

HUMAN RIGHTS “IN TRANSIT”: NATIONALITY, ANTI-HAITIANISM, AND THE
REACTIONARY STATE IN THE DOMINICAN REPUBLIC

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A thesis presented in partial fulfillment of the requirements for completion
Of the Bachelor of Arts degree in International Studies at the
Croft Institute for International Studies
Sally McDonnell Barksdale Honors College
The University of Mississippi

University, Mississippi
April, 2013

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Introduction

In the North of Hispaniola, on the border between the Dominican Republic and Haiti, two towns face each other across the Massacre River. When I first visited the area more than a year ago as part a weekend trip during the Dominican Independence Day weekend, the “river” was little more than dirty stream, low after months of the dry season but still wide. Approaching from the east on a minor highway from nearby Montecristi (the Dominican Republic’s “Highway 1” runs all the way from the capital to a dead end at the sea there rather than ending at the border) a visitor might remark that Dajabón resembles many other Dominican towns: its ordered, blocky streets, if perhaps a little dustier, still feature mom-and-pop *colmados* on every corner and a few quiet, shady plazas.

Across the brand-new bridge over the river, though, Haiti offers a different view. Ouanaminthe, larger than Dajabón but composed mostly of crowded slums, lies separated not only by the river and its laundry-covered banks but by a field littered with old sacks, bottles and ruined tires. That particular day, a Friday, was one of the two days a week when residents from the Haitian side could come over to the Dominican side to buy and sell, duty-free, in the open-air market. The trash-strewn space was filled with men and women furiously pushing over-laden wheelbarrows to the bridge, to the madness of the market on the other side, and back again to repeat the process while the daylight lasted. On the bridge itself, armed UN peacekeepers with Uruguayan flags sewn onto their uniforms talked amongst themselves but did not interact with any of the passersby, curious white tourists included.

Though I was unaware at the time, the dirty river under the bridge was more than just a political border and a flimsy obstacle to breakneck commerce; it was a marker for a bloody history between the two countries on either side of it. Originally named for the killing of several

dozen mostly French buccaneers by Spanish authorities in the eighteenth century, the “Massacre” River also reflects a more recent slaughter that occurred on its banks: the 1937 murder of thousands of people, mostly Haitian migrants, on the orders of Dominican Dictator Rafael Trujillo.¹ Trujillo’s “de-Haitianization” of the border area, often referred to as the “Perejil Massacre” after the infamous linguistic test applied to determine the nationality of those caught by the Dictator’s troops, was just one particularly brutal episode in a centuries-long saga of cultural, ethnic, and national conflict.

The peoples on either side of the island had already differentiated ethnically and economically well before the Dominican and Haitian States came into existence in the early nineteenth century. Cattle and food crops from the neglected, largely mulatto and Spanish eastern part helped feed the huge populations of recently-arrived African slaves in the sugar-producing French West before the latter rose up in the Haitian Revolution. After bloody Haitian incursions into the East and decades of Haitian rule over the entire island, though, the former Spanish colony revolted against a power they had begun to view as tyrannical and alien to their Hispanic roots. The Dominican Republic remains the only former Spanish colony to have declared independence from a different country; its fundamental separateness from Haiti is quite literally its *raison d’être*.² The threat of Haitian invasion and interference remained very real for decades more, and the antagonism engendered by the stricken relations between Dominicans and Haitians is still alive and well, in some ways more than ever. Even when massacres like

¹ Michele Wucker, *Why the Cocks Fight: Dominicans, Haitians, and the Struggle for Hispaniola* (New York: Hill and Wang, 1999), 44.

² *Ibid*, 38-40.

Trujillo's do not rule the day, mutual suspicion between peoples and mistreatment, especially of Haitians and their descendants and on the part of Dominicans, remain endemic.³

Anti-Haitianism, the mistrust and abuse of those perceived to be Haitian, comes in many forms. One of the few times I witnessed blatantly anti-Haitian behavior while in the Dominican Republic actually occurred in Dajabón, on my second trip there, this time to revisit the market. As I and a few other exchange students—no Dominican students chose to accompany us on this border trip as they had on other occasions—waited in a park for our bus, two dark-skinned women with bags of new clothes on their backs approached us. In Kreyol-tinged English, they attempted to sell us some socks. Before too long, a Dominican man approached and berated them in front of us in Spanish, cursing and yelling at them to go back to Haiti. The women ignored him stoically as one of our group, an American exchange student of Dominican descent, told him off. The incident cemented what I had assumed before, that for Haitians the Dominican Republic could often be a less than welcoming place. The women in Dajabón may have only been casual vendors, and—from the proximity of the border—could easily have been daily commuters from Haiti. Haitians who work on sugar plantations called *bateyes* and live there long term, however, make up the largest chunk of those who live in the Dominican Republic.

Anti-Haitianism in these places can take casual forms like what I witnessed, but one of the most immediate and pressing issues facing this group as a result of anti-Haitian sentiment is statelessness. Statelessness is the global phenomenon in which people lack the rights of nationality and citizenship offered by any state, including labor protections and rights to education and a political voice. Often, as in the case of refugees from Palestine to neighboring countries, statelessness results from war and political conflict, and international organizations

³ David Howard, *Coloring the Nation: Race and Ethnicity in the Dominican Republic* (Boulder: Rienner, 2001), 184.

like the U.N. often work at reversing the situation. However, even in the absence of international political conflict, Haitians and their descendents in the bateyes and large cities of the Dominican Republic face periodic denial of documentation and access to the benefits of the state, and sometimes even face forced expulsion, abuse or death.⁴

Statelessness can have many complicated causes, but in the case of Dominico-Haitians, it has resulted to a large degree from the codification of long-standing anti-Haitian sentiment on the part of the Dominican State rather than from immediate inter-state conflict. This thesis attempts to address the questions surrounding that process, especially over the past decade or so, during which several important events have fundamentally changed the relationship between the State and many of the people subject to it. Dominating and driving my research are the primary questions “How has the role of anti-Haitianism in Dominican law and policy changed in recent times?” and “What has driven the legal exclusion of Haitians and Dominico-Haitians from citizenship?”. In answer to the first query, I argue that law and policy have shifted significantly in the past 15 years toward more consistent and total exclusion of those of Haitian descent from the benefits of nationality, leaving many stateless. The other question is more complicated, but my research suggests that the State’s reaction to the threat of litigation has played a significant role in recent anti-Haitian legal exclusion. When human rights groups have challenged the State’s treatment of Dominico-Haitians in the Inter-American Court of Human Rights and in domestic courts, the State has consistently responded with reactionary alarm and ever-stricter citizenship policies.

To reach these conclusions, I have analyzed the text of primary sources including relevant sections of Dominican constitutional and statutory law, bureaucratic directives,

⁴ Open Society Institute, "In Transit to Nowhere—Personal Accounts of Statelessness in the 21st Century," Open Society Foundations, <http://www.soros.org/events/transit-nowhere-personal-accounts-statelessness-21st-century>.

statements by government officials, and court documents both submitted to and issued by the Inter-American Court of Human Rights and Dominican domestic courts. I have looked for evidence of anti-Haitianism in the arguments and tactics of those representing the State and attempted to make sense of the timing of rulings, litigation, and legal changes. To better understand these issues and the historical background of the Dominican Republic, its government, and the complicated relationship between Dominicans and Haitians, I have consulted multiple scholarly works and articles written by both academics and international human rights organizations.

My analysis here reviews and builds onto the already rich discussions of Dominican national identity, anti-Haitianism, and statelessness. Much excellent scholarship already exists on these topics, and on most of the primary sources of my analysis, but I believe my collection brings them all together in a historical narrative of the past decade or so in a novel and complete way.⁵ I also believe that my conclusions about the perceived threat to reactionary states like the Dominican Republic posed by international litigation are, if not unique, at least rare in the types of sources I have consulted. While the idea that judicial overreach can sometimes backfire on progressive forces is nothing new, especially in the U.S., applying this idea to this particular Dominican context likely is. The remainder of this thesis begins with a brief discussion of national identity and the principles of citizenship, followed by my primary, chronological analysis of legal documents and court cases and finally my conclusions and points of comparison.

⁵ I have especially relied on the work of David Howard, Ernesto Sagás, and Michele Wucker in making sense of the intricacies of Dominican-Haitian relations. While Howard's *Coloring the Nation: Race and Ethnicity in the Dominican Republic* provides a crucial glimpse into popular Dominican conceptions of race and their origins, Sagás in *Race and Politics in the Dominican Republic* emphasizes the role of the State and the political process in policing and defining race and Haitian-ness. Wucker, on the other hand, provides a balanced, narrative approach to understanding Dominican-Haitian history since Trujillo and the roles played by leaders of both countries in *Why the Cocks Fight: Dominicans, Haitians, and the Struggle for Hispaniola*.

Identifying “Dominican-ness”

Before we can delve into the long and complicated relationship between the Dominican Republic and anti-Haitianism, we must first understand what being Dominican actually means. Essential to the question of “Who is Dominican,” is its equally controversial corollary, “Who is Haitian?” Even when Dominicans may express no obvious animus toward Haitians and Haitian-ness, they still view the two groups as largely distinct, nationally and culturally. One group that stands at the crossroads of these important questions of identity are Dominicans of Haitian descent. Identifying those who belong to this category is essential to this analysis and to the dilemma facing Dominicans and State officials who want to de-emphasize or expel Haitians. The size of this emerging social group, Dominico-Haitians, highlights the question of national identity in the Dominican Republic and sheds light on efforts to exclude them not only socially or culturally but legally.

The estimates of the size of the Haitian population living in the Dominican Republic vary wildly, from official government records of a laughably small 4,205 to estimates from friendly NGOs of around 300,000. Some Dominican Nationalist groups have even put the number at more than 1 million people, or roughly 10% of the population of the entire country.⁶ Some of the difficulty of measuring the Haitian population comes with the territory: immigrants, especially undocumented ones, may prove difficult to reach through conventional means, even in countries like the U.S. with systematic censuses and sufficient bureaucratic resources to collect and interpret the data.

⁶ David C. Baluarte, “Inter-American Justice Comes to the Dominican Republic: An Island Shakes as Human Rights and Sovereignty Clash,” Human Rights Brief 13, no. 2 (2006), 25.

A more entrenched reason for the difference in population estimates is that each of the above numbers relies on completely different assumptions of who should be categorized as Haitian. Government records, for example, may only keep track of those who enter the country legally and directly from Haiti, and even that count rests upon the assumption that the State collects these records consistently and can interpret them effectively. An organization that works directly with Haitian immigrants in the Dominican Republic, regardless of legal status, might well be better placed to estimate their numbers, though significant difficulties still exist in measuring Haitian penetration of marginal communities. Even if we assume a number like 300,000 could potentially include all those of Haitian origin who immigrated during their own lifetime, would it include their children born on Dominican soil? This group alone easily might personally identify as part of either or both categories.

Whether completely accurate or not, probably the most relevant number for the purpose of this analysis is the largest one, closer to 1 million, for no other reason than that it is the number touted of those who most fervently call for the exclusion of “Haitians,” including powerful nationalist elements within the government.⁷ The number offered by antagonistic voices provides a convincing look at how many might be caught in their sights. Almost certainly many fewer Dominicans than this large percentage would actually identify themselves as purely Haitian or of Haitian descent, yet this is precisely the point: self-identification matters very little when any characteristics that might be perceived as Haitian receive the highest scrutiny and the threat of social, political, and economic exclusion. As Columbia professor of anthropology Steven Gregory states in his book on Dominican politics and globalization,

It was not uncommon for persons’ identities to be publicly in dispute, ambiguous, and shot through with contradictions. In a sociopolitical milieu where full citizenship rights

⁷ Baluarte, 25.

were difficult to achieve, subject to recurrent verification, and the risk of being diminished and even negated, much was at stake in whom people were believed to be... Rumor and gossip concerning one's identity, as well as one's appearance, could be [as] significant in influencing the actions of the police or other authorities as the papers in one's possession.⁸

Abundant concrete examples reflect Gregory's idea of socially-proscribed identity; most of those individuals mentioned later in this analysis fit the bill. The families of Dilcia Yean and Violeta Bosico, the young girls at the heart of an international discrimination case against the Dominican state, considered themselves Dominican, and the girls—native-born but from mixed-nationality parentage—personally had only ever lived in that country and interacted almost exclusively with their Dominican maternal families. All that, however, did not stop the civil registry from denying their applications for birth certificates, technically guaranteed by the Constitution, after recognizing their Haitian surnames or their appearance.⁹ Emildo Bueno Oguis, another individual born in the country who considered himself fully Dominican and who even had held national identity documents his entire life to prove it, nevertheless actually had his document renewal applications repeatedly denied on the grounds that his parents, decades earlier, had been Haitian immigrants themselves ineligible for Dominican nationality.¹⁰ Later sections delve more deeply into the particulars of both these cases, but in each the victims' own identification did not matter much when faced with a state that considered them Haitian.

