful right to nationality.

### **The 2004 Migration Law: An Official Policy of Exclusion**

In August 2004, one year before the Court issued its judgment in *Yean and Bosico*, the Dominican government adopted a new General Law on Migration (Law 285-04),<sup>19</sup> the first comprehensive reform of the country's immigration statutes in 65 years. In addition to regulating the entry, stay, and employment of immigrants, the law effectively put an end to the automatic right of Dominican nationality granted to Dominicans of Haitian descent under the constitution's *jus soli* guarantee. Despite a vocal domestic and international outcry, which officials characterized as the work of an "international conspiracy" determined to ruin the reputation of the Dominican Republic, the changes introduced for the first time a descent-based legislative restriction to Dominican nationality. As such, it transformed the previously *ad hoc* discriminatory practices into national policy.<sup>20</sup>

Under Law 285-04, the constitutional exception which denied nationality to Dominican-born children of persons "in transit" no longer applied just to parents that were transiting through the Dominican Republic for a period of ten days or less. As of the entry into force of the law, all "non residents" would also be considered as being "in transit." "Non-residents" were broadly defined to include, not only tourists and temporary foreign workers, but also persons with expired residency visas, and undocumented migrant workers.<sup>21</sup> Despite having been born on Dominican territory, children of "non-resident" parents – including persons who could not circumvent the various bureaucratic obstacles to secure documentary proof of legal residence – would be excluded from Dominican nationality and would henceforth be considered as foreign residents.

This differential residency status was enforced through a new birth certification system introduced under Law 285-04. Instead of receiving the standard proof-of-birth document (*constancias de nacimiento*) issued by hospitals to Dominican mothers, "non-resident" mothers would now receive "certifications of foreigner live birth" (*constancias de nacido vivo extranjero (a)*), which are in practice a different color (pink) than the certifications of birth issued to Dominican nationals. These documents cannot be used to obtain a birth certificate from the Dominican civil registry; rather, bearers of these alternate *constancias* are channeled through a

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<sup>19</sup> The full text of the General Law on Migration no. 285-04 (Ley General de Migración No. 285-04) was published in the *Gaceta Oficial* on August 27, 2007. It is available (in Spanish) at <http://www.seip.gov.do/cnm.php>.

<sup>20</sup> See Panky Corcino, "Tolentino: es una 'burla' el proyecto de ley migratoria. Considera que tiene un enfoque exclusivo para los Haitianos," *El Caribe*, April 24, 2004 and "Contra la reforma migratoria: La FLACSO asegura que el Senado introdujo viejas discriminaciones," *El Caribe*, April 23, 2004; Jose Luis Soto, "República Dominicana: vuelve al debate proyecto de ley para controlar la migración ilegal de haitianos," [www.alterpresse.org](http://www.alterpresse.org), April 26, 2004.

<sup>21</sup> General Law on Migration No. 285-04, Articles 36 and 152. The law also defined as "non-residents" business travelers and Haitian residents of the Dominico-Haitian border.

separate birth registration system that denies them any legal connection to the Dominican state. In order to receive official recognition of their children's birth, "non-resident" parents must take their children's *constancias* to a foreign embassy or consulate and obtain an official birth certificate there. The only record of the "non-resident" child's birth in the Dominican Republic would be lodged in the Dominican government's Foreign Registry Book.<sup>22</sup>

The broad definition of "non-resident" provided by the 2004 migration law also meant that Dominicans of Haitian descent that had previously been denied birth certificates and other identity documents would experience difficulty in obtaining recognition as Dominican nationals, as they would not be able to prove their lawful residence in the Dominican Republic and thus would be considered as "non-residents." As a result of their lack of documentation, their children could also be denied their constitutional right to Dominican nationality. Their children would never receive a birth certificate from the Dominican Republic, the country of their birth, and they would be barred from obtaining a *cédula* and accessing all the rights inherent in Dominican nationality. They would be forced to request birth certificates and identity documents from a foreign country with which they had few, if any, effective links: Haiti. Despite being born in the country, their default status in the Dominican Republic would be that of permanent illegality.

Criticism of the new migration law was widespread. The United Nations' Committee on the Rights of the Child warned the Dominican Republic that "a large number of stateless children" would be generated by this new migration law, as the assumption that the mother was "in-transit" often disregarded long-term residence in the Dominican Republic and prevented the acquisition of any nationality by the child.<sup>23</sup> The United Nations Special Rapporteur on Contemporary Forms of Racism and the United Nations Independent Expert on Minority Issues issued a joint recommendation to the Dominican government that it "act swiftly to bring its Migration Law No. 285-04 into conformity with article 11 of the Constitution and promulgate regulations that appropriately implement the law in a manner that protects the right to non-discrimination enjoyed by every person within Dominican territory and the imperative to avoid statelessness."<sup>24</sup>

In June 2005, a coalition of Dominican human rights organizations challenged the constitutionality of Law 285-04, alleging, among other claims, that it violated the Dominican Constitution's non-discrimination clause (Article 101). In a decision issued in December 2005,<sup>25</sup> the Supreme Court ruled Law 285-04 constitutional, arguing that Congress had a constitutional right to interpret the Article 11 nationality provision as it saw fit. The Supreme Court ratified the legislature's interpretation that children of "non-resident" migrants were necessarily excluded from the constitutional guarantee of nationality, even though Law 285-04 was the first law to specifically interpret the constitution in this way.

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<sup>22</sup> The only role of the Dominican state vis-à-vis children of "non-residents" is to send copies of all pink *constancias* to the JCE, the Ministry of Foreign Relations, and the Directorate General for Migration. This ensured that key areas of the state bureaucracy are on notice regarding the "foreign" origin of children just born on Dominican soil.

<sup>23</sup> Committee on the Rights of the Child, *Concluding Observations: Dominican Republic*, UN Doc. CRC/C/DOM/CO/2, February 11, 2008, para. 39.

<sup>24</sup> UN Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, Doudou Diène, and the independent expert on minority issues, Gay McDougall: Mission to the Dominican Republic*, UN Doc. A/HRC/7/19/Add.5, A/HRC/7/23/Add.3, March 18, 2008, para. 126.

<sup>25</sup> The full text of the judgment can be found at <http://www.suprema.gov.do/novedades/sentencias/inconstitucionalleydemigracioncertificada.htm>

The Supreme Court's judgment also ignored the fact that Law 285-04 violated the fundamental tenets of the Inter-American Court's *Yean and Bosico* judgment, issued only two months earlier. Most egregiously, it made nationality contingent upon a person's migration status, it made parents' migration status an inheritable trait, and it refused to set any reasonable temporal limits on the "in transit" status.<sup>26</sup> In doing so, the Supreme Court contravened its own jurisprudence, which in 2003 had established that all judgments issued by the Inter-American Court of Human Rights were binding and of equal weight to the country's constitution.<sup>27</sup>

## **Retroactive Application of the 2004 Migration Law: Effective Denationalization of Dominicans of Haitian Descent**

Migration Law 285-04 did not only affect the *prospective* right of Dominicans of Haitian descent to Dominican nationality. As noted by the United Nations Committee on the Elimination of Racial Discrimination, the JCE began *retroactively* applying the law to Dominican citizens, interpreting the "in transit" exception to the detriment of thousands of Dominican families of Haitian origin.<sup>28</sup> In effect, the JCE has been applying the nationality restrictions imposed on "non-residents" by the 2004 migration law to retroactively remove the nationality of Dominicans of Haitian descent born ten, twenty and thirty years before the law entered into force. Many of these persons were previously recognized as citizens by the Dominican state. In pursuing this policy, the Dominican government is falling afoul of a constitutional prohibition of retroactive application of laws.<sup>29</sup>

### **Denial of Cédulas and Birth Registration**

Since 2006, Dominican citizens of Haitian descent have faced serious difficulties in obtaining *cédulas*. Although in possession of state-issued birth certificates which cement their status as Dominican nationals, many have been told by JCE officials that their application for a *cédula* cannot proceed because their parents were "non-residents" at the time their births were registered and, as such, they never had the right to Dominican nationality. Particularly affected have been those Dominicans of Haitian descent whose parents used *fichas* as proof of parental identity. Dominicans of Haitian descent whose *cédula* applications have been blocked were instructed to come back only when their parents' migration status has been "sorted out" –

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<sup>26</sup> *Dilcia Yean and Violeta Bosico v. Dominican Republic*, Judgment of September 8, 2005, Inter-Am Ct. H.R. (Ser. C), No. 130 (2005), para. 156.

<sup>27</sup> Supreme Court of the Dominican Republic, Resolution No. 1920-2003 of 13 November 2003 on Anticipated Measures to the New Code of Criminal Procedure (Resolución No. 1920-2003 de fecha 13 de noviembre de 2003, sobre medidas anticipadas al Nuevo Código Procesal Penal, available at [http://www.suprema.gov.do/novedades/resoluciones/2003/Resolucion\\_1920-2003.pdf](http://www.suprema.gov.do/novedades/resoluciones/2003/Resolucion_1920-2003.pdf): "the Dominican Republic has a constitutional system consisting of equal standing provisions that emanate from two sources essential rules: a) national, formed by the Constitution and constitutional jurisprudence local dictated both by the fuzzy control as the concentrate, b) international, composed of international covenants and conventions, advisory opinions and decisions of the Inter-American Court of Human Rights, legal sources that together, under the best doctrine, comprising what has been called, the constitutional law, which is subject to formal and substantive validity of any adjective or secondary legislation."

<sup>28</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Dominican Republic*, UN Doc. CERD/C/DOM/CO/12, 16 May 2008, para. 14.

<sup>29</sup> According to Article 47 of the 1999 Dominican constitution, Dominican laws can only be applied prospectively. Furthermore, "in no case may the law or [any other] public power affect or alter the juridical security derived from situations established under previous legislation." Article 110 of the January 26, 2010 constitution upholds this prohibition.

presumably, when their parents' migration status has been regularized. In short, the JCE has abruptly repudiated a practice the state had allowed to flourish for decades - the use of identity documents that did not prove legal residence in the country for purposes of parental identification. In so doing, the civil registry agency has now placed the burden on the affected individuals of fixing its administrative "error." For many Dominicans of Haitian descent whose parents are deceased, have relocated outside the Dominican Republic, or whose whereabouts are unknown, it is impossible to comply with these instructions.

Adult Dominicans of Haitian descent whose *cédula* applications have been rejected have seen their rights to education, political participation, freedom of movement and access to justice severely conscribed. Those whose *cédula* applications were rejected prior to 2008 could not vote in the 2008 presidential elections or the 2010 congressional elections. Many have had to forgo completion of their secondary education or pursuit of higher education, and many others have lost important employment opportunities.

One devastating consequence of being rejected for a *cédula* is the inability of affected Dominicans of Haitian descent to register the births of their own children. Enforcing a 1994 law, civil registries now require all parents to present a valid *cédula* in order obtain a birth certificate for their children. Dominicans of Haitian descent whose *cédula* applications have been rejected are unable to fulfill this requirement, and thus their children have gone unregistered.

Even Dominicans of Haitian descent who already possess a valid *cédula* have experienced grave difficulties in registering the births of their children. They go to their local civil registry office for what they assume will be a simple procedure, as they meet all the documentary requirements for birth registration, only to be told that because their parents' (the children's grandparents') status is under review, their children cannot be issued a Dominican birth certificate until the situation is "resolved." The experience of Dilcia Yean and Violeta Bosico, condemned by the Inter-American Court of Human Rights in 2005, continues to be common throughout the Dominican Republic.

A birth certificate, according to UNICEF, "is the permanent and official record of a child's existence and is fundamental to the realization of children's rights and practical needs"<sup>30</sup>, a "membership card" for society that should open the door to the enjoyment of a whole range of other rights including education and health care, participation, and protection."<sup>31</sup> It is the key to an official identity, a recognized name, and a nationality; a necessary prerequisite to being recognized by the state as an individual with rights and responsibilities.