⁸ Stacie Kosinski, "State of Uncertainty: Citizenship, Statelessness, and Discrimination in the Dominican Republic," *International and Comparative Law Review* 32, no. 2 (2009): 394.

⁹ Inter-American Court of Human Rights (IACHR). *Case of the Yean and Bosico Children v. The Dominican Republic*. September 8, 2005. <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=44e497d94&skip=0&query=yean%20bosico>, 35-36, 25-26

¹⁰ Open Society Institute. "Bueno v. Dominican Republic," Open Society Foundations, <http://www.opensocietyfoundations.org/litigation/bueno-v-dominican-republic>.

The taint of Haitian connections, whether genealogical or fictive, follows even those involved in politics and the workings of the State, perhaps even more so because of their high-profile power. Famously, the decades-long dictator Rafael Trujillo obsessed over keeping his own Haitian ancestry under wraps even while carrying out his heinously bloody “dehaitianization” campaigns in the border regions.¹¹ His Haitian grandmother had come to the eastern side of the island during the nineteenth century occupation/unification, and Trujillo used pancake makeup to lighten his complexion, underlining the centrality of color as a marker of Dominican/Haitian difference.¹² Trujillo himself despised Haitians, or at the very least their presence in what he regarded as Hispanic, Dominican territory, and would never have considered himself as such. Nevertheless, he clearly recognized more than anyone the consequences of the Haitian label and how others might use it to delegitimize his claims on power as an “authentic” Dominican and leader of *la patria*.

José Francisco Peña Gómez, the longtime leader of the populist Partido Revolucionario Dominicano (PRD) and candidate in the several presidential elections in the 1980s and 90s, found the cost of the Haitian label the hard way. The opposition used his lower-class parentage and his black skin against him; possibly born to immigrant parents who had fled during Trujillo’s 1939 anti-Haitian massacre, Peña Gómez had nevertheless been adopted and raised by a Dominican peasant family. Nevertheless, Ernesto Sagás, a scholar on anti-Haitianism, has classified Peña Gómez as, “even by the loose Dominican racial standards, a pure black: that is he had dark skin and no ‘fine’ features, making his acceptance into light-skinned circles more difficult.”¹³ Political cartoons and the like emphasized and mocked his dark skin and “African”

¹¹ Ernesto Sagás, *Race and Politics in the Dominican Republic* (Gainesville: University Press of Florida, 2000), 54.

¹² Michele Wucker, *Why the Cocks Fight: Dominicans, Haitians, and the Struggle for Hispaniola* (New York: Hill and Wang, 1999), 51.

¹³ Sagás, 107.

features as they simultaneously associated him with Haitian politicians like Aristide and centuries-old fears of Haitian domination and “un solo país compartido.”¹⁴

While not-so-subtly mocking his race and associating him with Haitian expansionism, Peña Gómez’s opponents also openly tried to smear and associate him with other markers of Haitian difference, including religion. Rumors that he secretly practiced Vodou rather than pure Catholicism abounded, bolstered by television campaigns with doctored footage implying his demonic possession. Some attacks merely directly implied, negatively, that he was Haitian without mention of either race or religion: in one flier he is depicted wearing a Haitian baseball uniform (less-than-accurate on multiple levels—Haitians largely prefer soccer) and in another an election worker asks him to pronounce *perejil*, a hideous nod to the test commonly applied to those who had been murdered in Trujillo’s “dominicanization” campaigns (potentially including his own biological parents).¹⁵ If Peña Gomez’s case reveals anything besides the vulnerability of even a politically connected Dominican-raised man to anti-Haitian attacks, it is the complexity of factors that categorize societal expectations of “Haitian-ness.” Merely considering the issue one of race or skin color ignores potentially even more important markers like religion and language. Most Dominicans would much sooner identify as Haitian a Kreyol-speaking, Vodou-practicing mulatto than a Spanish-speaking, Catholic black.

As a quick aside on the terminology used in this analysis, I must express that the question of who is “Haitian” and “Dominican” is a complicated one, and so is any decision on what to call them in academic discourse. Merely referring to those at risk of statelessness and discrimination as “Haitian” or “Haitian immigrant” can be simply inaccurate either because of the self-identification of some within that group as Dominican or the fact that so many are native-born to

¹⁴ Sagás., 139.

¹⁵ Ibid., 109.

the country. Calling them “Dominicans” defies practical ability to distinguish between groups, and “Dominicans of Haitian descent” is too much of a mouthful to repeat very often. For these reasons, in this analysis I utilize the term “Dominico-Haitian” as a compromise, despite similar issues of accuracy, and because it is the identification preferred by relevant groups like the *El Movimiento de Mujeres Dominico-Haitianas* (The Dominico-Haitian Women’s Movement or MUDHA). I will continue to refer to actual discrimination as anti-Haitianism or anti-Haitian, however. Those terms deny Dominican-ness, and that is precisely the point of those who espouse such views and tactics.

The Path to Legal Exclusion

If constitutional law, rather than concretely anti-Haitian attacks of the kind directed toward Peña Gómez, provided the only glimpse possible of the Dominican Republic as it approached the new millennium, that glimpse might show a country surprisingly on par with other American states in terms of legal inclusiveness and citizenship rights for its residents. Despite historical animosity with Haitian neighbors, the Dominican constitution in theory offered Haiti’s children and grandchildren, far and away the bulk of the multi-generational immigrant community, as fair a shake at citizenship as any other Dominican. However, as we shall see in the several pivotal cases featured in this analysis, in practice the State has refused to fulfill the guarantees of nationality included in its constitution.

Under the principle of *jus soli* or “right of the soil,” the Dominican Constitution prior to 2010 guaranteed citizenship as the right of all those born within the territory of the State, regardless of their or their parents’ ethnic, national or other characteristics. Almost universally common to the Americas and just as exclusive to them, *jus soli* reflects the importance of

political rather than ethnic identification as the basis of nationality. In recent years, this definition has come under stress in some places traditionally dominated by *jus soli*. In the United States, right-wing politicians have called for an end to the entry of illegal immigrants and their “anchor babies” who take advantage of the system, while in France the fear of immigrants overwhelming the welfare state has led to more restrictive citizenship and immigration law. As we will see, the Dominican Republic has also proven determined to alter its traditional basis for awarding citizenship.

Jus soli also reflects the idea of “nations of immigrants” like the United States, Argentina, and Brazil, and the generally pro-immigration policies of those countries in earlier eras.¹⁶ Anxious for immigrants ever since its days as a Spanish colonial backwater, the Dominican Republic’s immigration policy resembled that of the “whitening” sought by republican Brazil, under which an influx of industrious Europeans would redeem the mixed-race population.¹⁷ In the 1930s, for example, President and Dictator Rafael Trujillo took advantage of European conflict to welcome refugees from the Spanish civil war and, notably, large numbers of Jews fleeing Nazi Germany. Revealingly, he placed emphasis on admitting mostly non-married immigrants, so as to encourage white intermarriage with the native population.¹⁸ Relatively few took him up on the offer, and most of those families who settled on Trujillo’s “donated” land in Sosúa on the northern coast re-emigrated to the United States within a few years. *Jus Soli* in the cases of most American countries largely reflects the belief in (selective) immigration as a driving force for national progress.

¹⁶ Greta Gilbertson, “Citizenship in a Globalized World” in *Migration Information Source*, Migration Policy Institute, January 2006, <http://www.migrationinformation.org/Feature/display.cfm?ID=369>.

¹⁷ Thomas E. Skidmore, “Racial Ideas and Social Policy in Brazil, 1870-1940,” in *The Idea of Race in Latin America, 1870-1940*, ed. Richard Graham (Austin: University of Texas Press, 1990), 7-11.

¹⁸ Michele Wucker, 56.

Until recently one of only two American states not to subscribe to this principle (the other being revolutionary Cuba), Haiti takes an approach ironically more similar to its former European colonial rulers. As opposed to *jus soli*, *jus sanguinis*—the right of blood—requires membership to an ethnic, cultural, or national group. In Germany, for example, immigration and citizenship largely rely on ethnic or linguistic affiliation. In Haiti’s case, nationals receive their status from parents who already belong to this cultural and linguistic group as citizens. Haiti, proud of its unique heritage and justifiably wary of the influence of white immigrants, long before limited the inclusiveness of what it means to be Haitian and still does so today, while its neighbors at least nominally include immigrants’ children as citizens.¹⁹

“Nominal” is the key term, both now and then, however, at least in the case of the other state on Hispaniola, the Dominican Republic. Dominican law under the 1994 Constitution, as it had at least since the Trujillo era, defined Dominican nationals as “all those born in the territory of the Republic with the exception of legitimate children of resident foreigners of diplomatic status, or those in transit” and also those born to Dominicans abroad or naturalized according to other Dominican law.²⁰ Within this short and seemingly simple definition, “in transit,” would prove to become the most fateful phrase in the still-ongoing struggle over Dominican nationality (as an extremely small, elite population, diplomats and the clause about them do not figure vitally here). The “in transit” clause had traditionally been interpreted as referring to those who entered the country’s territory for less than 10 days, ostensibly traveling en route to another

¹⁹ Ilio Durandis, “On Citizenship, Nationality, and Haiti’s 1987 Constitution,” *Caribbean Journal*, March 8, 2012, <http://www.caribjournal.com/2012/03/08/durandis-on-citizenship-nationality-and-haitis-1987-constitution/>.

²⁰ “Constituciones Dominicanas de 1994, 2002, y 2010,” *Political Database of the Americas*, Edmund A. Walsh School of Foreign Service, Georgetown University, <http://pdba.georgetown.edu/Constitutions/DomRep/dominicanrepublic.html>.

destination.²¹ The State would later dispute this limited interpretation, as we shall see, extending the applicability of the term. This action simultaneously narrowed the pool of potential Dominican citizens and crept toward something more closely resembling *jus sanguinis*.

On a different but important note, the Constitution draws distinction between “Dominican national” and “citizen.” In addition to fulfilling the definition of nationals under Section I of Item III on “Political Rights,” citizens—explicitly defined in Section II of that same item as those who have the right to vote and run for office—must also be 18 years old or have married, though the rights of their citizenship may be forfeited by unlawful action.²² Since the only relevant questions of my research do not vary between the two definitions, in some limited instances I use “citizen” and “citizenship” in a broader sense on equal footing with “national” or “Dominican” as terms which denote legal recognition as a member of the Dominican State. When this is the case, I merely am referring to figurative citizenship rather than to any distinction of age.

Intimately wrapped up in the Dominican State’s recognition of its nationals and citizens is the right to a birth certificate, a *cédula* or national identification card, and public benefits like primary education that require these documents. While the constitutional principle of *jus soli* provides citizenship at birth, “in practice the state confers nationality through its birth registration process” as director of the International Human Rights Law Clinic, Laurel Fletcher points out. Thus, the State bears the practical power to withhold the benefits of citizenship through this process. Despite the fact that the Dominican State was and remains party to international agreements, such as the Convention on the Rights of the Child, which bar the denial

²¹ Peynado, Jacinto B, *Reglamento de Migración no. 279, del 12 de Mayo de 1939*, May 12, 1939, <http://www.acnur.org/Pdf/0241.pdf?view=1>.