Dominican children of Haitian descent who have been denied birth registration by civil registry authorities do not exist in the eyes of the state. Their names are not recorded anywhere, and the government disavows any responsibility towards them. Absent any improvement to the Dominican Republic's nationality policies, they are destined to experience the same cycle of exclusion and deprivation as their parents and grandparents.

#### Denial of access to copies of birth certificates

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<sup>30</sup> UNICEF, *Child Protection Information Sheet: Birth Registration* (May 2006).

<sup>31</sup> UNICEF Innocenti Research Centre, *Birth Registration: Right from the Start* (March 2002).

In the Dominican Republic, unfettered access to certified copies of birth certificates is critically important.<sup>32</sup> They are required in order to register for primary school, to obtain health care coverage, to apply for *cédulas*, to apply for passports, to register for university, to get married, and to conduct a wide variety of other critical, quotidian tasks. A series of instructional memorandums issued by the JCE has barred Dominicans of Haitian descent from obtaining certified copies of their birth certificates, dramatically curtailing their ability to engage in any of these activities.

*Circular 017* was issued by the administrative chamber of the JCE in March 2007. It prohibits civil registry officers from expediting any requests relating to potentially “irregular” birth certificates due to worries that the original versions of these documents may have been improperly issued to children of “foreign parents who had not proven their residency or legal status in the Dominican Republic.” In practice, *Circular 017* bars civil registry officials from giving anyone with “suspect” documents certified copies of their birth certificates. Rather than upholding the right of Dominican citizens to unobstructed access to their personal records, as guaranteed under Dominican law,<sup>33</sup> *Circular 017* instead orders civil registry officers to forward all “suspect” documents and related requests to the JCE headquarters for further “investigation.” According to the investigatory procedure outlined by the JCE, suspect documents are then forwarded to its Department for Verification of Documents and then to its plenary body for a final decision on the validity of the documents.

The JCE’s issuance of *Circular 017* is legally questionable. Under Dominican law, birth certificates previously issued by civil registry officers are considered valid until such time as a judicial authority has revoked their validity.<sup>34</sup> The burden of correcting a mistake such as the one alleged by the JCE in *Circular 017* – that the birth certificates may have been improperly issued to children of “foreign parents” – falls on the state agency itself, not on the individual to whom the document was originally issued. Furthermore, *Circular 017* restricts access to birth certificates on the basis of the presumed residency status of the bearers’ parents. As the parental residency requirement for Dominican nationality was introduced only in 2004, the issuance and implementation of *Circular 017* is a clear example of retroactive application of Migration Law 285-04.

The Dominican Republic counts with no other historic population of foreign origin who would have received birth certificates from the civil registry in decades prior, making clear that one of *Circular 017*’s intended target was this vulnerable population. Indeed, in some civil registry offices’ copies of *Circular 017*, the phrase “foreign parents” has been replaced with “Haitian parents.”<sup>35</sup> In practice, civil registry officials have admitted using skin color, racial features, and “Haitian-sounding names” to determine who might be carrying irregular or suspect

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<sup>32</sup> There are three official types of certified copies of birth certificates: *Extracto de Acta de Nacimiento para fines de Cedula y Escolares*, *Acta de Nacimiento en Extracto*, and *Acta de Nacimiento in Extensa*. Different activities call for different types of certified copies.

<sup>33</sup> Under current Dominican law, holders of civil registry documents have unfettered and automatic right of access to these documents. See Law 659 of 1955 on Civil Status Acts, Article 31.

<sup>34</sup> Law No. 659 of 17 July 1944 on Civil Status Acts on Provisions that Dictate Disposition on Registries and Death Certificates (Ley No. 659 del 17 de julio de 1944 sobre Actos del Estado Civil que dicta disposiciones sobre los registros y las actas de defunción), Article 3.

<sup>35</sup> The Open Society Justice Initiative has on file an example of such a document.

documents and are therefore ineligible to receive certified copies if their birth certificates. One local registry official admitted that she determined who was born to foreign parents “by the physical traits of person, the manner of talking.”<sup>36</sup> In the words of the United Nation’s Independent Expert on Minority Issues, “this presumption of illegality is applied only to people with dark skin and Haitian features.”<sup>37</sup>

Since 2007, many Dominicans of Haitian descent have requested certified copies of their birth certificates from their local civil registry office only to be told that their request was rejected because their parents were “Haitian” and thus the validity of their original birth certificate needed to be submitted to an investigative process before any further action was taken. This has happened to Dominicans of Haitian descent of all ages, from school-age children who needed a copy to register for school to adults already in possession of valid *cédulas* and passports who needed a copy to apply for a visa. Many had gone through life never once questioning their Dominican nationality or the validity of the identity documents the state had previously issued them. The JCE’s investigation into the validity of their birth certificates under the umbrage of *Circular 017* became the first time they experienced the government’s policy of racial discrimination in respect of nationality. They have attended university, developed professional careers, voted in elections, served in the military, and traveled the world without ever having their nationality called into questions. After the issuance of *Circular 017*, however, they were branded as suspect citizens in the country of their birth.

While *Circular 017* was not a blanket declaration of denationalization of Dominicans of Haitian descent, its application to thousands of Dominicans of Haitian descent does severely threaten their right to nationality and their ability to exercise the rights attendant their Dominican nationality. While their birth certificates are “under investigation” for an extended period of time, affected Dominicans of Haitian descent are stuck in a legal limbo during which they are unable to proceed with basic activities that require certified copies of their birth certificates. Most critical among these is the inability to apply for a *cédula*, as a certified copy of a birth certificate must be deposited with the civil registry agency before the application can move forward.

While some of those affected by *Circular 017* continued to possess valid *cédulas* and passports, they will eventually encounter difficulty in renewing or replacing these identity documents, as certified copies of their birth certificates would be required to proceed with their reapplication. In the absence of these documents, Dominicans of Haitian descent will be unable to prove their nationality or exercise the rights inherent to Dominican citizenship, leaving them effectively stateless. Of particular concern is the civil registry’s plan to replace all existing *cédulas* with newer versions that will contain biometric data.<sup>38</sup> The process of *cedulización* announced in October 2008 as a measure to “clean up” the civil registry records, the plan requires citizens to present their old *cédulas* and apply for a new one. As of September 2010, the

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<sup>36</sup> Justice Initiative interview with an administrative assistant at a civil registry office in Puerto Plata, Dominican Republic, August 24, 2007.

<sup>37</sup> UN Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, and the independent expert on minority issues, Gay McDougall: Mission to Dominican Republic*, UN Doc. A/HRC/7/19/Add.5 and A/HRC/7/23/Add. 3, 18 March 2008, para. 62.

<sup>38</sup> Junta Central Electoral, *Cámara Administrativa Inicia Plan Piloto Proyecto Captura Datos Biométricos del Ciudadano y su Integración con el Acta y Cédula de Identidad y Electoral*, October 18, 2008.

*cedulización* process is still ongoing, with old *cédulas*, even those which had formally expired, still in valid use. Nevertheless, early evidence indicates that some Dominicans of Haitian descent have faced significant problems in applying for the replacement *cédulas*. Many have reported being turned away by civil registry officers because they were “Haitian” or because their parents were “non-residents” or have been asked to return with a copy of their birth certificate, a requirement that most of them will not be able to fulfill. Whether they will actually receive their new *cédulas* upon completion of the documentation process remains to be seen. Once the documentation process is complete, persons left without new *cédulas* will be left without any valid proof of their Dominican nationality.

*Resolución 12-2007* is another internal JCE memo which restricts Dominicans’ access to their personal identity documents. First proposed in December 2007 and confirmed in June 2008, this administrative resolution authorizes the provisional suspension of state-issued identity documents on the basis “irregularities.” Once suspended, these documents are submitted to an internal investigatory process similar to the *Circular 017* process. JCE records of these documents, both at the central and local level, are marked with a “suspended” stamp; the documents would only be able to be utilized at the discretion of the JCE and only for “judicial matters” until such time as the investigation is completed. Unlike *Circular 017*, *Resolución 12-2007* does not list parents’ residency status as suspicious factor. Rather, it points to things such as multiple birth declarations, documents where the bearers’ names and parents’ names had been amended after their original issuance and documents which had been irregularly filed in the JCE’s central records. However, civil registry officer and other JCE employees often reference *Resolución 12* and *Circular 017* when denying a document to a Dominican of Haitian descent.<sup>39</sup> In 2009, the JCE passed an additional resolution which allows that agency to cancel all *cédulas* issued to persons whose birth certificates were invalidated as a result of an investigation carried out under *Circular 17* and *Resolución 12-2007*.<sup>40</sup>

There is evidence that the JCE’s application of *Resolución 12-2007* has disproportionately affected Dominicans of Haitian descent. By July 2008, the identity documents of an estimated 3,115 unnamed individuals – the majority of them apparently of Haitian origin – had fallen under review as per *Circular 017* and *Resolución 12-2007*.<sup>41</sup> In September 2008, the national director of the Civil Registry sent an official request to the JCE’s governing body to annul the birth certificates and cancel the *cédulas de identidad y electoral* of 126 persons of Haitian descent on the basis of investigations authorized by both *Circular 017* and *Resolución 12-2007*.<sup>42</sup> The list included persons ranging from age 6 to age 60. Prior to submitting this official request, the Office of the Civil Registry did not inform the targeted individuals of their decision. Indeed,

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<sup>39</sup> *Resolución 12-2007* cites as the most common example of “irregularities” proceedings (births, marriages, etc.) recorded after the closing of the registry books, records illegally modified, amended with data such as registered name, dates, names of parents or the declarer, etc., duplication of birth declarations, and substantial omission of formally required information.

<sup>40</sup> Junta Central Electoral, *Resolución 05-2009*, available at <http://www.jce.do/web/Descargas/tabid/458/DMXModule/1164/Default.aspx?EntryId=1302>.

<sup>41</sup> Wanda Méndez, “Llevará a Justicia falseadores de actas,” *Listin Diario*, September 13, 2008, and “Pleno de la JCE ratifica medidas sobre actas de nacimiento,” *Diario Digital RD*, July 16, 2008.

<sup>42</sup> Memorandum from the Secretary General of the Junta Central Electoral to the President of the Junta Central Electoral on remission of information on investigations carried out on files under Resolution 12 and/or Circular 017 (Doc. No. 5787, September 11, 2008 (Oficio No. 5787 del 11 de septiembre 2008 del Secretario General de la Junta Central Electoral al Presidente de la Junta central Electoral, Remisión informe sobre investigaciones realizadas a los expedientes relativos a la Resolución No. 12 y/o Circular 017), on file with the Open Society Justice Initiative.

many people did not even know the validity of their documentation was under investigation, as they had not recently asked the JCE for any copies or renewals of their documents. It remains unclear what criteria the JCE used to identify these persons. To date, it is unknown how or when the JCE carried out these investigations, or what kind of proof they collected that would warrant these persons' effective denationalization.