²² “Constituciones Dominicanas de 1994, 2002, y 2010.”

of rights like primary education on the basis of undocumented status, in practice it has used and continues to use its power to require documentation as a filter for “non-Dominicans.”²³

This practical power to deny citizenship rights through bureaucracy marks one half of a national strategy to exclude certain people, in this case Dominicans of Haitian descent, from the benefits of citizenship. The other half is the redefinition of the written law related to the legal phrases referring to those “in transit” and others ineligible for nationality. Though even beyond the year 2000 the constitution may have nominally enfranchised all native-born Dominicans, the pathway to legal exclusion of Dominico-Haitians was already in place through institutional means, with legal reinforcement on the horizon. An examination of two crucial legal cases, *Yean and Bosico v. The Dominican Republic* and *Emildo Bueno Oguis v. The Dominican Republic*, brought first before the various levels of the Dominican bureaucracy and court system and afterward—in the case of the former—to the Inter-American Court for Human Rights, will show the process of this disenfranchisement by a reactionary state from 1997 to the present through the travails of some of its victims.

The briefs put forward by the representatives of these victims, the decisions of the courts which also feature the facts of the case, and the relevant arguments of representatives of the Dominican State figure as my essential primary documents. The shifting arguments of the State, in particular, reveal its insistent denial of the nationality of Dominico-Haitians by any means and any excuse. While both of these cases have come before international bodies and intimately concern the Dominican situation in the context of global statelessness and human rights issues, my primary analysis in this section has to do with the domestic context: the discussion of ethnic/racial discrimination on the part of the state in conferring the effective citizenship rights,

²³ Laurel E. Fletcher, “Final Argument: Yean & Boscio v. Dominican Republic,” March 15, 2005, http://www.escri-net.org/sites/default/files/Berkeley-Closing_Argument_15_MAR_05_0.pdf.

and in the State's own failure or success in carrying out the principles of its laws. When pertinent to this goal, I discuss international law and norms and the arguments used in the cases regarding them, but the progress of international discussions on statelessness and discrimination in the conferring of nationality does not by itself constitute a major goal here. Along with the records and ultimate decisions of these cases, I will also outline and analyze the documents—laws, constitutional amendments, civil registry policy memos—relevant to the time period of these cases in order to identify the changes and non-changes to Dominican citizenship, and the role of *antihaitianismo* in its definition.

Yean y Bosico v. La República Dominicana

Dilcia Yean, one of the two young girls at the crux of *Yean and Bosico v. The Dominican Republic*, the first landmark case on Dominican nationality and statelessness to come before the Inter-American Court of Human Rights, was only just under a year old when her local civil registry office in Sabana Grande de Boyá, an agricultural community near the capital, denied her application for a late birth certificate.²⁴ Her and the other children's denial, based on the discrimination regularly practiced by State actors against Haitians and Dominico-Haitians, initiated a process of domestic and international litigation that would not come to an end for nearly ten years.

Dilcia Yean's mother, Leonidas Oliven Yean, grew up in the sugar plantation slums known as *bateyes* where her children would as well, years later. Leonidas was the daughter of a Dominican mother and a Haitian immigrant father whose name she took. Consequently, even though young Dilcia never knew her own father, also a Haitian national from a later wave in that steady back-and-forth of Haitian labor in the *bateyes*, she nevertheless shared the effect of

²⁴ IACHR, 38-39, 82.

having a Haitian name, inherited instead from her maternal grandfather.²⁵ She did, though, inherit half her genes from her father, a native of a country with a population more than ninety-percent black, compared to the Dominican Republic's twelve percent. Of course, those figures, besides being largely self-reported and highly subjective, hide the vast diversity of physical traits—not just skin color—which make the Dominican Republic a thoroughly racially-mixed society, around 65-95% mulatto.²⁶ Haiti, too, has a demographically (and historically) important group of mixed-race people. However, few would dispute the fact that the “average” Haitian has darker skin than her Dominican neighbor, and given her family history, Dilcia likely shared this characteristic along with most poor Dominicans, especially those in the bateyes.

The older girl, Violeta Bosico, born in 1985, had much in common with Dilcia Yean and her family; she also hailed from the bateyes of Sabana Grande de Boyá, as did her mother Tiramén Bosico Cofi, born there in the 1950s while Rafael Trujillo still ruled the country as his personal fiefdom. Violeta's absent father was Haitian as well; she eventually took her name from her mother's Haitian father, Anol Bosico, though her grandmother Juliana was Dominican like Tiramén. From her childhood, though, Violeta lived in a batey outside Santo Domingo not with her mother but with her sister Teresa, one of several siblings who already had birth certificates and for some, curiously enough, Dominican fathers and Dominican last names.²⁷

Though their applications to the registry office for the copy of their birth certificates were late (very late in Violeta's case), the Central Electoral Board (or Junta Central Electoral, or JCE) which governs the civil registry had policies in place to govern that situation, especially common for the poorest Dominicans not born at hospitals where such registration might occur at birth.

The girls, brought by Violeta's mother and Dilcia's cousin, by no means made that fateful trip to

²⁵ IACHR, 21-23.

²⁶ David Howard, *Coloring the Nation: Race and Ethnicity in the Dominican Republic* (Boulder: Rienner, 2001), 3.

²⁷ IACHR, 33-37, 21-23.

the registry office on March 5 of 1997 accidentally, or in ignorance of the refusal they would likely receive from the presiding registrar, Thelma Bienvenida Reyes. Instead, a lawyer from the Movement of Dominican-Haitian Women (MUDHA) accompanied them, representing that advocacy group for Dominicans of Haitian descent long led by the late Sonia Pierre, the internationally recognized human rights activist.²⁸

The two girls were not the only choice, even; according to the testimony of MUDHA's lawyer, Genaro Rincón Miesse, he attempted to register twenty children that day, among them Dilcia and Violeta. MUDHA had already recognized the problems Haitian immigrant and mixed-nationality women like Tiramen had experienced registering their children for the birth certificates necessary to attend school and receive other identification cards, and the organization needed cases through which they could challenge the common practice. They found the opportunity with the two girls, both of whom arrived at the registry office with their legally Dominican mothers' cédulas and proof of their births in their home communities (documents signed by a community official in Violeta's case, and in Dilcia's at the "health center" of her birth).²⁹

By the principle of *jus soli* in the Dominican constitution, the girls' proof of native birth alone ought to have guaranteed their nationality. The birth certificate would be the necessary technical document allowing them to partake in the benefits of that status, like attendance at a public school. Even if, for the sake of argument, Dominican nationality required the more stringent test of *jus sanguinis*, their mothers' identification cards as Dominicans should have done the trick as well. MUDHA chose carefully, in other words. Since the girls were

²⁸ IACHR, 38-39.

"Stateless in Santo Domingo," The Economist "Americas View" Blog, December 16, 2011, <http://www.economist.com/blogs/americasview/2011/12/dominican-haitian-relations>.

²⁹ IACHR, 25-26.

undeniably born on national territory to Dominican mothers, the potentially muddying issues of *solis* and *sanguinis* (and which one the Dominican State actually adheres to) should have been off the table, and proved to be so, at least for the limited scope of the girls' case. Simultaneous to their impeccable credentials, the girls had obvious, pronounced characteristics by which they might be perceived as "Haitian" and thus discriminated against by the anti-Haitian State. Proof of this anti-Haitian discrimination was the organization's real aim, what they believed to be at the heart of the statelessness of so many Dominico-Haitians.³⁰ Registrar Bienvenida later testified, though, that her denial of their requests did not come worded as a denial of the legitimacy of the documents presented, or of the girls' national status. Instead Bienvenida argued that she had simply pointed out, as the State would in the legal struggle to come, that the offered documents simply did not comply with all that the Central Electoral Board required for late applicants.³¹

The testimony given by others, however, tells a different story. Genaro Rincón Miesse's statement does not agonize over Bienvenida's reasoning at the time, nor does he rely on instinct alone as to whether her refusal to grant the registry request actually has roots in anti-Haitian bias. His account describes Bienvenida as rejecting the girls' documentation not as incomplete, but rather as irrelevant on account of their being "Haitian." He does not specify if she commented on the girls' race or other physical characteristics, but she certainly did identify them as having Haitian ancestry because of the "Africanized" appearance of their last names. "If the parents are Haitian, the children are Haitian," and Haitian nationals do not qualify for registration as Dominicans, he recalls her saying. Furthermore, she was acting under the orders of her

³⁰ IACHR, 25-26.

³¹ *Ibid.*, 40.

supervisors, she claimed, and Rincón and those he represented would have to take it up with the next level of the Civil Registry in nearby Monte Plata.³²

Rincón's assertion of Bienvenida's purportedly discriminatory refusal does not make it into the case's "proven facts," so his testimony must be viewed with caution, at least for the parts concerning Bienvenida's words (hearsay). However, this may only be because of the apparent conflict between her account and his, the former of which proves at the very least inconsistent on the matter of which requirements the girls lacked. Even if we take only the barest assumptions from Rincón's statement about Bienvenida's reaction to the simultaneous appearance of twenty young Dominico-Haitian children and their mothers in her office to apply for birth certificates, we can recognize that she had to have been more than aware of their Haitian connections.

Coming again to the question of Bienvenida's inconsistency in her story, during the processing of the request to the Inter-American Commission on Human rights in 2001, the body to which the girls and their advocates eventually turned after their denial at the domestic level, the state presented a document signed by the Registrar Bienvenida attesting that the bureaucratic late-registry process really required no less than a whopping 11 documents, far more than simply a proof of birth and the mothers' cédulas:

1. Document from the Mayor (if the child was born in a rural area), or certification from the clinic or hospital where the child was born.
2. Certification from the church or parish on whether the child was baptized or not.
3. School certification, if the child is in school.
4. Certification from all the Registry Offices in the place where the child was born.
5. Copies of the parents' identity cards; if the parents are deceased, copies of the death certificates.

³² IACHR, 25.

6. If the parents are married, copy of the marriage certificate.
7. Sworn statement (Form OC-25) signed by three witnesses over 50 years of age who have an identity card (the new identity card), and who know how to sign their names.
8. Copies of the witnesses' identity cards.
9. Letter addressed to the President of the Central Electoral Board requesting late declaration of birth.
10. Letter addressed to the President of the Central Electoral Board requesting certification of whether or not the child has an identity document; if the applicant is over 20 years of age, he/she also requires a certification from the Edificio El Huacalito: National District [...] of whether or not he/she has an identity document.
11. Two (2) photographs [...].”³³

Thus, when MUDHA and the Center for Justice and International Law (CEJIL) subsequently argued that the State had discriminated against the girls, the State responded that the girls had simply never fulfilled the necessary requirements of the Central Electoral Board for orderly recognition of Dominican status, which in theory were the same for all residents, regardless of race or national background. Since they had supposedly failed to follow the procedures on the domestic level first, the State argued that the case of the girls was ineligible for the Inter-American Court's jurisdiction. As some would argue later, these eleven requirements could easily be interpreted as unnecessary and exclusionary to those lacking resources, but MUDHA argued something much more simple: that the list of required documents didn't even apply to the case of the girls.

Bienvenida's later official testimony before the Court in 2005 on her recollection of the registration attempt tell a different story from the document she signed in 2001 about the 11

³³ IACHR, 41.

documents, as does the statement of Rincón, MUDHA's lawyer present at the time. As both Bienvenida and the "proven facts" in the 2005 decision say, the actual late birth registration requirements for Dilcia and Violeta were only "a birth certification, their parents' identification cards, and, if the latter were married, their marriage certificate." The full set of 11 documents originally pointed to by Bienvenida and the state was rather the one required for the late registration of children over the age of 12, which applied to neither of the girls. Bienvenida's statement in this instance instead says that she found the girls' applications incomplete because they didn't have their parents' identification cards, a position not taken earlier and contradicted by all other evidence.³⁴

From these facts alone, it seems clear that while the representatives of the girls had their suspicions as to the discriminatory nature of the girls' refusal, the State itself, in the form the Civil Registry and Thelma Bienvenida Reyes, had less than certain confidence in any specific reasoning for their own refusal of the birth certificate. If Bienvenida indeed never received the mothers' cedula, why would she say otherwise in the first place? Considering the other possibility, if the registrar had mistakenly held the girls' application to the more stringent set of requirements, why would she not admit the mistake later on, if indeed the State itself was purely interested in complete fulfillment of the law? As the court record implies, Bienvenida may even have simply refused the girls' lack of documents without specifying which ones, a rather damning possibility.³⁵

In reality, even if Bienvenida did not outwardly comment on the girls' Haitianness or refuse them because of it, even if she personally held no anti-Haitian bias, that does not preclude the fact that the policies of the civil registry as a whole and the Central Electoral Board that

³⁴ IACHR, 26-27.