In July 2008, both *Circular 017* and *Resolución 12-2007* were re-approved by the JCE, despite popular national and international critique, even at the JCE plenary level,<sup>43</sup> that they promoted the “civic death” and “civic genocide” of Dominicans of Haitian descent.<sup>44</sup> As per the JCE Plenary's statement, it was illegal to have granted birth certificates to persons whose parents had not demonstrated their legal residency status, and therefore birth certificates could be retroactively annulled.<sup>45</sup> They furthermore accused “special interest groups” of attempting to use their criticism of *Circular 017* to violate “Dominican identity” providing fraudulent identity documents to “foreign residents”, particularly “Haitians.”<sup>46</sup>

The procedural lacunae accompanying the JCE's retroactive nationality policies have made it difficult for Dominicans of Haitian descent to challenge the government's arbitrary and discriminatory actions. Applicants whose requests for *cédulas* and birth certificates have been rejected on the basis of their parents' “non-resident” status are often forced to return to their local civil registry office multiple times in order to find out the status of their applications, at great financial cost to themselves and their families. When their petitions are rejected by local civil registry officers, they are done so orally, rather than in writing; in a public place; and in an informal, often derogatory fashion. The lack of written notification means leaves the affected individuals virtually powerless to seek judicial remedy, since under Dominican jurisprudence a written notice is necessary in order to appeal actions taken by a government agency.<sup>47</sup> Furthermore, all decisions of local registry officials and JCE staff must first be appealed to the JCE itself. This discourages victims of discrimination from appealing their effective denationalization, as their experience with the agency has been so negative that many do not wish to engage in additional contact that, in their opinion, will be futile. The lack of *cédulas* further compounds procedural problems, as *cédulas* are required in order to make any sort of sworn statement in testimony to the civil registry's actions.

The JCE's implementation of *Circular 017* and *Resolución 12-2007* has been marked by similar problems. Rarely do JCE officials explain the investigatory process to the individuals

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<sup>43</sup> JCE judges Aura Celeste and Eddy Olivares both raised public concerns about the legality of these instructions and resolutions and their impact on the fundamental rights of Dominicans. See: “Olivares reclama revocar Circular 017; cree viola derechos de ciudadanos,” *Clave Digital*, June 24, 2008.

<sup>44</sup> Panky Corcino, “Los muertos de ‘muerte civil,’” *Clave*, June 12, 2008; Juan Bolívar Díaz, “Genocidio civil retroactivo,” *Hoy*, June 14, 2008; Evangelista Martes, “Dicen violan derechos descendientes de haitianos,” *Hoy*, June 14, 2008; “Serios problemas con identidades,” *Hoy*, June 15, 2008; Loyda Peña, “Jesuitas: medida JCE es inconstitucional,” *Hoy*, June 18, 2008; “Abogados dicen debate es inconstitucional, no migratorio,” *7 Días*, June 18, 2008; and “Carta Pública al presidente JCE sobre documentos de hijos inmigrantes no legales,” *El Nuevo Diario*, June 18, 2008.

<sup>45</sup> The full text of resolution published by the JCE on July 16, 2008 can be found at [http://www.diariodigital.com.do/?module=displaystory&story\\_id=30874&format=print](http://www.diariodigital.com.do/?module=displaystory&story_id=30874&format=print).

<sup>46</sup> Leoncio Comprés, “JCE dice grupos buscan que vulnere identidad,” *Diario Libre*, June 19, 2008 and “Piden a JCE respetar ley sobre registro y derecho a identidad,” *Diario Libre*, June 20, 2008.

<sup>47</sup> Article 1325 of the Civil Code of the Dominican Republic. See also: Dirk Leenman, *Dominicano, Dominicana como tú: El derecho a la nacionalidad dominicana que tienen los niños y niñas de ascendencia haitiana que nacen y viven en el país* (Namur: Jesuit Refugee Services, 2006).

whose documentation have been deemed suspect. Most affected individuals are either instructed to come back at a later date to check the status of their application, or told that the review of their documents is underway at the JCE headquarters with no way for the local civil registry offices to find out what was going on. The lack of written notice, together with the cost inherent in hiring a legal representative, means that affected Dominicans of Haitian descent frequently do nothing to challenge the civil registry's actions. In addition, the JCE has failed to establish any interim measure that would allow for provisional issuance or use of certified copies when the birth certificates are under investigation. It has also failed to set any temporal limit to the investigatory procedure.

### Effective Statelessness

The government of the Dominican Republic has yet to officially strip any Dominican of Haitian descent of his or her previously-recognized nationality. The absence of a formal notice of denationalization does not change the fact that Dominicans of Haitian descent affected by the retroactive application of Law 285-04 have been left effectively stateless.

Their inability to obtain original or certified copies of identity documents to which they are entitled by law has translated into a chronic inability to enjoy numerous fundamental rights which, in practice, are attendant on the right to nationality. Their freedom of movement, their right to political participation, their ability to pursue education and employment, their capacity to obtain health care and social security benefits, their right to family life – all of these have been compromised by the JCE's discriminatory nationality policies.

In justifying their discriminatory actions against Dominicans of Haitian descent, government officials have often remarked that Dominicans of Haitian descent have the right to Haitian nationality, and therefore have not been made stateless.<sup>48</sup> Nevertheless, this interpretation of the Haitian constitution is fundamentally incorrect. The Haitian constitution grants automatic citizenship only to “person[s] born of a Haitian mother or Haitian father *who are themselves native-born Haitians* and have never renounced their nationality” (emphasis added).<sup>49</sup> In order to obtain Haitian nationality, the second- and third-generation descendants of Haitian migrants would have to first reside in Haiti for a continuous five-year period, and then apply to become naturalized Haitian citizens. They would also need to abandon the country they have called home for their entire lives. Dominicans of Haitian descent whose recognition of Dominican nationality has been retroactively withdrawn therefore have no recourse to an alternate nationality.

Today, the JCE continues to retroactively apply the 2004 migration law to deny Dominicans of Haitian descent access to their identity documents and recognition of their nationality. Persons who were unable obtain *cédulas* and original or certified copies of their birth certificates in 2007 and 2008 continue to exist in a document-less limbo. The 2008 commentary by the UN Independent Expert on Minority Issues is as true today as it was then:

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<sup>48</sup> Loyda Peña, “Exhorta a ciudadanos a regularizar su situación,” *Hoy*, June 19, 2008. Supreme Court's ruling on the unconstitutionality of Migration Law. See also paragraph 36 of the Supreme Court's 2005 ruling on the constitutionality of the 2004 migration law, available at <http://www.suprema.gov.do/novedades/sentencias/inconstitucionalleydemigracioncertificada.htm>.

<sup>49</sup> Constitution of Haiti, Article 11.

All Haitians living in the Dominican Republic, regardless of distinctions, are now having their presence questioned, even if they have been issued with official documents in the past. They complain that they currently live in a climate of uncertainty and fear over their future... The Independent Expert has found that by failing to make distinctions in the status of persons of Haitian descent, government officials treat them all as illegal migrations, subject to discriminatory practices, unjustified expulsions, denial of their rights and ultimately also denial of their legitimate expectations of citizenship.<sup>50</sup>

## **The New Constitution: Legalizing Discrimination**

On January 26, 2010, the Dominican Republic formally adopted a heavily revised constitution<sup>51</sup> which effectively excludes Dominicans of Haitian descent – even those whose nationality was previously recognized by the Dominican state – from enjoying the right to Dominican nationality.

Article 18 of the new constitution identifies as Dominican citizens

- (1) The children of Dominican mothers or fathers;
- (2) Those who enjoyed Dominican nationality prior to the entry into force of this Constitution;
- (3) Persons born on national territory, with the exception of the sons and daughters of foreign members of diplomatic and consular delegations, and foreigners who find themselves in transit or reside illegally on Dominican territory. Foreigners shall be considered as being in transit as defined in Dominican laws;
- (4) Persons born abroad to Dominican mothers or fathers, regardless of having acquired, by virtue of their place of birth, a different nationality than their parents. Having reached the age of 18, they may express their will, to the competent authority, to assume dual nationality or renounce one of them;
- (5) Whoever marries a Dominican, as long as they opt for their spouse's nationality and meets the requirements established by law;
- (6) Naturalized persons, in accordance with the conditions and formalities required by law.

Article 18 (3) imports the language of the 2004 migration law and its limitation of the right to Dominican nationality to children of documented “residents” and made it constitutional writ. Contrary to *Yean and Bosico*, acquisition of Dominican nationality for the children of foreigners is now explicitly dependent on their parents’ migration status: as of January 26, 2010, all children of “illegal residents” or “persons in transit” born on Dominican territory are barred from acquiring Dominican nationality. The “in transit” exception similarly imports retrograde legal practice from domestic law and elevates it to the constitutional level. The 2004 Migration law

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<sup>50</sup> UN Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, and the independent expert on minority issues, Gay McDougall: Mission to Dominican Republic*, UN Doc. A/HRC/7/19/Add.5 and A/HRC/7/23/Add. 3, 18 March 2008, para. 102.

<sup>51</sup> The full text of this new constitution is available at <http://www.suprema.gov.do/codigos/Constitucion.pdf>.

has been interpreted such that “illegal residence” and “in transit” are synonyms: regardless of the length of a person’s residence in the Dominican Republic, a person who cannot satisfy documentary requirements for legal residence will be considered “in transit”. By making “illegal residence” of parents a ground for the denial of citizenship to children, the new constitution make it unnecessary to rely upon a distorted definition of ‘in transit’ in order to bar individuals from citizenship. However, leaving the key term of ‘in transit’ undefined permits ample scope for future manipulation of the constitutional provision on citizenship; the Dominican legislature can change the definition of “in transit” at will. This in turn invites arbitrary interpretation of the term and application of the exception.

In protecting persons who “enjoyed Dominican nationality before the coming into force of this new constitution,” Article 18(2) appears to protect against retroactive application of the new nationality regime. However, what it actually does is entrench an individual’s legal status in whatever state it existed at the moment of the constitution’s entry into force. Dominicans of Haitian descent previously denied *cédulas*, original birth certificates, or certified copies of these on the basis of a retroactive application of the parental residency requirement introduced in Law 284-04, cannot be considered as “having enjoyed Dominican nationality before the coming into force” of the new constitution. Not only has the lack of identity documents left them with no valid proof of Dominican nationality, but the government, in justifying its discriminatory nationality policies, has explicitly said that they never had a right to Dominican citizenship.

Article 18’s apparent assurance of non-retroactivity is therefore illusory. Persons who on January 26, 2010 were determined to have parents who were “in transit” or “non-resident” at the time of their birth are necessarily excluded from Article 18’s nationality guarantee. Evidence of intent to exclude from citizenship individuals whose citizenship had already been questioned, however unfairly, is shown by the fact that a legislative measure to grant amnesty and recognize the nationality status of persons whose previously-issued identity documents were being “investigated” by the JCE prior to the entry into force of this new constitution was rejected by the Constitutional Review Assembly (composed of members of the National Assembly) by a vote of 132 to 20.<sup>52</sup>

In practice, the new constitutional provision on nationality has not dramatically changed the ways in which Dominicans of Haitian descent whose nationality was previously recognized are now being deprived of recognition. Dominicans of Haitian descent born in the country are still being denied *cédulas*, the birth registration of their children and certified copies of their birth certificates on the basis of their parents’ migration status at the time of their births. What the new constitution has done is to transform the previous policies from an impermissible, unlawful practice—retroactive application of the 2004 migration law—into a constitutional policy.

Dominicans of Haitian descent are now encountering two distinct legal obstacles to their attempts to assert their Dominican nationality. Those whose access to identity documents and formal recognition of Dominican nationality were impeded by the government’s retroactive

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<sup>52</sup> See “Asamblea rechaza otorgar amnistía a hijos de inmigrantes,” 7días.com, 28 de Septiembre del 2009, (available at: <http://www.7dias.com.do/app/article.aspx?id=60383>); “Niegan la nacionalidad a los hijos de extranjeros,” Listín Diario, 29 de septiembre 2009, (available at: <http://www.listin.com.do/app/article.aspx?id=116444>); “ANR rechaza amnistía para otorgar nacionalidad,” Diario Libre, 29 de septiembre 2009, (available at: [http://diariolibre.com/noticias\\_det.php?id=217438](http://diariolibre.com/noticias_det.php?id=217438)).

application of the 2004 migration law continue to suffer from the effects of this policy. Now, Dominican children of Haitian descent who were born after January 26, 2010 are denied citizenship directly by the new constitution—which entrenches the denial of citizenship of their parents. If their parents, having been deprived of formal recognition of their Dominican nationality under the previous discriminatory policies, are now considered as “illegal residents” for the purposes of Article 18, the children have no constitutional right to Dominican nationality. From birth they are considered to be foreigners, consigned to their parents’ illegal status. The violations suffered by their parents have extended into the present to affect their right to nationality.