³⁵ *Ibid.*, 40.

oversees it may have been discriminatory. The potential of that discrimination lies in both the seemingly arbitrary way in which the Civil Registry chose to implement different requirements for late birth certificates for different individuals, strongly implied by the girls' case, but also in the way in which the restrictions themselves singled out many children of Haitian for almost automatic denial.

As Rincón Miesse points out, the pattern of discrimination is largely geographical; civil registrars applied registration requirements incoherently or strictly in districts with large Haitian immigrant populations but did so with more flexibility elsewhere, likely to avoid entangling non-“Haitian” children.³⁶ The nature and length of registration requirements would automatically make eligible for denial huge swaths of disadvantaged Dominican children whose parents lack documents or who lack practical access to them, often for economic reasons like fees associated with registry and the difficulty of travel.³⁷ This group with the potential for disenfranchisement would by its very nature include a majority of chronically marginalized Dominico-Haitian children, but many poor Dominicans without apparent Haitian descent might also fall victim to the stringent requirements. As the State argued, the requirements for a late birth certificate application of course had no language specifically targeting Dominico-Haitians as such; if it so happened that in practice they disproportionately fit the bill for denial, the State did not recognize that as its responsibility.

The importance of the civil registry's discretion at applying the differing requirements becomes paramount with Registrar Bienvenida's differing accounts. If, as her conflicting testimony and signed statements attest, registrars like Bienvenida did apply the lists of two, three, or eleven requirements for late registration inconsistently, it does not even matter if she

³⁶ IACHR, 25.

³⁷ *Ibid.*, 23.

openly displayed anti-Haitian bias as Rincón alleges. It is enough to know that in common practice the Civil Registry applied the requirements differently to different people. If the practical difficulties of the registration process were enough to keep Dominico-Haitians from succeeding with it, the arbitrary application of those difficulties could make sure those same difficulties only applied them as a group, avoiding catching “authentic” Dominicans in the wide net.

The evidence and testimony offered so far has come overwhelmingly from the litigation of Violeta and Dilcia’s case before the Inter-American Court of Human Rights, principally from statements presented to the Commission before the Court accepted the case for consideration and from testimony heard at the trial in San Jose, Costa Rica, in 2005. However, the lengthy and complicated involvement of an international court did not, of course, begin with the first confrontation between Rincón and Registrar Bienvenida; MUDHA did not even submit its first petition to the body until more than eighteen months had passed.³⁸ In the time in between these events, and continuing even after the application to the Commission, those working on behalf of the girls submitted requests to several levels of the Central Electoral Board bureaucracy, as suggested by Bienvenida, and even the Dominican courts. The refusals they received in turn for their appeals, despite the continued presentation of documents proving the girls’ birth, provide excellent examples of the State’s repeated yet changing justification for their exclusion from certified Dominican nationality.

In September of 1997, several months after the initial refusal, MUDHA and the Dominican Committee on Human Rights (CDH) filed their initial petition to the district judiciary for Monte Plata province, asking for authorization for late birth certificates for Violeta, Dilcia, and several other children who had been denied by the registry office in Sabana Grande de Boyá.

³⁸ IACHR, 2.

Somewhat unsurprisingly, the Public Prosecutor in charge rejected their appeal on grounds of lack of documentation: the girls did not have the appropriate proofs, a long list which this time included a twelfth addition to the earlier eleven—a “certification of identity, with seven witnesses.” Of course, like with Registrar Bienvenida, the requirements presented in 1998 proved incongruent with the bureaucracy’s actual policies: in 2001 the Representatives submitted civil registry document valid during the time of the incident which required only the 3 requirements.³⁹ MUDHA, relatively well-connected and with resources that poor Dominican-Haitians families lacked, could perhaps have helped women like Leonidas Yean find the appropriate documents for even the longer list for their children’s late birth registration, given enough time. Their plan to take on the Central Electoral Board had the larger aim of taking on the entire discriminatory civil registry system, and they would need to reach beyond the scope of a few children in Monte Plata Province.

The Petition to the IACHR and the Arguments of the State

Instead of submitting to the exhaustive demands repeated by the Prosecutor, MUDHA decided to petition a higher authority: the Inter-American Commission on Human Rights, an independent branch of the Organization of American States.⁴⁰ This step would prove crucial for the both the individual success of the Yean and Bosico children’s quest for state recognition of their nationality and the legacy of the experience in the wider Dominican an international contexts. In its legal wrangling with the girls’ representatives and the Commission itself, the State shifted its strategies and made inconsistent excuses for its denial of documentation to

³⁹ IACHR., 42-43.

⁴⁰ Based in Washington, the Commission, after review for jurisdiction and other qualifiers, refers petitions to the Inter-American Court in San Jose, where *Yean y Bosico* eventually landed. “What is the IACHR,?” Inter-American Commission on Human Rights. <http://www.oas.org/en/iachr/mandate/what.asp>.

Dominico-Haitian children, attempting at all costs to avoid an embarrassing international investigation. As the State sought to avoid the ramifications of such a spectacle, the victims continued to suffer the practical statelessness consequent to their lack of documentation. That lack of documents itself resulted from the discriminatory burden of proof that Dominico-Haitians had to undergo to under the civil registry.

In the original petition to the Commission, MUDHA couched their complaint in terms of a “denial...of their birth certificates, which [would] allow them to have a nationality and a name,” but, significantly, focused on the resultant loss of access to education rights, a well-established concern in international legal circles.⁴¹ The loss of a right to education was no mere threat: in 1998 the state refused Violeta registry for the fourth grade at her school because she had no birth certificate (Dilcia had not yet reached school-age). For three full years as the legal parties bickered, she could only attend night school for adults, classes which only met for a couple of hours per day and focused on remedial literacy inappropriate for the young girl. The desperation of Violeta’s educational situation cannot be over-emphasized; it was only in the month or so following her rejection that MUDHA took the drastic step to petition to the IACHR.

The petition itself, however, only initiated the process of recognition of the girls’ rights. As the Commission considered it merits and whether to refer the case to the Court, it had to contend for nearly five years with representatives of the Dominican state, who argued against the body’s intervention in the affair. The state’s argument took several forms. Its first objection to the petition by the girls’ representatives was aimed at the commission’s request that it take “precautionary measures” to ensure the girls’ right to education and legal safety—i.e. provide them with provisional birth certificates. When the commission asked the State for “information that [would] enable [the court...] to assess whether the remedies under domestic law had been

⁴¹ IACHR, 5.

exhausted,” the State tried to shift the burden back to the Commission and MUDHA, asking for compelling reasons why it should even have to provide such information at that point.⁴²

Perhaps seeking to come across as protective of the girls and acknowledging of the dangers of statelessness, especially deportation, the State assured the commission that “the Dominican Republic would never repatriate a Haitian citizen who was in the country legally...according to any of the conditions that have been established for accepting illegal immigrants...who have been in the country for a long time, or those who are related to Dominican nationals.”⁴³ This statement reveals, crucially, the assumptions of the Dominican state considering individuals like Violeta, Dilcia and their mothers. First and foremost, the State here indirectly but quite obviously identifies the girls as legally Haitian, a claim that it would continue to make in years to come. Even though the girls’ absent fathers assumingly had Haitian citizenship, neither the girls themselves nor their mothers had ever attempted to claim it for themselves, or had even been to Haiti.

In the eyes of the state, however, those with a technical legal right to Haitian citizenship (in itself a matter the state had no evidence to assume beyond the girls’ names and appearance) could not possibly be in danger of statelessness, even if they lack the means to access it. If one is “Haitian” and lacking documents, the responsibility for ensuing statelessness must lie with the Haitian state. “The Dominican Republic cannot be asked to shoulder the consequences of the serious deficiencies that plague the Haitian civil registry,” replied the Dominican Ambassador to the U.S., Aníbal de Castro, to a 2011 *Economist* article on the statelessness of Dominico-Haitians

⁴² IACHR, 3.

⁴³ *Ibid.*, 4.

and the work of MUDHA.⁴⁴ For whatever reason—physical appearance, last names, geographic location—the State assumed the girls to be Haitian, despite any other connections they might have. They and others in their position were not the problem of the Dominican state or officials like Ambassador de Castro, and at best were a non-priority because they did not fit the State’s definition of at risk for statelessness.

The second aspect of the State’s protective assurances to the commission —about “illegal immigrants...who are related to Dominican nationals”— assumes knowledge that the girls’ own mothers were Dominican, undisputed by any side, including the State itself.⁴⁵ In a single statement, the State plasters the children with the labels of Haitian national and illegal immigrant, while affirming that such individuals might still descend from Dominican families. This contradiction is especially striking when we return to the constitutional principles of both *jus soli* and *jus sanguinis*, under each of which the children of Dominicans would count as Dominican nationals. Underlying the bureaucratic assumption that the girls were Haitian is the social understanding that Haitians *cannot* also be Dominicans, an idea apparently even superseding the 1994 national constitution, which makes no such comment on double nationality. An ironic double standard thus emerges from the state: a mixed-nationality child’s Haitian nationality is assumed even with little concrete evidence, but Dominican nationality requires assiduous proof.

After its first objection suggesting that providing provisional documents was unnecessary, the State’s second argument to the Commission and the petition before it simply asserted that it had in fact never refused the girls’ birth registry. Instead, “the procedure

⁴⁴. Aníbal de Castro, “A Response from the Embassy of the Dominican Republic in the United States,” *The Economist*, December 27, 2011, <http://www.economist.com/blogs/newsbook/2011/12/our-blog-post-haitian-dominicans>.

⁴⁵ IACHR, 4.

established [by law] had not been complied with” and “it doubted that domestic remedies had been exhausted.”⁴⁶ In other words, MUDHA had not followed the appropriate course of bureaucratic appeal in representing the girls’ case, even if it had indeed provided the appropriate requirements—an assumption the JCE did not take for granted. This argument behind the shifting strategies appears in the later court accounts of the behavior of Registrar Bienvenida and the Public Prosecutor at Monte Plata, both agents of the JCE bureaucracy. Throughout the contesting of jurisdiction before the Commission and the hearings before the Court itself, the State never wavered in its argument that the girls never provided the necessary documentation. However, they did waver significantly on what actually counted as necessary.

We have already established that the State offered different lists with different requirements at different times, and could not consistently identify which it had applied in the case of Violeta Bosico and Dilcia Yean. Somewhat less obvious from the plethora of policy resolution records submitted to the Court by the State which list the requirements for civil registry of birth (more than eight different lists, not counting those provided by MUDHA), is the reality that critical policy changes occurred while the case was working its way through the Commission and the Court between 1998 and 2005. On the one hand, the State finally abandoned its original assertion that the girls fell under the 11-12 requirement list: letters offered by the State to the Commission in 2001 and 2003 list only the 3-4 requirements necessary for applicants under the age of thirteen during the period that the girls applied.⁴⁷ At a certain point the State could no longer defend the first excuse, presented in the original testimony of the Registrar and the Public Prosecutor, that the girls were fairly denied registry because of their failure to turn in the longer list of requirements. For this reason Bienvenida’s later

⁴⁶ IACHR, 4.

⁴⁷ Ibid, 43-46.

testimony changed to say that she rejected the applications only because the mothers' cédulas were missing (described earlier).

On the other hand, however, a 1999 list featured a more insidious change, one which entered the record unremarked-upon by both the Commission and the State itself. This list, taken from a policy resolution issued by the Central Electoral Board, featured only three requirements, but in the place of the parents' marriage certificate came the requirement for "any other document that the respective Civil Status Registrar deems pertinent."⁴⁸ That this stunning admission of the birth registry process's subjectivity went unnoticed by both the Commission and MUDHA seems unlikely. That they did not remark upon it seems just as unlikely, yet nevertheless seems to be the case. It is possible that the Commission viewed 2001 and 2003 lists discussed in the previous paragraph—which do not include the "anything pertinent" clause—as overruling previous policy resolutions. However, the record from the Court shows little evidence to support this claim; one act of bureaucratic policy might not cancel another unless explicitly worded as such. The *State's* reluctance to point out the clause, though, is much more understandable; it had little to nothing to gain by trying to apply it to the girls' case or to Bienvenida's refusal of them. Making the policy retroactive to the 1997 incident could not have been effective, and doing so would admit that the State had been discriminatory, or at best subjective, when it chose to give the Dominico-Haitian children a stricter set of registry requirements.