The widespread and concrete effect of both continuing application of the 2004 Migration law and of the new constitution has been documented by the Open Society Justice Initiative. A July 2010 study conducted by the Open Society Justice Initiative in 14 different communities<sup>53</sup> with heavy concentrations of people of Haitian descent found that of the 89 mothers of Haitian descent who had given birth since January 26, 2010, only 9 had been able to register the birth of their children with the JCE. The remaining 80 children have gone undocumented because of their parents’ lack of documents, and as a consequence are unlikely to ever be able to claim any citizenship under the current legal regime.

The study found that children whose mothers were previously denied *cédulas* are currently unable to register the births of their own children. Furthermore, Dominican mothers of Haitian descent in possession of a *cédula* are facing similar problems. Of the 40 Dominican mothers of Haitian descent in possession of valid *cédulas* whose children were born after January 26, 2010 recently surveyed by the Justice Initiative, 32 have been unable to register the birth of their children. They were told to come back with copies of their own birth certificates, which, given the ongoing retroactive application of the 2004 migration law via *Circular 017* and *Resolución 12-2007*, is a practically impossible task.

The present generation of children whose births are going unregistered are legal ghosts. Although they are born in the same country as their parents, they are unable to enjoy the rights their parents enjoyed as children. Lacking birth certificates, they will face difficulties in attending primary school and accessing child-specific health and social services. They will never be counted in the national census. They will never be able to apply for a passport and travel outside the country. They will never be able to apply for a *cédula*, or vote in elections. They will live under constant suspicion in the country of their birth, eternally vulnerable to detention or deportation because of her undocumented status. They will be stateless -- permanently excluded from Dominican social, political and economic life.

Perversely, the constitutional revision has made it easier for foreign-born individuals to acquire Dominican nationality, by marrying or being born to Dominican citizens, than for Dominicans of Haitian descent, who have been born and brought up in the Dominican Republic, to be recognized as citizens.

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<sup>53</sup> The study was conducted in the northern communities of Batey Cangrejo, Batey Muñoz, and Batey Baraguana; in the eastern communities of Batey Alejandro Baas, Batey Cacata, and Batey Santa Rosa; in the southern communities of Batey Bienvenido, Batey Palave, Batey Caballona, and Batey Lechería; and in the central communities of Batey Libertad and Batey Boca de Mao.

## **A Call to Action: Recommendations for the Dominican Republic and for the International Community**

The government of the Dominican Republic has steadfastly rebuffed any internal or external criticism of its discriminatory nationality policies. During the country's 2009 review by the UN Human Rights Council's Working Group on the Universal Periodic Review, various member states recommended that the government (i) ensure that appropriate legal frameworks are in line with international norms governing the issue of nationality, (ii) cancel all retroactive measures taken to replace the principle of *jus soli* with the principle of *jus sanguinis*, and (iii) adopt measures to ensure that Dominicans of Haitian descent were not denied citizenship or access to civil and birth registration procedures and were not arbitrarily subject to retroactive cancellation of birth and identity documents. Having accepted a wide range of recommendations on an expansive list of human rights issues, the Dominican delegation rejected all nationality-related recommendations, arguing that the country's constitution was not open to interpretation by external norms, and that, notwithstanding all evidence to the contrary, its laws were not being applied retroactively.<sup>54</sup>

Contrary to what the Dominican government maintains before human rights monitoring bodies and its own citizens, it does not enjoy unfettered authority to regulate matters bearing on nationality. Its powers to set citizenship policies are circumscribed by legal obligations to ensure the full protection of human rights to those on its territory.<sup>55</sup> As reaffirmed by the Inter-American Court of Human Rights in the *Yean and Bosico* case, 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.<sup>56</sup>

One of the most important international legal restrictions on state discretion in matters of nationality is the prohibition of arbitrary deprivation of citizenship. Human rights treaty bodies have recognized that deprivation of nationality on the grounds of national origin, a form of racial discrimination prohibited by international and comparative law,<sup>57</sup> is a form of impermissible arbitrariness. The UN Committee on the Elimination of Racial Discrimination recommends that states "[r]ecognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States Parties' obligations to ensure non-discriminatory enjoyment of the right to nationality."<sup>58</sup> The UN Commission on Human Rights has reaffirmed that the right to a nationality is a fundamental human right and that "arbitrary deprivation of nationality on racial, national, ethnic, religious, political or gender grounds is a violation of

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<sup>54</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Dominican Republic*, UN Doc A/HRC/13/3, January 4, 2010, para. 89.

<sup>55</sup> *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion oc-4/84, para. 32.

<sup>56</sup> *Yean and Bosico*, para. 140.

<sup>57</sup> See, for example, UN Human Rights Committee, *Concluding Observations of the Human Rights Committee Sweden 24/4/2002*, UN Doc. CCPR/CP/74/SWE, para. 12; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Ireland 03/08/93*, UN Doc. CCPR/C/79/Add.21, para. 17; UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Elimination of Racial Discrimination: Dominican Republic 26/08/99*, UN Doc. CERD/304Add.74, para. 17; UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Iceland 31/01/2003*, UN Doc. CRC/C/15/Add.203, para. 22.

<sup>58</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation No.30: Discrimination Against Non Citizens: 01/10/2004*, para. 14.

human rights and fundamental freedoms.”<sup>59</sup> Article 9 of the 1961 Convention on the Reduction of Statelessness explicitly prohibits states from depriving “any person or a group of persons of their nationality on racial, ethnic, religious or political grounds.”