What the clause *did* do for the State, though, was give it an avenue for bureaucratically legitimate discrimination in future cases. If the policy had been in effect before the girls' trip to the registrar with the attorney, Rincón, it surely would not have kept MUDHA from petitioning to the IACHR. However, it would have allowed the state something else to point to than its

⁴⁸ IACHR., 44.

shifting-sand list of documentation and witnesses. Regardless of its obvious potential for discrimination, the clause would have given more weight to the claim that the girls never provided the appropriate documentation, because *whatever Bienvenida asked for would have been required* according to Central Electoral Board policy.

For the purposes of this analysis and the hypothesis of increasing anti-Haitianism, the most salient points to take from the actions of the State during the early struggles over the *Yean y Bosico* are twofold. First, during the period from 1995-2005 the State actively changed its policies to become more exclusionary of applicants for national identity documents. Second, increasing exclusion coincided with litigation threatening to the State. This second point, recognizing legal exclusion as State response to outside judicial threats, is a powerful and controversial idea, but one which looks increasingly likely with other changes to the law, policy, and even the constitution, changes which figure heavily in later sections of this analysis.

Eventually, as a referral of *Yean y Bosico* to the Inter-American Court appeared increasingly likely, the State reneged on its earlier indignant claim that to seek birth certificates outside of the domestic, bureaucratic pathway (by way of the IACHR) was necessarily illegal. Or, rather, it chose to ignore its supposed illegality and award the girls birth certificates anyway, in an attempt to settle. Officials delivered formal birth certificates to both Dilcia and Violeta in September of 2001, after which the latter could finally re-enroll in formal schooling. One of the State's preliminary objections when the court finally convened in 2005, then, was that awarding of the birth certificates fulfilled the requirements of an agreed-upon friendly settlement, and that further litigation was unnecessary or inappropriate.⁴⁹

Indeed, the commission actively encouraged settlement between the girls' representatives and the State to save time and resources from a costly series of hearings. MUDHA was not

⁴⁹ IACHR, 17-19.

wedded to the idea of bringing the case to court, provided that the State rectify not only the girls' situation but eliminate the conditions that had led to it. This second, more extensive requirement proved the sticking point for the State. While it could grudgingly accept having to provide documentation to two girls it still did not see as Dominican, it could not accept the modification of its domestic policy, a perceived threat to its right to define its citizens as it saw fit. Neither could MUDHA accept an agreement wherein the State would neither recognize its own mistreatment of Dilcia and Violeta nor ensure that hundreds of thousands more Dilcias and Violetas would not still be left without the right to education, work, and a life without fear of deportation to a foreign country. Without a prior agreement on what would constitute a friendly settlement, the Commission rendered the State's concession to the girls as moot, and the Dominican Republic finally found itself facing a looming trial in an international human rights court which might easily result in a disastrous opinion.

The Codification of Exclusion

In 2004, while the representatives of the two girls and of the Dominican state were still busy wrangling over the particulars of the impending trial in the IACHR, at the domestic level the state was busy in an altogether a different avenue. The proceedings of *Yean y Bosico* proved to the State that its strategy of systematic denial of the nationality of Dominico-Haitian children—through bureaucratic refusal to grant the necessary documents by arbitrary application of rules—would remain imminently vulnerable to a discerning observers like MUDHA and the IACHR who had the money and power to challenge the state's actions. In the most determined effort yet to circumvent to this vulnerability, congress passed the General Law on Migration in 2004, in Spanish the *Ley General de Migración* or *Ley 285*. It proved itself to be a piece of

legislation as wide in scope and as intricate as was the country's larger relationship with immigrants and immigration. The law's many clauses included some which certified the State's right to bar entry to those with infectious diseases or criminal histories, while others governed the visa process and who qualifies for it. While the document did not so obviously mention the definition of nationality; it did, however, alter the definition of "foreigner."⁵⁰ As the civil registry had already been doing, 285 helped legally divide separate many Dominico-Haitians from those the state considered "true" Dominicans.

In the section most directly applicable to the concerns of this research, under the heading "Distinct Categories of Migratory Stay," Law 285 classified foreigners under the categories of "resident" and "non-resident." This categorization did not in itself constitute a change to earlier policy. "Resident" status in the document included those in the country both permanently and for limited periods of time, like legally admitted immigrants, family members of Dominican nationals, and professionals and investors working in the country. Notwithstanding the inherent irony of labeling anyone living long-term in the country as "non-resident," 285 nevertheless created such a category to include not only tourists and students but also diplomats and their families and workers with permits for short, specified periods of time. Most importantly, "non-residents" also included "travelers *in transit* to another destination outside the country."⁵¹

If the identification of diplomats and those in transit sounds familiar, it is because those two categories of people appear explicitly in the constitution of 1994 and the updated version of 2002. Any children born in the country under those circumstances would not automatically receive the benefit of nationality, even under the principle of *jus soli*. If these two categories

⁵⁰ Pellerano & Herrera Law Firm, "Aspectos Fundamentales Sobre Ley General de Migración y su Reglamento de Aplicación," August 1, 2012, http://www.phlaw.com/pubs/rejec/sp/aspectos_grles_Ley_General_de_Migracion.pdf, 2.

⁵¹ *Ibid.*, 2-3

were distinctive enough to identify separately in the constitution, why does this law seemingly treat them the same as tourists, students, and migrant workers? “Transit,” after all, referred to the movement of those on their way to another place, like those waiting in an international airport for a connecting flight out of the country, an inherently transitory state one might easily assume to be lesser than that of a tourist or guest worker. This definition of those in transit goes back at least to the 1940s and Trujillo’s dictatorship, which was not Haitian-friendly by any standards.⁵²

The only hint in the text of 285 as to the necessity of the new category of non-residents comes from the limited other sections mentioning the group. These sections limit the people under this category from staying in the country beyond a fixed period of time, and govern the limits of their rights to apply for resident, permanent status.⁵³ Those qualifications would almost certainly have already been the case for tourists, students, and migrant workers, though. They also don’t fit the case of diplomats, who presumably can stay as long as their appointment, or those in transit, who by their very definition do not stay long enough to worry about overrunning a certain period of stay. Some minute changes to visa or another policy might warrant the mention of tourists and migrant workers, but the law offers no apparent clue as to the purpose of including diplomats and those in transit.

In perhaps the only potential reason left for including those two different types of people—some singled out by the constitution as different and the others not mentioned at all—the writers of the law likely intended to create a sort of legal equity between those types which had not existed previously. In a subtle way, lawmakers said through the document that diplomats and those in transit were not alone in their constitutional category disallowing their children’s rights to Dominican nationality. Rather, Dominican *jus soli* might potentially exclude

⁵² Peynado, Jacinto B, *Reglamento de Migración no. 279, del 12 de Mayo de 1939*.

⁵³ Pellerano & Herrera, 5.

Dominican-born offspring of at least these other categories, depending on one's interpretation of the law. For Haitian migrants and their children, this would add legal uncertainty to the practical, institutional barriers to the process of documentation.

Contrary to some of the abbreviated descriptions of the law offered by observers later on, the law did not necessarily redefine the term "in transit" to include Haitian immigrants or Dominico-Haitians, legal or otherwise. It did not even *necessarily* say that those all "non-residents" had to be treated equally with those in transit. Instead, this clause opened the door to an interpretation, not before considered, of *jus solit* that expanded significantly the ranks of those born in the country but ineligible for nationality.⁵⁴ It made this leap more explicitly by singling out those born to undocumented migrants as less than or equal to those in transit. In its summary of the law, Dominican law Firm Pellerano and Herrera points out that undocumented immigrants under 285 have to follow an unspecified "special procedure" for birth registry.⁵⁵ In other words, the State had created the legal justification, if not yet the means, to separate the documentation process of children of Haitian migrants from that of "true" Dominicans. The ramifications of the 285 would not be felt immediately, but a shift had certainly occurred, a shift that worked in the favor of a state frantically searching for justification for its exclusionary policies, including those affecting Dilcia Yean and Violeta Bosico.

The crux of the law would prove to be its flexible execution by the state. The uncertainties and new categories provided in 285 allowed for politically opportune interpretations that might have proven difficult under the more straightforward 2002

⁵⁴ Open Society Institute, "Yean and Bosico v. Dominican Republic," Open Society Foundations, <http://www.opensocietyfoundations.org/litigation/yeand-bosico-v-dominican-republic>.

⁵⁵ Pellerano & Herrera, 2.

constitution.⁵⁶ As the Dominican Supreme Court would later rule in interpreting the law, and government officials like Ambassador de Castro would later argue, “If those born to parents legally in transit are precluded from automatically acquiring the nationality [sic], the children of those who cannot justify their legal entry or stay in the country cannot benefit from a greater right.”⁵⁷ Law 285, much maligned by MUDHA and internal human rights organizations, did not even explicitly redefine the children of undocumented immigrants as in transit or as less than equal to that distinction, nevertheless it would come to mean such practically. Congress, stoked by popular anti-Haitian sentiment, used the law to muddy the position of nationality categories like “in transit.” As the Office of the High Commissioner of Human Rights said of the law, it would be interpreted “broadly to include temporary workers, visa overstays, undocumented migrants, and persons who cannot otherwise prove their legal residence in the Dominican Republic.”⁵⁸ As we shall see, the swift review of the law by the Supreme Court suggests that lawmakers created these widened categories with an exclusionary interpretation in mind.

Law 285 in the Context of *Yean y Bosico*

In 2005, after the passage of the still innocuous-seeming Ley 285 and during its own defense in the hearings finally taking place before the Inter-American Court of Human Rights, the Dominican State curiously made almost no mention of the “in transit” issue or the implications of its new law. It did argue vociferously against the girls’ representatives—which now officially included North American players like the Center for Justice and International Law

⁵⁶ This version of the Constitution is identical to the previous, 1994 version, in the relevant sections on nationality and citizenship.

⁵⁷ Aníbal de Castro, “A Response from the Embassy of the Dominican Republic in the United States,” *The Economist*, December 27, 2011, <http://www.economist.com/blogs/newsbook/2011/12/our-blog-post-haitian-dominicans>.

⁵⁸ Kosinski. *State of Uncertainty: Citizenship, Statelessness and Discrimination in the Dominican Republic*, 389.

(CEJIL) and Berkeley's International Human Rights Law Clinic along with MUDHA—on some of the already discussed questions. Once again the State argued that it had not broken its domestic laws and constitution by denying nationality to those owed it, one of the principal charges against it; instead, the girls and their mothers' failure to provide the necessary documents had resulted in their refusal, nothing more. As we have seen already, the State's internal disarray and conflicting testimony over its own requirements made such a defense difficult to uphold. The girls' representatives showed quite easily that the State's inconsistency in application of the law alone could unfairly prevent Violeta and Dilcia from receiving their documents.

The other principal charge, instead of concerning violations of human rights ensured by domestic law, concerned violations on the international level for which the IACHR had a more direct interest. It consisted of two main elements. First, the Representatives charged that the State's refusal of the children, for whatever reason, had caused effective statelessness for the girls who had no other options, a failure to fulfill the right to nationality under Article 20 of the American Convention. Second, the subjective nature under which the JCE rejected the girls' registry applications and the strenuous requirements for birth registry disproportionately affects Dominico-Haitians like themselves, a violation of the right to equal protection of the law from discrimination.⁵⁹ On the first point, the State argued, as pointed out before, that the responsibility to award nationality for the girls lay with Haiti. The Court pointed out, though, that the girls' three years of statelessness occurred only as a result of their rejection by the Dominican Central Electoral Board while living exclusively on Dominican territory, and in any case states' discretionary authority over nationality "is limited...by their obligation to provide individuals with the equal and effective protection of the law and...by their obligation to prevent,

⁵⁹ IACHR, *Yean and Bosico v. Dominican Republic*, 55.

avoid and reduce statelessness.”⁶⁰ In the case of Dilcia Yean and Violeta Bosico, the Court held that the State had, at best, put its bureaucratic processes before Human Rights to nationality, education, and the like, and at worst (and more probable) had used that bureaucratic power to deny and exclude Dominico-Haitians in particular.

The repeated denial of Dilcia and Violeta’s late birth registry might still only constitute anecdotal evidence of a purportedly widespread and systematic problem, even if the Court proved they were based in anti-Haitian discrimination. The most truly damning evidence for discrimination, however is not their own mistreatment of the two young girls, which might only prove that Bienvenida or her immediate superiors personally harbored anti-Haitian views, but the behavior of the State in responding to the litigation of the cases. Its repeated shift of strategy within the context of the Court—claiming the girls didn’t have the eleven necessary documents, that they didn’t provide their mothers’ cédulas, and that they never appealed to all the appropriate bureaucratic bodies—shows a desperation to keep the matter from coming under the scrutiny of an international human rights organization.

While the State eventually proved willing to give in to MUDHA’s demand to give the two girls their documents, it could not accept any agreement or judgment that would affect its entire discriminatory apparatus. If we imagine for a moment that the State denied their claim because it earnestly believed that the girls didn’t have their mothers’ identification, for example, why would the Central Electoral Board not simply relent once its realized the mistake, as it must have when MUDHA appealed to the Public Prosecutor, or even before? Or, if, as the court found, in fact Registrar Bienvenida had applied the eleven-requirement list incorrectly, why not simply reverse course and publicly clarify the true (three) requirements? Instead of just trying to follow bureaucratic procedure, the State’s true interest lay in denying not just girls but all those it

⁶⁰ IACHR, 57.

saw and identified as “Haitian” their applicability to the benefits of Dominican nationality. As the Court said in its final decision,

From the foregoing we can conclude that the State adopted different positions regarding the requirements the children had to fulfill while the case was being processed before the Inter-American System for the protection of human rights. This situation shows that there are no standard criteria for demanding and applying the requirements for late birth registration of children under 13 years of age in the Dominican Republic.⁶¹

Not only were the standards the State used against the girls’ claims in the court built on shifting foundations, the court explicitly concluded that the state in fact actually applied those requirements for applicants in an arbitrary fashion.

The crux of the matter in the case of Dilcia Yean and Violeta Bosico was that the State began with no legitimate legal reason to deny the girls their birth certificates as proof of their Dominican nationality. There did not yet exist a coherent policy attempting to apply the restrictions of those “in transit” toward the children of Haitian immigrants. Tellingly, the state argued that the girls’ mothers had not yet jumped through all the hoops of the bureaucracy, not that they were legitimately denied because of lack of national status. This missing argument reveals that the State did not yet view existing Dominican law as a real or relevant limiting factor for those clearly born in the country. At the very least, the legal status of parents would probably not qualify as admissible in the IACHR at that point in time, especially for a case whose principal facts occurred long before the complications associated with legislation like Law 285.

The state’s behavior and response *outside* the context of the court corroborates the intent of its evasive action within it. The expansion of the limited scope of “in transit” in 2004’s Ley 285 came when it did because the State was looking for a way to justify the already-in-place

⁶¹ IACHR, 59.

discrimination against those it saw as not authentically Dominican. *Yean and Bosico* brought international scrutiny to the Dominican Republic's institutional exclusion of Dominico-Haitian children from the benefits of nationality. It proved not only to embarrass the State and reveal its actions as contrary to international human rights norms, but also showed how it had disregarded its own constitutional guarantees of nationality for the native-born. Ley 285 didn't change the constitution, but it did provide an arguably legal pathway for the government to exclude the native-born children of undocumented Haitian immigrants from nationality by eventually making legally necessary the proof of parental status. The IACHR had criticized this argument as contrary to the country's own standards of *jus soli*.

The proof of parental status disproportionately singles out Dominico-Haitians not only because of the limits that poverty places on their ability to seek out all of the necessary documentation, but because of the use of explicit markers of Haitian-ness—last names, skin color, physical features—which Civil Registry officials used in cases like Violeta and Dilcia's to identify them as “suspect” or inherently ineligible for Dominican nationality. The legal discrimination of 285 followed already-existing institutional discrimination, placed as a way to bolster the state's claim of “just following procedure” in the face of outside criticism. In the end, 285's passage in 2004 did not by itself technically force an obvious change or increase in practical animosity and discrimination toward Dominico-Haitians; its legacy would play out in the years to follow. However, the subtle policy change mentioned earlier, the one which developed in the midst of the emerging controversy over birth registry requirements—gave registrars the power to arbitrarily assign requirements. The Dominican State in its passage and swift reinterpretation of Ley 285 proved its tendency to toughen citizenship policy rather than relent to outside judiciary threats. The State would prove itself a wounded, reactionary force

seeking to continue the same old exclusionary policies that had always lurked in the bateyes and in the slums of the capital where a despised minority resided.

The Aftermath

The Organization of American States requires its members to submit to rulings from the Inter-American Court of Human Rights, but has no means of practical enforcement, relying instead on the good faith of the governments involved and the accountability others members are willing to provide. The *Yean y Bosico* decision from the IACHR that arrived on the 8th of September, 2005, came with a clear rebuke to the misdeeds of the State, made under the assumption that it would comply with the Court's decisions. It ordered steps for the State to undertake in reforming its unclear citizenship law and effectively anti-Haitian civil registry policy—incubators for statelessness and discrimination. Besides issuing compensatory damages to the children and to their mothers for lost opportunities and productivity and to MUDHA and the North Americans for their court costs, the Court also ordered the State to nationally publicize the court's decision and the “proven facts” section of the case and, even more humbling, publicly and physically apologize to the victims and their families as an admission of its wrongdoing and “a guarantee of non-repetition.”⁶² The explicitly public nature of these apologies may be seen as a fitting response for the decidedly non-public, bureaucratic intrigue the State had used to deny Dominico-Haitians their nationality. As various State actors would prove through their comments, decisions, and legislative actions, the State found every reason to not only limit the repercussions of *Yean y Bosico* but also circumvent and reverse its supposed encroachment on Dominican sovereignty. It wholly rejected the decision and brazenly refused to complete its

⁶² IACHR, *Yean and Bosico v. Dominican Republic* 82-83.

terms despite its previous acceptance of the Court's jurisdiction and the qualifications of OAS membership.

Among the most significant and hard-to-swallow requirements the Court placed on the State figured the mandate that it quickly take up meaningful reforms to its documentation and citizenship process:

The State should adopt within its domestic law... the legislative, administrative, and any other measures needed to regulate the procedure and requirements for acquiring Dominican nationality based on late declaration of birth. This procedure should be simple, accessible and reasonable since, to the contrary, applicants could remain stateless.⁶³

The Court's order here clearly calls for a transparent and simple process for birth registration that would make more difficult the kind of institutional anti-Haitian discrimination endemic to the arbitrary and convoluted system then in place. The Court recognized that merely ordering an end to discrimination against Dominico-Haitians could only have a limited, if any, impact so long as the flawed system that enabled it remained in effect. The Court's orders clearly stated the State's responsibilities and also its guarantee of continuing international oversight of the situation. In this final requirement, though, it blended unequivocal directions with enough leeway for the State to bring about the necessary changes in its own way.

The bitter irony is that the State would indeed soon fulfill the Court's final call for clarity and regulation, but—crucially—to the effect of consistently denying Dominico-Haitians their nationality rights rather than restoring them. In essence, *Yean and Bosico* began as a challenge to practical anti-Haitian discrimination that ran contrary to protections under both Dominican and international law. By the time it ended, this challenge found justification internationally but

⁶³ IACHR 82.

complete rejection domestically, where the casual discrimination of the civil service had already been recently enabled by Law 285, in anticipation of the ruling. Even before the official decision, tensions were already escalating over the Haitian question. In the April of that year, months before the release of the ruling, the acting Secretary of Labor declared his plans to “dehaitianize” the Dominican Republic, worryingly using the same language first coined by the Trujillistas before the slaughter of 20-30,000 Dominico-Haitians in the border regions in 1937.⁶⁴

The statement’s history of violence rang true soon enough, when the murder of a Dominican woman in the northwest of the country in May of 2005 initiated an outbreak of anti-Haitian violence. The government itself deported thousands of Haitian immigrants several months later, often forcing them out of their homes at night and depositing them on the other side of the border with no money, food or communication with their now-divided family. Beyond deportations, Haitian communities during that summer and after faced machete-armed mobs, and “beatings, stabbings, and burnings...resulted in a number of deaths [while] perpetrators of this...violence...enjoyed complete impunity,” even to the point of half-open support from officials.⁶⁵ Keeping track of all of the repeated rounds of deportation of Haitians and Dominico-Haitians at this and other periods would be a nigh-impossible task. Though my analysis here focuses more on legal arguments and more abstract rights to nationality, the Dominican State has continued to deport thousands, from the Trujillo era through the 2000s.⁶⁶ The very real threat of deportation, suddenly and often to a place where deportees have little to no connection, figures along with statelessness as the most dangerous consequences of State-sponsored anti-Haitianism.

When the judgment from Inter-American Court’s headquarters in San Jose, Costa Rica, arrived in the actual chambers of Congress in Santo Domingo, ordering reparations for the girls

⁶⁴ Baluarte, “Inter-American Justice Comes to the Dominican Republic,” 25.

⁶⁵ *Ibid.*, 26.

⁶⁶ Wucker, *Why the Cocks Fight*, 134.

and serious civil policy reform at the state level to prevent similar occurrences in the future, the state's official reaction may well be guessed. Once again, the critical weakness of most international bodies, of which the OAS and its judicial wing are no exception, lies in their inability to enforce their decisions on member states: only the state in question holds the power to either respect or ignore a ruling like that in *Yean and Bosico*. The Dominican Republic did neither. Instead it rejected the Court's decision outright and in public. A few weeks after the ruling was released, the Ministry of Foreign Affairs issued a statement that deemed the ruling "unacceptable." The Vice President himself, Rafael Albuquerque, who had entered the government barely a year before on the neoliberal wave of Leonel Fernández's reelection, echoed the opinion of the foreign ministry: he "denied the validity of the court's holdings and declared that the country was under siege by international organizations intent upon discrediting the Dominican Republic before the world community."⁶⁷ The language here, from a report by CEJIL, minces no words on the source of the indignation of officials: they clearly saw the ruling as not just wrong, but as an affront to the State's sovereignty over nationality and citizenship law and a credible threat to its international standing.

Only a few days after the Vice President's words, on October 18, the Senate issued its resolution again rejecting the court's ruling. Echoing the Foreign Ministry's sentiments, the body in its resolution painted the Court's decision as an attack by the international community on the victimized Dominican Republic. That same international community was somewhat shocked by the vehemence of the State's response. As CEJIL's representative, Baluarte points out, "the extreme hostility of the legislature, the body responsible for executing institutional reforms ordered by the Court, is clear cause for alarm." This statement is the closest any of the litigants would come to recognizing the possibility of not just a negative state reaction, but one which

⁶⁷ Baluarte, 28.

might reverse the cause of Dominico-Haitians rights rather than encourage it.⁶⁸ We have already witnessed the State's willingness to change the law and policy in order to protect itself from potential threats like those which developed during the processing of *Yean y Bosico*. To what lengths would it go to protect itself now that the IACHR had actually threatened its policies, or at least its international standing?

Several weeks later, on December 14, the Supreme Court of the Dominican Republic reversed previous interpretations of nationality requirements when it upheld 285's constitutionality, and interpreted its cloudy "non-resident" categories by affirming that the law did extend the limits of nationality previously assigned only to those in transit to those of other categories, specifically the undocumented, usually Dominico-Haitians or recent Haitian immigrants.⁶⁹ Thus, children born in the country to undocumented parents, even if the parents themselves had been born in the country would no longer have the right to Dominican nationality. This later possibility could easily have become the case for, say, Violeta Bosico's children had she not finally received a birth certificate (which occurred when she was 15, already at childbearing age). Whereas, at worst, 285 had hinted at a broader category excluded from nationality and an unspecified separate registration process for the children of undocumented parents, the Court's ruling made the exclusion of that group abundantly clear.