Even when international law allows states to withdraw citizenship, such action must be accompanied by procedural and substantive safeguards. Article 8(4) of the 1961 Convention on the Reduction of Statelessness provides that a “Contracting State shall not exercise a power of deprivation . . . except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.” Procedural due process includes the prescription by law of an objective standard for deprivation of nationality and the meaningful opportunity for individuals to have recourse to an independent tribunal. The Dominican government’s failure to provide these safeguards renders its actions arbitrary and in violation of international law.<sup>60</sup>

Dominicans of Haitian descent have been alienated from their political and social community in direct consequence of the government’s discriminatory nationality policies and practices. As a result, they are prevented from enjoying a broad range of rights guaranteed to them by international human rights law, including the rights to political participation, education, equal access to good as services, equality before the law, family life, juridical personality, freedom of movement, and freedom to leave and return to their country.

### Recommendations to the government of the Dominican Republic

In order to remedy this situation of protracted discrimination and statelessness, the government of the Dominican Republic must do the following:

- Immediately cease all retroactive application of Migration Law 285-04 and issue cédulas and birth certificates to Dominicans of Haitian descent born in the Dominican Republic prior to the entry into force of the law. This requires (i) the immediate withdrawal of the *Circular 017* and *Resolución 12-2007* instructions and (ii) instruction to all civil registry officers that, as per Dominican law, all Dominican nationals should enjoy unfettered access to their identity documents.
- Develop, apply and publicize adequate procedural guarantees with respect to birth registration and other nationality-related processes. Submit all determinations and reviews of nationality to judicial review, as per Dominican law; provide written notification of any negative decisions made by the civil registry body; and clearly explain the JCE’s investigatory procedure to persons whose documents are under investigation for suspected fraud. Establish firm deadlines for completion of investigations; establish effective appeals

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<sup>59</sup> UN Commission on Human Rights, *Human Rights and Arbitrary Deprivation of Nationality*, C.H.R. res 1998/48, UN Doc. E/CN.4/1998/48 ([www1.unm.edu/humanrts/UN/1998/res048.html](http://www1.unm.edu/humanrts/UN/1998/res048.html)), para 2.

<sup>60</sup> See, for example, the UN Commission on Human Rights resolution calling on all states “to refrain from taking measures and from enacting legislation that discriminates against persons or groups of persons on grounds of race, gender, religion or national or ethnic origin by nullifying or impairing exercise, on an equal footing, of their right to a nationality, especially if this renders a person stateless, and to repeal such legislation if it already exists” (on Human Rights, *Human Rights and Arbitrary Deprivation of Nationality*, C.H.R..Res. 1998/48, para 3).

procedures; and implement appropriate measures for granting provisional identification for those whose documents are under investigation.

- Implement the regularization scheme detailed in Migration Law 285-04 and grant formal resident status and identity documents to Haitian migrants who entered the country under the previous migration law, which would enable their children to qualify for Dominican citizenship. Under no circumstances should this regularization scheme be applied to Dominicans of Haitian descent whose Dominican nationality was previously recognized by the government; their inviolable right to Dominican nationality was already recognized by the previous constitution and they should not be treated as migrants.
- Fully respect in the distribution of new biometric *cédulas* the right to equality before the law; do not rely on the alleged migratory status of the parents of persons who currently possess valid *cédulas*. Any allegations that the previous *cédulas* were obtained in a fraudulent manner must be accompanied by a full investigation and a judicial determination of validity.
- Clarify—through constitutional reform or a statement of intent by the legislature—that Article 18(2) of the new Constitution should be interpreted to mean that any and all individuals born in the Dominican Republic under the previous constitution have the right to Dominican nationality.
- Clarify—through constitutional reform or a statement of intent by the legislature—that the term ‘in transit’ in Article 18(3) of the constitution must be interpreted to mean presence on Dominican territory of no more than 10 days.
- Uphold, respect and apply the nationality criteria established by the Inter-American Court of Human Rights in the *Yean and Bosico* case, in particular the prohibition of children inheriting the migratory status of their parents.

### Recommendations to the International Community

The international community must act swiftly and decisively to condemn the discriminatory nationality policies of the Dominican Republic. To that end

- United Nations treaty monitoring bodies such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee on the Rights of the Child should continue to monitor the situation of ongoing discrimination in access to nationality in the Dominican Republic and periodically report on the Dominican Republic’s compliance with its international human rights obligations. These bodies’ reports and concluding observations should make clear how the Dominican Republic’s treatment of Dominicans of Haitian descent is incompatible with its obligations under international human rights treaties, and should urge the Dominican Republic to develop and implement nondiscriminatory birth registration and citizenship policies and practices.

- Regional human rights monitoring bodies such as the Inter-American Commission on Human Rights should conduct a country visit to the Dominican Republic and publish a report on the human rights situation in the country, with particular focus on the ongoing discrimination in access to nationality.
- International organizations such as the World Bank, the Inter-American Development Bank, UNICEF, the United Nations Development Programme, and the Organization of American States should incorporate a review of the Dominican Republic's discriminatory nationality policies into their programmatic decision-making and make the Dominican Republic's good standing and eligibility for beneficial programs conditional upon implementation of non-discriminatory birth registration and nationality policies, the development of which they should support.
- Bilateral partners of the Dominican Republic should urge the government to (a) develop and implement nondiscriminatory birth registration and citizenship policies and practices; (b) implement nondiscriminatory policies ensuring that all individuals born in the Dominican Republic prior to the entry into force of the Migration Law 285-04 receive the same proof of birth and access to citizenship irrespective of the parents' national origin; and (c) develop, apply and publicize procedures that effectuate due process guarantees with respect to birth registration and nationality procedures.
- Bilateral partners of the Dominican Republic should make continued funding on human rights and developments projects contingent upon the Dominican government's reversal of its discriminatory nationality policies. They should withdraw any existing support to the government's civil registry reform projects until Dominican nationality is securely provided and/or restored to all Dominicans of Haitian descent.

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