Astoundingly, the Court said that all those in the country illegally or unlawfully were subject to the same revocation of *just soli* rights of their children, since their status was inherently below that of legal immigrants who were now disenfranchised. As for the question of statelessness and the State's culpability, the Supreme Court repeated the line that Dominico-Haitians faced no risk of statelessness because they already possessed the right to Haitian

⁶⁸ Baluarte, 28

⁶⁹ Corte Suprema de Justicia, *Sentencia del 14 de Diciembre del 2005, No. 9*, December 14, 2005, <http://www.suprema.gov.do/sentscj/sentencia.asp?B1=VR&llave=114110009>.

citizenship according to that country's law. Whether or not Haiti's civil registry could or would accept them was Haiti's concern. The irony of this anti-Haitian opinion coming from the highest court in the land, as some canny observers like Bridget Wooding noticed in her article in the journal *Peace Review*, is its implicit assumption that "the Haitian Constitution should be applied in precedence to the Dominican Constitution, ignoring the territoriality of the application of laws."⁷⁰ For a State so concerned with the imposition of an international body on its sovereignty, the Supreme Court certainly had little problem deferring to the law of another country when it suited the State's interest.

The immediate question of who would be affected once Ley 285 came into full effect, reinterpreted by the supreme court in 2005 and bolstered by all three branches' rejection of the *Yean and Bosico* ruling, may not be immediately apparent. The wording of the law, by creating a new category of non-residents now equivalent to "in transit," and—according to the Supreme Court—subordinating undocumented immigrants even to that rights-deprived group, made clear that the children of almost exclusively Haitian migrant workers would not necessarily have the right to nationality if they were undocumented or could not prove their legal status. At least on the basis of some standing law, confirmed by the highest court of the land (though not yet the constitution), *jus soli* ceded to *jus sanguinis*. Certainly the State would now use the law to keep future young Dilcias and Violetas from eligibility for birth certificates and other documents. Moreover, not all Dominico-Haitians had the advantage of legally Dominican mothers that the girls did. Yes, children who did not yet have legal recognition faced the most obvious danger, but what about other Dominicans of Haitian descent? Could adults find themselves in a similar situation, as well? Despite the optimistic assurances from groups like CEJIL that, at their very worst, the requirements and categories of 285 were still "not retroactive," the years following the

⁷⁰Wooding. "Contesting Dominican Discrimination and Statelessness," 371.

ruling would prove just how far the State was willing to go to exclude from citizenship those who it views as irredeemably Haitian.

Emildo Bueno Oguis v. La República Dominicana

One Dominican man found out the extent of 285's practical application the hard way. According to a petition placed before the Inter-American Commission on Human Rights in June of 2010, more than ten years after MUDHA filed their first complaint with the body on behalf of Dilcia and Voleta, a Dominican man named Emildo Bueno Oguis alleged a violation by the State of his rights to nationality. In fact, as Bueno applied to renew his birth certificate, the state not only denied his nationality but effectively stripped him of existing status and benefits. Born in 1975, we have no indication that Bueno or his parents originally faced difficulty in receiving documentation upon his birth, including a birth certificate, despite the fact that both were Haitian immigrants to the country.⁷¹ Of course, we know already that simply fulfilling the *jus soli* principle of natural birth in the country does not necessarily guarantee practical nationality rights, but in his case he did acquire a birth certificate, a cédula, and even a passport and held these documents as proof of his nationality for more than three decades, granting him the right to "political participation, pursuit of higher education, gainful employment, and purchase of properties," among others.⁷²

In 2007, several years after the passage of Law 285 on Migration, Bueno was in the process of completing a visa request for residence in the United States, where his wife resided

⁷¹ "Thousands Stripped of Citizenship in the Dominican Republic," PR Newswire, <http://www.prnewswire.com/news-releases/thousands-stripped-of-citizenship-in-the-dominican-republic-95321524.html>.

⁷² Open Society Justice Initiative and the Center for Justice and International Law, "Summary of Initial Petition in the Case of Emildo Bueno Oguis v. Dominican Republic," June 1, 2010, <http://www.opensocietyfoundations.org/sites/default/files/Petition%20Summary-20100601.pdf>.

and had citizenship. The necessary documents for his application included a long-form birth certificate, something in the case of all Dominicans only accessible through the Civil Registry. When Bueno applied to the Registry in June of that year for a certified copy of his birth certificate that—unlike the girls—he had already received earlier in life, the registrar rejected his application on the grounds that his parents were among those deemed “non-residents” at the time of his birth.⁷³ This man, who had identified himself as a Dominican his entire life, who was born on the soil of a *jus soli* state and who had the documents issued by that same entity to prove it, no longer had the rights to that nationality.

Bueno filed two domestic challenges to his denial the following year. In February of 2008, he filed his first legal challenge against the Central Electoral Board that oversees the Civil Registry, alleging that internal memos ordered by the department had discriminated against him for his Haitian ancestry and had unconstitutionally revoked his citizenship rights in the process. In only a couple of months, the Board’s tribunal rejected his challenge, making no comments on the details of his history or his personal application, only ruling that the main memo in question, *Circular 017*, did not violate the Constitution. With no other recourse, in June of that year he took his challenge to the Dominican Supreme Court that it might reverse the finding of the tribunal and restore his right to nationality and the accompanying documents.⁷⁴ The Supreme Court proved not as prompt, however, and while it sat on the case for more than three years Bueno’s other vital documents—including his *cédula* and passport—slowly but surely began to expire without a valid birth certificate to renew them. Even after the Supreme Court’s eventual decision against him, neither the Open Society Institute nor any other available source gives a clue to Emildo Bueno Oguis’ fate. Whether or not the U.S. granted him a visa to join his wife

⁷³ Open Society Institute, “Bueno v. Dominican Republic.”

⁷⁴ *Ibid.*

even without the appropriate Dominican identity documents, we have little evidence to believe the Dominican State has resolved his situation or awarded his renewed documents.

Circular 017 and Civil Enforcement

Circular 017, originally issued in March of 2007, only months before the original refusal of Bueno's long-form birth certificate, lay at the root of his denial. The JCE and government officials phrased the directive as intent on reforming the inconsistencies of not just the birth certificate process but the entire identity document registry, which in itself seems an admirable idea, given the complications that MUDHA had faced with Dilcia Yean and Violeta Bosico in the previous decade.⁷⁵ Not so admirable, however, was that the Central Electoral Board issued the memo as a practical guide for implementation of the principles set out in Law 285, which the Supreme Court had certified less than two years previously as 100% legally exclusionary toward the descendents of undocumented Haitian immigrants. In practice, though, Circular 017 and its cousin, Resolution 12, proved even more blatantly discriminatory than the law that had provided their foundation.

The memo dictated that, after very closely examining all birth certificates before issuing requested copies, "for whatever irregularity exists, [civil registry officials] must abstain from issuing copies," and also "abstain from issuing birth certificates to children of foreign parents, if it is not probable that those parents reside legally in the Dominican Republic" (translated from the original Spanish).⁷⁶ Finally, 017 instructed registrars to refer the irregular or questionable documents back to the Board's administrative body. For the first grounds for denial of document renewal things as simple as amended names on existing documents (often for spelling, a

⁷⁵ Aníbal de Castro, "A Response from the Embassy of the Dominican Republic."

⁷⁶ Nelson Buttén Varona, "Circular No. 017 de la JCE," *Hoy*, August 26, 2008, <http://www.hoy.com.do/opinion/es/2008/8/26/245084/print>.

common problem with Dominican and Haitian names) might qualify as “irregularities.”⁷⁷ For the grounds of suspiciously foreign parentage, the memo did not even specify any means to test that quality, leaving the decision up to the registrar to discern from context clues what an applicant’s existing record might not. A previously issued birth certificate might not include parental legal status, but it would certainly include parents’ names—along with all the ethnic and linguistic baggage it might carry. As domestic observers would remark soon after the memo became widely circulated with the case of Bueno Oguis, *Circular 017* was also dangerous because it was in the most practical sense, retroactive by definition. It referred to those requesting copies of their already existing and long-approved nationality documents, not outsiders seeking to game the system into giving up the previously withheld benefits of national status.⁷⁸

It does not take much effort to see in 017 a more formal and weightier version of that clause long before buried in the birth registry requirements from 1999—discussed earlier in this analysis in the context of *Yean y Bosico*—which explicitly gave civil registrars the duty to deny document applications at their own discretion. Under that flimsier directive, registrars like Thelma Bienvenida Reyes could have indirectly blocked the issuance of birth certificates by arbitrarily requiring documents like witness statements which applicants would have practical problems providing. Under *Circular 017*, however, she could simply deny the application outright, even with the appropriate documents, presumably without even having to specify her reasoning to the person facing denial. Even if she found no mistakes which she might use to

⁷⁷ Open Society Justice Initiative and the Center for Justice and International Law, “Dominicans of Haitian Descent and the Compromised Right to Nationality,” October 2010, <http://www.opensocietyfoundations.org/sites/default/files/Dominican-Republic-Nationality-Report-ENG-20110805.pdf>, 13.

⁷⁸ Juan Bolívar Díaz, “La Anulación de la Circular 017,” *Hoy*, August 23, 2008, <http://www.hoy.com.do/opiniones/2008/8/23/244741/print>.

disqualify an request for document copies, the mere knowledge that the applicant possessed foreign (read: Haitian) parents—and even a foreign-sounding name might be enough to imply foreign parentage—would allow her cast suspicion on the authenticity of their right to nationality documentation. Thus, with identification of either subjectively-applied inconsistencies or a subjective judgment of Haitian parentage, a registrar could block petitioners like Emildo Bueno Oguis indefinitely, potentially leaving them stateless when their existing documents expire.

Circular 017 was not alone in putting into practice the heightened exclusion dictated by Law 285. Another internal memo from the Central Electoral Board, Resolution 12-2007, laid out the ways in which civil registrars not only must abstain from renewing the document applications of those whose background they deem irregular, but also can suspend the documents still in their possession.⁷⁹ In Bueno's case, the registrar in question did not choose to revoke his existing documents, since we know his *cédula* remained valid for some time. Even though the civil registrar did not leave Bueno immediately stateless, the consequence still remained a real threat to others, a significant expansion of the State's exclusionary power from Circular 017.⁸⁰ Logically, though, the Resolution only required a small step to go from deeming existing birth certificates and other documents as irregular and thus void; after all, if the applicant's current application is ineligible because of ineligibility from birth, so must be any issued in the intervening period.

Circular 017 and Resolution 12 certainly did not form in a vacuum of bureaucracy: instead they were the product of the CEB finally getting around to turning the government's Law 285 into a practical policy. The law had mandated the denial of nationality to the children of a group, overwhelmingly Haitian migrants or their descendents, deemed less worthy than even

⁷⁹ Open Society Justice Initiative, "Dominicans of Haitian Descent," 13.

⁸⁰ Open Society Institute, "Bueno v. Dominican Republic."

those “in transit.” Even though that denial in many cases already existed practically through stringent requirements for registration—the idea behind *Yean y Bosico*—the law now legally allowed more comprehensive exclusion. Why the need for a new policy, though? The requirements for proof of parental status—like Tiramén Bosico’s *cédula*, presented upon her application for her daughter’s birth certificate—remained on the books in practice despite the IACHR’s objections. Would this requirement not keep “Haitian” children of immigrants from illegally obtaining birth certificates?

The truth is that the existing requirements would indeed keep new applicants out, but the JCE had other, more worrying targets. Those requirements for proof of parents’ status of course did not apply to those already in possession of nationality documents, some of whom the Dominican government might very well still wish to determine “irregular.” If the government’s true aim in 285 was to deny the possibility of new applicants that did not fit a new, more *jus sanguinis* style citizenship model, it would not have bothered with a new policy memo, but it seems clear that the JCE leadership believed it had the responsibility to retroactively purge the rolls of Dominican nationality of those whose backgrounds might not fit the new, more stringent qualifications.

The policy memos’ denial of birth certificates to the children of Haitian immigrants should surprise no one; the Civil Registry was bound to start implementing 285’s denial of the nationality of that group eventually. The retroactive application of the requirements of 285, spelled out by Circular 017, seems particularly shocking, especially for an audience accustomed to uncommonness of this type of *ex post facto* in U.S. constitutional law. However unfair and contrary to common sense it may seem, the Dominican Constitution provides no such guarantees. Revealingly, while commenting on its injustice, the Open Society Foundation’s brief

on Bueno's behalf does not even attempt to identify this as one of the Dominican State's trespasses.

In that same organization's later report to the Inter-American commission, Open Society even admits that "the government...has yet to officially strip any Dominican of Haitian descent of his or her previously-recognized nationality."⁸¹ This seems flat wrong based on the evidence already seen, until we consider the difference between legal statelessness and practical statelessness, the latter being the relevant one in the Dominican Republic's case. Even in the case of Emildo Bueno Oguis or others who actually had their documents suspended, the State does not officially state that such individuals are definitively not Dominican; instead it merely prevents their use of documents to actually claim of their nationality, ostensibly hiding behind the curtain of "review" or waiting for the individuals to produce impossible proofs. This subtle difference allows the state some room to hide from accusations of breaking international norms on the right to nationality.

In effect, the critical issue with the way the CEB was carrying out the law was not that it was applying it unlawfully to children born legally in the country—those children having lost their right to nationality under 285—or even so much that it was applying them retroactively to those like Bueno who already had Dominican nationality, stripping them of their long-held status. Though those aspects are certainly unjust, the real problem, or at least the most interesting one in terms of revealing anti-Haitian discrimination is the profiling not just allowed but dictated under Circular 017 and Resolution 12. The arbitrary power of approval and denial afforded registrars by the Central Electoral Board already widely existed in the twentieth century and in documented cases like *Yean y Bosico*. These new policy directives nevertheless widened, fortified, and justified that discriminatory power. As the result of reactionary legislation,

⁸¹ Open Society Justice Initiative, "Dominicans of Haitian Descent," 15.

Circular 017 and Resolution 12 provided the bureaucracy's answer to the national legal trend of codification and strengthening of the State's anti-Haitian tendencies.

The Last Constitutional Frontier

Unfortunately for Emildo Bueno Oguis and tens of thousands of other Dominico-Haitians, the Central Electoral board's policy memos did not provide the last and worst word on their rights to practical nationality. At the end of the first decade of the new millennium while Bueno's claim was in limbo in both domestic and international arenas, the Dominican State under the now firmly entrenched leadership of Leonel Fernández, then in his third term as president, undertook a reworking of the country's constitution. Given the major legal shifts on the matter of citizenship law that had occurred over the previous decade in conjunction with international challenges to the State's treatment of its immigrant and immigrant-adjacent communities, it should come as no surprise that the 2010 constitution radically reworked the meanings and qualifications for Dominican nationality, incorporating the assumptions of *Ley 285*, *Circular 017* and other documents and, among other changes, definitively abandoning *jus soli* for its more exclusionary cousin, *jus sanguinis*.⁸²

Most of the categories of people in the new Article 18, "De la Nacionalidad," who were identified as "Dominican" remain basically unchanged from older versions, including those born to Dominicans in other countries, spouses of Dominicans who adopt his/her nationality and follow the relevant legal procedure, etc. The relevant clauses for our purposes however are only the second and third, which state that the following, too, are Dominicans—

⁸² Amnesty International, *Dominican Republic: Submission to the UN Human Rights Committee*, London: Amnesty International Publications, March 12, 2012, http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AI_2_DominicanRepublic_HRC104.pdf, 7.

(2) Those who enjoyed Dominican nationality before the entry into force of this Constitution;

(3) Those born on national territory, with the exception of the children of foreign members of diplomatic and consular delegations, and the children of foreigners found in transit or who live illegally on Dominican territory. In transit refers to all those foreigners considered as such by Dominican law⁸³

Requirement 3 removes all doubt that may still have existed as to the intricacies of the phrase “in transit” and its relationship to the children of undocumented populations, while the previous one would seem to offer protection to those who might still see their status in flux or would have been previously been found ineligible under the new, stricter definitions.

In practice, the second clause, at its best, remains with the status quo, since people like Dilcia Yean, Violeta Bosico, and Emildo Bueno Oguis faced the effective denial of their Dominican nationality *even while the constitution still reserved that right*. Why would Bueno, in particular, have reason to trust the new constitution’s promise, especially since, at the time of the Constitution’s approval he actually did not practically enjoy Dominican nationality, regardless of whether he had before? He, adults like him, and thousands of native-born children and adolescents denied even their first documents in the 1990s and 2000s—referred to by some as “legal ghosts”—now face not even the slightest legal promise of a former constitutional right.⁸⁴

The shift marked by the new constitution cannot be exaggerated, but another legal addendum still remains: the Dominican Supreme Court’s long-awaited response to Bueno’s challenge to his retroactive denial under Circular 017. In perhaps its most unsurprising move

⁸³ “Constitucion Dominicana de 2010, *Political Database of the Americas*.”

⁸⁴ Open Society Justice Initiative, “Dominicans of Haitian Descent,” 18.

yet, the Court rejected his claim in December of 2011.⁸⁵ Just as the litigation of *Yean y Bosico* preceded the exclusionary Ley 285 and Circular 017, so did Bueno's attempts at both international and domestic litigation precede the State's crushing legal repudiations of human-rights challenges. Essentially the entire conflict still relied on question "Who is Dominican?" and the threats others posed to the State's right to answer it. Bueno's search to reclaim his nationality now continues only in an international arena that has already proven ineffectual, if admirable, as he, MUDHA, CEJIL and others who support the rights of Dominico-Haitians to this day once again await referral to come before the Inter-American Court for Human Rights.

Comparisons and Conclusions

How can we contrast the particulars of *Yean y Bosico* with those of *Bueno Oguis* only a few years later? For one, the civil registry initially refused young Dilcia Yean and Violeta Bosico their birth certificates in a different legal atmosphere in 1997. That event occurred well before the official legal exclusion of children with immigrant parents under Law 285 and its 2005 judicial interpretation and certainly before its widespread and universal application under the infamous Circular 017 and its accompanying resolution. Undoubtedly, the evolution of Dominican citizenship law in the past ten years came to a critical head with the enshrinement of 285's effective exclusion of Dominico-Haitians in the constitution of 2010. The gravity of the shift from unofficial practice to federal statute to constitutional law comes across in no uncertain terms in the differences between the facts of the two cases and also in the differences of the language and arguments offered in related reports and legal documents. Emildo Bueno Oguis's trials began in 2007, at the critical moment after 285's legal directive shifted into the sphere of

⁸⁵ Katheryn Luna, "Rechazan Sentencia de SCJ contra recurso de Casación," *Listin Diario*, December 7, 2011, <http://www.listin.com.do/la-republica/2011/12/7/213790/Rechazan-sentencia-de-SCJ-contra-recurso-de-casacion>.

the civil enforcement with Circular 017. Had he applied only months before, the government's assurances of non-retroactive application of 285 might have held true and he could have received a new copy of his birth certificate with little trouble.

My most critical mistakes in originally conceptualizing the “vast changes in citizenship policy” of the last 10-15 years included the assumption that a total shift had occurred—from guaranteed rights to lost rights. I knew and could point to the basic fact that the law became stricter, but wondered why, with such a long and well-documented history of anti-Haitianism, did the Dominican government only begin systematically barring Dominico-Haitians from nationality in the new millennium? Of course, a cursory glance at the timing of the travails of Violeta Bosico, Dilicia Yean, and their mothers—initially refused birth certificates in 1997—would have revealed the truth: systematic exclusion was *already* the norm before Ley 285, and certainly before the 2010 constitution. The statutes, Supreme Court decisions, policy memoranda, and constitutional amendments of the intervening period were only the codification and retroactive legalization of already-common practice on the part of agents of the civil service, their superiors, and by extension, the State. Of course, these issues of statelessness barely touch on other, even more distressing historical and contemporary injustices like the deportation, abuse, and murder of Dominico-Haitians which continue from before Trujillo's Massacre at Dajabón to this day.

This admission of a decades-long problem does not preclude the idea that prospects for Dominico-Haitians did indeed worsen on some level during the 2000s; legal justification has made their exclusion both more entrenched and more expansive in terms of those under immediate threat. After all, Emildo Bueno Oguis, despite his Haitian connections, could enjoy the benefits of his nationality, including renewal of his cédula and birth certificate, during the

same period in the 1990s and earlier, when the Civil Registry found no qualms in denying the claims of children like Dilcia and Violeta. The pattern for systematic, targeted denial of the citizenship of Dominico-Haitians already existed before the laws officially justified them, but the laws allowed the State to exclude more openly and exclude more people. In the process they broke all remaining semblances of their country's constitutional traditions of the "right of soil" and the value of immigrants, a value that, admittedly, had not included Haitians since before Trujillo's time.

Important factors for why the laws happened so recently and not, say, in the mid-twentieth century, have much to do with the political and economic instability of the island. During this era the authoritarian regimes of Trujillo and Balaguer in the Dominican Republic and the Duvaliers in Haiti were undoubtedly brutal, but were marked by fairly steady economic growth. Agreements for temporary Haitian workers served as bargaining chips between each country through the 1980s and helped support the Dominican agricultural economy. As the Dominican Republic shifted toward a greater reliance on industry and tourism, though, leaders like Balaguer felt more free to dispose of thousands of cane cutters as he did in 1991 by deporting them back to a Haiti that was rapidly spiraling out of control.⁸⁶ Since then Haiti has been rocked by ever more natural and political disasters while its neighbor's tolerance for instability has waned. The Dominican Republic itself faced a crushing fiscal crisis in the early 2000s, during the litigation of *Yean y Bosico* and immediately before Law 285's passage in 2004. Even without existing animosity between Dominicans and Haitians, the politico-economic context of the past twenty years seem a likely culprit for at least some of the Dominican State's strident legal anti-Haitianism.

⁸⁶ Wucker, *Why the Cocks Fight*, 134-5.

Though they do not make up much of the focus of this thesis, the political uncertainties in Haiti since the collapse of the Duvalier regime in the 1980s and the economic struggles in both countries in the same period help explain why Dominican State officials became more willing to solidify the anti-Haitian discrimination that already characterized citizenship rights in their country. Unwittingly, though, and as this thesis attests, the efforts of Dominican-Haitian advocates like MUDHA and international human rights organizations like CEJIL almost certainly contributed to the devastating legal changes of the 2000s. Though its rulings were binding, the IACHR by its very nature could not practically force the Dominican Republic to accede to any potential ruling. By bringing attention to the issue in the court, though, MUDHA and the others forced the State to take a more public stand and strictly codify what had been loose laws and informal practices of discrimination. Unfortunately for them, the State's loyalty to a Dominican national identity that by definition excluded Haitians and Haitian-ness trumped any loyalty to an ineffectual inter-American community. Also, the State clearly presented the Court's meddling as a threat to its sovereignty, an example of a long tradition of State exploitation of the (warranted) national fear of outside intervention.⁸⁷

Blaming the most active advocates of the victims is, of course, not entirely fair; they brought attention to the plight of a marginalized and despised group, and in the cases of at least a few like Dilcia and Violeta, their efforts directly forced the Dominican government into granting the rights of nationality. Yet, the realization that the litigation in these cases helped lead to such a counterproductive reaction from the State should give human rights advocates pause in how they address this and similar issues in the future. A little more introspection into their tactics might serve CEJIL and other groups well, along with more and earlier dialogue and attempts at mediation with a wary state. The State should not get a free pass to discriminate, but friendly,

⁸⁷ Wucker, *Why the Cocks Fight*, 164.

respectful offers from NGOs, IGOs, and neighbor states to aid in reforming the civil registry, for example, might lead to practical relief for marginalized Dominico-Haitians.

In the end what matters most must be the restoration of rights like that to nationality, education, and freedom from fear of state-led exclusion and deportation. Even when human rights activists have the moral high ground they must remain practical and considerate of the challenges and fears facing the state. It is easy for an American NGO or researcher to boldly cast blame on the Dominican state, as I have done also at points in this analysis, or even imply the fault of Dominican culture and greater society. Yet, as outsiders we have to consider the often very real concerns facing countries like the Dominican Republic—concerns including economic pressure, the ravages of crime, and, of course, the inescapable influence of a national history of outside invasion and internal corruption. If we truly believe human rights must be a priority for Dominico-Haitians, we must also recognize the continuing responsibilities of the international community, especially the United States, due to its vital historical role in the unfolding of history in Hispaniola. We must consistently support human rights at home and abroad, acknowledge our own mistakes, and respect states' differences, all the while remaining unafraid to challenge state-supported injustices like anti-Haitianism.

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